
Managerialist influences on granting patents in Australia

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This article examines important influences other than the Patents Act 1990 (Cth) on the Commissioner of Patents decision-making to grant or refuse to grant patents. The influences considered are the recent public administration reforms on budget, financial management, people management and reporting arrangements. The analysis shows that there is considerable potential to influence the Commissioner's decision-making. Most importantly, the article identifies a range of policy and guidance materials that contribute to the environment (a matrix of legalities) in which decisions are made. Unfortunately, key instruments are not presently publicly disclosed, challenging the rhetoric of accountability and transparency in the recent public administration reforms, and leaving open questions about managerialist influences on granting patents in Australia.

1. INTRODUCTION

IP Australia is a governmental entity with a regulatory function promoting innovation, investment and international competitiveness (or trade), in part, through allocating time-limited “exclusive rights” under the *Patents Act 1990* (Cth).¹ Within IP Australia the “decision”² to grant or refuse to grant³ these “exclusive rights” is made by a statutory office holder, the Commissioner of Patents.⁴ The Commissioner’s decisions have immediate consequences for invention, investment and competition affecting the invention incentives of both initial inventors (the extent to which revenues must be shared with independent improvers) and follow-on inventors (the choice between seeking ambitious or niche improvements).⁵ If the thresholds are too low there may be patent proliferation (various described as thickets, minefields, royalty stacks, anti-commons effects and flooding), restricting “freedom of operate”, requiring unnecessary licensing negotiations, and creating, maintaining or extending unwarranted market power.⁶ If the thresholds are too high then there will be suboptimal

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¹ These “exclusive rights” are “during the term of the patent, to exploit the invention and to authorise another person to exploit the invention” where the term “exploit” means “in relation to an invention, includes: (a) where the invention is a product – make, hire, sell or otherwise dispose of the product, offer to make, sell, hire or otherwise dispose of it, use or import it, or keep it for the purpose of doing any of those things; or (b) where the invention is a method or process – use the method or process or do any act mentioned in paragraph (a) in respect of a product resulting from such use”: *Patents Act 1990* (Cth), s 13 and Sch 1 (“exploit”).

² In the nature of an administrative determination: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 335-338 (Mason J), 365 (Brennan J) and 369 (Deane J). Notably, this conception of a “decision” contemplates the place of other considerations that “guides but does not control the making of decisions”: *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641 (Brennan J). See also *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177 at 178 (Evatt J), 183 (Davies J) and 189-190 (Pincus J).

³ See *Patents Act 1990* (Cth), ss 45 (examination), 59 (opposition), 207 (general powers).

⁴ *Patents Act 1990* (Cth), s 207.

⁵ See, eg, Intellectual Property and Competition Review Committee (IPCRC), *Review of Intellectual Property Legislation under the Competition Principles Agreement* (IP Australia, 2000) p 154. See also Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Federal Trade Commission, 2003) pp 4-4-4-6; Treasury, *Gowers Review of Intellectual Property* (HM Stationary Office, 2006) pp 82-83.

⁶ See, eg, Federal Trade Commission, n 5, pp 4-4-4-6.

levels of invention and investment in invention leading to a long term decline in competition.⁷ How the Commissioner (and her delegates)⁸ makes these decisions therefore has a critical place in an efficient and effective economy.⁹

The purpose of this article is to consider how the various governmental institutions and personalities of government might affect the Commissioner's decisions.¹⁰ The article assumes the Commissioner makes decisions within an environment of policy and guidance materials (a matrix of legalities) and tests the thesis that there are important influences other than the *Patents Act 1990* (Cth) on the Commissioner's decisions. While others have focussed on the "quality" of patents,¹¹ or the decision-making processes,¹² and so on, this article focuses solely on governance arrangements that potentially influence the Commissioner's decision making. The analysis is confined to the formal reporting periods from the 2006 Budget¹³ to the 2006-2007 *Annual Report*¹⁴ that covers the period of the 2006 Budget allocation.

The article is structured as follows: Part 2 provides an overview of the institutions and personalities involved in the governance of IP Australia and the Commissioner addressing the budget, financial management, people management and reporting arrangements; Part 3 sets out practical examples of financial management and people management arrangements affecting the Commissioner; and Part 4 sets out a conclusion suggesting that any future assessment of the efficiency and effectiveness of the patent scheme needs to consider the consequences of the recent public administration reforms on the budget, financial management, people management and reporting arrangements. Most importantly, however, the article identifies a range of policy and guidance materials that contribute to the environment in which decisions are made and that are not presently publicly disclosed, challenging the rhetoric of accountability and transparency in these recent public administration reforms.

2. THE INSTITUTIONS AND PERSONALITIES

The Commonwealth *Constitution* provides: "[t]he Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... patents of inventions".¹⁵ According to this power the Parliament has enacted the *Patents Act 1990* (Cth) providing for the granting of patents and the administration of the patent scheme created under

⁷ See, eg, IPCRC, n 5, pp 136-138. See also Federal Trade Commission, n 5, pp 2-1-2-7; Treasury, n 5, pp 11-12.

⁸ *Patents Act 1990* (Cth), s 209.

⁹ In the context of regulation this means "efficient" in terms of "maximising the benefits to the community, taking account of the costs", and "effective" in "addressing an identified problem": Office of Best Practice Regulation, *Best Practice Regulation Handbook* (Productivity Commission, 2007) p 1. See also Productivity Commission, *Regulation and Its Review 2002-2003*, Annual Report Series (Productivity Commission, 2003) p 1. More broadly, and in the context of resources, "efficiency relates to the productivity of the resources used to conduct an activity in order to achieve the maximum value for the resources used" and "effectiveness relates to how well outcomes meet objectives": Department of Finance and Administration, *Commonwealth Procurement Guidelines*, Financial Management Guidance No 1 (Department of Finance and Administration, 2005) pp 13-14.

¹⁰ The Australian Government has acknowledged that key determinants of regulatory outcomes include how regulations are interpreted, applied and enforced by regulators: see, eg, Australian Government Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation* (2006) p 158.

¹¹ See, eg, Lemley M, "Rational Ignorance at the Patent Office" (2001) 95 *Northwestern U L Rev* 1495; Merges R, "As Many as Six Impossible Patents before Breakfast: Property Rights for Business Concepts and Patent System Reform" (1999) 14 *Berkeley Technology LJ* 577.

¹² See, eg, Dent C, *Decision-Making and Quality in the Patent Examination Process: An Australian Exploration*, Intellectual Property Research Institute of Australia Working Paper No 01.06 (IPRIA, 2006).

¹³ See Budget Speech 2006 and associated documents were delivered on 9 May 2006 as the Second Reading to the *Appropriation Bill (No 1) 2006* (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, n 13, 9 May 2006, pp 57-65 (Peter Costello, Treasurer). See also Commonwealth, *Parliamentary Debates*, Senate, 9 May 2006, pp 115-116 (Nick Minchin, Minister for Finance and Administration).

¹⁴ See Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (DITR, 2007) that was tabled in Parliament on 31 October 2007.

¹⁵ *Constitution*, s 51(xviii).

that Act.¹⁶ Administering the patent scheme relies on the executive power under the *Constitution*.¹⁷ The executive power itself almost certainly includes the authority for the institutions and body of persons of government to administer the laws authorised by the *Constitution* and carry on the business of government.¹⁸

The *Constitution* vests executive power in the “Governor-General”¹⁹ as the Queen’s representative.²⁰ A “Federal Executive Council” (or “Governor-General in Council”) is established to “advise” the “Governor General”.²¹ In the practice of responsible government, however, the authority to “advise” is a power vested in the “Federal Executive Council” to *exercise* the executive powers under the *Constitution* according to the expressed values of the community that have been resolved through parliamentary politics.²² The “Federal Executive Council” must include every “Minister of State”²³ and may include others.²⁴ The “Ministers of State” (including those designated as Parliamentary Secretaries)²⁵ are appointed by the Governor-General on the advice of the Prime Minister.²⁶ The Governor-General, again on the advice of the Prime Minister, establishes Departments of State and formally allocates executive responsibility among Ministers and Parliamentary Secretaries through the *Administrative Arrangements Order*.²⁷ Ministers and Parliamentary Secretaries swear a declaration before the Governor-General to administer the Department of State in the portfolio area to which they have been appointed.²⁸

According to the *Administrative Arrangements Order* the legislation administered by the Minister for Industry, Tourism and Resources administering the Department of Industry, Tourism and Resources includes the *Patents Act 1990* (Cth), and matters dealt with by the Department of Industry, Tourism and Resources include “patents” and matters arising under the *Patents Act 1990* (Cth).²⁹ The other portfolio Ministers assisting the Minister for Industry, Tourism and Resources are the Minister for Small Business and Tourism and the Parliamentary Secretary to the Minister for Industry, Tourism and

¹⁶ For a review of this constitutional power see Lawson C, “Revisiting the Commonwealth Parliament’s Legislative Authority for Patent and Patent-like Schemes under the *Constitution*” (2006) 17 AIPJ 243.

¹⁷ *Constitution*, ss 2, 61.

¹⁸ Notably, the scope and extent of the Executive power remains uncertain and open to interpretations, although administering the *Patents Act 1990* (Cth) is unlikely to be contentious: see *Victoria v Commonwealth* (1975) 134 CLR 338 at 396-397 (Mason J).

¹⁹ *Constitution*, s 2. Although the Crown may exercise certain constitutional powers when present in Australia: see *Royal Powers Act 1953* (Cth), s 2.

²⁰ *Constitution*, s 61. Notably, this is the powers of the Crown in right of the Commonwealth.

²¹ *Constitution*, s 62.

²² Noting, of course, that the “Governor-General in Council” acts with the advice of the “Federal Executive Council” being the exercise of those powers and functions that do not include the prerogative powers of the Crown and only those powers exercisable by the Crown in right of the Commonwealth. See *Constitution*, s 62; *Acts Interpretation Act 1901* (Cth), s 16A.

²³ *Constitution*, s 64.

²⁴ *Constitution*, s 62. According to practice those appointed remain executive councillors for life (adopting the title “Honourable”), although only those executive councillors who are members of the current ministry are summoned to advise the Governor-General: see Federal Executive Council Secretariat, *Federal Executive Council Handbook* (Federal Executive Council Secretariat, 2005) p 3; Prime Minister, *A Guide on Key Elements of Ministerial Responsibility* (Department of the Prime Minister and Cabinet, 1998) 8.

²⁵ See *Ministers of State Act 1952* (Cth), s 4.

²⁶ *Constitution*, s 64.

²⁷ *Constitution*, s 64. See also Key Elements of Ministerial Responsibility, n 24, p 1.

²⁸ Federal Executive Council Secretariat, n 24, p 3.

²⁹ *Administrative Arrangements Order* (30 January 2007) Sch (pt 14).

Resources.³⁰ In respect of intellectual property policy the Minister is provided with “independent advice” by the Advisory Council on Intellectual Property.³¹

In short, the powers to administer the laws and institutions of the Crown (the legal personality of the State) under the *Constitution* are exercised by Ministers as heads of departments directing the work of public servants (collectively termed the “Australian Government”). The Ministers, and through the Minister the public servants, remain responsible to the Parliament and must comply with the Parliament’s directions set out in the laws and other instruments made by the Parliament. In dealing with “patents” under the *Patents Act 1990* (Cth), however, there are a number of other competing sources of authority within the Executive, albeit under the umbrella of ministerial responsibility. These include both competing institutions and competing personalities. The recent evolution of these institutions and their personalities identifies these competing sources of authority.

In 1992 the Australian Industrial Property Organisation was created out of the Australian Patent, Trade Marks and Designs Offices.³² The statutory offices of the Commissioner of Patents,³³ Registrar of Trademarks³⁴ and Registrar of Designs³⁵ were placed with a “Division Head” in the Department of Industry, Technology and Regional Development, together with the overall administration responsibility of the Australian Industrial Property Organisation.³⁶ This arrangement was changed by the *Industry, Technology and Regional Development Legislation Amendment Act 1994* (Cth) that amended the *Patents Act 1990* (Cth) to removed the administration of the Australian Industrial Property Organisation from the Commissioner of Patents, Registrar of Trademarks and Registrar of Designs.³⁷ This allow for the appointment of the separate Commissioner of Patents, Registrar of Trademarks and Registrar of Designs to administer each of the *Patents Act 1990* (Cth), the *Trade Marks Act 1955* (Cth) and the *Designs Act 1906* (Cth) respectively,³⁸ and leaving an overseeing “Director General” “to concentrate on the overall financial and general management of the Australian Industrial Property Organisation”.³⁹ In 1994 the Australian Industrial Property Organisation was a Division of the Department of Industry, Science and Technology organised into Patents and Designs, Trademarks and Support Services sub-programs.⁴⁰ On 25 February 1998 Australian Industrial Property Organisation was given a new “corporate image” with the new name, “IP Australia”, to “reflect a changing business

³⁰ DITR Annual Report 2006-2007, n 14, p 17; Department of Industry, Tourism and Resources, *Annual Report 2005-2006* (Department of Industry, Tourism and Resources, 2006) p 11.

³¹ The Advisory Council on Intellectual Property is an “advisory body” within the Industry, Tourism and Resources Portfolio appointed by the Minister for Industry, Tourism and Resources and funded through IP Australia and its allocations: see Department of Finance and Administration, *List of Australian Government Bodies*, Financial Management Reference Material No 1 (Department of Finance and Administration, 2004) p 310.

³² Department of Industry, Technology and Regional Development, *Annual Report 1992-1993* (Department of Industry, Technology and Regional Development, 1993) pp 2-3.

³³ *Patents Act 1990* (Cth), s 207 providing: “(1) There is to be a Commissioner of Patents” and “(2) The Commissioner has, under the Minister, the administration of the Patent Office”.

³⁴ *Trade Marks Act 1955* (Cth), s 10(1).

³⁵ *Designs Act 1906* (Cth), s 8(1).

³⁶ DITRD Annual Report 1992-1993, n 32, pp 2-3.

³⁷ *Industry, Technology and Regional Development Legislation Amendment Act 1994* (Cth), s 3 and Sch.

³⁸ Notably the *Trade Marks Act 1955* (Cth) and the *Designs Act 1906* (Cth) have been replaced with the *Trade Marks Act 1995* (Cth) and the *Designs Act 2003* (Cth) respectively.

