
Can the Executive influence the “independence” of the Auditor-General under the Auditor-General Act 1997 (Cth)?

Charles Lawson*

This article addresses the “independence” of the Auditor-General under the Auditor-General Act 1997 (Cth), and how the formal regulation (the matrix of legalities) applies to promote the Auditor-General’s role in making the Executive transparent and accountable. The article demonstrates that the “independence” delivered under the Act is essentially symbolic and that avenues remain for the Executive to influence the Auditor-General. The article concludes that the effectiveness of the formal regulation of the Auditor-General’s “independence” under the Act depends on a vigilant Parliament.

INTRODUCTION

At the time of federation the *Constitution* proposed that the form and content of the Commonwealth audit was left to the future Federal Parliament to determine.¹ The first federal Parliament established the first institution of the Auditor-General in the *Audit Act 1901* (Cth).² In recent times, however, the *Audit Act 1901* (Cth) was replaced with the *Auditor-General Act 1997* (Cth),³ the *Financial Management and Accountability Act 1997* (Cth), the *Commonwealth Authorities and Companies Act 1997* (Cth) and the *Financial Management Legislation Amendment Act 1999* (Cth) that together introduced devolved public sector management, accrual accounting, performance reporting and the outcomes and outputs budgeting arrangements. Under these administration reforms, the Auditor-General under the *Auditor-General Act 1997* (Cth) continues to be an integral part of the Executive’s transparency and accountability arrangements,⁴ emphasising an “independent assurance” about the Executive’s performance, propriety and accountability “giving credibility to Australia’s system of parliamentary governance”.⁵

The “independence” of the Auditor-General is central to the credibility of parliamentary control

* Senior Lecturer, Australian Centre for Intellectual Property in Agriculture, Griffith Law School, Griffith University.

¹ *Constitution*, s 97. See also Quick J and Garran R, *The Annotated Constitution of the Commonwealth of Australia* (Australian Book Co, 1901) p 872.

² See *Audit Act 1901* (Cth), s 3. See also Joint Committee of Public Accounts (JCPA), *The Auditor General: Ally of the People and Parliament*, Report No 296 (AGPS, 1989) pp 13-14 (and the reference therein).

³ *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), s 3 and Sch 1 (item 1).

⁴ For the relevant arrangements under the repealed Act see *Audit Act 1901* (Cth), ss 3-15. See also JCPA, Report No 296, n 2, pp 57-58.

⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1351 (Ian Campbell, Parliamentary Secretary to the Treasurer). See also Auditor-General, *Accountability for the 21st Century: The Powers and Responsibilities of the Commonwealth Auditors-General*, 20th Commonwealth Auditors-General Conference, Bermuda, 7 July 2008, p 3, http://www.anao.gov.au/uploads/documents/Accountability_for_the_21st_Century.pdf viewed 27 November 2008; JCPA Report No 296, n 2, pp 9, 12; Auditor-General, *Accountability, Independence and Objectivity: A Response to Report 296 of the Parliamentary Joint Committee of Public Accounts* (AGPS, 1989) pp 7-8; Auditor-General, *Parliament’s Right to Know: Legislation to Replace the Audit Act 1901*, Audit Report No 43 1993-94 (AGPS, 1994) p ix; JCPA, *Guarding the Independence of the Auditor-General*, Report No 346 (AGPS, 1996) pp 6-7; Joint Committee of Public Accounts and Audit (JCPAA), *Review of the Auditor-General Act 1997*, Report No 386 (Senate Printing, 2001) p 1; Taylor J, “Parliament and the Auditor-General” in Dermody K (ed), *Republicanism, Responsible Government and Human Rights*, Papers on Parliament No 26 (Dept of the Senate, 1995) pp 61-62.

over the Executive:⁶

In order that the Auditor-General’s audits and reports be accepted as valid, it is essential that the Auditor-General should not be subject nor be suspected of being subject to pressure from the Executive or Legislative arms of government to report in one way or another. In other words, his independence is fundamental to the objectivity of his judgements and acceptance of the latter. Without statutory independence there could be doubts over whether he impartially exercises his functions.⁷

This article addresses the “independence” of the Auditor-General, and how the formal regulation (the matrix of legalities)⁸ applies to promote the Auditor-General’s role in making the Executive transparent and accountable.⁹ The essence of “independence” is that the Auditor-General is, and is seen to be, independent of the Executive and others so that he can carry out the audit responsibilities without any positive or negative influences from the Executive and others that might affect Auditor-General’s decisions about the nature, quality and quantity of audits the Auditor-General might decide to undertake.¹⁰ The first step in making an assessment, and the purpose of this article, is to review the formal regulation and the place of “independence” in that regulation. While others have considered aspects of this formal regulation,¹¹ there remains no comprehensive analysis of the current regulation of “independence”, and the possible avenues of influence within the existing matrix of legalities. The contribution of this article is to demonstrate that the “independence” delivered under the *Auditor-General Act 1997* (Cth) is essentially symbolic and that many avenues remain for the Executive to influence the Auditor-General. This becomes especially important, for example, with the

⁶ See Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1351 (Ian Campbell, Parliamentary Secretary to the Treasurer).

⁷ JCPA Report No 296, n 2, pp 58. See also Auditor-General’s Response to Report 296, n 5, pp 1, 10.

⁸ Formal regulation is only one of the forms of accountability and transparency that apply to the Auditor-General, others being the range of agents operating in the public and private spheres of government, formal and informal rules and practices, national and supra-national institutions articulating governance, and so on. This article is, however, confined to the formal regulations applying to the Auditor-General (and the Australian National Audit Office (ANAO)) as an entity within the Commonwealth.

⁹ This has been an issue of ongoing significance since the first enactment of the *Audit Act 1901* (Cth): see, eg, Funnell W, “Executive Encroachments on the Independence of the Commonwealth Auditor-General” (1996) 55 *Australian Journal of Public Administration* 109 at 117-120. The issue also remains contentious outside the Executive: see, eg, *Corporations Act 2001* (Cth), ss 324AA-DD.

¹⁰ Various “principles” have been articulated when considering the “independence” of public sector auditors such as the Auditor-General under the *Auditor-General Act 1997* (Cth) (so-called “Supreme Audit Institutions”) addressing the elements of organisational, functional and financial independence: see International Organization of Supreme Audit Institutions, *The Lima Declaration of Guidelines on Auditing Precepts* (INTOSAI, 1977) Art 5-7. International Organization of Supreme Audit Institutions, *Statutes* (2007) Art 1 provides: “The International Organization of Supreme Audit Institutions (INTOSAI) is an autonomous, independent and non-political organization established as a permanent institution in order to foster the exchange of ideas and experiences among the Supreme Audit Institutions on government auditing. Its headquarters are in Vienna, Austria”. Australia, represented by the Auditor-General under the *Auditor-General Act 1997* (Cth) is a full member. See also JCPA Report No 346, n 5, p 10.

¹¹ And in particular, in the context of the “struggle” between the Parliament and the Executive over the Parliament’s right to oversee the accounts and management practices of the Executive: see, eg: Guthrie J and Parker L, “A Quarter of a Century of Performance Auditing in the Australian Federal Public Sector: A Malleable Masque” (1999) 35 *Abacus* 302 at 322-323; English L and Guthrie J, “Mandate, Independence and Funding: Resolution of a Protracted Struggle Between Parliament and the Executive over the Powers of the Auditor-General” (2000) 59 *Australian Journal of Public Administration* 98 at 108-110. See also Verspaandonk R, *The Independence of the Auditor-General*, Parliamentary Library Research Note 16 (Dept of Parliamentary Services, 2000).

increasing prevalence of party political loyalty ahead of parliamentary responsibilities.¹² Thus, the purpose of this article is not to assess the Auditor-General's "independence", but rather to catalogue the possible avenues of influence.

The following parts consider the appointment and status of the Auditor-General, the Auditor-General's financial arrangements, the Auditor-General's staffs' employment arrangements, the Auditor-General's operational independence from Parliament and authority to report, and the Auditor-General's authority to access information and premises. The article concludes with an overview of the considerations of "independence" leading to the *Auditor-General Act 1997* (Cth) demonstrating that the effectiveness of the formal regulation (the matrix of legalities) now depends on a vigilant Parliament and its responsibility to hold the Executive accountable and transparent.

APPOINTMENT AND STATUS OF AUDITOR-GENERAL

The concern is that the appointment and the status of the Auditor-General should not be subject to any influence from the Executive,¹³ especially where the Auditor-General proves a burden to the Executive by exposing incompetence or addressing politically sensitive matters.¹⁴ In the context of the *Auditor-General Act 1997* (Cth) this is manifest in: how the Auditor-General is appointed; the term of the appointment; the opportunities for termination of that appointment; and the status of the office. These are considered in turn.