³⁹ Parliamentary Debates (Senate), n 13, 16 December 1993, pp 4762-3 (Nick Sherry, Parliamentary Secretary to the Minister for Primary Industries and Energy); Parliamentary Debates (Representatives), n 13, 2 March 1994, pp 1594-6 (Eamon Lindsay, Parliamentary Secretary to the Minister for Industry, Technology and Regional Development). See also Department of Industry, Science and Technology, *Annual Report 1993-1994* (Department of Industry, Science and Technology, 1994) p 103.

⁴⁰ Department of Industry, Science and Technology, *Annual Report 1994-1995* (Department of Industry, Science and Technology, 1995) pp 2, 144.

environment and a new direction for the organisation”.⁴¹ In recent times IP Australia exists as a semi-autonomous entity in the Industry, Tourism and Resources portfolio associated with the Department of Industry, Tourism and Resources.⁴²

Within the institution of the Department of Industry, Tourism and Resources and IP Australia a number of personalities have powers: the Secretary of the Department of Industry, Tourism and Resources has responsibility under the *Workplace Relations Act 1996* (Cth) and the *Public Service Act 1999* (Cth) as an “Agency Head”,⁴³ and the Director General has responsibility under the *Financial Management and Accountability Act 1998* (Cth) as a “Chief Executive”.⁴⁴ The following sections address the roles of the Ministers and these different personalities through the budget, financial management, people management and reporting arrangements to show the scope of these overlapping authorities.

A. Budget arrangements

A key measure of accountability required by the *Constitution* is that any appropriation of the “Treasury of the Commonwealth” must be for the expenditure purposes of the Commonwealth.⁴⁵ The historic basis for requiring a separate Consolidated Revenue Fund (CRF) and an appropriation law that was carried into the *Constitution* at Federation was the imperial and colonial imperative that Parliament should exert some control over the expenditure of the Executive.⁴⁶ There is no doubt that an appropriation law⁴⁷ must disclose its purpose and that this purpose must also be a “purpose of the Commonwealth”.⁴⁸ There remains some doubt about what constitutes a valid Commonwealth purpose⁴⁹ and how broadly a Commonwealth purpose may be claimed.⁵⁰ Unfortunately, the High Court’s decisions do not comprehensively settle the matter. The reasoning in *Brown v West*⁵¹ and *Combet v Commonwealth*⁵² suggests that these purposes may be very, very broadly stated and that the

⁴¹ Department of Industry, Science and Tourism, *Annual Report 1997-1998* (Department of Industry, Science and Tourism, 1998) p 169.

⁴² *Administrative Arrangements Order (30 January 2007)*, Sch (pt 14). See also DITR Annual Report 2006-2007, n 14, p 16; DITR Annual Report 2005-2006, n 30, p 11; Department of Industry, Tourism and Resources, *Annual Report 2004-2005* (Department of Industry, Tourism and Resources, 2005) p 8.

⁴³ See *Public Service Act 1999* (Cth), s 9.

⁴⁴ See *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth), r 5 and Sch 1 (item 128A).

⁴⁵ *Constitution*, ss 81, 83.

⁴⁶ See, eg, *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 599 (McHugh J); *Combet v Commonwealth* (2005) 224 CLR 494 at 522-523 (Gleeson CJ), 535-537 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ) and 594-598 (Kirby J). Notably, the expenditure (as a debit or payment) of an appropriation requires a “drawing right” issued by the “Finance Minister”: *Financial Management and Accountability Act 1997* (Cth), ss 26, 27.

⁴⁷ See, eg, *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 271 (Dixon J); *Victoria v Commonwealth* (1975) 134 CLR 338 at 353 (Barwick CJ) and 392 (Mason J). The requirement for a “law” may not, however, be so certain, as the commonly cited authority of Viscount Haldane in *Auckland Harbour Board v King* [1924] AC 318, 326 stated “no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself”, the term “authorisation” arguably including something less than a “law”.

⁴⁸ See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338 at 392 (Mason J); *Attorney-General for Victoria v Commonwealth* (1945) 71 CLR 237 at 253 (Latham CJ); *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224 (Isaacs and Rich JJ); *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200 (Isaacs J).

⁴⁹ See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338 (Barwick CJ, McTiernan, Gibbs, Stephen, Mason and Jacobs JJ).

⁵⁰ See, eg, *Brown v West* (1990) 169 CLR 195 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

⁵¹ (1990) 169 CLR 195 at 212 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). See also *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 578-579 (Mason CJ, Deane, Toohey and Gaudron JJ) and 594-596 (Dawson J).

⁵² (2005) 224 CLR 494 at 529-530 (Gleeson CJ), 553-554 (McHugh J), 577 (Gummow, Hayne, Callinan and Heydon JJ) and 612-613 and 614-615 (Kirby J).

High Court will be reluctant to intervene.⁵³ Put another way, the current practice of very broadly stated purposes in appropriation laws are unlikely to restrict the expenditures incurred in administering the *Patents Act 1990* (Cth). However, for IP Australia the budgeting arrangements are somewhat complicated by there being *both* an annual appropriation (though, for example, the *Appropriation Act (No 1) 2006-2007 2006* (Cth) and *Appropriation Act (No 5) 2006-2007 2007* (Cth)) and a standing appropriation (though, for example, a “Special Account”).⁵⁴

Annual appropriations are made according to an “outcomes and outputs framework”. The outcomes and outputs framework was introduced in the Federal Budget 1999 and coincided with the adoption of the accrual budgeting framework in the *Financial Management Legislation Amendment Act 1999* (Cth).⁵⁵ The purpose of the framework was to impose “a means of structuring corporate governance and management arrangements and reporting on planned and actual performance” taking into account that “agencies and their ministers have considerable scope for adopting specific structures and arrangements that suit their circumstances”.⁵⁶ In other words, to improve public sector corporate governance through devolved responsibility and at the same time enhanced public accountability.⁵⁷ At its heart was the imperative to establish performance benchmarks based on performance indicators of efficiency of agency operations and cost effectiveness of the outputs delivered:⁵⁸

performance indicators are developed to allow scrutiny of effectiveness (ie the impact of the outputs and administered items on outcomes) and efficiency (especially in terms of the application of administered items and the price, quality and quantity of outputs) and to enable the system to be further developed to improve performance and accountability for results.⁵⁹

The outcomes and outputs framework specifically addresses what the government wants to achieve (“outcomes”), how that is to be done (“outputs” and “administered items”), and how those administering the outcomes can know if it has been successful (“performance reporting”).⁶⁰ “Outputs” and “administered items” are identified separately to reflect their different accountability requirements.⁶¹ “administered items” are those resources administered by the agency on behalf of the

⁵³ See Lawson C, “‘Special Accounts’ under the *Constitution*: Amounts Appropriated for Designated Purposes” (2006) 29 *University of NSW Law Journal* 114 at 126-137.

⁵⁴ See, eg, Department of Finance and Administration, *Agency Resourcing 2007-2008*, Budget Paper No 4 (Department of Finance and Administration, 2007) pp 1-3. See also Australian National Audit Office, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (ANAO, 2007) pp 15-30.

⁵⁵ See also Department of Finance and Administration, *Agency Resourcing 1999-2000*, Budget Paper No 4 (Department of Finance and Administration, 1999) pp 1-2. See also ANAO *Application of the Outcomes and Outputs Framework*, n 54, pp 37-41. See also Vertigan M, *Review of Budget Estimates Production Arrangements* (Department of Finance and Administration, 1999); Verspaandonk R, *Accrual Budgeting-State of Play*, Parliamentary Library Research Note 30 (Department of the Parliamentary Library, 2000).

⁵⁶ Department of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (Department of Finance and Administration, 2000) p 4.

⁵⁷ Finance Outcomes & Outputs Framework Guidance, n 56, p 4.

⁵⁸ See also ANAO *Application of the Outcomes and Outputs Framework*, n 54, p 38; Australian National Audit Office, *Annual Performance Reporting*, Audit Report No 11 (ANAO, 2003) pp 27-35.

⁵⁹ Finance Outcomes & Outputs Framework Guidance, n 56, p 5.

⁶⁰ Finance Agency Resourcing 2007-2008, n 54, pp 3-4. See also Senate Finance and Public Administration Legislative and General Purpose Committee, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (Senate Printing, 2007); ANAO *Application of the Outcomes and Outputs Framework*, n 54; Joint Committee of Public Accounts and Audit, *Review of Accrual Budget Documentation*, Report No 388 (Senate Printing, 2002); Senate Finance and Public Administration Legislation Committee, *The Format of the Portfolio Budget Statements: Third Report* (Senate Printing, 2000); Senate Finance and Public Administration Legislation Committee, *The Format of the Portfolio Budget Statements: Second Report* (Senate Printing, 1999); Department of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth’s Accrual-based Outcomes and Outputs Framework and Outcomes and Outputs – Guidance for Review* (Department of Finance and Administration, 1999); Senate Finance and Public Administration Legislation Committee, *Report on the Format of the Portfolio Budget Statements* (Senate Printing, 1997).

⁶¹ See *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2006) 2006* (Cth), Sch 1.

Australian Government that contribute to a specified outcome,⁶² meanwhile, “outputs” are those resources controlled by the agency to produce the identified products and services (also called “departmental items”).⁶³ Put another way, the “outcomes” address the *Constitution*’s requirement that there be an appropriation law identifying a Commonwealth purpose. Meanwhile, the “outputs” (and “administered items”) set out in the *Portfolio Budget Statements* (and the *Portfolio Additional Estimates Statements*) accompanying the appropriation laws⁶⁴ provide more information on what has been appropriated within the particular outcomes together with relevant performance targets:⁶⁵ “[o]utcomes are the intended effects of government programmes, whereas outputs – the goods and services delivered by government – are the means of achieving those outcomes”.⁶⁶

As part of the annual appropriation arrangements for 2006-2007, IP Australia recorded the following resources, in summary:

IP Australia operates on a full cost recovery basis and utilises the receipts from charges for intellectual property services to fund its operations ... The only funds received directly via the Appropriation Bills in 2006-07 relate to notional interest paid against the IP Australia Special Account (\$1.787m), last financial year’s measure in relation to the China Free Trade Agreement (\$0.268m) and a small administered amount in relation to Plant Breeder’s Rights (\$0.074m). The balance of IP Australia’s expenditure is appropriated via the use of a Special Account established under the *Financial Management and Accountability Act 1997*.⁶⁷

The main annual appropriations for 2006-2007, the *Appropriation Act (No 1) 2006-2007 2006* (Cth), recorded for IP Australia amounts up to a total \$2,129,000, comprising Departmental Outputs of \$2,055,000 and Administered Expenses of \$74,000 for “Outcome 1 – Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade”.⁶⁸ The “*Portfolio Budget Statements*” were declared to detail activities (the outputs) relevant to the appropriated outcomes.⁶⁹ The relevant details for 2006-2007 are set out in Table 1. The contributions to achieving Outcome 1 were stated to be:

⁶² Finance Outcomes & Outputs Framework Guidance, n 56, p 16. “Those items that an [agency] does not control but over which it has management responsibility on behalf of the Government and which are subject to prescriptive rules or conditions established by legislation, or Australian Government Policy, in order to achieve Australian Government outcomes”: *Financial Management and Accountability Orders (Financial Statements for reporting periods ending on or after 1 July 2006) 2006* (Cth), Sch 1.

⁶³ Finance Outcomes & Outputs Framework Guidance, n 56, p 16. “Those items which the [agency] controls that are used in the operational activities of the [agency]”: *Financial Management and Accountability Orders (Financial Statements for reporting periods ending on or after 1 July 2006) 2006* (Cth), Sch 1.

⁶⁴ Notably, the *Portfolio Budget Statements* and *Portfolio Additional Estimates Statements* are Budget Related Papers and are declared by the Appropriation Bills to be “relevant documents” for the interpretation of the Bills: *Appropriation Act (No 1) 2006-2007 2006* (Cth), s 4 and *Appropriation Act (No 5) 2006-2007 2007* (Cth), s 4.

⁶⁵ See *Combet v Commonwealth* (2005) 224 CLR 494 at 529-530 (Gleeson CJ), 542-550 (McHugh J), 565-568 (Gummow, Hayne, Callinan and Heydon JJ) and 611-615 (Kirby J); Australian National Audit Office and Department of Finance and Administration, *Guide on Annual Performance Reporting*, Better Practice Guide (ANAO, 2004); ANAO Annual Performance Reporting, n 58; Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Better Practice Guide (ANAO, 2002); Australian National Audit Office, *Performance Information in Portfolio Budget Statements*, Audit Report No 18 (ANAO, 2001).

⁶⁶ *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ) citing Webber D, “Managing the Public’s Money: From Outputs to Outcomes – and Beyond” (2004) 4(2) *OECD Journal on Budgeting* 101 at 109 citing Brumby J and Robinson M, *Performance Budgeting, an Overview*, a paper prepared for the International Seminar on Performance Budgeting organised by the IMF and Brazilian Ministry of Planning, Budget and Management in March 2004.

⁶⁷ Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (Department of Finance and Administration, 2006) p 83. See also Department of Finance and Administration, *Portfolio Budget Statements 2007-2008: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.14 (Department of Finance and Administration, 2007) p 89.

⁶⁸ *Appropriation Act (No 1) 2006-2007 2006* (Cth), ss 7 (departmental items), 8 (administered items), 15 (appropriation) and Sch 1.

⁶⁹ *Appropriation Act (No 1) 2006-2007 2006* (Cth), s 4(2).

A robust intellectual property (IP) system stimulates investment and trade by providing incentives for individuals and industry to invent and create. IP Australia contributes to the achievement of its outcome through three main areas – IP Rights administration, education and advice.

Through the administration and regulation of Patent, Trade Mark, Design and Plant Breeder's Rights, IP Australia ensures a sound intellectual property protection regime, providing investors with confidence that products and brands will not be threatened with unauthorised use. IP Australia's regulatory role also includes an accreditation and registration system for IP professionals to ensure a level of quality advice is available.

To ensure business and individuals are aware of the importance of IP rights and fully understand the best type of right for their need, IP Australia undertakes an education and awareness role. Engagement in the international intellectual property system is also crucial to ensure improved access for Australia to the global market.

As IP becomes of increasing interest to business investing in research and supporting innovation, and to Government in negotiating international trade agreements, IP Australia's role in supporting quality research and providing policy advice is growing. This specialist advice enables Australia to keep on the forefront of IP issues and be influential in international activities.⁷⁰

The *Appropriation Act (No 5) 2006-2007 2007* (Cth) and the *Portfolio Additional Estimates Statements* varied the appropriated amounts but made no change to the principal objectives and functions of IP Australia for Outcome 1.⁷¹ A detailed summary of the prospective performance measures in the outcomes and outputs framework are set out in Tables 1 and 2.

The other appropriations for IP Australia are standing appropriations through Special Accounts. Special Accounts under the *Financial Management and Accountability Act 1997* (Cth) are established either by the Minister responsible for the *Financial Management and Accountability Act 1997* (Cth) (the "Finance Minister")⁷² by written determination⁷³ or as a provision in legislation.⁷⁴ In both instances they are a ledger⁷⁵ of the CRF.⁷⁶ The essential features of Special Accounts are that they: are a method by which money may be drawn from the "Treasury of the Commonwealth"⁷⁷ for the expenditure purposes of the Commonwealth; articulate the requirements of an appropriation from the CRF; set out an authorisation to expend; and, identify the Commonwealth purposes for which that money may be expended.⁷⁸

IP Australia administers a number of Special Accounts established by written determination.⁷⁹ Importantly, however, the full cost recovery by IP Australia from "customers" of its intellectual

⁷⁰ DITR Portfolio Budget Statements 2006-2007, n 67, p 91.

⁷¹ See Department of Finance and Administration, *Portfolio Additional Estimates Statements 2006-2007: Industry, Tourism and Resources Portfolio* (Department of Finance and Administration, 2007) p 43. The revised appropriation for Output 1 was \$2 506 000 and for Output 2 was \$391 000 to reflect notional interest for Special Accounts of \$842 000.

⁷² *Financial Management and Accountability Act 1997* (Cth), s 5. The "Finance Minister" is currently the Minister for Finance and Administration.

⁷³ *Financial Management and Accountability Act 1997* (Cth), s 20. Noting that such determinations are disallowable instruments that must satisfy special procedural requirements before the Parliament before they take effect (s 22).

⁷⁴ *Financial Management and Accountability Act 1997* (Cth), s 21. A listing of these Acts is set out in Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Inquiry into the Draft Financial Framework Legislation Amendment Bill*, Report 395 (Senate Printing, 2003) app K.

⁷⁵ They are an "account ... used to record moneys received for a designated purpose and expenditure of those moneys": Explanatory Memorandum, *Financial Management Legislation Amendment Bill 1999* (Cth) 3.

⁷⁶ See *Constitution*, s 81. Note also *Constitution*, ss 66, 82.

⁷⁷ This is "any fund or sum of money standing to the credit of the Crown in right of the Commonwealth": *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 573 (Mason CJ, Deane, Toohey and Gaudron JJ). In other words, the moneys actually held by the Commonwealth.

⁷⁸ *Financial Management and Accountability Act 1997* (Cth), s 20. See Department of Finance and Administration, *Guidelines for the Management of Special Accounts*, Financial Management Guidance No 7 (Department of Finance and Administration, 2003) pp 3-15.

⁷⁹ These are: "IP Australia Special Account (Departmental) ... for expenditure in connection with the provision of services in relation to intellectual property"; "Other Trust Monies – World Intellectual Property Organisation ... for the receipt of moneys temporarily held in trust for the World Intellectual Property Organisation under the *Patent Cooperation Treaty* and Madrid

property services that are used to fund its operations are conducted through a Special Account.⁸⁰ As a consequence, the Special Account acts as a standing appropriation of the amount credited to the account that is supplemented with any annually appropriated “notional interest” and various other amounts for identified purposes (as set out above).⁸¹ However, the costs recovered from “customers” of intellectual property services⁸² also include a component of the costs of IP Australia’s activity and another component related to other policy considerations.⁸³ These include rising annual renewal fees after the fifth year so that less innovative patents extract lower economic rents (discouraging unwanted patents),⁸⁴ a waiver of fees for public goods (such as lower costs for small to medium sized enterprises),⁸⁵ and so on.

For the IP Australia Special Account used to credit receipts from charges for intellectual property services to fund its operations the appropriation is set out in the *Financial Management and Accountability Act 1997* (Cth): “[t]he CRF is hereby appropriated for expenditure for the purposes of a Special Account ... up to the balance for the time being of the Special Account the expenditure purpose of the Commonwealth”.⁸⁶ The Commonwealth purpose is set out in the determination establishing the Special Account: “[f]or expenditure related to the development and administration of intellectual and industrial property systems, including the provision of property rights in inventions ... and matters incidental thereto” and “[f]or expenditure comprising payments of moneys to the [CRF], as agreed from time to time by the Minister for Finance and the relevant Minister, in addition to payments expressly required to be paid to that fund under legislation”.⁸⁷ The appropriated amount credit to the Special Account available to expend is recorded in 2006-2007 (“receipts”) as \$120,224,000 and associated with the “Outcome 1” in the terms “Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade”.⁸⁸ Importantly, the *Portfolio Budget Statements* records the Special Account balance as “receipts” and distinct from the amount of the annual appropriation by the *Appropriation Act (No 1)*

protocol and IP legislation”; “Other Trust Monies – Security of Costs ... for the receipt of moneys held as a security in respect of the costs of the opposition proceedings under ... s 219 of the *Patents Act 1990* [(Cth)]”; “services for Other Governments and Non-Agency Bodies Account ... [for] monies advanced to IP Australia by Comcare for the purpose of distributing compensation payments made in accordance with the *Safety, Rehabilitation and Compensation Act 1998* [(Cth)]”; and, “services for Other Governments and Non-Agency Bodies Account - IP Australia Salary Packaging ... for payment of Salary Packaging expenses on behalf of current IP Australia employees in accordance with the IP Australia Certified Agreement”: DITR Annual Report 2006-2007, n 14, pp 369-371. See also DITR Portfolio Budget Statements 2006-2007, n 67, p 86 (listing only three of these Special Accounts).

⁸⁰ See DITR Annual Report 2006-2007, n 14, p 145 and 369; DITR Annual Report 2005-2006, n 30, pp 133-134, 362.

⁸¹ See, eg, DITR Portfolio Budget Statements 2006-2007, n 67, p 83. See also DITR Portfolio Budget Statements 2007-2008, n 67, p 89.

⁸² This was a policy that already featured in patent practice at the time the *Patents Act 1990* (Cth) was implemented: see, eg, Department of Industry, Technology and Commerce, *Annual Report 1989-1990* (Department of Industry, Technology and Commerce, 1990) p 98.

⁸³ For example, this includes agreed charges applying under international agreements, such as applications filed under the *Patent Cooperation Treaty* [1980] ATS 6 in an agreement with the World Intellectual Property Organisation.

⁸⁴ *Patents Regulations 1991* (Cth), Sch 7(pt 2). See also IPCRC, n 5, pp 144, 156, 157; IP Australia, *Government Response to Intellectual Property and Competition Review Recommendations* (IP Australia, 2001) p 7.

⁸⁵ See, eg, IP Australia, *Corporate Guidelines for Refunds and Waivers* (IP Australia, 2007) p 13.

⁸⁶ *Financial Management and Accountability Act 1997* (Cth), s 20(4).

⁸⁷ *Initial Determination to Establish Components of the Reserved Money Fund* (1997), sch. Notably the *Financial Management Legislation Amendment Act 1999* (Cth), s 5 merged the Loan Fund and the “components” of the Reserve Money Fund and the Commercial Activities Fund into the single CRF with the “new” Special Accounts preserving the rights and obligations of the “components” of the Reserve Money Fund and Commercial Activities Fund: Department of Finance and Administration, *Reserved Money Fund (RMF) and Commercial Activities Fund (CAF) – Transition to “Special Accounts”*, Finance Circular 1999/03 (Department of Finance and Administration, 1999); Finance Guidelines for Special Accounts, n 78.

⁸⁸ DITR Portfolio Budget Statements 2006-2007, n 67, p 84. See also DITR Additional Estimates Statements 2006-2007, n 71, p 44.

2006-2007 2006 (Cth).⁸⁹ Presumably the expenditure purposes of the annual appropriation and the Special Account appropriation are within the meaning of the terms of both forms of appropriation purposes and that the outcomes and outputs framework also applies to the Special Account standing appropriations.⁹⁰ This appears to be the approach adopted by IP Australia.⁹¹

As a consequence of the outcomes and outputs framework in annual appropriations, and the form of Special Account standing appropriation, there has been a move away from before-the-event parliamentary scrutiny of expenditure contemplated by the *Constitution* at Federation to an after-the-event accountability and transparency as part of the broader financial management, reporting and audit arrangements. This has diminished the significance of the budgeting arrangements on imposing limits on future spending through limiting purposes and shifted the focus to the later reporting requirements in meeting the broadly stated appropriation purposes.⁹² A broader effect of adopting the outcomes and outputs framework (budget arrangements) has also been in most agencies to align the agency's organisational structure with its financial management, people management and reporting arrangements.⁹³

Alignment of an agency's organisational structure with outcomes, outputs and administered items best defines management accountabilities and responsibilities and enables agencies to directly translate internal reporting to external reporting.⁹⁴

So, the Minister for Industry, Tourism and Resources is the personality formally responsible and accountable to Parliament for the expenditures of the Australian Government in respect of IP Australia.⁹⁵ However, the interest of the Parliament in the conduct and operations of IP Australia have been superficial and have not reported a detailed after-the-event assessment according to the outcomes and outputs framework.⁹⁶ As a consequence the budget arrangements (and the scrutiny by the

⁸⁹ DITR Portfolio Budget Statements 2006-2007, n 67, p 84.

⁹⁰ Similar dual appropriations have been considered by the High Court, although the issue of inconsistency or supremacy has not been resolved. See, eg, *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). While this may be of little practical consequence there are potentially significant issues where the appropriations are double counted in the calculation of surplus revenue due to the States (*Constitution*, s 94), and where an appropriation is for "the necessary supplies for the ordinary annual services of Government" (*Constitution*, ss 53, 54).

⁹¹ See, eg, DITR Annual Report 2006-2007, n 14, p 25; DITR Annual Report 2005-2006, n 30, p 19.

⁹² Senate Finance and Public Administration Legislative and General Purpose Committee, Transparency and Accountability, n 60, p 15.

⁹³ See Senate Finance and Public Administration Legislation Committee Budget Statements Third Report, n 60, p 10. See also ANAO Application of the Outcomes and Outputs Framework, n 54, pp 52-53.

⁹⁴ ANAO Application of the Outcomes and Outputs Framework, n 54, p 52.

⁹⁵ This is expressly recognised by the Minister: see, eg, DITR Additional Estimates Statements 2006-2007, n 71, p v.

⁹⁶ There was very limited formal scrutiny during 2006 and 2007, eg, about KPMG contracts (Parliamentary Debates (Representatives), n 13, 11 September 2007, p 107 (Kelvin Thomson)), outsourcing information technology services (Parliamentary Debates (Representatives), n 13, 11 September 2007, p 126 (Anna Burke)), water usage (Parliamentary Debates (Representatives), n 13, 9 August 2007, p 198 (Anna Burke)), change to the logo (Parliamentary Debates (Representatives), n 13, 7 August 2007, p 103 (Kelvin Thomson)), credit cards (Parliamentary Debates (Representatives), n 13, 24 May 2007, p 160 (Kelvin Thomson)), freedom of information applications (Parliamentary Debates (Representatives), n 13, 21 May 2007, p 144 (Kelvin Thomson)), staffing (Parliamentary Debates (Representatives), n 13, 21 May 2007, p 159 (Kelvin Thomson)), cost recovery (Parliamentary Debates (Senate), n 13, 9 May 2007, p 178 (Kerry O'Brien)), office accommodation (Parliamentary Debates (Representatives), n 13, 8 May 2007, p 101 (Kelvin Thomson)), fuel costs (Parliamentary Debates (Representatives), n 13, 27 March 2007, p 124 (Kelvin Thomson)), staffing arrangements (Parliamentary Debates (Senate), n 13, 7 February 2007, p 170 (Kerry O'Brien)), consultancy services (Parliamentary Debates (Representatives), n 13, 9 October 2006, p 184 (Chris Bowen)), opinion polling (Parliamentary Debates (Representatives), n 13, 9 October 2006, p 190 (Chris Bowen)), media training (Parliamentary Debates (Representatives), n 13, 9 October 2006, p 198 (Chris Bowen)), travel entitlements (Parliamentary Debates (Senate), n 13, 9 October 2006, p 166 (Kerry O'Brien)), childcare (Parliamentary Debates (Representatives), n 13, 16 August 2006, p 200 (Tanya Plibersek)), Estimates training sessions (Parliamentary Debates (Senate), n 13, 15 August 2006, p 123 (Kerry O'Brien)), recruitment agencies (Parliamentary Debates (Representatives), n 13, 9 August 2006, p 201 (Chris Bowen)), massage services (Parliamentary Debates (Representatives), n 13, 9 October 2006, p 228 (Chris Bowen)), patent statistics (Parliamentary Debates (Senate), n 13, 14 June 2006, p 186 (Kerry O'Brien)), legal service providers (Parliamentary Debates (Representatives), n 13, 26 May 2006, p 166 (Brendan O'Connor)), legal service payments (Parliamentary Debates

Parliament) appear to have a very limited direct effect on the Commissioner's decision-making, albeit there is potential for considerable intervention by the Minister (and Parliament) through controlling specific expenditures.

B. Financial management arrangements

The *Financial Management and Accountability Act 1997* (Cth)⁹⁷ imposes part of the Australian Government's financial management and reporting arrangements.⁹⁸ The underlying objective of this arrangement was to devolve financial management consistent with the entity's departure from ministerial control and its legal and financial separation from the Commonwealth,⁹⁹ while still being able to assess and compare the financial performance of individual entities through obligatory and uniform reporting and audit requirements.¹⁰⁰ The *Financial Management and Accountability Act 1997* (Cth) imposes a "regulatory/ accounting/ accountability framework for dealing with and managing the money and property of the Commonwealth", specifying the "responsibilities and powers necessary for the efficient, effective and ethical use of the resources lawfully available to the Commonwealth to carry out its program", and providing "for appropriate mechanisms to ensure that the stewardship and management performance of those who are responsible for those resources can be made visible and, thereby, allow them to be held accountable".¹⁰¹ Following amendment in 1999, the *Financial Management and Accountability Act 1997* (Cth) imposes accrual budgeting placing a focus on the outcomes and outputs from budget allocations.¹⁰² This was to be achieved by requiring an "Agency" (including a "prescribed Agency")¹⁰³ "Chief Executive"¹⁰⁴ to manage their resources efficiently,

(Representatives), n 13, 22 May 2006, p 171 (Nicola Roxon), legal service payments (Parliamentary Debates (Representatives), n 13, 9 May 2006, p 93 (Nicola Roxon)), consultancy services (Parliamentary Debates (Representatives), n 13, 27 March 2006, p 111 (Chris Bowen)), advertising providers (Parliamentary Debates (Representatives), n 13, 27 February 2006, p 137 (Chris Bowen)), and customer service telephone lines (Parliamentary Debates (Senate), n 13, 7 February 2006, p 206 (Chris Evans)).