Appointment

The *Auditor-General Act 1997* (Cth) establishes the office of "Auditor-General".¹⁵ The Auditor-General is appointed by the Governor-General¹⁶ for one term of 10 years based on the recommendation of the Prime Minister.¹⁷ The appointment of the Auditor-General is particularly sensitive as these arrangements place the Auditor-General within the Executive.¹⁸ To address this concern the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), that coincided with the *Auditor-General Act 1997* (Cth),¹⁹ amended the *Public Accounts and Audit Committee Act 1951*

¹² This is a oft repeated concern: see, eg: Taylor, n 5, pp 66-67; Evans H, "The Senate, Accountability and Government Control" in Walsh K (ed), *The Senate and Accountability*, Papers on Parliament No 48 (Dept of the Senate, 2008) p 77. That this was also a part of the *Auditor-General Bill 1996* (Cth) debates was evidenced by government members of the JCPAA that made recommendations that were not taken up by the Executive subsequently supported the Minister's positions in the debates. For example, the JCPAA recommended that Auditor-General's auditing mandate extends to GBEs, while the final Bill did not implement this recommendation and this was accepted by government members of the JCPAA voting for the Bill: see Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, pp 1749 (Alexander Somlyay), pp 1755-1756 (Petro Georgiou), pp 1775-1775 (Mark Vaile). The same concern also applies to opposition parties: cf, eg, Senator Cooney's "Additional Comments" criticising cl 37(3) in Legal and Constitutional Affairs Legislation Committee, Senate, *Auditor-General Bill 1996: Clauses 35 and 37* (Senate Printing, 1997) pp 25-26 and his subsequent support for that provision in the Senate chamber according to his political party affiliations at Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, p 7112 (supporting and amendment) and 2 October 1997, pp 7470-7471 (silent when amendment rejected by Senate) (Barney Cooney).

¹³ See JCPA Report No 296, n 2, pp 75-76; JCPA, *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) pp 86-90; JCPA Report No 346, n 5, p 11.

¹⁴ For a recent example where the Auditor-General released a critical report during an election period identifying unacceptable standards of public administration and a Minister suggested changing the rules to prevent the Auditor-General releasing reports during an election period: see Topsfield J and Schubert M, "Vaile Cries Foul over Damaging Audit", *The Age*, 17 November 2007; Auditor-General, *Performance Audit of the Regional Partnerships Programme*, Audit Report No 14, 2007-08 (ANAO, 2007).

¹⁵ *Auditor-General Act 1997* (Cth), s 7(1).

¹⁶ Being the "Governor-General in Council": *Constitution*, ss 61-63.

¹⁷ *Auditor-General Act 1997* (Cth), Sch 1 (item 1). See also *Acts Interpretation Act 1901* (Cth), s 19A; *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 16).

¹⁸ See *Auditor-General Act 1997* (Cth), Sch 1 (item 1); *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 16).

¹⁹ See *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), s 2(2); *Auditor-General Act 1997* (Cth), s 2.

(Cth) (including its title from *Public Accounts Committee Act 1951* (Cth))²⁰ to provide the Joint Committee of Public Accounts and Audit (JCPAA) with a role in the appointment of the Auditor-General.²¹ This requires the Prime Minister to make a recommendation²² that a majority of the JCPAA must approve or reject within 44 days,²³ and an approval is deemed if there is no decision.²⁴ In effect this means that a potential candidate is chosen by the Prime Minister and subject *only* to a veto by the JCPAA.²⁵ The constitution and deliberation arrangements for the JCPAA demonstrate that a veto is unlikely with there being either approval or no decision (hence approval) of the Prime Minister’s preferred candidate.

The JCPAA is composed of 16 members of the Parliament comprising six Senator appointed by the Senate and 10 members appointed by the House of Representatives.²⁶ The Senate and House of Representative members are appointed according to the practice for the appointment of members to serve on joint select committees.²⁷ For the Senate the specific authority and process is unclear with the six committee members being agreed by a motion of the Senate “pursuant to standing orders”, albeit exactly which one(s) is not certain.²⁸ The practice appears to be to appoint three government Senators, two opposition Senators and one from the independents/minor parties.²⁹ For the House of Representatives this is six government Members and four non-government Members.³⁰ The overall representation as a matter of practice is nine government members and seven from the opposition and independents/minor parties.³¹ The key concern is that the majority of the JCPAA are government Members so that a majority decision about appointment (and even the subjects of deliberations) will merely reflect the Executive’s perspective.³² Further, the Chairman,³³ by convention a government Member,³⁴ has a deliberative vote.³⁵ Perhaps more concerning, the Senate is also unable to assert a separate perspective (presuming a functioning bicameral legislature) being dominated by the representation from the House of Representatives.³⁶ The consequence of these arrangements is that the JCPAA’s veto over the Prime Minister’s potential candidate is unlikely to fail with the majority and deliberative vote held by government members. Perhaps the real effect of these arrangements is only

²⁰ *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), s 3 and Sch 2 (item 1113).

²¹ *Public Accounts and Audit Committee Act 1951* (Cth), s 8A.

²² *Public Accounts and Audit Committee Act 1951* (Cth), s 8A(1); *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 2).

²³ *Public Accounts and Audit Committee Act 1951* (Cth), s 8A(1), (3).

²⁴ *Public Accounts and Audit Committee Act 1951* (Cth), s 8A(4).

²⁵ See also JCPA Report No 346, n 5, pp 11-14.

²⁶ *Public Accounts and Audit Committee Act 1951* (Cth), s 5(2).

²⁷ *Public Accounts and Audit Committee Act 1951* (Cth), s 5(2).

²⁸ See Evans H, *Odgers’ Senate Practice* (12th ed, Dept of the Senate, 2008) p 372. See Senate, *Standing Orders*, O 27.

²⁹ See JCPAA, *Annual Report 2005-2006*, Report No 408 (Senate Printing, 2006) p ix; JCPAA, *Annual Report 2004-2005*, Report No 405 (Senate Printing, 2005) p ix; JCPAA, *Annual Report 2003-2004*, Report No 401 (Senate Printing, 2004) pp x-xi.

³⁰ House of Representatives, *Standing Orders*, O 215(d).

³¹ See, eg, Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia: Handbook of the 41st Parliament* (30th ed, Dept of Parliamentary Services, 2005) pp 44, 49, 60, 67, 68, 71, 85, 86, 87, 88, 90, 113, 124, 133, 135, 136, 137, 151, 155, 169, 173, 175, 180, 185, 209, 212, 228, 251, 255, 262, 265, 270, 272, 273, 290; JCPAA Report No 408, n 29, p ix; JCPAA Report No 405, n 29, p ix; JCPAA Report No 401, n 29, pp ix-xi.

³² *Public Accounts and Audit Committee Act 1951* (Cth), s 7(2).

³³ For the uses of this term by the Senate see, eg, *Acts Interpretation Act 1901* (Cth), s 18B.

³⁴ Albeit the chairman is elected by the committee, the government majority means that the chairman is inevitably a government member: *Public Accounts and Audit Committee Act 1951* (Cth), s 6(1); Senate, *Standing Orders*, O 31.

³⁵ *Public Accounts and Audit Committee Act 1951* (Cth), s 7(3).

³⁶ See *Odgers*, n 28, p 371.

to raise the Parliament's involvement and interests in the appointment and the ongoing performance of the Auditor-General.³⁷ Clearly, however, the appointment of the Auditor-General is influenced and influenceable by the Executive.

Term of appointment

The *Auditor-General Act 1997* (Cth) provides the term of the Auditor-General's appointment is one term or up to 10 years.³⁸ The term, whether unstated, limited by retirement or limited by years, has been contentious and open to the concern that an inconvenient Auditor-General might be removed or replaced with a more congenial candidate.³⁹ The term of appointment was made more complicated by the experience of the first Auditor-General, who had tenure limited only by good behaviour,⁴⁰ and the Executive's inability to replace him despite their perception of his managerial competence to undertake the office.⁴¹ More recently there were concerns about a too short fixed terms deterring good appointments and preventing an appointment from effecting cultural change on the Australian National Audit Office (ANAO).⁴² The favoured solution was the compromise tenure of one term up to 10 years allowing the Auditor-General an opportunity to "implement significant reforms", and sufficient time to be "conducive to the appointment of strong and independent Auditors-General".⁴³ However, there remains the concern that with any limits on the term the Auditor-General's independence might be diminished.⁴⁴

Termination of appointment

The Governor-General can remove the Auditor-General if each House of the Parliament, in the same session of the Parliament, requests the Auditor-General's removal on the ground of "misbehaviour or physical or mental incapacity".⁴⁵ The Governor-General *must* also remove the Auditor-General if the Auditor-General "becomes bankrupt", "applies to take the benefit of any law for the relief of bankrupt or insolvent debtors", "compounds with his or her creditors", or "assigns his or her remuneration for the benefit of his or her creditors".⁴⁶ The circumstances of certain credit conditions are relatively easily determined by the evidence of those conditions, while the meaning of the phrase "misbehaviour or physical or mental incapacity" is open to some speculation and the potential for the Executive to move to remove an Auditor-General (especially where government Senators and Members can exercise a parliamentary majority).

The phrase "misbehaviour or physical or mental incapacity" is commonly used in legislation addressing office holders.⁴⁷ This is convenient general language necessary to address the diversity of behaviour or incapacity that might affect an office holder in the performance of his or her duties. Undoubtedly this general language is also necessary because rules, codes, and so on, are unlikely to address the multitude of behaviours and incapacities that might affect an Auditor-General's abilities to

³⁷ JCPA Report No 296, n 2, p 77.

³⁸ *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 1(1), (4)).

³⁹ See original *Audit Act 1901* (Cth), s 3 (unstated, the first Auditor-General dying in office); *Audit Act 1901* (Cth), s 5A (limited by retirement); JCPA Report No 296, n 2, p 79 (limited by retirement or limited by years); JCPA Report No 346, n 5, p 17 (limited by retirement or limited by years).

⁴⁰ See *Audit Act 1901* (Cth), s 3; Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 1901, p 1248 (Sir George Turner, Treasurer).