⁹⁷ Notably a similar Bill had been introduced in 1994, referred to a committee and lapsed when the Parliament was prorogued in 1996: see Joint Committee of Public Accounts and Audit, *An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, Report No 331 (AGPS, 1994).

⁹⁸ Notably, other key elements of this formal framework include the *Commonwealth Authorities and Companies Act 1997* (Cth), the *Charter of Budget Honesty Act 1998* (Cth), the *Auditor-General Act 1997* (Cth), the Joint Committee of Public Accounts and Audit under the *Public Accounts and Audit Committee Act 1951* (Cth) and the referral of annual reports to the Senate and House of Representatives Standing Committees under *Senate Standing Order 25(21)* and *House of Representatives Standing Order 324(b)* respectively.

⁹⁹ Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies*, Financial Management Reference Material No 2 (Department of Finance and Administration, 2005) pp 56-57.

¹⁰⁰ Parliamentary Debates (Representatives), n 13, 12 December 1996, p 8349 (John Fahey, Minister for Finance). See also Department of Finance and Administration, *Requirements and Guidance for the Preparation of Financial Statements of Australian Government Entities (Incorporating Explanatory Notes as Guidance): For Reporting Periods Ending On or After 30 June 2005, Unless Amended* (Department of Finance and Administration, 2005) pp 5-6. See generally Australian Public Service Commission, *The Australian Experience of Public Sector Reform*, Occasional Paper 2 (Australian Public Service Commission, 2003) pp 89-116; Australian National Audit Office, *Monitoring Board Performance*, Guidance Paper No 5 (ANAO, 2003) pp 1-2.

¹⁰¹ Parliamentary Debates (Representatives), n 13, 12 December 1996, pp 8344-5 (John Fahey, Minister for Finance).

¹⁰² See *Financial Management Legislation Amendment Act 1999* (Cth). See also Parliamentary Debates (Representatives), n 13, 10 February 1999, p 2283 (Peter Slipper, Parliamentary Secretary to the Minister for Finance and Administration). Other amendments were included in the *Public Employment (Consequential and Transitional) Amendment Act 1999* (Cth), *Financial Management and Accountability Amendment Act 2000* (Cth), *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth) and the *Parliamentary Service (Consequential and Transitional) Determination 2000/1* (Cth).

¹⁰³ *Financial Management and Accountability Act 1997* (Cth), s 5. These are a Department of State (including persons allocated to that Department) (see *Financial Management and Accountability Regulations 1997* (Cth), r 4(1)(a)-(d), (f)), a Department of the Parliament (including persons allocated to that Department) (see r 4(1)(e)), and a "prescribed Agency" (see s 5: "a body, organisation or group of persons prescribed by the regulations for the purpose of this definition"; for the purposes of this definition r 5 prescribed the "body, organisation or group" set out in Sch 1, and "other persons who perform financial tasks in relation to a function of a person referred to in an item in sch 1"). It is notable that some of the "prescribed Agencies" in Sch 1 are subject to the *Commonwealth Authorities and Companies Act 1997* (Cth) for their handling of "public money".

effectively and ethically,¹⁰⁵ and setting out mandatory accounting requirements to satisfy the role of the “Finance Minister” (the Minister for Finance and Administration) in preparing an account of the Commonwealth (including the Australian Government) for the Parliament.¹⁰⁶ Central to the objective of this reform was to give chief executives the powers to make and then be accountable for decisions about expenditure, and the use of money and the other resources of the Commonwealth under their control.¹⁰⁷

Under the *Financial Management and Accountability Act 1997* (Cth) “IP Australia” is a “prescribed Agency” comprised of “the person occupying, or performing the duties of, the position within the Department of Industry, Tourism and Resources known as the Director General of IP Australia” and “persons engaged under the *Public Service Act 1999* [(Cth)] to assist the Director General”.¹⁰⁸ The “Chief Executive” for the purposes of the *Financial Management and Accountability Act 1997* (Cth) is the “Director General”.¹⁰⁹ As the “Chief Executive”, the Director General has definite management responsibilities over the control and management of public money and public property, including:

- To “manage the affairs of the Agency in a way that promotes [efficient, effective and ethical use]¹¹⁰ of the Commonwealth resources for which the Chief Executive is responsible”;¹¹¹
- To complying with the “Finance Minister’s Orders”¹¹² and other requirements so that “the Chief Executive must manage so as to promote proper use of those resources to the greatest extent practicable while complying with those requirements”;¹¹³
- To “implement a fraud control plan for the Agency”;¹¹⁴

¹⁰⁴ *Financial Management and Accountability Act 1997* (Cth), s 5. For a prescribed Agency, “the person identified by the regulations as the Chief Executive of the Agency”, and for any other Agency, “the person who is the Secretary of the Agency for the purposes of the *Public Service Act 1999* (Cth) or the *Parliamentary Service Act 1999* (Cth)”. Noting that the *Public Service Act 1999* (Cth), s 7 provides that the “Secretary” means “the Secretary of a Department”; the term “Department” is defined to mean “a Department of State, excluding any part that is itself an Executive Agency or Statutory Agency”; the term “Agency Head” is defined to mean “the Secretary of a Department”, “the Head of an Executive Agency” or “the Head of a Statutory Agency” and the *Parliamentary Service Act 1999* (Cth), s 7 provides that the “Secretary” means “the Secretary of a Department and includes the Clerk of the Senate and the Clerk of the House of Representatives” and that “Secretary of a Department” means “(a) if the Department is the Department of the Senate – the Clerk of the Senate; or (b) if the Department is the Department of the House of Representatives – the Clerk of that House; or (c) if the Department is another Department – the Secretary of that Department”.

¹⁰⁵ *Financial Management and Accountability Act 1997* (Cth), s 44. This is assisted through issuing Chief Executive Instructions (s 52), implementing a Fraud Control Plan (s 45) and requiring an Agency Audit Committee (s 46).

¹⁰⁶ *Financial Management and Accountability Act 1997* (Cth), ss 54-57. The standards are proscribed by the Finance Minister’s Orders (s 63).

¹⁰⁷ See Parliamentary Debates (Representatives), n 13, 12 December 1996, p 8345 (John Fahey, Minister for Finance).

¹⁰⁸ *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth) r 5 and Sch 1 (item 128A). Notably, IP Australia is not a “business operation”: see *Financial Management and Accountability Orders 2005* (Cth), O 6.2.

¹⁰⁹ *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth), r 5 and Sch 1 (item 128A).

¹¹⁰ The term “ethics” is probably “the moral boundaries or values within which officials work”, so that “[e]thical behaviour encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency”: Commonwealth Procurement Guidelines, n 9, p 16. Unfortunately the Director General of IP Australia has never articulated his conception of efficient, effective or ethical use.

¹¹¹ *Financial Management and Accountability Act 1997* (Cth), s 44(1), (3).

¹¹² See *Financial Management and Accountability Act 1997* (Cth), s 63.

¹¹³ *Financial Management and Accountability Act 1997* (Cth), s 44(2).

¹¹⁴ *Financial Management and Accountability Act 1997* (Cth), s 45; *Financial Management and Accountability Orders 2005* (Cth), O 2.2.

- To “establish and maintain an audit committee for the Agency, with the functions and responsibilities required by the Finance Minister’s Orders”;¹¹⁵
- To “ensure that accounts and records of the Agency are kept as required by the Finance Minister’s Orders”;¹¹⁶
- To “give instructions to officials in their Agencies on any matter on which regulations may be made under this Act” (the “Chief Executive’s Instructions”).¹¹⁷ The regulations provide: “to give instructions ... to officials in that Agency on any matter necessary or convenient for carrying out or giving effect to the Act or these Regulations, and, in particular” the “handling, spending and accounting for public money”, “making commitments to spend public money”, “recovering amounts owing to the Commonwealth”, “using, or disposing of, public property”, and “acquiring property that is to be public property” for “ensuring or promoting” the “proper use and management of public money, public property and other resources of the Commonwealth” and “proper accountability for the use and management of public money, public property and other resources of the Commonwealth”;¹¹⁸ and
- To give to the Finance Minister any required “financial statements” and “information” about the financial affairs of the Agency.¹¹⁹

The effect of each of these measures in the financial management arrangements is that the Director General can have a considerable influence on the Commissioner’s decision-making. So, for example, by limiting the expenditure and other resources available to the Commissioner the Director General may influence the ability of the Commissioner to complete her statutory duties, and perhaps also the quality of the Commissioner’s decisions.

C. People management arrangements

The *Workplace Relations Act 1996* (Cth)¹²⁰ and the *Public Service Act 1999* (Cth)¹²¹ both introduced reforms directed specifically at placing responsibility for employment arrangements at the workplace between employees and their immediate employers. In the words of the then Minister for Industrial Relations, the *Workplace Relations Act 1996* (Cth) was intended to:

deliver the framework for structural reform of the labour market demanded by the imperatives of world competition and warranted by the legitimate expectation of Australians to enjoy improved living standards through higher employment and better paid jobs over time.¹²²

The *Workplace Relations Act 1996* (Cth) established a process for agreement-making and details specific protection against unlawful termination, discrimination, and so on. The *Workplace Relations Act 1996* (Cth) also imposes the same industrial relations and employment arrangements for public

¹¹⁵ *Financial Management and Accountability Act 1997* (Cth), s 46; *Financial Management and Accountability Orders 2005* (Cth), O 2.1.

¹¹⁶ *Financial Management and Accountability Act 1997* (Cth), s 48(1); *Financial Management and Accountability Orders 2005* (Cth), O 2.3.

¹¹⁷ *Financial Management and Accountability Act 1997* (Cth), s 52(1).

¹¹⁸ *Financial Management and Accountability Regulations 1997* (Cth), r 6(1).

¹¹⁹ *Financial Management and Accountability Act 1997* (Cth), ss 50(1), (2).

¹²⁰ See Parliamentary Debates (Representatives), n 13, 23 May 1996, pp 1295-1305 (Peter Reith, Minister for Industrial Relations). Notably, the final Bill was subjected to considerable amendment: see Parliamentary Debates (Representatives), n 13, 21 November 1996, pp 7179-7217.

¹²¹ See Parliamentary Debates (Representatives), n 13, 30 March 1999, pp 4683-5 (David Kemp, Minister Assisting the Prime Minister for the Public Service). Notable an earlier Bill had been considered by the Joint Committee of Public Accounts that had recommended that the Bill be simplified, modernised and presented in a more accessible form: see Joint Committee of Public Accounts, *Advisory Report on the Public Service Bill 1997 and the Public Employment (Consequential and Transitional) Amendment Bill 1997* (Senate Printing, 1997).

¹²² Parliamentary Debates (Representatives), n 13, 23 May 1996, p 1296 (Peter Reith, Minister for Industrial Relations). In addressing the *Public Service Act 1999* (Cth) the former Minister said the statute would “promote higher performance in the APS by devolving management responsibility to individual agencies and, at the same time, ensure that public interest objectives are maintained through enhanced accountability”: Parliamentary Debates (Representatives), n 13, 26 June 1997, p 6461 (Peter Reith, Minister for Industrial Relations).

servants as those applying to other workers. The effect was to devolve employment decision about setting remuneration and employment terms and conditions to the individual agencies through Australian Workplace Agreements (AWAs) and Certified Agreements.¹²³

The *Public Service Act 1999* (Cth) essentially provides the basic framework for the structure, responsibilities and management of the Australian Public Service (APS).¹²⁴ The major advances brought about by the *Public Service Act 1999* (Cth)¹²⁵ were a declaration of “APS Values” (reflecting public expectations of the relationship between the public service and the government, the Parliament and the Australian community),¹²⁶ a “Code of Conduct” (reflecting the public expectation that public servants will exercise appropriate conduct),¹²⁷ and the devolution to “Agency Heads” of all the rights, duties and powers of an employer in respect of their APS employees,¹²⁸ subject to the *Workplace Relations Act 1996* (Cth).¹²⁹ Under the *Public Service Act 1999* (Cth) there is a statutory office of Public Service Commissioner¹³⁰ with various function addressing APS employment,¹³¹ including promoting the APS Values and the Code of Conduct.¹³² The Public Service Commissioner must also issue directions about APS Values,¹³³ the Code of Conduct,¹³⁴ and various other matters.¹³⁵ Further, the Prime Minister may issue general directions to Agency Heads about the management and leadership of APS employees.¹³⁶ The people management approach to devolution under the *Workplace Relations Act 1996* (Cth) and the *Public Service Act 1999* (Cth) was also balanced with “enhanced accountability for Agency performance”¹³⁷ that included an annual reporting obligation.¹³⁸

IP Australia is a separately identifiable entity as a “prescribed Agency” under the *Financial Management and Accountability Act 1997* (Cth) with its employees engaged under the *Public Service Act 1999* (Cth).¹³⁹ For the purposes of the *Public Service Act 1999* (Cth), however, the employer is the “Agency Head”, being the Secretary of the Department of Industry, Tourism and Resources.¹⁴⁰ The

¹²³ Although this was not without some limits. See, eg, Australian Public Service Commission, *Policy Parameters for Agreement Making in the APS* (APSC, 2006).

¹²⁴ The APS consisting of Agency Heads and APS employees: *Public Service Act 1999* (Cth), s 9.

¹²⁵ For an historical overview see Australian Public Service Commission, *A History in Three Acts: Evolution of the Public Service Act 1999* (APSC, 2004). See also Public Service and Merit Protection Commission and the Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (PSMPC, 1997) pp 4-8.

¹²⁶ *Public Service Act 1999* (Cth), s 10. See also Public Service Commissioner’s Directions 1999 (Cth), d 2.1-4.7.

¹²⁷ *Public Service Act 1999* (Cth), s 13. See also Public Service Commissioner’s Directions 1999 (Cth), d 5.1-5.6.

¹²⁸ See *Public Service Act 1999* (Cth), ss 20, 22, 24(1). See also APSC Australian Experience, n 100, pp 33-37.

¹²⁹ *Public Service Act 1999* (Cth), s 8(1).

¹³⁰ *Public Service Act 1999* (Cth), s 40(1).

¹³¹ See *Public Service Act 1999* (Cth), s 41(1).

¹³² *Public Service Act 1999* (Cth), s 41(1)(e). See also Australian Public Service Commission, *State of the Service Report 2005-2006*, State of the Service Series (APSC, 2006) pp 56-69.

¹³³ *Public Service Act 1999* (Cth), s 11. See also Public Service Commissioner’s Directions 1999 (Cth), d 2.1-4.7.

¹³⁴ *Public Service Act 1999* (Cth), s 15(4). See also Public Service Commissioner’s Directions 1999 (Cth), d 5.1-5.6.

¹³⁵ *Public Service Act 1999* (Cth), s 36 (senior executive employment). See also *Public Service Commissioner’s Directions 1999* (Cth), dd 6.1-6.8 (senior executive employment).

¹³⁶ *Public Service Act 1999* (Cth), s 21(1). See Prime Minister’s Public Service Directions 1999 (Cth).

¹³⁷ APSC Australian Experience, n 100, p 55.

¹³⁸ *Public Service Act 1999* (Cth), s 63(1), (2). See also Department of the Prime Minister and Cabinet, Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies (PMC, 2006).

¹³⁹ See *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth), r 5 and Sch 1 (item 128A).

¹⁴⁰ *Public Service Act 1999* (Cth), s 7 (“Agency Head”).

Agency Head is bound by the Code of Conduct¹⁴¹ and must uphold and promote the APS Values.¹⁴² The Secretary is also responsible for managing the Department, advising the Agency Minister in matters relating to the Department, and assisting the Agency Minister to fulfil any parliamentary accountability obligations.¹⁴³ The Secretary's reporting obligations include the provision of an annual report¹⁴⁴ according to guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit.¹⁴⁵

The Secretary (as the Agency Head) is appointed by the Prime Minister for up to 5 years after consultation with the person who is, or is expected to be, the portfolio Minister.¹⁴⁶ The remuneration and other conditions of appointment are determined by the Prime Minister.¹⁴⁷ These conditions are not publicly disclosed, although they do include performance benchmarks and a bonus payments scheme.¹⁴⁸ The Agency Head must also comply with the Public Service Commissioner's Directions under the *Public Service Act 1999* (Cth),¹⁴⁹ and may be investigated by the Public Service Commissioner for alleged breaches of the Code of Conduct.¹⁵⁰ As an Agency Head, the Secretary has "all the rights, duties and powers of an employer in respect of APS employees" for IP Australia, including employing the Director General, the Commissioner (of Patents) and the other persons engaged under the *Public Service Act 1999* (Cth) assisting the Director General in IP Australia.¹⁵¹

The Director General and Commissioner are employed according to an AWA under the *Workplace Relations Act 1996* (Cth).¹⁵² The terms and conditions of the AWA are not publicly disclosed, although they include performance benchmarks and a bonus payments scheme.¹⁵³ The Director General and Commissioner must comply with the Public Service Commissioner's Directions under the *Public Service Act 1999* (Cth),¹⁵⁴ and may be investigated by the Agency Head for alleged breaches of the Code of Conduct according to the Directions issues by the Public Service Commissioner.¹⁵⁵ The other persons assisting the Director General in IP Australia are employed by the Secretary under the *Public Service Act 1999* (Cth) and subject to either an AWA or an enterprise agreement (a Certified Agreement) under the *Workplace Relations Act 1996* (Cth).¹⁵⁶ The terms and conditions of the Certified Agreement are disclosed¹⁵⁷ and include performance benchmarks and a bonus payments

¹⁴¹ *Public Service Act 1999* (Cth), s 14(1). This also includes statutory office holder such as the Commissioner of Patents (*Patents Act 1990* (Cth), s 207) (s 14(2)).

¹⁴² *Public Service Act 1999* (Cth), s 12.

¹⁴³ *Public Service Act 1999* (Cth), s 57.

¹⁴⁴ *Public Service Act 1999* (Cth), s 63(1).

¹⁴⁵ *Public Service Act 1999* (Cth), 63(2). See Prime Minister and Cabinet Requirements for Annual Reports, n 138.

¹⁴⁶ *Public Service Act 1999* (Cth), s 58(1), (4).

¹⁴⁷ *Public Service Act 1999* (Cth), s 61(1).

¹⁴⁸ See also Commonwealth, Determination under Section 61: Consolidation of Secretaries' Remuneration and Other Conditions, *Gazette* No 40, 11 October 2001 (Commonwealth, 2001).

¹⁴⁹ *Public Service Act 1999* (Cth), s 42(2).

¹⁵⁰ *Public Service Act 1999* (Cth), s 41(1)(f).

¹⁵¹ *Public Service Act 1999* (Cth), s 20(1). See also *Public Service Regulations 1999* (Cth), rr 3.2, 3.3.

¹⁵² See DITR Annual Report 2006-2007, n 14, 92, pp 143, 149; DITR Annual Report 2005-2006, n 30, pp 87, 94, 96, 131. See also Parliamentary Debates (Representatives), n 13, 7 February 2007, p 170 (Kerry O'Brien).

¹⁵³ See DITR Annual Report 2006-2007, n 14, p 143; DITR Annual Report 2005-2006, n 30, p 96.

¹⁵⁴ *Public Service Act 1999* (Cth), s 42(2).

¹⁵⁵ *Public Service Act 1999* (Cth), s 15(1), (3). See also *Public Service Regulations 1999* (Cth), r 2.3.

¹⁵⁶ See DITR Annual Report 2006-2007, n 14, p 148; DITR Annual Report 2005-2006, n 30, p 93. See also Parliamentary Debates (Representatives), n 13, 7 February 2007, p 170 (Kerry O'Brien).

¹⁵⁷ See IP Australia, *IP Australia Certified Agreement 2005-2008* (IP Australia, 2005). Notably, a recent performance audit (*Auditor-General Act 1997* (Cth), s 18) that included IP Australia reported: "[t]he audit identified that each of the three audited agencies" had adopted a "cascading of plans" approach to linking agency plans to [individual performance agreements] in their planning and performance management frameworks. However, there was not a consistent or systematic approach to

scheme.¹⁵⁸ The terms and conditions of the AWAs are not publicly disclosed but they also include performance benchmarks and a bonus payments scheme.¹⁵⁹

Under these people management arrangements the Secretary has considerable scope to influence the decision-making of the Commissioner. The primary influence will be the terms and conditions of employment set out in the Commissioner's AWA and her delegates' AWAs or Certified Agreement. Unfortunately the AWAs are not publicly available so the actual influential effects of these agreements and the role of the Secretary are uncertain. However, there are Australian Government policy positions addressing employee performance,¹⁶⁰ and within IP Australia, there are performance benchmarks with bonus payments available for desirable performance achievements,¹⁶¹ showing that the Secretary has articulated his conception, at least in part, of performance. The Certified Agreement perhaps provides some further indications.¹⁶² The Certified Agreement promotes "continuous improvement in performance ... by recognising effective performance".¹⁶³ The performance is then articulated in *IP Australia's Work Level Standards and Work Skills Framework*,¹⁶⁴ the *IP Australia Performance Management Policy*,¹⁶⁵ and *IP Australia's Performance Management Process Manual and Guidelines*.¹⁶⁶ Unfortunately, none of these documents are publicly available. Presumably, the desirable performance will also be consistent with the Australian Government's policy positions that clearly advocates that Agency "vision", "mission", "aims", "values", "behaviours", "major directions/priorities" and "management structures" should be directed to achieving the "outcomes", "outputs" and "performance indicators".¹⁶⁷ In short, there is considerable potential for the Secretary (and perhaps others) to influence the Commissioner's decision making through the people management arrangements.

D. Reporting arrangements

Each of the financial management and people management arrangements impose reporting obligations.¹⁶⁸ The outcomes and outputs framework requires agencies to provide relevant

incorporating [*Portfolio Budget Statements*] performance indicators, as appropriate, into agency plans or [individual performance agreements] and linking these plans with "outcomes and agency outputs": ANAO Application of the Outcomes and Outputs Framework, n 54, p 54. The Auditor-General recommended and IP Australia accepted the recommendation: "that to enhance the integration of the framework into agency operations, details of outcomes and outputs and *Portfolio Budget Statement* indicators be incorporated into ... individual performance agreements, to the extent appropriate" (p 55). It seems likely that the recommendation will be implemented in the Certified Agreement nominally commencing on 28 January 2008.

¹⁵⁸ See DITR Annual Report 2006-2007, n 14, p 149; DITR Annual Report 2005-2006, n 30, p 136.

¹⁵⁹ See DITR Annual Report 2006-2007, n 14, p 149; DITR Annual Report 2005-2006, n 30, p 137.

¹⁶⁰ See, eg, Management Advisory Committee, *Performance Management in the APS: A Strategic Framework*, MAC Report 1 (APSC, 2001) p 5 provides: "the factors that will assist organisations in designing, implementing and reviewing their performance management systems. The success factors for performance management systems are summarised as: alignment – within a values-based framework that takes account of the organisational culture and business objectives; credibility – applying across the organisation, and seen as fair, transparent and rigorous; and, integration – integrating organisational objectives with the performance of teams and individuals". See also Prime Minister, *More Time for Business* (DITR, 1997) p 54.

¹⁶¹ See DITR Annual Report 2006-2007, n 14, p 143.

¹⁶² See DITR Annual Report 2006-2007, n 14, p 149.

¹⁶³ IP Australia Certified Agreement 2005-2008, n 157, p 33.

¹⁶⁴ IP Australia Certified Agreement 2005-2008, n 157, p 33.

¹⁶⁵ IP Australia Certified Agreement 2005-2008, n 157, p 34. See also IP Australia, *Guidelines on the Examiner of Patents Efficiency Advancement Scheme* (IP Australia, 2006).

¹⁶⁶ IP Australia Certified Agreement 2005-2008, n 157, p 35.

¹⁶⁷ See Management Advisory Committee Performance Management, n 160, p 16. See also Australian Public Service Commission, *Sharpening the Focus: Managing Performance in the APS* (APSC, 2006); Australian Public Service Commission, *Performance Management* (APSC, 2002). IP Australia may have had some difficulty complying with these standards: see Australian National Audit Office, *Performance Management in the Australian Public Service*, Audit Report No 6 (ANAO, 2004) pp 153-154.

¹⁶⁸ See *Financial Management and Accountability Act 1997* (Cth), ss 54-57 (financial management); *Public Service Act 1999* (Cth), s 63(1) (people management).

performance information about the effectiveness of achieving outcomes and the efficient delivery or management of outputs and administered items in the *Public Service Act 1999* (Cth) *Annual Report*.¹⁶⁹ The *Annual Report* itself is a report from a *Public Service Act 1999* (Cth) “Agency Head” to the portfolio Minister for tabling in the Parliament about that Agency’s performance.¹⁷⁰ The *Financial Management and Accountability Act 1997* (Cth) complements these requirements by obliging the “Chief Executive” to prepare annual financial statements (according to the Finance Minister’s Orders),¹⁷¹ and the associated Auditor-General’s report,¹⁷² to be included in that *Annual Report*.¹⁷³ In effect, the *Annual Report* is the “key reference document”¹⁷⁴ that links the financial management and people management arrangements within an outcomes and outputs framework set out in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) accompanying Budget appropriations.¹⁷⁵ IP Australia’s obligations for an *Annual Report* are those imposed on the Secretary of the Department of Industry, Tourism and Resources as the Agency Head of the Department of Industry, Tourism and Resources¹⁷⁶ and incorporate IP Australia’s audited financial statements provided by the Director General.¹⁷⁷ Tables 1 and 2 detail in summary form the outcome and output (performance) measures, and the quality, quantity and price projections and actual deliverables, derived from the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) and *Annual Report* for the reporting period 2006-2007.

The *Annual Report* is tabled in Parliament¹⁷⁸ and referred to a Senate Standing Committee¹⁷⁹ and a House of Representative Standing Committee.¹⁸⁰ In the case of the Department of Industry, Tourism and Resources the *Annual Report* is referred to the Senate Standing Committee on Economics and the House of Representative Standing Committee on Industry and Resources. These committees have the mandate to rigorously assess the *Annual Report*,¹⁸¹ although in practice, their assessments are fairly superficial and have not commented on IP Australia in recent reports.¹⁸² Other opportunities for parliamentary scrutiny of the Australian Government’s operations, activities and expenditure proposals occurs through the Joint Committee of Public Accounts and Audit under the *Public Accounts and*

¹⁶⁹ See Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 1.

¹⁷⁰ Notably, these reporting requirements also apply to prescribed Agencies under the *Financial Management and Accountability Act 1997* (Cth), s 5: Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 1.

¹⁷¹ *Financial Management and Accountability Act 1997* (Cth), s 63; *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2006) 2006* (Cth).

¹⁷² *Financial Management and Accountability Act 1997* (Cth), ss 49-51, 54-57.

¹⁷³ *Financial Management and Accountability Act 1997* (Cth), s 57(7). This has been interpreted to mean the *Annual Report* required by the *Public Service Act 1999* (Cth), s 63(1): Prime Minister and Cabinet Requirements for Annual Reports, n 138, p 13; ANAO Portfolio Budget Statements Performance Information, n 65, p 5.

¹⁷⁴ ANAO Annual Performance Reporting, n 58, p 21. See also *Senate Standing Order 25(21)*; ANAO and Finance Guide on Annual Performance Reporting, n 65.

¹⁷⁵ See ANAO Portfolio Budget Statements Performance Information, n 65, p 5. See also Prime Minister and Cabinet Requirements for Annual Reports, n 138, pp 3-4.

¹⁷⁶ *Public Service Act 1999* (Cth), ss 7 (“Agency Head”), 63 (annual reporting).

¹⁷⁷ *Financial Management and Accountability Act 1997* (Cth), s 57(7).

¹⁷⁸ *Public Service Act 1999* (Cth), s 63(1).

¹⁷⁹ *Senate Standing Order 25(21)*. See also Evans H, *Odgers’ Australian Senate Practice* (11th ed, Senate Printing, 2004) pp 386-387.

¹⁸⁰ *House of Representatives Standing Order 215(c)*. See also Harris I (ed), *House of Representatives Practice* (5th ed, Senate Printing, 2005) p 624.

¹⁸¹ See *Senate Standing Order 25(21)*; *House of Representatives Standing Order 215(c)*.

¹⁸² See, eg, Senate Standing Committee on Economics, *Annual Reports*, No 1 of 2007 (Senate Printing, 2007) pp 6-7 (addressing the DITR Annual Report 2005-2006, n 30); Senate Standing Committee on Economics, *Annual Reports*, No 1 of 2006 (Senate Printing, 2006) p 5 (addressing the DITR Annual Report 2004-2005, n 42). Notable the House of Representative Standing Committee on Industry and Resources has not assessed any recent *Annual Reports*.