⁴¹ Wanna J, Ryan C and Ng C, *From Accounting to Accountability: A Centenary History of the Australian National Audit Office* (Allan and Unwin, 2001) pp 41-57. Following the death of the first Auditor-General the *Audit Act 1901* (Cth), s 5A was inserted to include a mandatory retiring age of 65 years: see *Audit Act 1926* (Cth), s 3.

⁴² JCPA Report No 346, n 5, pp 16-17.

⁴³ JCPA Report No 346, n 5, p 16. See also *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 1(1), (4)).

⁴⁴ JCPA Report No 346, n 5, pp 14-15.

⁴⁵ *Auditor-General Act 1997* (Cth), Sch 1 (item 6(1)).

⁴⁶ *Auditor-General Act 1997* (Cth), Sch 1 (item 6(2)).

⁴⁷ See, eg, *Ombudsman Act 1976* (Cth), s 28; *Inspector-General of Taxation Act 2003* (Cth), s 35; etc.

perform his duties or undermine the integrity of the office. Surprisingly, however, the phrase has not been interpreted by courts although some useful guidance about the likely approach to interpreting “misbehaviour” has been provided in considering similar arrangements for High Court judges according to the *Constitution*.⁴⁸ This perhaps provides some assurances about tenure albeit not unassailable tenure.⁴⁹ The term “misbehaviour” in the context of High Court judges and the *Constitution* was considered by the parliamentary Commission of Inquiry.⁵⁰ There the judges considered that “misbehaviour” was: used in its ordinary meaning and was not confined to “misconduct in office” or conduct of a criminal nature;⁵¹ included conduct, whether or not displayed in office, that was “morally wrong”;⁵² or conduct that was “so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence”.⁵³ Perhaps the effect of the term is best summed up by one of the judges:

The view of the meaning of misbehaviour which I have expressed leads to the result that it is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values, are the standards expected of the judges of the High Court and other courts created under the *Constitution*.⁵⁴

In effect, the term “misbehaviour” is open to various meanings and it is for the Parliament to determine, whereupon the Governor-General will almost certainly act on the advice of the Ministers of States.⁵⁵ Importantly, the Governor-General’s action following a request from both Houses of Parliament is unlikely to be justiciable.⁵⁶ The effect is that a majority in both Houses of Parliament could frame an allegation of “misbehaviour” or “incapacity” and cause the Auditor-General to be removed from office. This is a real possibility where the government Senators and members hold a majority on both Houses of Parliament.

“Independent officer of the Parliament”

The status of the Auditor-General is expressly provided for in the *Auditor-General Act 1997* (Cth) as “an independent officer of the Parliament”.⁵⁷ There has always been, and remains, a tension between the Auditor-General’s status as the external auditor of the Executive *for* the Parliament, and being responsive to the Executive’s as an accountability mechanism *for* the Executive itself.⁵⁸ Essentially, the contentions arise between the competing function of the Auditor-General assisting the Parliament (as an “employer” and “ultimate client”)⁵⁹ and being situated within the Executive (as an appointee of the Governor-General on the advice of the Ministers and financed and resourced by the Executive).⁶⁰

⁴⁸ See *Constitution*, s 71. See also JCPA Report No 296, n 2, p 81.

⁴⁹ See, eg, JCPA Report No 296, n 2, pp 78-79, 81.

⁵⁰ *Parliamentary Commission of Inquiry Act 1986* (Cth), s 4. This Act was repealed by the *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth), s 3.

⁵¹ “Parliamentary Commission of Inquiry: Re The Honourable Mr Justice Murphy – Ruling on Meaning of ‘Misbehaviour’” (1986) 2 Aust Bar Rev 203 at 209 per Hon Sir George Lush.

⁵² “Parliamentary Commission of Inquiry”, n 51 at 221 per Hon Sir Richard Blackburn.

⁵³ “Parliamentary Commission of Inquiry”, n 51 at 230 per Hon Andrew Wells QC.

⁵⁴ “Parliamentary Commission of Inquiry”, n 51 at 210 per Hon Sir George Lush.

⁵⁵ See *Constitution*, s 61. This presumes that the power exercised by the Governor-General under the *Auditor-General Act 1997* (Cth) is as the “Governor-General in Counsel” as opposed to the Governor-General as the Queen’s representative exercising the powers conferred by the *Constitution*, s 1.

⁵⁶ Traditionally courts are reluctant to intervene in the intra-mural activities of the Parliament: see, eg, *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 at 409-410 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

⁵⁷ *Auditor-General Act 1997* (Cth), s 8(1).

⁵⁸ JCPA Report No 296, n 2, pp 75-76; Auditor-General’s Response to Report 296, n 5, p 9; JCPA Report No 346, n 5, pp 33-34.

⁵⁹ JCPA Report No 346, n 5, p 43.

⁶⁰ See JCPA Report No 346, n 5, pp 34-40 (for an overview of the various contentions).

Thus, the purpose of expressly stating the Auditor-General status is “to dispel ambiguity about the role of the office and to reinforce the Auditor-General’s *functional independence* from the executive” (emphasis added).⁶¹ However, to avoid any ambiguity about the functions and powers that might follow the status of an “Officer of the Parliament” as opposed to an “Officer of the Crown”,⁶² the *Auditor-General Act 1997* (Cth) expressly provides:

- (2) The functions, powers, rights, immunities and obligations of the Auditor-General are as specified in this Act and other laws of the Commonwealth. There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament.
- (3) ... There are no implied powers of the Parliament arising from the Auditor-General being an independent officer of the Parliament.⁶³

Perhaps the true effect of the *Auditor-General Act 1997* (Cth) “an independent officer of the Parliament” was captured during the parliamentary debate of the *Auditor-General Bill 1996* (Cth):

Subclause 8(1) of the bill proposes to designate the Auditor-General as an independent officer of the parliament. We have no problem with this approach. Indeed, we do think it is appropriate to recognise the uniqueness or special character of the position. I think we do have to frankly acknowledge that this change is really cosmetic and meaningless as it is brought to fruition in the terms of this particular legislation. Subclause 8(2) really makes this crystal clear when you look at its terms. It states: “There are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the parliament”. I should add that there are no explicit or express functions, powers, rights, immunities or obligations either. The bill is really quite silent in all these things. So in terms of the functions of the office, it really is quite meaningless to describe the Auditor-General as an officer of the parliament. It is mere window dressing without any substance.⁶⁴

Thus, the Auditor-General’s status as “an independent officer of the Parliament” is purely symbolic,⁶⁵ and merely emphasises that there is an important relationship between the Auditor-General and the Parliament, and that the Auditor-General is not wholly an institution of the Executive.⁶⁶ In effect, however, the status of “an independent officer of the Parliament” is of no consequence to the Auditor-General’s actual independence from the Executive.

AUDITOR-GENERAL’S FINANCIAL ARRANGEMENTS

The concern is that the financial arrangements of both the Auditor-General and the ANAO could influence the Auditor-General’s decisions about the nature, quality and quantity of audits the Auditor-General might decide to undertake. This might take effect through the remuneration paid to the Auditor-General affecting the perceptions about the importance of the office of Auditor-General, the pool of potential appointees, and either rewarding or penalising the Auditor-General for particular conduct undertaking or declining to undertake particular actions.⁶⁷ These are considered in turn.

⁶¹ JCPA Report No 346, n 5, p 34.

⁶² See JCPA Report No 346, n 5, pp 46-57.

⁶³ *Auditor-General Act 1997* (Cth), s 8(2), (3).

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, pp 1743-1744 (Gareth Evans, Shadow Treasurer).

⁶⁵ JCPA Report No 346, n 5, pp 40, 42, 55-57, 60. See also Dept of Finance and Deregulation, *Portfolio Budget Statements 2008-09*, Budget Related Paper No 1.15a (Prime Minister And Cabinet Portfolio) (2008) p 69.

⁶⁶ JCPA Report No 296, n 2, p 76; JCPA Report No 346, n 5, pp 34, 56-57, 60. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8342 (John Fahey, Minister for Finance); Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, p 1350 (Ian Campbell, Parliamentary Secretary to the Treasurer); *Explanatory Memorandum Auditor-General Bill 1996* (Cth) p 1.

⁶⁷ See JCPA Report No 296, n 2, pp 79-80; JCPA Report No 331, n 13, pp 90-91; Audit Report No 43, n 5, pp 19-20; JCPA Report No 346, n 5, pp 18-19, 27-32.

The Auditor-General’s remuneration

The Auditor-General is remunerated according to a determination by the Remuneration Tribunal under the *Remuneration Tribunal Act 1973* (Cth).⁶⁸ This amount is appropriated under the *Auditor-General Act 1997* (Cth)⁶⁹ and the *Remuneration Tribunal Act 1973* (Cth).⁷⁰ The remuneration and allowances of the Auditor-General include the salary and other non-monetary benefits provided at the Commonwealth’s expense.⁷¹ Significantly, the Auditor-General is paid an additional amount in recognition that he is not eligible for performance bonuses.⁷² The determinations of the Remuneration Tribunal are made by members that are appointed by the Governor-General (on the advice of the Prime Minister).⁷³ Further, the Minister for Education, Employment and Workplace Relations⁷⁴ may request a specific determination and the Remuneration Tribunal is required to make a determination;⁷⁵ the same Minister may appoint a person “to assist the [Remuneration] Tribunal in an inquiry”;⁷⁶ and the Remuneration Tribunal makes annual reports to that Minister.⁷⁷ The Remuneration Tribunal determinations are legislative instruments under the *Legislative Instruments Act 2003* (Cth),⁷⁸ so that they must be lodged with each House of Parliament to have effect,⁷⁹ and may be disallowed by either House (a power of veto),⁸⁰ whereupon the cease to have effect.⁸¹

The concern is that the level of the Auditor-General’s remuneration might affect perceptions about the importance of the Auditor-General and allow the Executive “an opportunity to reward or penalise” the Auditor-General.⁸² Under current arrangements the Remuneration Tribunal appears to make its own decisions when to review the Auditor-General’s remuneration⁸³ and the level of remuneration is “broadly equivalent to that of departmental secretaries”,⁸⁴ and “Tier 1 Full-Time Office Holders”,⁸⁵

⁶⁸ *Remuneration Tribunal Determination 2008/06: Specified Statutory Officers – Remuneration and Allowances 2008* (Cth) cl 2.1; *Remuneration Tribunal Act 1973* (Cth), s 7(3), (4); *Remuneration and Allowances Act 1990* (Cth), s 3(2). See also *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 3).