Audit Committee Act 1951 (Cth) and the twice yearly Senate Estimate Committee hearings.¹⁸³ However, the formal scrutiny of IP Australia by the Parliament has been very limited.¹⁸⁴

There are a range of other mandatory reporting obligations imposed by the *Financial Management and Accountability Act 1997* (Cth)¹⁸⁵ and the *Charter of Budget Honesty Act 1998* (Cth),¹⁸⁶ and a plethora of discretionary reports depending on the particular agency and its business. For example, IP Australia provides a range of reports (and other publications) directed to its particular stakeholders, such as a patent practice manual,¹⁸⁷ information materials,¹⁸⁸ notices,¹⁸⁹ and so on. IP Australia is also required to identify and make available some internal management documents.¹⁹⁰

3. PRACTICAL EXAMPLES OF AFFECTS

So far the article has detailed the separate budget, financial management, people management and reporting arrangements, and the potential for institutions and personalities to influence the Commissioner's decision making. The remaining parts now address practical examples of how those arrangements might affect the Commissioner's decision-making. Unfortunately, the Commissioner's AWA is not publicly available so the actual influential effects of that agreement and the role of the Secretary are uncertain, albeit potentially significant.

A. Regulatory or service delivery?

A fundamental governance issue is determining whether IP Australia's function is to impose a regulatory arrangement for a broader public interest, or delivering a service to patent applicants. Is the IP Australia "customer" (or stakeholder) a broader public benefiting from innovation, investment and international competitiveness, or is the "customer" (or stakeholder) *only* those making patent applications with the attendant services for granting the patent? The Commissioner's decision making is likely to be affected by this choice.

The *Portfolio Budget Statement* articulates an Outcome 1 effectiveness measure that "Australians benefit from effective use of intellectual property" (see Table 1).¹⁹¹ The listed sub-outcomes include that "Australians benefit from IP initiatives",¹⁹² with the effectiveness measures, indicators and targets

¹⁸³ See Evans, n 179, pp 307-312, 364-369. See also Department of the Senate, *Consideration of Estimates by the Senate Committees*, Senate Brief No 5 (Senate Printing, 2006).

¹⁸⁴ See, eg, Commonwealth, *Committee Hansard*, Senate Economics Legislation Committee, 29 May 2006, pp E86-E96 (new performance measures, employing patent examiners, cost recovery, work for other patent offices and examination periods), E20-E30 (springboard provisions, applicants keeping IP Australia informed about patent searches and inoperative web links).

¹⁸⁵ These include, eg, a monthly financial statement in a form consistent with the Budget estimates that includes information about the fiscal balance, the underlying cash balance and the net operating result for the general government sector, and annually consolidated financial statements for the Commonwealth: *Financial Management and Accountability Act 1997* (Cth), ss 54 (monthly financial statement), 55 (consolidated financial statements). See, eg, Department of Finance and Administration, *Consolidated Financial Statements for the Australian Government for the Financial Year Ended 30 June 2006* (Department of Finance and Administration, 2007).

¹⁸⁶ These include, eg, a budget economic and fiscal outlook report with each budget and a final budget outcome report within 3 months of the end of each financial year: *Charter of Budget Honesty Act 1998* (Cth), ss 10 (budget economic and fiscal outlook report with each budget), 14(1) (mid-year economic and fiscal outlook report based on financial statistics by the end of January in each year, or within 6 months after the last budget, whichever is later), 18 (final budget outcome report within 3 months of the end of each financial year). See, eg, Treasury, *Final Budget Outcome 2006-2007* (Treasury, 2007); Treasury, *Mid-Year Economic and Fiscal Outlook 2006-2007* (Treasury, 2006).

¹⁸⁷ IP Australia, *Australian Patent Office Manual of Practice and Procedure* (IP Australia, 2007).

¹⁸⁸ See, eg, IP Australia, *Australian Patents for Biological Inventions* (IP Australia, 2005); IP Australia, *Patents for Computer Related Inventions* (IP Australia, 2005); and so on.

¹⁸⁹ See, eg, IP Australia, "Proceedings under the Patents Act 1990" (2007) 21(20) *Australian Official Journal of Patents* 1219.

¹⁹⁰ See, eg, *Freedom of Information Act 1982* (Cth), s 9(2)(c) (documents to be available for inspection and purchase). See IP Australia, *Statement Pursuant to Paragraph 9(2)(c) of the Freedom of Information Act 1982* (IP Australia, 2006).

¹⁹¹ DITR Portfolio Budget Statements 2006-2007, n 67, pp 93-95. Notably, this assumes that Outcome 1 applies equally to the Special Account standing appropriation.

¹⁹² DITR Portfolio Budget Statements 2006-2007, n 67, pp 82, 92.

being “[a]nalysis of benefit through periodic research and programs studies and independent reviews”, and “[i]ncreased application by Australian industry for international IP Rights”.¹⁹³ However, this sub-outcome is not restated in the output groups of proposed performance measures and actual performance measured (see Table 2). In short, there is *no* assessment of the sub-outcome that “Australians benefit from IP initiatives” in the *Annual Report*. However, the listed sub-outcomes “[c]ustomer and stakeholder satisfaction”,¹⁹⁴ with the effectiveness measures, indicators and targets being “[c]ustomer satisfaction with products and services measured through surveys and feedback”,¹⁹⁵ is re-stated in the outputs groups as “[c]ompliance with IP Australia *customer service charter* and quality standards” (emphasis added).¹⁹⁶ IP Australia’s *Customer Service Charter*¹⁹⁷ reflects an Australian Government requirement for an Agency engaged in “service delivery”.¹⁹⁸ The charter is “the driver for cultural change within the Agency ... [and] ... can encompass client-focus, changed business practices, outcomes rather than process, better and more responsive communications, and improved relationships with clients”.¹⁹⁹ IP Australia’s *Customer Service Charter* is promulgated by the Director General in meeting his obligations to manage the resources under his control efficiently, effectively and ethically.²⁰⁰

The *Portfolio Budget Statement* and *Annual Report* also place a considerable focus on “customers”. For example, the *Portfolio Budget Statement* articulates various “quality”, “quantity” and “price” measures in addressing sub-outputs (see Table 2). In particular the “quality” relating to “patents” for “output 1” that contributed to the Outcome 1 is “[c]ompliance with IP Australia *customer service charter* and quality standards” (emphasis added).²⁰¹ The *Annual Report* records “greater than 96% compliance across all national and international work against published *Product Quality Standards* for patents”,²⁰² “[m]ore than 98% of applications proceeded to grant unopposed”, “[f]ifty-two hearing decisions were issued and of these 83% were issued within the required time”, and so on.²⁰³ The *Customer Service Charter* identifies its “customers” as “[n]ational and international businesses and research companies”, “[i]nventors, small to medium enterprises, students, people with good ideas” and “[a]ttorneys and other IP professionals, including professional searchers”.²⁰⁴ There is *no* mention or even oblique suggestion in the output measures that the Commissioner or IP Australia is administering the statutory scheme for a broader public. Further, the Director General has advised Parliament that the key indicator of performance is “to meet our *customer service charter* standards” (emphasis added)²⁰⁵ and the “customer” in mind refers to the “customer satisfaction benchmarking

¹⁹³ DITR Portfolio Budget Statements 2006-2007, n 67, p 92.

¹⁹⁴ DITR Portfolio Budget Statements 2006-2007, n 67, pp 82, 92.

¹⁹⁵ DITR Portfolio Budget Statements 2006-2007, n 67, p 92.

¹⁹⁶ DITR Portfolio Budget Statements 2006-2007, n 67, p 93. See also DITR Annual Report 2006-2007, n 14, p 138.

¹⁹⁷ IP Australia, *Customer Service Charter* (IP Australia, 2007). See also IP Australia, *Customer Service Standards* (IP Australia, 2006).

¹⁹⁸ More Time for Business, n 160, pp 55-56. See also Department of Finance and Administration, *Client Service Charter Principles* (Department of Finance and Administration, 2000); Department of Industry, Science and Tourism, *Putting Service First: Principles for Developing a Service Charter* (DIST, 1997).

¹⁹⁹ Finance Client Service Charter Principles, n 198, p 6.

²⁰⁰ *Financial Management and Accountability Act 1997* (Cth), ss 44 and 52; *Financial Management and Accountability Regulations 1997* (Cth), r 6(1). See also Department of Finance and Administration, *Chief Executive’s Instructions, Finance Circular No 2004/15* (Department of Finance and Administration, 2004) p 1.

²⁰¹ DITR Portfolio Budget Statements 2006-2007, n 67, p 93.

²⁰² See Australian Patent Office Manual, n 187, para [2.1.2] providing: “The Australian Patent Office recognises that the services it provides must comply with the requirements of the *Patents Act*, and meet the expectations of its customers. To ensure that customers’ expectations are met, a set of quality standards for patent examination have been developed using feedback from our customers and in consultation with our staff”.

²⁰³ DITR Annual Report 2006-2007, n 14, p 138.

²⁰⁴ IP Australia Customer Service Charter, n 197, p 3.

²⁰⁵ Committee Hansard, n 184, 29 May 2006, p E88 (Ian Health, IP Australia).

survey” directed to “the quality, efficiency and timeliness of our services”.²⁰⁶ This appears consistent with the Minister for Industry, Science and Resources intention that IP Australia should seek to be a leading *provider* of IP rights in the world,²⁰⁷ and the Australian Government policy that promotes the interests of the “client” – “it infers a level of empowerment to those undertaking a transaction with the ... Agency”.²⁰⁸ Put simply, the focus of the Commissioner within IP Australia appears to be directed to “customer” satisfaction (or service delivery) according to the management directives from the Director General as opposed to addressing a broader public interest. The remaining question is how this focus on the “customer” might influence the Commissioner’s decisions.

Perhaps surprisingly, there is no clear statement from the Australian Government about what it believes the patent scheme is intended to achieve.²⁰⁹ The available stated policy objectives for patents are couched in generalized terms such as “strengthen our intellectual property (IP) management processes and increase access to global research and technologies”,²¹⁰ and to variously stimulate invention (and innovation), increase the public availability of information about new technology, encourage entrepreneurs, promote investment and address free-riding on investment in intellectual effort.²¹¹ While these are undoubtedly desirable, they do not provide a basis for detailed policy choices about the objectives of a policy, and in the context of the outcomes and outputs favouring “customers” and “stakeholders”, the default position might be expected to favour those using the scheme rather than the broad and nebulous “Australian public”.

The consequences of the distinction between regulatory or service delivery for IP Australia might best be illustrated by contrast with another competition focus regulatory agency, the Australian Competition and Consumer Commission (ACCC) administering the *Trade Practices Act 1974* (Cth).²¹² The ACCC is a statutory body corporate consisting of a Chairperson and others appointed by the Governor-General on approval of the Minister (Treasurer).²¹³ The ACCC is also a prescribed Agency under the *Financial Management and Accountability Act 1998* (Cth) with the Chairperson as the “Chief Executive”,²¹⁴ comprising, in part, persons engaged under the *Public Service Act 1999* (Cth) to assist the ACCC.²¹⁵ However, the ACCC is also a “Statutory Agency”²¹⁶ with the Chairperson being the Agency Head for the purposes of the *Public Service Act 1999* (Cth).²¹⁷ Put simply, the Chairperson is responsible for both financial and people management arrangements. The interesting contrast between IP Australia and the ACCC, however, is in the latter’s focus on regulatory compliance, recalling that both agencies administer statutory arrangements intended to promote competition. In particular, the ACCC administers authorisation, notifications and clearances of

²⁰⁶ Committee Hansard, n 184, 28 May 2007, p E29 (Ian Health, IP Australia). See also DITR Annual Report 2006-2007, n 14, p 135; DITR Annual Report 2005-2006, n 30, p 119.

²⁰⁷ Australian National Audit Office, *IP Australia: Productivity and Client Service*, Audit Report No 5 (ANAO, 1999) p 14.

²⁰⁸ Finance Client Service Charter Principles, n 198, p 6.

²⁰⁹ For a details assessment of this contention and the existing policy statements from the Australian Government see, eg, Lawson C and Pickering C, “‘TRIPs-Plus’ Patent Privileges – An Intellectual Property ‘Cargo Cult’ in Australia” (2004) 22 *Prometheus* 355.

²¹⁰ Commonwealth, *Backing Australia’s Ability: An Innovation Action Plan for the Future* (Big Island Graphics, 2001) p 18.

²¹¹ IPCRC, n 5, pp 136-138.

²¹² See *Trade Practices Act 1974* (Cth), s 6A.

²¹³ *Trade Practices Act 1974* (Cth), ss 6A, 7.

²¹⁴ *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth), r 5 and Sch 1 (item 108). Notably, the Australian Competition and Consumer Commission is not a “business operation”: see *Financial Management and Accountability Orders 2005* (Cth), O 6.2.

²¹⁵ *Trade Practices Act 1974* (Cth), s 27(1); *Financial Management and Accountability Regulations 1997* (Cth), r 5 and Sch 1 (item 108).

²¹⁶ *Trade Practices Act 1974* (Cth), s 27(2).

²¹⁷ *Trade Practices Act 1974* (Cth), s 27(2); *Public Service Act 1999* (Cth), s 7.

potentially anti-competitive practices.²¹⁸ The ACCC's 2006 Budget outcome is "to enhance the social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed Australian markets".²¹⁹ In addressing this outcome, the ACCC focuses on a broader "public interest". For example, the ACCC *Service Charter* provides:

At the ACCC we produce results in the public interest by:

- being accessible, transparent, independent and fair in our dealings with the community including consumers, business and governments.
- performing our role in a timely, effective, efficient and consistent manner.²²⁰

In contrast to IP Australia's *Customer Service Charter*,²²¹ the ACCC's *Service Charter* does not use the language of "customer" (or "stakeholder"), albeit that it does address "service" and "service performance".²²² The significance of this issue is not in the semantics of "customer" and "stakeholder", but rather in an attitude to regulation and whose interests are being served. In the case of the Commissioner's decisions, this is particularly important as the patent applicants (or their representatives)²²³ negotiate with the Commissioner about the objections to patentability in preparing the report for examination.²²⁴ While the Commissioner's exercising statutory decision-making powers might be characterised as an objective enterprise, it is possible that that exercise might be in sympathy with other considerations and that the primary consideration might be "customer satisfaction" as opposed to protecting a broader public interest. In these circumstances the influences of the financial management promulgated by the Director General favouring "customer service" over the "public interest" could be significant. Further, the performance arrangement in the Commissioner's AWA promulgated by the Secretary could also favour "customer service" over the "public interest", although without access to the AWA this is presently highly speculative, albeit very likely given the intention of integrating the outcome and output framework with individual performance.²²⁵

B. Efficiency and effectiveness

The budget arrangements in the form of the outcomes and outputs framework, together with the financial management and people management frameworks, are directed to establishing and measuring performance related to the efficiency of an Agency's operations and the effectiveness of the Agency's contribution to the identified outputs and administered items.²²⁶ The "efficiency" is measured by assessing the "quality", "quantity" and "price" of an Agency's goods or services.²²⁷ Meanwhile "effectiveness" is measured by assessing the contribution to the identified outputs and administered items.²²⁸ Central to these measures are the reporting standards before the event in the *Portfolio Budget Statements* (and *Portfolio Additional Estimates Statements*) and after the event in the *Annual Report*. The content of performance measures in the *Portfolio Budget Statements* (and *Portfolio Additional*

²¹⁸ See *Trade Practices Act 1974* (Cth), ss 88 (authorisations), 93 (notifications), 95AC (clearances).

²¹⁹ Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Treasury*, Budget Related Paper No 1.17 (Department of Finance and Administration, 2006) p 83.

²²⁰ Australian Competition and Consumer Commission, *Service Charter* (ACCC, 2005) p 2.

²²¹ IP Australia Customer Service Charter, n 197, pp 1-6.

²²² See ACCC Service Charter, n 220, pp 1-4.

²²³ See *Patents Act 1990* (Cth), s 200.

²²⁴ *Patents Act 1990* (Cth), ss 49, 104. See also *Patent Regulations 1991* (Cth), rr 3.19(2), 10.5(1)(b).

²²⁵ See, eg, Management Advisory Committee Performance Management, n 160, p 5.

²²⁶ See Department of Finance and Administration, *Performance Reporting Under Outcomes and Outputs* (Department of Finance and Administration, 2003); Department of Finance and Administration, *Performance Management Principles* (Department of Finance and Administration, 2003). See also ANAO Application of the Outcomes and Outputs Framework, n 54; ANAO Annual Performance Reporting, n 58.

²²⁷ See Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2.

²²⁸ See Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2.

Estimates Statements) are determined by the Agency (and the “prescribed Agency”),²²⁹ albeit with guidance from the Department of Finance and Administration.²³⁰ The content is intended to address issues such as balance and clarity (“a concise basket of performance indicators which can be understood, are well-defined, and are cost-effective to collect, store and manage”), targets (“where current output performance can be compared qualitatively or quantitatively against specific benchmarks, targets or activity levels”), balance (“a balance between addressing progress against milestones or intermediate outcomes and ultimate long-term impacts”), stability and improvement (“performance information should be regularly assessed for appropriateness”), and so on.²³¹ The overall purpose of these arrangements was “to provide a basis for deciding and managing what agencies should produce, assessing how well it was produced, how it contributed to the Government’s outcomes, and at what cost”.²³² The consequence was intended to be “information of sufficient quality that can be relied on by both Agency management and stakeholders in making judgements about the Agency’s performance”.²³³ According to these arrangements, the Director General, with the assistance of the Department of Finance and Administration, formulates the performance measures that the Commissioner then seeks to achieve.

The Auditor-General’s performance audit²³⁴ of IP Australia’s application of the outcomes and outputs framework for the 2005-2006 year recommended, and IP Australia agreed:

that agencies review and where necessary improve: their performance indicators to ensure that they have a range of appropriate indicators that incorporate better practice characteristics that provide stakeholders with useful and reliable performance information.²³⁵

Unfortunately, the Auditor-General’s performance audit did not provide specific and identifiable details about IP Australia’s outcomes and output framework arrangements. In general terms, however, the Auditor-General found:

that annual reports generally reported on activities and initiatives undertaken and not on the effectiveness with which outputs contributed to the achievement of outcomes. In addition, there was limited information presented on the overall state of outcomes ... Agency annual reports generally had indicators of quality, quantity and price for each output. The [Australian National Audit Office] found that while performance was reported against the majority of [*Portfolio Budget Statements*] indicators, agencies generally did not include any discussion or analysis of the efficiency with which their outputs were delivered or the extent to which expected performance was achieved ... The [Australian National Audit Office] found that the audited agencies did not generally report on the effectiveness of administered items in achieving outcomes. Agencies often provided details of activities undertaken or funding provided without demonstrating how these activities achieved programme objectives and, ultimately, outcomes.²³⁶

Similarly, the Auditor-General’s performance audit did not provide specific and identifiable details about IP Australia’s *Annual Report* performance reporting requirements. In general terms, however, the Auditor-General concluded:

²²⁹ Based on their interpretation and application of the Department of Finance and Administration guidance materials. See, eg, ANAO Application of the Outcomes and Outputs Framework, n 54, pp 21-24.

²³⁰ See Finance Performance Reporting Under Outcomes and Outputs, n 226; Finance Performance Management Principles, n 226. Notably, some of the guidance is mandatory: see ANAO Application of the Outcomes and Outputs Framework, n 54, p 85.

²³¹ Finance Performance Reporting Under Outcomes and Outputs, n 226, pp 1-2. See also ANAO and Finance Guide on Annual Performance Reporting, n 65; Finance Performance Management Principles, n 226; ANAO Portfolio Budget Statements Performance Information, n 65.

²³² ANAO Application of the Outcomes and Outputs Framework, n 54, p 21.

²³³ ANAO Application of the Outcomes and Outputs Framework, n 54, p 57.

²³⁴ *Auditor-General Act 1997* (Cth), s 18.

²³⁵ ANAO Application of the Outcomes and Outputs Framework, n 54, p 67.

²³⁶ ANAO Application of the Outcomes and Outputs Framework, n 54, p 80.

agencies needed to improve performance reporting in relation to reporting on: the overall state of outcomes; the effectiveness of agency and administered items in contributing to the achievement of outcomes; the efficiency of outputs; and agency achievements rather than activities.²³⁷

With IP Australia's focus on "customers" and "stakeholders", there is the potential that its performance measures might be eliciting inappropriate outcomes and outputs. In particular there is the concern that:

poorly designed indicators can result in unintended consequences if the behaviours they encourage are not carefully considered and there is a risk that managers may feel obliged to generate output that is tailored to an artificial or inappropriate target.²³⁸

Table 2 details the prospective performance (*Portfolio Budget Statements*) and actual performance (*Annual Report*) of IP Australia, and appears to favour quantitative ("quantity" and "price") over qualitative ("quality") measures. This is reinforced by IP Australia seeking service delivery process certification according to international standards (ISO 9001:2000) and various awards for public sector service delivery.²³⁹ With the Director General setting the performance standards for the Commissioner within the outcomes and outputs framework, the Director General is directly influencing the Commissioner's performance and directing it towards those performance measures. The analysis in this article shows that these measures are directed and that there is a "customer" focus. Whether this influences the Commissioner's decisions is not certain. Again, the performance arrangement in the Commissioner's AWA promulgated by the Secretary could also favour these performance measures. This seems very likely given the intention of integrating the outcome and output framework with individual performance²⁴⁰ and an AWA that includes performance benchmarks and a bonus payments scheme.²⁴¹

The significance of this analysis is to suggest that the Commissioner's decision-making might be directed towards performance measures (perhaps "quantity" over "quality"), set out by both the Director General in the financial management arrangements and the Secretary in the people management arrangements, which influence her exercising her statutory decision-making powers.

C. Cost recovery

Central to IP Australia's ongoing financial viability and cost effective operations is the "achievement of cost recovery on an accrual basis over time".²⁴² These fees and charges are significant for patents, projected to be \$71,485,000 in 2006-2007,²⁴³ and represent the fees paid by customers for applications, registration, examination, renewals and hearings work.²⁴⁴ This cost recovery objective is governed by the *Australian Government Cost Recovery Guidelines* that requires a Cost Recovery Impact Statements (CRIS) for "significant cost recovery arrangements" being "total cost recovery receipts equal [to] \$5 million or more per annum".²⁴⁵ IP Australia's justification for charging fees is:

Cost recovery is appropriate for the administration of IP rights by IP Australia. Customers are provided with an "exclusive capturable commercial benefit" and cost recovery is not inconsistent with the

²³⁷ ANAO Application of the Outcomes and Outputs Framework, n 54, p 83.

²³⁸ ANAO Application of the Outcomes and Outputs Framework, n 54, p 59. See also Department of Finance and Administration, *Outcomes and Outputs Guidance* (Department of Finance and Administration, 2003).

²³⁹ DITR Annual Report 2006-2007, n 14, pp 135-136.

²⁴⁰ See, eg, Management Advisory Committee Performance Management, n 160, p 5.

²⁴¹ See DITR Annual Report 2006-2007, n 14, p 143.

²⁴² DITR Annual Report 2005-2006, n 30, p 118. See also DITR Portfolio Budget Statements 2006-2007, n 67, pp 83, 96-100 (summary of the Cost Recovery Impact Statement).

²⁴³ DITR Portfolio Budget Statements 2006-2007, n 67, pp 96-98. Notably, patents comprised the largest contribution to IP Australia revenues, followed by trademarks (\$42 018 000), designs (\$1 890 000), plant breeder's rights (\$1 254 000) and Professional Standards Board (\$435 000).

²⁴⁴ DITR Portfolio Budget Statements 2006-2007, n 67, p 96.

²⁴⁵ Department of Finance and Administration, *Australian Government Cost Recovery Guidelines*, Financial Management Guidance No 4 (Department of Finance and Administration, 2005) p 3. See also Productivity Commission, *Cost Recovery by Government Agencies*, Report No 15 (Productivity Commission, 2001).

objectives of the IP legislation, in particular the promotion of innovation in Australia. Costs related to the administration of IP rights can be recovered, over the period of IP protection, through the fees paid by customers.

IP Australia has developed a four-year cost recovery budget [2006-2010] with revenues and costs allocated against each of the five main customer groups. In complying with cost recovery policy IP Australia is attempting to achieve the following three budget objectives:

1. the removal of any subsidies between the customer groups (over the four-year budget period);
2. budget surpluses at the agency level in each separate financial year; and
3. a small over-recovery at the agency level (over the four-year budget period) to enable sustainable future operations as a cost recovery agency.²⁴⁶

The cost recovery policy is promulgated by the Director General²⁴⁷ in compliance with the *Patents Regulations 1991* (Cth).²⁴⁸ Cost recovery from “customers” has the potential to create a conflict between recovering increasing financial resources to cover administration costs and favouring granting more and more low quality patents. This is particularly likely as the fees and charges are determined as a fixed amount for a particular service as opposed to a cost related to processing time,²⁴⁹ and the Special Account standing appropriation for administering the *Patents Act 1990* (Cth) functions within IP Australia is linked directly to those fees and charges.²⁵⁰ These resources are under the direct management and control of the Director General.²⁵¹ In these circumstances the Commissioner’s decision making, and particularly the resources allocated to those decisions, are intimately tied to the costs recovered and most likely influenced by the likely amounts recoverable and their management by the Director General. The following examples illustrate some of the Director General’s likely influences:

- (a) The Director General can limit the available public money to pay for the number of patent examiners exercising the Commissioner’s delegated powers directly affecting the quality and timeliness of the Commissioner’s decisions about patent grants.²⁵²
- (b) Director General has articulated the *Strategic Statement 2007-2012* that commits IP Australia and its employees to, among other things, “[s]trengthen stakeholder relationships and better inform decision-making in order to remain a competitive provider of high quality products and services”.²⁵³ This requires that the results of the Commissioner’s decision-making be sympathetic with this strategic objective, and in particular, that it be “competitive”. Presumably, “competitive” means granting more patents as the focus of reporting (the quality, quantity and price) is directed to meeting the needs of “customers”, the number of applications made and examined and the costs involved (see Table 2).²⁵⁴

In short, the Commissioner must exercise her powers within the auspices of constraints imposed on the recovered “public money” managed by the Director General. This means that the Director General’s financial management responsibilities could have manifest effects on the Commissioner’s decision-making.

²⁴⁶ DITR Portfolio Budget Statements 2006-2007, n 67, p 97. See also DITR Annual Report 2006-2007, n 14, p 145.

²⁴⁷ See IP Australia, *Care and Custody of Public Money*, Chief Executive Instruction No 8 (IP Australia, 2003). Related policies include refunds and waivers: see IP Australia Refunds and Waivers, n 85.

²⁴⁸ *Patents Regulations 1991* (Cth), r 22.2 and Sch 7 (pts 2 and 3).

²⁴⁹ See *Patents Regulations 1991* (Cth), r 22.2 and Sch 7 (pts 2 and 3).

²⁵⁰ See DITR Annual Report 2006-2007, n 14, pp 145, 369; DITR Annual Report 2005-2006, n 30, pp 133-134, 362.

²⁵¹ *Financial Management and Accountability Act 1997* (Cth), s 44(1).

²⁵² This continues to be a concern, as more rigorous screening of patent applications entails significant costs irrespective of whether they are passed on to “customers”: see, eg, IPCRC, n 5, pp 164-167. See also Jensen P and Webster E, “Achieving the Optimal Power of Patent Rights” (2004) 37 *Australian Economic Review* 419.

²⁵³ IP Australia, *Strategic Statement 2007-2012* (IP Australia, 2007) p 5.

²⁵⁴ See DITR Annual Report 2006-2007, n 14, pp 130-131.