⁶⁹ *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 3(4)). See also 2008-9 Budget Related Paper No 1.15a, n 65, p 71.

⁷⁰ *Remuneration Tribunal Act 1973* (Cth), s 7(13).

⁷¹ *Remuneration Tribunal Determination 2008/06: Specified Statutory Officers – Remuneration and Allowances 2008* (Cth), cl 2.3-2.7. See also Explanatory Statement, *Determination 2008/06: Specified Statutory Officers – Remuneration and Allowances* (Remuneration Tribunal, 2008).

⁷² *Remuneration Tribunal Determination 2008/06: Specified Statutory Officers – Remuneration and Allowances 2008* (Cth), cl 2.7.

⁷³ *Remuneration Tribunal Act 1973* (Cth), s 4(2), (5).

⁷⁴ Being the Minister of State administering the Department dealing with the matters arising under the legislation administered by a Minister of State administering the Department in respect of the *Remuneration Tribunal Act 1973* (Cth): *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 6).

⁷⁵ *Remuneration Tribunal Act 1973* (Cth), s 7(4)(b).

⁷⁶ *Remuneration Tribunal Act 1973* (Cth), s 11(2).

⁷⁷ *Remuneration Tribunal Act 1973* (Cth), s 12AA(1).

⁷⁸ See *Legislative Instruments Act 2003* (Cth), ss 5, 6.

⁷⁹ *Legislative Instruments Act 2003* (Cth), s 38(3).

⁸⁰ Senate, *Standing Orders*, O 76, O 84; House of Representatives, *Standing and Sessional Orders*, O 106, O 117. See also Odgers, n 28, pp 329-343; Harris I, *House of Representatives Practice* (5th ed, Dept of the House of Representatives, 2005) pp 285-302.

⁸¹ *Legislative Instruments Act 2003* (Cth), s 42(1). The Minister for Education, Employment and Workplace Relations is also required to lodge a copy of a determination before each House of the Parliament within 15 sitting days of that House after receiving the determination: *Remuneration Tribunal Act 1973* (Cth), s 7(7).

⁸² See JCPA Report No 296, n 2, pp 79-80; JCPA Report No 331, n 13, pp 90-91; JCPA Report No 346, n 5, pp 18-19.

⁸³ See Remuneration Tribunal, *Annual Report 2006-07* (Remuneration Tribunal, 2007) p 5.

⁸⁴ See Remuneration Tribunal, n 83, p 5.

⁸⁵ *Remuneration Tribunal Determination 2008/08: Remuneration and Allowances for Holders of Full-Time Public Office 2008* (Cth), cl 2.1.

High Court justices,⁸⁶ and so on. However, the role of the Minister's appointed assistance to the Remuneration Tribunal and the ability to disallow determinations (pay rises) leaves open avenues to influence the Auditor-General's remuneration.

The Australian National Audit Office's funding

Unlike the Auditor-General, the ANAO, that assists the Auditor-General in performing the Auditor-General's functions,⁸⁷ is funded through the usual annual budget appropriations.⁸⁸ Importantly, these are a part of the standard arrangements that the Executive seeks appropriation for the future expenditure of the Executive, and must comply with the *Constitution's* requirement that such laws originate in the House of Representatives and that laws for the "ordinary annual services of the Government" cannot be amended by the Senate.⁸⁹ These requirements are satisfied by dealing with the appropriation for the ANAO as part of *Appropriation Act (No 1)*.⁹⁰ These appropriations are within the Prime Minister and Cabinet Portfolio⁹¹ and these amounts are amounts of "public money"⁹² that may only be expended according to authority of the Finance Minister under the *Financial Management and Accountability Act 1997* (Cth).⁹³ More importantly, the ANAO is a "prescribed Agency" for the purposes of the *Financial Management and Accountability Act 1997* (Cth) comprising the Auditor-General and the staff of the ANAO,⁹⁴ with obligations on the Auditor-General (as the "Chief Executive") to "manage the affairs of the Agency in a way that promotes [efficient, effective and ethical use] of the Commonwealth resources for which the Chief Executive is responsible".⁹⁵ Together with this obligation are a range of other accountability obligations to the Finance Minister:⁹⁶ to maintain accounts and records as required by the Finance Minister's Orders,⁹⁷ to comply with the *Commonwealth Procurement Guidelines*,⁹⁸ provide annual financial statements,⁹⁹ provide additional financial statements and information,¹⁰⁰ to comply with various orders and guidelines issued by the

⁸⁶ *Remuneration Tribunal Determination 2008/09: Judicial and Related Offices – Remuneration and Allowances 2008* (Cth), cl 2.1.

⁸⁷ *Auditor-General Act 1997* (Cth), s 39.

⁸⁸ See, eg, *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio).

⁸⁹ *Constitution*, s 53.

⁹⁰ See *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio). For a recent overview of the appropriation powers and their exercise see Lawson C, "Re-invigorating the Accountability and Transparency of the Australian Government's Expenditure" (2008) 32(3) MULR (in press).

⁹¹ *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio).

⁹² *Financial Management and Accountability Act 1997* (Cth), s 5 ("public money").

⁹³ *Financial Management and Accountability Act 1997* (Cth), s 13.

⁹⁴ *Financial Management and Accountability Act 1997* (Cth), s 5 ("prescribed Agency" and "Agency"); *Financial Management and Accountability Regulations 1997* (Cth), reg 5 and Sch 1 (item 116).

⁹⁵ *Financial Management and Accountability Act 1997* (Cth), s 44.

⁹⁶ *Financial Management and Accountability Act 1997* (Cth), s 5 ("Finance Minister"). Being the Minister of State administering the Department dealing with the matters arising under the legislation administered by a Minister of State administering the Department in respect of the *Financial Management and Accountability Act 1997* (Cth): *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 9).

⁹⁷ *Financial Management and Accountability Act 1997* (Cth), s 48(1). See also *Financial Management and Accountability Orders 2008* (Cth), O 2.3; *Financial Management and Accountability Orders (Financial Statements for reporting periods ending on or after 1 July 2008) 2008* (Cth), O 1.1. Further, the Finance Minister "is entitled to full and free access to the accounts and records" (s 48(2)).

⁹⁸ *Financial Management and Accountability Regulations 1997* (Cth), regs 7, 8.

⁹⁹ *Financial Management and Accountability Act 1997* (Cth), s 49. These are audited by an Independent Auditor: *Auditor-General Act 1997* (Cth), ss 41-43 and Sch 2.

¹⁰⁰ *Financial Management and Accountability Act 1997* (Cth), s 50.

Finance Minister,¹⁰¹ and so on. Each of these obligations leaves open the potential for the Finance Minister to direct the Auditor-General or ANAO, or influence the Auditor-General or ANAO, albeit in minor or subtle ways.

In addition to these measures, the appropriation process itself involves the formulation of the future expenditure intentions of the Executive that is determined by the Executive. The *Financial Management Legislation Amendment Act 1999* (Cth) aligned the legislative framework of the original *Financial Management and Accountability Act 1997* (Cth) with an accrual budgeting arrangement.¹⁰² The result was to replace the “fund accounting” of cash transaction that had been carried over from the *Audit Act 1901* (Cth)¹⁰³ with accounting for assets, liabilities, expenses and revenues (both cash and non-cash resources, resource uses and revenues).¹⁰⁴ The other key development that coincided with the adoption of the accrual budgeting in the *Financial Management Legislation Amendment Act 1999* (Cth) was the introduction of the “outcomes” and “outputs” framework with the Federal Budget 1999.¹⁰⁵ The purpose of the framework was to impose corporate governance, management and reporting on performance arrangements (enhanced public accountability) reflecting the circumstances of the particular agencies and their ministers (so-called devolved responsibility).¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸

The outcomes and outputs framework specifically addresses what the Executive 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”).¹⁰⁹ “Outputs” and “administered items” are identified separately to reflect their different accountability

¹⁰¹ See, eg, *Financial Management and Accountability Act 1997* (Cth), ss 16 (instructions about special public monies), 27 (issue drawing rights), 63 (make orders), 64 (issues guidelines), etc.

¹⁰² See Commonwealth, *Parliamentary Debates*, House of Representatives, 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 The *Audit Act 1901* (Cth) was repealed by the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), s 3 and Sch 1 (item 1).

¹⁰⁴ For a recent overview of these developments see Lawson C, “‘Special Accounts’ under the *Constitution*: Amounts Appropriated for Designated Purposes” (2006) 29 UNSWLJ 114 at 116-119.

¹⁰⁵ See also Dept of Finance and Administration, *Agency Resourcing 1999-2000*, Budget Paper No 4 (1999) pp 1-2. See further, ANAO, *Application of the Outcomes and Outputs Framework*, Audit Report No 23 (2007) pp 37-41; Verspaandonk R, *Accrual Budgeting-State of Play*, Parliamentary Library Research Note 30 (Dept of Parliamentary Services, 2000).

¹⁰⁶ Dept of Finance and Administration, *The Outcomes & Outputs Framework: Guidance Document* (2000) p 4.

¹⁰⁷ See also ANAO, n 105, p 38; ANAO, *Annual Performance Reporting*, Audit Report No 11 (2003) pp 27-35.

¹⁰⁸ Dept of Finance and Administration, n 106, p 5.

¹⁰⁹ Dept of Finance and Administration, *Agency Resourcing 2007-2008*, Budget Paper No 4 (2007) 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, n 105; JCPAA, *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); Dept of Finance and Administration, *Specifying Outcomes and Outputs: The Commonwealth’s Accrual-based Outcomes and Outputs Framework and Outcomes and Outputs – Guidance for Review* (1999); Senate Finance and Public Administration Legislation Committee, *Report on the Format of the Portfolio Budget Statements* (Senate Printing, 1997).

requirements:¹¹⁰ “administered items” are those resources administered by the Agency on behalf of the Executive that contribute to a specified outcome,¹¹¹ meanwhile, “outputs” are those resources controlled by the Agency to produce the identified products and services (also called “departmental items”).¹¹² Put another way, “[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”.¹¹³ At its most basic, the outcomes and outputs framework:

- government (through its ministers and with the assistance of relevant agencies) specifies the outcomes it is seeking in a given area;
- these outcomes are specified in terms of the impact government is aiming to have on some aspect of society (eg education), the economy (eg exports) or the national interest (eg defence);
- Parliament appropriates funds to allow the government to achieve these outcomes through administered items and departmental outputs;
- items such as grants, transfers and benefit payments are administered on the government’s behalf by agencies, with a view to maximising their contribution to the specified outcomes;
- agencies specify and manage their outputs to maximise their contribution to the achievement of the Government’s desired outcomes;
- 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.¹¹⁴

The effect of the outcomes and outputs framework, however, is that the Executive sets the outputs and outcomes and performance benchmarks for the Auditor-General and the ANAO.¹¹⁵ According to the *Appropriation Act (No 1) 2008-2009* (Cth):

Outcome 1 – Independent assessment of the performance of selected Commonwealth public sector activities including the scope for improving efficiency and administrative effectiveness.

Outcome 2 – Independent assurance of Commonwealth public sector financial reporting, administration, control and accountability.¹¹⁶

The outputs in achieving these outcomes that are relevant to the Parliament are:

The key result to be achieved from assistance to Parliament is an understanding by ministers, shadow ministers, parliamentary committees and their staff and parliamentarians of audit reports tabled in Parliament and the impact that implementation of audit recommendations can have on contributing to improvement in public administration.¹¹⁷

And:

¹¹⁰ See *Financial Management and Accountability Orders (Financial Statements for Reporting Periods Ending on or after 1 July 2007)* 2007 (Cth), Sch 1.

¹¹¹ Dept of Finance and Administration, 106, 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 2007)* 2007 (Cth), Sch 1.

¹¹² Dept of Finance and Administration, n 106, 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 2007)* 2007 (Cth), Sch 1.

¹¹³ *Combet v Commonwealth* (2005) 224 CLR 494 at 523 (Gleeson CJ).

¹¹⁴ Senate Standing Committee on Finance and Public Administration, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (Senate printing, 2007) p 9. See also Dept of Finance and Administration, n 106, p 5.

¹¹⁵ For an overview of the budget processes and the schedule of internal deliberations of the Executive see Webb R, *The Commonwealth Budget: Process and Presentation*, Parliamentary Library Research Brief No 7 2006-07 (Dept of Parliamentary Services, 2007) pp 6-13.

¹¹⁶ *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio).

¹¹⁷ 2008-9 Budget Related Paper No 1.15a, n 65, pp 77, 80 (“Output Group 2.1 Assistance to Parliament”).

The result to be achieved from financial statement audit reports is assurance to the Parliament that the financial statements of [Executive] entities have been prepared in accordance with the government’s reporting framework and give a true and fair view of the financial position of each entity and the results of the entity’s operations and cash flows.¹¹⁸

Some of the performance indicators of outputs are: “90%” the “Percentage of audit recommendations supported by the JCPAA and other parliamentary committees”;¹¹⁹ “246” the “Number of financial statement audit opinions to be issued”;¹²⁰ “90% value role of ANAO” where “Parliament acknowledges the value of the ANAO contribution”;¹²¹ and “High standard of satisfaction” with the “JCPAA’s general satisfaction with the overall quality, timeliness and coverage of the ANAO’s products and services”.¹²² As a generalisation the performance indicators of outputs are directed to a broader array of objectives than just the Executive’s accountability to Parliament:

The Auditor-General, assisted by the [ANAO], is responsible for undertaking audits of the financial statements and performance of Australian Government public sector agencies and entities. Through the delivery of an integrated range of high-quality audit products that are timely, cost-effective and consistent with public sector values, the ANAO aims to meet the needs and expectations of the Parliament, the Executive and audit clients and to add value to public sector performance and accountability.¹²³

In short, the concern is that both the formulation of the future expenditure intentions of the Executive and the reporting of that expenditure is according to standards determined by the Executive and for the Executive’s purposes in addition to mere auditing. Thus, the Executive sets the standards for auditing financial statements and the role of the Auditor-General is to report on those standards together with other Executive focussed tasks (including their “needs and expectations”). While these standards and tasks might be expected to reflect accepted auditing practices, there is considerable scope for the Executive to manipulate these standards and tasks (according to performance indicators of outputs) in ways that might influence the Auditor-General and the nature, quality and quantity of audits the Auditor-General might decide to undertake.

A further concern is that the *Appropriation Act (No 1)* is introduced into the House of Representatives where the Executive will almost certainly have a majority, and the *Appropriation Act (No 1)* cannot be amended by the Senate, albeit the Senate may decline to pass or reject the proposed law in entirety.¹²⁴ This concern is that the funding arrangements for the ANAO through appropriations “for the ordinary annual services of the Government” might be affecting the independence of the Auditor-General.¹²⁵ This independence extending to the nature, quality and quantity of audits the Auditor-General might decide to undertake.¹²⁶ While there have been various deliberations about ways of limiting the Executive’s role in determining the funding arrangements,¹²⁷ there remains a fundamental barrier under the *Constitution* that the Parliament has no money,¹²⁸ and that the money of the Consolidated Revenue Fund comprises “revenues or moneys raised and received by the Executive

¹¹⁸ 2008-9 Budget Related Paper No 1.15a, n 65, p 79 (*Output Group 3.1 Financial Statement Audit Reports*).

¹¹⁹ 2008-9 Budget Related Paper No 1.15a, n 65, p 76.

¹²⁰ 2008-9 Budget Related Paper No 1.15a, n 65, p 79.

¹²¹ 2008-9 Budget Related Paper No 1.15a, n 65, p 80.

¹²² 2008-9 Budget Related Paper No 1.15a, n 65, p 80.

¹²³ 2008-9 Budget Related Paper No 1.15a, n 65, p 69.

¹²⁴ See *Odgers*, n 28, pp 271-273.

¹²⁵ This has been an ongoing concern: see, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, pp 1756-1757 (Petro Georgiou); JCPA Report No 296, n 2, pp 62-73; Auditor-General’s Response to Report 296, n 5, pp 10-11; JCPA Report No 346, n 5, pp 27-32.

¹²⁶ See JCPA Report No 296, n 2, p 62; Auditor-General’s Response to Report 296, n 5, p 20; Audit Report No 43, n 5, pp 11-12; JCPA Report No 346, n 5, pp 65-68.

¹²⁷ See, eg, JCPA Report No 346, n 5, pp 29-31.

¹²⁸ *Constitution*, s 56. See also JCPA Report No 346, n 5, p 29.

Government of the Commonwealth”.¹²⁹ In short, the available monies that the Parliament might apply to the ANAO are *only* those that the Parliament can authorise the Executive to expend (through an appropriation),¹³⁰ and there is no authority for the Parliament to compel the Executive to expend an appropriated amount.¹³¹ The result is that, as a matter of practicalities, the Parliament can only authorise expenditure through appropriations, and must rely on the Executive to expend that amount accordingly.¹³² In the case of the ANAO this is ameliorated by the requirement in the *Auditor-General Act 1997* (Cth) that the “Finance Minister must issue drawing rights¹³³ ... that cover in full the amounts that the Parliament appropriates for the purposes of the Audit Office”¹³⁴ and the “Auditor-General has authority to approve a proposal to spend money under an appropriation for the [ANAO]”.¹³⁵ The issuing of drawing rights is, however, subject to limits and conditions,¹³⁶ and there is considerable scope for limits or conditions on the content of drawing rights that are within the bounds of the broad appropriation purposes under the *Appropriation Act (No 1)*.¹³⁷ The likely effect of these provisions is a limited opportunity for the Executive to influence the Auditor-General’s and ANAO’s expenditure and the way that expenditure is made.