D. Performance reporting

The *Financial Management and Accountability Act 1997* (Cth) also provides a more formal avenue for management influences. The Director General is empowered to give instructions (the “Chief Executive’s Instructions”)²⁵⁵ to those public servants comprising IP Australia “on any matter necessary or convenient for carrying out or giving effect to the Act or ... Regulations”²⁵⁶ including to the Commissioner. The content of these instructions can address “any matter that promotes the efficient, effective and ethical use of the Commonwealth resources for which the Chief Executive is responsible” (emphasis added).²⁵⁷ While these instructions must be consistent with the *Financial Management and Accountability Act 1997* (Cth),²⁵⁸ they may address various aspects of the Commissioner’s decision-making under a rubric of managing Commonwealth resources efficiently, effectively and ethically. The extent of these Chief Executive’s Instructions, that may be written, oral, or in some other form, are not comprehensively documented. Those of a legislative nature need to comply with the *Legislative Instruments Act 2003* (Cth) and be registered,²⁵⁹ and all instructions “should be publicly available on the agency’s public internet site for access by officials (including allocated officials) and contractors”.²⁶⁰

For IP Australia a number of Chief Executive’s Instructions are publicly available, and some of these could affect the Commissioner’s decision-making, such as, complying with *Portfolio Budget Statements* performance targets setting the number of patent applications to be considered,²⁶¹ managing risk according to a strategy for which the Director General is responsible,²⁶² and so on. However, a number of others are not so clearly identified and they have the potential to significantly influence the Commissioner’s decision making. So, for example, the Director General might proscribe quality standards for the Commissioner as this might be characterised as going to the efficient and effective allocation of available Commonwealth resources.²⁶³ The Director General has issued a “Quality Policy” that applies to the assessment of patent applications by the Commissioner,²⁶⁴ providing in part:

We strive to deliver quality products and services that are valued by our customers and which contribute to the realisation of our vision of becoming an “Office of Choice”. Certification of our Quality Management System for key business processes to the ISO 9001 standard is a means by which we will achieve and maintain the necessary alignment of our people, products, services, business systems and processes.²⁶⁵

The question then arises, whether the central place of performance in the financial management and people management arrangements is actually delivering better quality through the more efficient and effective allocation of resources? In the case of patents, the “quality” of the Commissioner’s decisions is critical:

²⁵⁵ *Financial Management and Accountability Act 1997* (Cth), s 52.

²⁵⁶ *Financial Management and Accountability Regulations 1997* (Cth), r 6(1).

²⁵⁷ Finance Chief Executive’s Instructions Circular, n 200, p 1.

²⁵⁸ *Financial Management and Accountability Regulations 1997* (Cth) r 6(2).

²⁵⁹ See *Legislative Instruments Act 2003* (Cth) ss 5, 20. See also Finance Chief Executive’s Instructions Circular, n 200, pp 4-5.

²⁶⁰ Finance Chief Executive’s Instructions Circular, n 200, p 5. Notably, special provision may be necessary for sensitive information such as matters of commercial confidentiality or national security (p 5).

²⁶¹ IP Australia, *Financial Framework, Forecasting and Reporting*, Chief Executive Instruction No 1 (IP Australia, 2003) p 1.

²⁶² See IP Australia, *Managing Risk and Accountability*, Chief Executive Instruction No 11 (IP Australia, 2003) p 1.

²⁶³ Other standards promulgated by the Director General include IP Australia Customer Service Charter, n 197; IP Australia, *Customer Service Code of Practice* (IP Australia, 2006); IP Australia, *Quality Manual for Patent Examination* (IP Australia, 2005). See also Australian Patent Office Manual, n 187, para [2.1.2] (Product Quality Standards).

²⁶⁴ Although it is not clear whether this “Quality Policy” is formally classed as a “Chief Executive Instruction” by the Director General (or IP Australia), there does not appear to be another relevant head of power available for management directions that are promulgated by the Director General.

²⁶⁵ Australian Patent Office Manual, n 187, para [2.1.1].

The Committee notes that the effective quality of the granted patent and the costs and benefits of the patent system depend on the threshold tests as actually applied to the application during examination. In addition to the height of the thresholds being defined through the legal requirements ... the height of the threshold for a granted patent depends on two administrative factors: (a) the stringency of the test; and (b) the quality of examination.²⁶⁶

There seems little doubt that by some measures performance of both individuals and organisations in the public sector has improved.²⁶⁷ However, whether this applies to IP Australia is uncertain. IP Australia was subjected to a performance audit by the Auditor-General of “the effectiveness of IP Australia’s management of productivity and client service”.²⁶⁸ The conclusions from this performance audit included:

IP Australia can also strengthen its performance information framework in two important areas. Currently there are no measures of the effectiveness with which IP Australia’s outcomes meet its objectives, although this issue is being considered in the Outcomes and Outputs Framework. Furthermore, there are limited measures of quality of the product, an area which clients have identified as of key importance to them. A quality assurance framework which focuses more on client perceptions of quality, and which makes greater use of information already available, would improve quality management of processes and outputs.²⁶⁹

IP Australia agreed with this critique,²⁷⁰ and subsequently introduced changes to its outcomes and outputs framework most recently reflected in the 2006-2007 *Portfolio Budget Statement*.²⁷¹ The outcomes and outputs chosen by the Director General, with the assistance of the Department of Finance and Administration,²⁷² determine the performance measures that the Commissioner then seeks to achieve. Interestingly, the predominant focus of this performance audit was on improving “customer/client services” where the customer/client was the patent applicant (and their representatives), and in terms of improved cost and timeliness of services for that customer/client.²⁷³ Perhaps unsurprisingly, the Director General’s responding performance measures appear to be directed to those measures, and presumably the Commissioner’s response will also be directed to those measures.

4. CONCLUSIONS

In recent times the Australian Government’s public administration reforms have been directed towards the twin goals of (a) “building a performance culture”, and (b) “making the public sector more responsive to government”.²⁷⁴ The significant reforms included changes to the arrangements for the budget (following the *Financial Management Legislation Amendment Act 1999* (Cth)), financial management (under the *Financial Management and Accountability Act 1998* (Cth), the *Auditor-General Act 1998* (Cth) and the *Charter of Budget Honesty Act 1998* (Cth)) and people (public

²⁶⁶ IPCRC, n 5, p 166.

²⁶⁷ See, eg, Australian Public Service Commission, *State of the Service Report 2001-2002* (APSC, 2002) p 70. Although, how this performance information is used in future budget considerations is limited by the quality and relevance of the data: see Curristine T, “Performance Information in the Budget Process: Results of the OECD 2005 Questionnaire” (2005) 5 *OECD Journal of Budgeting* 87.

²⁶⁸ ANAO IP Australia Productivity and Client Service, n 207, p 11. See also *Auditor-General Act 1997* (Cth), s 18.

²⁶⁹ ANAO IP Australia Productivity and Client Service, n 207, pp 12-13.

²⁷⁰ See ANAO IP Australia Productivity and Client Service, n 207, p 41.

²⁷¹ Compare DITR Portfolio Budget Statements 2006-2007, n 67, p 82 and Department of Finance and Administration, *Portfolio Budget Statements 2005-2006: Industry, Tourism and Resources Portfolio*, Budget Related Paper No 1.13 (Department of Finance and Administration, 2005) p 78.

²⁷² See Finance Performance Reporting Under Outcomes and Outputs, n 226; Finance Performance Management Principles, n 226.

²⁷³ See ANAO IP Australia Productivity and Client Service, n 207, pp 14-18.

²⁷⁴ Boxall P, “How the Reforms Fit Together: An Australian Perspective” (1998) 88 *Canberra Bulletin of Public Administration* 117 at 118. See also Scheers B, Sterck M and Bouckaert G, “Lessons from Australian and British Reforms in Results Oriented Financial Management” (2005) 5 *OECD Journal on Budgeting* 133; Chan M, Nizette M, La Rance L, Broughton C and Russell D, “Australia” (2002) 1 *OECD Journal on Budgeting* 35.

servants) management (under the *Workplace Relations Act 1996* (Cth) and the *Public Service Act 1999* (Cth)). Put simply, the key change brought about by these reforms has been a change in governmental accountability and transparency from *how* the resources of the Australian Government were expended to revealing *why* the Australian Government wants to expend those resources (outcomes and outputs) and *how* those ends have been achieved (performance).

The Commissioner's decision-making according to the *Patents Act 1990* (Cth) is an in situ example of the consequences of these public administration reforms. In particular, addressing the question of how these reforms might influence the Commissioner's decision-making under the *Patents Act 1990* (Cth)? This analysis has not established that such influence has *actually* been effected. Rather, the article identified budget arrangements that broadly state the appropriation purposes with a focus on after-the-event reporting; a financial management arrangement with potential for the Director General to influence the Commissioner's decision-making through directing the use of public money, public property and other Commonwealth resources; a people management arrangement with potential for the Secretary to influence the Commissioner's decision-making through the terms and conditions of employment; and finally, reporting arrangements with potential to influence the Commissioner's decision through setting inappropriate outcomes and outputs.

Perhaps the most important outcome of this analysis is to show that recent public administration reforms have introduced new influences on the exercise of statutory powers under the *Patents Act 1990* (Cth) and that those influences need to be considered in properly assessing the efficiency and effectiveness of the patent scheme.²⁷⁵ Critically, the documentary sources of those influences need to be clearly identified, such as the Director General's influences through the *Financial Management and Accountability Act 1998* (Cth) and the Secretary through the *Public Service Act 1999* (Cth), and the content of the influential arrangements made publicly available to ensure accountability and transparency. These publicly available documents might include *all* the Chief Executive's instructions, the terms and conditions of employment (including the performance targets, bonus payments thresholds, policy preferences, and so on), and all the policy and guidance materials that contribute to the environment (the matrix of legalities) in which decisions are made. Without access to these documents the rhetoric of accountability and transparency in the recent public administration reforms remains undelivered and the Commissioner's decision making haunted by the prospect that the Secretary and Director General might be eliciting inappropriate outcomes and outputs. While this article has not been able to deliver actual evidence of influence beyond the *Patents Act 1990* (Cth), these seems little doubt that such an influence exists, and that it should be addressed in properly assessing the quality of the Commissioner's decisions.

²⁷⁵ Notably, that "[o]nce a Party has reviewed legislation that restricts competition under the principles ... the Party will systematically review the legislation at least once every ten years": *Competition Principles Agreement*, cl 5(6). The Intellectual Property and Competition Review Committee conducted such an inquiry reporting in 2000, so the next review might be expected before 1010: see IPCRC, n 5, pp 20-21.

TABLE 1 Effectiveness measurements for Outcome 1

Outcome	Outcome particulars	Sub-outcomes	Effectiveness through measures, indicators and targets
Outcome 1: Australians benefit from the effective use of intellectual property, particularly through increased innovation, investment and trade	IP Australia seeks to achieve this outcome by administering the Patents ... acts, promoting the benefits of intellectual property and participating in the development of international IP systems	Australians benefit from IP initiatives Customer and stakeholder satisfaction Recognised as best practice in administration and delivery of high quality IP system Ongoing financial viability and cost effective	*Analysis of benefit through periodic research and programs studies and independent reviews *Increased application by Australian industry for international IP Rights *Customer satisfaction with products and services measured through surveys and feedback *Ministerial and stakeholder feedback *Compliance with quality management framework *Results of periodic benchmarking studies *Feedback from overseas offices involved in bilateral agreements with IP Australia *IP Australia prices aligned to Outcome and in operations compliance with cost recovery policy and international competitiveness *Products and service charges remain internationally competitive

Department of Finance and Administration, *Portfolio Budget Statements 2006-2007: Industry, Tourism and Resources Portfolio, Budget Related Paper No 1.13* (Department of Finance and Administration, 2006) pp 82, 92 and Department of Industry, Tourism and Resources 2006-2007 Performance Reporting Structure from Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (DITR, 2007) p 128.

TABLE 2 Actual performance measures for Outcome 1

Output groups	Output particulars	Sub-outputs	Customer/stakeholder	Prospective performance	Actual performance
Output 1: Intellectual property rights administration and professional registration	IP Administration and Professional Registration encompasses the administration of Patent, Trade Mark, Design and Plant Breeder's IP rights legislation. This output also includes the administration of the Professional Standards Board for Patent and Trade Marks Attorneys and the Patent Attorneys Disciplinary Tribunal	Quality	Patents indicator	*Compliance with IP Australia customer service charter and quality standards	*Greater than 96% compliance ...
			Professional Standards Board	*Stakeholder satisfaction with secretariat support	*All high levels of satisfaction ...
		Quantity	Patents	*26,231 Patent applications *17,000 Patent examinations	*26,365 applications were made *17,310 examinations were performed
			Professional Standards Board	*60 applications for registrations *1,070 current registrations	*132 applications for registration *1,032 current registrations
Output 2: Awareness, Education and International Engagement	Awareness, Education and International Engagement represents IP Australia's role in raising awareness and educating customers about intellectual property, and engaging with key international stakeholders and IP bodies	Price	Patents	*Cost: \$65.888m	*Cost: \$63.295m
			Professional Standards Board	*Cost: \$0.451m	*Cost: \$0.519m
		Quality	International Engagement Awareness & Education	*Australian business demonstrates increased awareness of intellectual property *Business sectors consider information useful, accessible and easy to understand	*3,354 people attended presentations *1,383 website visitors, 94.4% found information useful
			International Engagement	*Key outcomes achieved through participation at key international and regional forums *Key agreements reached and implemented with targeted international IP offices	*Delivered symposiums, and so on *Signed MOU and so on
Quantity	Awareness & Education	*Number of information kits distributed. *Number of brochures downloaded from IP Australia's website. *Number of subscribers to online subscriber lists	*14,670 kits distributed *86,102 brochures downloaded *5,380 subscribers		
	International Engagement	*Number of International activities and agreements. *Number of externally funded aid projects delivered against key target segments	*110 international activities *5 major projects		

TABLE 2 continued

Output groups	Output particulars	Sub-outputs	Customer/stakeholder	Prospective performance	Actual performance
Output 3: Advice to Government		Price	Awareness & Education	*Cost: \$2.208m	*Cost: \$2.010m
			International Engagement	*Cost: \$1.036m	*Cost: \$2.001m
	Advice to Government relates to IP Australia's role in providing advice on intellectual property matters, and supporting research into the current and future use of IP Rights	Quality	Policy and legislation	*Satisfaction of stakeholders with quality and timeliness of advice on policy and legislation, ministerial correspondence, speeches & briefings, submissions to reviews and Government responses	**All stakeholders reported high levels of satisfaction ..."
			IP Research	*Increased understanding of IP issues impacting on Australian industry.	**Increasing use of IP Australia-supported research ..."
	Quantity	Support for Advisory Boards	*Council & Board satisfaction with quality of secretariat and research support provided	**... all have reported high levels of satisfaction ..."	
		Policy and legislation	*Number of draft bills, regulation changes, amendments ministerial responses & briefs prepared	*1 Bill *2 Regulations	
	Price	IP Research	*Number of IP research initiatives	*17 initiatives, 15 reports/papers	
		Support for Advisory Boards	*Number of ACIP reviews undertaken *Number of meetings, briefings and seminars held	*Progressed current reviews *15 meetings	
	Price	Policy and legislation	Cost: \$1.521m	*Cost: \$2.272m	
		IP Research	Cost: \$0.524m	*Cost: \$0.276m	
Support for Advisory Boards		Cost: \$1.320m	*Cost: \$1.110m		

Department of Industry, Tourism and Resources 2006-2007 Performance Reporting Structure from Department of Industry, Tourism and Resources, *Annual Report 2006-2007* (DITR, 2007) pp 138-142.