AUDITOR-GENERAL’S STAFFS’ EMPLOYMENT ARRANGEMENTS

The Auditor-General is assisted in performing the Auditor-General’s functions by staff engaged under the *Public Service Act 1999* (Cth).¹³⁸ The Auditor-General and those employees assisting the Auditor-General together comprise the ANAO,¹³⁹ and constitute a “Statutory Agency” under the *Public Service Act 1999* (Cth).¹⁴⁰ The Auditor-General is the Head of the Statutory Agency.¹⁴¹ The *Public Service Act 1999* (Cth) provides that a “Statutory Agency” is “a body or group of persons declared by an Act to be a Statutory Agency for the purposes of this Act”.¹⁴² For the purposes of the *Public Service Act 1999* (Cth) the ANAO is an “Agency”,¹⁴³ the Auditor-General is the “Agency Head”,¹⁴⁴ and the “Agency Minister” is the Prime Minister as “the Minister who administers the

¹²⁹ *Constitution*, s 81. See also JCPA Report No 331, n 13, p 62.

¹³⁰ *Constitution*, s 83.

¹³¹ An alternative possibility is that the *Constitution* s 97 itself provides an authority for the Parliament to appropriate amounts out of the Consolidated Revenue Fund for the review and audit of the receipt and expenditure on account of the government, in the same way *Constitution* s 3 appropriates the Governor-General’s salary, and so on. Although whether these do effect an appropriation is not settled: see, eg, *Australian Assistance Plan case* (1975) 134 CLR 338 at 353 (Barwick CJ) and the references therein. See also *Brown v West* (1990) 169 CLR 195 at 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

¹³² See JCPA Report No 346, n 5, p 29.

¹³³ “Drawing rights” are the authorisation necessary to make a payment or debit an appropriation: *Financial Management and Accountability Act 1997* (Cth), ss 26, 27.

¹³⁴ Although this is probably a re-statement of an existing obligation: see *Financial Management and Accountability Act 1997* (Cth), s 27(2).

¹³⁵ *Auditor-General Act 1997* (Cth), ss 50, 51. See also JCPA Report No 346, n 5, p 68.

¹³⁶ See Dept of Finance and Administration, *Drawing Rights: Payments and Debiting Appropriations*, Finance Circular 2006/09 (2006) [22].

¹³⁷ See *Financial Management and Accountability Act 1997* (Cth), ss 26, 27. Both the scope of “purposes” is very likely resolved in favour of a very broad purpose: see *Combet v Commonwealth* (2005) 224 CLR 494 at 577 (Gummow, Hayne, Callinan and Heydon JJ) and citing *Australian Assistance Plan case* (1975) 134 CLR 338 at 394 (Mason J) and *Pharmaceutical Benefits case* (1945) 71 CLR 237 at 253, 256 (Latham CJ).

¹³⁸ *Auditor-General Act 1997* (Cth), s 40(1).

¹³⁹ *Auditor-General Act 1997* (Cth), ss 5, 38(2).

¹⁴⁰ *Auditor-General Act 1997* (Cth), s 40(1A)(a).

¹⁴¹ *Auditor-General Act 1997* (Cth), s 40(1A)(b).

¹⁴² *Public Service Act 1999* (Cth), s 7.

¹⁴³ *Public Service Act 1999* (Cth), s 7.

¹⁴⁴ *Public Service Act 1999* (Cth), s 7.

provision of the Act that provides for the appointment of the Head of the Agency”.¹⁴⁵ An “Agency Head” is required to “uphold and promote the APS Values”,¹⁴⁶ and is “bound by the Code of Conduct”¹⁴⁷ in the same way as the staff who are engaged under the *Public Service Act 1999* (Cth) as “APS employees”.¹⁴⁸ The effect of these provisions would appear to be that both the Auditor-General as the “Agency Head”, and the staff as “APS employees” under the *Public Service Act 1999* (Cth), must comply with the “APS Values” and the “Code of Conduct”. The “APS Values” are:

- (a) the APS is apolitical, performing its functions in an impartial and professional manner;
- (b) the APS is a public service in which employment decisions are based on merit;
- (c) the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves;
- (d) the APS has the highest ethical standards;
- (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- (f) the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs;
- (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
- (h) the APS has leadership of the highest quality;
- (i) the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
- (j) the APS provides a fair, flexible, safe and rewarding workplace;
- (k) the APS focuses on achieving results and managing performance;
- (l) the APS promotes equity in employment;
- (m) the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment;
- (n) the APS is a career-based service to enhance the effectiveness and cohesion of Australia’s democratic system of government;
- (o) the APS provides a fair system of review of decisions taken in respect of APS employees.¹⁴⁹

The “Code of Conduct” is:

- (1) An APS employee must behave honestly and with integrity in the course of APS employment.
- (2) An APS employee must act with care and diligence in the course of APS employment.
- (3) An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
 - (a) any Act (including this Act), or any instrument made under an Act; or
 - (b) any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee’s Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister’s member of staff.
- (7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner.
- (9) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee’s APS employment.
- (10) An APS employee must not make improper use of:
 - (a) inside information; or

¹⁴⁵ *Public Service Act 1999* (Cth), s 7. See also *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 16).

¹⁴⁶ *Public Service Act 1999* (Cth), s 12.

¹⁴⁷ *Public Service Act 1999* (Cth), s 14(1). Notably, the Auditor-General as a statutory office holder is also “bound by the Code of Conduct” (s 14(2)).

¹⁴⁸ *Public Service Act 1999* (Cth), ss 13, 22.

¹⁴⁹ *Public Service Act 1999* (Cth), s 10(1). See also *Public Service Commissioner’s Directions 1999* (Cth), d 2.1-4.7.

- (b) the employee's duties, status, power or authority;
in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- (11) An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.¹⁵⁰

The focus of both the "APS Values" and the "Code of Conduct" in the *Public Service Act 1999* (Cth) were part of a broader reform directed to "building a performance culture" and "making the public sector more responsive to government".¹⁵¹ The intention was that the declaration of "APS Values" would reflect public expectations of the relationship between the public service and the government, the Parliament and the Australian community,¹⁵² and the "Code of Conduct" would reflect the public expectation that public servants will exercise appropriate conduct.¹⁵³ The significance of these measures for the Auditor-General and the ANAO staff is their compliance with obligations imposed by the "APS Values" and the "Code of Conduct" such as being responsive to the Executive and implementing the Executive's policies and programs,¹⁵⁴ and maintaining confidentiality when dealing with any Minister or Minister's member of staff.¹⁵⁵ Significantly, however, the *Auditor-General Act 1997* (Cth) provides:

Directions to staff of the [Australian National] Audit Office relating to the performance of the Auditor-General's functions may only be given by:

- (a) the Auditor-General; or
- (b) a member of the staff of the Audit Office authorised to give such directions by the Auditor-General.¹⁵⁶

The effect of this provision is that because the staff of the ANAO engaged under the *Public Service Act 1999* (Cth) comprise the ANAO¹⁵⁷ and the "function" of the ANAO is to "to assist the Auditor-General in performing the Auditor-General's functions",¹⁵⁸ then those staff in performing the Auditor-General's "functions" can *only* be directed by the Auditor-General (or an authorised ANAO staff member).¹⁵⁹ The distinction required here is between the effect of the *Public Service Act 1999* (Cth) obligations (including the "APS Values" and the "Code of Conduct") and the "directions" of the Auditor-General. This is in issue as the staff of the ANAO engaged under the *Public Service Act 1999* (Cth) appear to be required to comply with both the *Public Service Act 1999* (Cth) obligations and the Auditor-General's directions in performing the Auditor-General's functions. This is most probably resolved by limiting the *Public Service Act 1999* (Cth) obligations applicable to the staff of the ANAO to those that are not inconsistent with the "directions" of the Auditor-General relating to the performance of the Auditor-General's functions. While this may be easily distinguished in some

¹⁵⁰ *Public Service Act 1999* (Cth), s 13. See also *Public Service Commissioner's Directions 1999* (Cth), d 5.1-5.6.

¹⁵¹ 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.

¹⁵² *Public Service Act 1999* (Cth), s 10(1). See also *Public Service Commissioner's Directions 1999* (Cth), d 2.1-4.7.

¹⁵³ *Public Service Act 1999* (Cth), s 13. See also *Public Service Commissioner's Directions 1999* (Cth), d 5.1-5.6.

¹⁵⁴ See *Public Service Act 1999* (Cth), s 10(1)(f); *Public Service Commissioner's Directions 1999* (Cth), d 2.7.

¹⁵⁵ See *Public Service Act 1999* (Cth), s 13(6).

¹⁵⁶ *Auditor-General Act 1997* (Cth), s 40(2).

¹⁵⁷ *Auditor-General Act 1997* (Cth), s 38(2).

¹⁵⁸ *Auditor-General Act 1997* (Cth), s 39.

¹⁵⁹ *Auditor-General Act 1997* (Cth), s 40(2). Notably, this "authorisation" is in statutory form, as opposed to an implied authorisation, and will be similar to a delegation with the authorised member of staff of the ANAO exercising the power in his or her own right: see, eg, *Barton v Croner Trading Pty Ltd* (1984) 54 ALR 541 at 556-558 (Bowen CJ, Beaumont and Wilcox JJ).

circumstances, there will be other circumstances that might be difficult to resolve, especially where it is an individual staff member attempting to distinguish between their obligations under the *Public Service Act 1999* (Cth) and the effect of the Auditor-General’s “directions”. For example, A *Public Service Act 1999* (Cth) “APS value” is that “the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public”.¹⁶⁰ Meanwhile, under the *Auditor-General Act 1997* (Cth) provides that the “Auditor-General is an independent officer of the Parliament”.¹⁶¹ As the ANAO is within the Prime Minister and Cabinet portfolio, the responsible Minister is the Prime Minister,¹⁶² and through him the Parliament and the Australian public. Is a staff member of the ANAO (assisting the Auditor-General in performing the Auditor-General’s functions) accountable to the Parliament *through* the Prime Minister or *directly* to Parliament?

The scope of the Auditor-General’s “directions” must be confined to the “functions” identified in the *Auditor-General Act 1997* (Cth).¹⁶³ These “functions” include: auditing financial statements of Agencies in accordance with the *Financial Management and Accountability Act 1997* (Cth),¹⁶⁴ Commonwealth authorities and their subsidiaries in accordance with the *Commonwealth Authorities and Companies Act 1997* (Cth),¹⁶⁵ and Commonwealth companies and their subsidiaries in accordance with the *Commonwealth Authorities and Companies Act 1997* (Cth);¹⁶⁶ performance audits (“a review or examination of any aspect of the operations of the person or body”)¹⁶⁷ of Agencies under the *Financial Management and Accountability Act 1997* (Cth),¹⁶⁸ Commonwealth authorities and their subsidiaries (other than Government Business Enterprises (GBEs)¹⁶⁹ unless requested)¹⁷⁰ under the *Commonwealth Authorities and Companies Act 1997* (Cth),¹⁷¹ and Commonwealth companies and their subsidiaries (other than GBEs¹⁷² unless requested)¹⁷³ under the *Commonwealth Authorities and Companies Act 1997* (Cth);¹⁷⁴ general performance audits (a review or examination of a particular aspect of the operations of the whole or part of Agencies, Commonwealth authorities (other than GBEs) and their subsidiaries and Commonwealth companies (other than GBEs) and their subsidiaries);¹⁷⁵ audits of persons or bodies within the Commonwealth’s legislative power;¹⁷⁶ a *Corporations Act 2001* (Cth) auditor of a Commonwealth authority subsidiary, a Commonwealth

¹⁶⁰ *Public Service Act 1999* (Cth), s 10(1)(e).

¹⁶¹ *Auditor-General Act 1997* (Cth), s 8(1).

¹⁶² See *Administrative Arrangements Order 1 May 2008* (Cth), Sch (Pt 16).

¹⁶³ See also *Auditor-General Act 1997* (Cth), s 8(2).

¹⁶⁴ *Auditor-General Act 1997* (Cth), s 11.

¹⁶⁵ *Auditor-General Act 1997* (Cth), s 12.

¹⁶⁶ *Auditor-General Act 1997* (Cth), s 13.

¹⁶⁷ *Auditor-General Act 1997* (Cth), s 5(1).

¹⁶⁸ *Auditor-General Act 1997* (Cth), s 15(1).

¹⁶⁹ See *Auditor-General Act 1997* (Cth), s 5(1); *Commonwealth Authorities and Companies Act 1997* (Cth), s 5; *Commonwealth Authorities and Companies Regulations 1997* (Cth), reg 4. These are Australian Government Solicitor, Australian Postal Corporation and Defence Housing Australia.

¹⁷⁰ *Auditor-General Act 1997* (Cth), s 16(2).

¹⁷¹ *Auditor-General Act 1997* (Cth), s 16(1).

¹⁷² See *Auditor-General Act 1997* (Cth), s 5(1); *Commonwealth Authorities and Companies Act 1997* (Cth), s 5; *Commonwealth Authorities and Companies Regulations 1997* (Cth), reg 4. These are ASC Pty Ltd, Australian Rail Track Corporation Ltd, Health Services Australia Ltd and Medibank Private Ltd.

¹⁷³ *Auditor-General Act 1997* (Cth), s 17(2).

¹⁷⁴ *Auditor-General Act 1997* (Cth), s 17(1).

¹⁷⁵ *Auditor-General Act 1997* (Cth), s 18(1), (4).

¹⁷⁶ *Auditor-General Act 1997* (Cth), s 20(1), (3).

company and a company in which the Commonwealth has a controlling interest;¹⁷⁷ and reporting “any important matter that comes to the attention of the Auditor-General” while auditing financial statements and *Corporations Act 2001* (Cth) audits.¹⁷⁸

The next limitation concerns the nature of the Auditor-General’s “directions” to staff of the ANAO engaged under the *Public Service Act 1999* (Cth). In the context of employment under the *Public Service Act 1999* (Cth) and the *Auditor-General Act 1997* (Cth) in the performance of their duties: “employment does not entail the total subordination of an employee’s autonomy to the commands of the employer”.¹⁷⁹ However, the nature of the “directions” might extend to:

If a command relates to the subject matter of the employment and involves no illegality, the obligation of the servant to obey it depends at common law upon its being reasonable. In other words, the lawful commands of an employer which an employee must obey are those which fall within the scope of the contract of service and are reasonable.¹⁸⁰

In addition to this, the “directions” might also include other factors reflecting the broader interests of a public servant and broader governmental and public interests, and in particular the maintenance of public confidence in the integrity of the public service and of public servants.¹⁸¹ The likely limits of a “direction” might be that:

once an employee’s conduct can be shown to have significant and adverse effects in the workplace, because of its impact on workplace relations, on the productivity of others, or on the effective conduct of the employer’s business, that conduct becomes a proper matter of legitimate concern to an employer, and does so because of its consequences.¹⁸²

In the context of the *Auditor-General Act 1997* (Cth), the Auditor-General might articulate “directions” that “symbolically and practically strengthen[] the functional independence” of the ANAO¹⁸³ and promote the “vital role [the Auditor-general plays] in giving credibility to Australia’s system of parliamentary governance”.¹⁸⁴ In practice, the Auditor-General has promulgated the *Guide to Conduct in the ANAO* that acknowledges the effect of the *Public Service Act 1999* (Cth) “APS Values” and “Code of Conduct” and includes “policies and guidelines ... which are designed specifically for the [ANAO] and which are to be observed by all [ANAO] employees”¹⁸⁵ applied in the ANAO “environment”.¹⁸⁶ Significantly, however, the “directions” appear to be narrowly conceived and applied by the Auditor-General:

Managers and supervisors have the lawful authority to direct staff for whom they are responsible on work matters.

¹⁷⁷ *Auditor-General Act 1997* (Cth), s 21(1).

¹⁷⁸ *Auditor-General Act 1997* (Cth), s 26(1).

¹⁷⁹ *McManus v Scott-Charlton* (1996) 140 ALR 625 at 629 (Finn J).

¹⁸⁰ *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-622 (Dixon J). See also *McManus v Scott-Charlton* (1996) 140 ALR 625 at 628-629 (Finn J).

¹⁸¹ *McManus v Scott-Charlton* (1996) 140 ALR 625 at 630-633 (Finn J); *Anderson v Sullivan* (1997) 148 ALR 633 at 648 (Finn J).

¹⁸² *McManus v Scott-Charlton* (1996) 140 ALR 625 at 636 (Finn J). Notably, Finn J formulated his conclusions more narrowly, albeit in the context of conduct having a “substantial and adverse effects on workplace relations, workplace performance and/or the ‘efficient equitable and proper conduct’ (cf [Public Service Act 1992 (Cth)] s 6) of the employer’s business because of the proximity of the harasser and the harassed person in the workplace” (at 637). For applications of this principle see *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119 at 144-145 (Finn J); *Anderson v Sullivan* (1997) 148 ALR 633 at 647-650 (Finn J).

¹⁸³ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8342 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1350 (Ian Campbell, Parliamentary Secretary to the Treasurer).

¹⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8344 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1351 (Ian Campbell, Parliamentary Secretary to the Treasurer).

¹⁸⁵ ANAO, *Guide to Conduct in the ANAO* (2008) p 1.

¹⁸⁶ ANAO, n 185, p 4. See also Auditor-General, *Annual Report 2006-07* (ANAO, 2007) p 70.

If you consider a direction given by your supervisor to be unreasonable or unlawful, discuss it with your supervisor in the first instance. Where the matter is not easily resolved, including by further consideration of the matter within your group, there are grievance procedures that are available to staff.¹⁸⁷

This analysis suggests that the Auditor-General has not resolved the potential conflicts between the *Public Service Act 1999* (Cth) obligations set out in the “APS Values” and “Code of Conduct” and the specific circumstances of the Auditor-General in performing the Auditor-General’s functions under the *Auditor-General Act 1997* (Cth). The focus of directions appears to be within the context of grievance arrangements following breached of the “Code of Conduct”.¹⁸⁸ The potential to differentiate the role of the Auditor-General and the ANAO and its “independence” have not been adopted,¹⁸⁹ leaving open the potential for a conflict between the employment obligations of the Auditor-General and the staff of the ANAO engaged under the *Public Service Act 1999* (Cth) and the “independence” of the Auditor-General under the *Auditor-General Act 1997* (Cth).¹⁹⁰

AUDITOR-GENERAL’S OPERATIONAL INDEPENDENCE FROM PARLIAMENT AND AUTHORITY TO REPORT TO PARLIAMENT

The concern is that the Auditor-General’s decisions about the nature, quality and quantity of audits the Auditor-General might decide to undertake *should* rest completely with the Auditor-General and without any direction from the Parliament or the Executive. This encompasses the scope and range of audit functions expected of the Auditor-General, and in particular, whether the Auditor-General should audit all Commonwealth entities.¹⁹¹ More specifically, however, this concerns the absolute discretion of the Auditor-General to determine what should be audited and how the audit should be undertaken.¹⁹² The *Audit-General Act 1997* (Cth) presently provides, in part:

Subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:

- (a) whether or not a particular audit is to be conducted; or
- (b) the way in which a particular audit is to be conducted; or
- (c) the priority to be given to any particular matter.¹⁹³

Despite this apparent guarantee of audit independence, there remain some avenues of “advice” requiring that the Auditor-General in “performing or exercising his or her functions or powers” must “have regard” to “the audit priorities of the Parliament determined by the JCPAA”,¹⁹⁴ and any reports made by the JCPAA.¹⁹⁵ Further, the Executive may have some control over the content of reports made by the Auditor-General.¹⁹⁶ These are considered in turn.

¹⁸⁷ ANAO, n 185, p 4.

¹⁸⁸ *Public Service Act 1999* (Cth), s 15(3). See also ANAO, n 185, p 8; *Public Service Commissioner’s Directions 1999* (Cth), cll 5.1-5.6.

¹⁸⁹ This has been an ongoing concern: see, eg, JCPA Report No 296, n 2, pp 82-84 (and the references therein).

¹⁹⁰ Notably, the Auditor-General may also engage contractors to assist in the performance of any of the Auditor-General’s functions: *Auditor-General Act 1997* (Cth), s 27. Presumably, the contractors would also be subject to the similar kinds of standards affecting the staff of the ANAO engaged under the *Public Service Act 1999* (Cth).

¹⁹¹ See JCPA Report No 346, n 5, pp 19-21.

¹⁹² See JCPA Report No 346, n 5, pp 19-21. See also Wanna et al, n 41, pp 57-67 (detailing the second Auditor-General’s subjective “activism” in making reports)

¹⁹³ *Audit-General Act 1997* (Cth), s 8(4).

¹⁹⁴ *Auditor-General Act 1997* (Cth), s 10(a). See also *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1)(m).

¹⁹⁵ *Auditor-General Act 1997* (Cth), s 10(b). See also *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1)(h), (i).

¹⁹⁶ *Auditor-General Act 1997* (Cth), s 37.

The audit priorities of the Auditor-General

Under current arrangements, the JCPAA can “determine the audit priorities of the Parliament and ... advise the Auditor-General of those priorities”.¹⁹⁷ Significantly, the JCPAA cannot “direct the activities of the Auditor-General”,¹⁹⁸ although as a matter of practice, the Auditor-General determines the ANAO’s work program in consultation with the JCPAA,¹⁹⁹ and “may” undertake audits requested by JCPAA (and following a request of other parts of the Parliament through the JCPAA).²⁰⁰ This becomes important where the JCPAA expresses its audit priorities and presumably has some expectation that the Auditor-General will respond²⁰¹ – in the words of a former Auditor-General:

The reality is that Parliament does not have to tell us what to do. We are sensitive enough to realise what to do if a number of parliamentarians or a committee says, “We are interested in this”. We are always polling committee chairmen and secretariats about what they are interested in. We really want to know. I am not running some sort of show for my own benefit. The only benefit is in serving you. But it would be nugatory if we were just your investigators being told to go out and do this and go out and do that. That would not be an independent audit.²⁰²

While there is no clear demarcation of where the Auditor-General is under direction, there are clearly degrees of influence possible under this arrangement, and where there is an expectation of the JCPAA and the Auditor-General responds.

Reviewing the Australian National Audit Office

After various models were considered,²⁰³ the *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth) that amended the *Public Accounts and Audit Committee Act 1951* (Cth) provide the JCPAA with a role in reviewing the operations, resources and performance of the ANAO.²⁰⁴ The significance of these measures is the further requirement in the *Auditor-General Act 1997* (Cth) that the Auditor-General must “submit to the [JCPAA] draft estimates for the [ANAO] for a financial year before the annual Commonwealth budget for that financial year”²⁰⁵ that the JCPAA then considers.²⁰⁶ The JCPAA then makes recommendations to the Parliament and the Prime Minister about these estimates.²⁰⁷ Whether these draft estimates provide the JCPAA with any authority or effect over appropriations is uncertain,²⁰⁸ there being instances where the appropriations have not reflected the

¹⁹⁷ *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1)(m).

¹⁹⁸ *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1A). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8349 (John Fahey, Minister for Finance); Commonwealth, *Parliamentary Debates*, Senate, 5 March 1997, p 1355 (Ian Campbell, Parliamentary Secretary to the Treasurer).

¹⁹⁹ ANAO, *Annual Report 2006-2007* (2007) p 26; JCPAA Report No 408, n 29, p 3.

²⁰⁰ ANAO, n 199, p 26.

²⁰¹ This is particularly cogent where the Auditor-General believes the Parliament is his “employer”: see JCPA Report No 346, n 5, pp 28, 35.

²⁰² JCPA Report No 346, n 5, p 24.

²⁰³ JCPA Report No 296, n 2, pp 63-73; Auditor-General’s Response to Report 296, n 5, pp 21-32; Audit Report No 43, n 5, pp 12-13.

²⁰⁴ *Public Accounts and Audit Committee Act 1951* (Cth), s 8A(1)(g), (h), (i), (j), (l).

²⁰⁵ *Auditor-General Act 1997* (Cth), s 53(1), (2).

²⁰⁶ *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1)(j).

²⁰⁷ *Public Accounts and Audit Committee Act 1951* (Cth), s 8A(1)(l).

²⁰⁸ Perhaps notably the JCPAA chairman reported in 1998 (14 days after the Budget): “A process has been put in place whereby the draft budget estimates are considered by the JCPAA before the budget is handed down and the committee’s report provided to the Minister for Finance to be tabled as soon as practical after the budget. This process allows the resourcing of audit functions to be made transparent to the Parliament so that the Executive is held to account for the level of resources appropriated to allow the Auditor-General to fulfil the statutory functions of his office”: Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 1998, p 3719 (Bob Charles).

JCPAA’s recommendations.²⁰⁹ So, for example:

The Auditor-General advised the [JCPAA] that he had sought additional funding in the 2008-09 budget ... [of] \$6.5 million to conduct an annual review of major Defence capital equipment projects. By way of background, my [JCPAA] recommended in late 2006 that the Audit Office be funded to annually review progress in major Defence capital equipment projects ... The recommendation made by the [JCPAA] was similar to one previously made by the Senate, and which the [ANAO] had unsuccessfully sought funds for in previous budgets. We made this recommendation because we believed there would be considerable benefit from ongoing early review of Defence equipment acquisition projects, and that the modest funding sought by the [ANAO] should be considered in light of the substantial savings that may accrue from better management of these capital projects. I am pleased that the government has agreed to provide \$1.5 million annually to the [ANAO], from 2009-10 onwards, to conduct the Defence capital equipment projects report, with initial funding of \$750,000 in this year’s budget. The committee notes that the [ANAO] has not received the full \$1.5 million it had sought in this year’s budget, nor has it been reimbursed \$500,000 in funds it had sought towards the funds it spent on preparatory work in 2007-08.²¹⁰

So, while involving Parliament in reviewing the operations, resources and performance of the ANAO, the final decisions about the funding arrangements through appropriations are determined as part of the Executive, and as a very minor part of the total appropriations in *Appropriation Act (No 1)*.²¹¹ Perhaps the most telling aspect of the JCPAA’s role and the significance of their involvement in the ANAO’s budgeting process is that the Commonwealth budget is delivered in May each year with the budget process starting in November/December of the previous year.²¹² The JCPAA only delivers its report on the ANAO’s estimates in May, often *only* hours before the budget Bills are introduced into the Parliament.²¹³ With this practice the relevance of the JCPAA’s involvement is open to question,²¹⁴ especially as the Auditor-General has the opportunity to address the estimates issues in other reports to Parliament.²¹⁵

Reporting to the Executive and Parliament

The reports made by the Auditor-General to Parliament include: the audit of financial statements under the *Financial Management and Accountability Act 1997* (Cth)²¹⁶ that are included in annual reports under the *Public Service Act 1999* (Cth);²¹⁷ the Commonwealth’s annual financial statements prepared by the Finance Minister;²¹⁸ the audit of financial statements under the *Commonwealth Authorities and*

²⁰⁹ See, eg, JCPAA, *Report on the Draft Budget Estimates for the Australian National Audit Office for 2008-09* (Senate Printing, 2008); JCPAA, *Report on the Draft Budget Estimates for the Australian National Audit Office for 2007-08* (Senate Printing, 2007); JCPAA, *Report on the Draft Budget Estimates for the Australian National Audit Office for 2006-07* (Senate Printing, 2006).

²¹⁰ Commonwealth, *Parliamentary Debates*, Senate, 14 May 2008, p 1787 (John Hogg); House of Representatives, 13 May 2008, p 2589 (Sharon Grierson).

²¹¹ See *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio).

²¹² See Webb R, *The Commonwealth Budget: Process and Presentation*, Parliamentary Library Research Brief No 7 2006-07 (Dept of Parliamentary Services, 2007) p 8.

²¹³ Thus, the JCPAA’s report on the draft budget estimates for the ANAO for 2008-09 was delivered at 5:11 pm in the House of Representatives on the same day the budget Bills were introduced at 7:31 pm, and at 4:17 pm in the Senate on the following day: see Commonwealth, *Parliamentary Debates*, Senate, 14 May 2008, p 1786 (John Hogg); House of Representatives, 13 May 2008, p 2589 (Sharon Grierson).

²¹⁴ Importantly, the JCPAA is not involved in reviewing the budget as part of the Senate Estimates arrangements: see *Odgers*, n 28, pp 311-313 and 366-371.

²¹⁵ These include the power that the “Auditor-General may at any time cause a report to be tabled in either House of the Parliament on any matter” and an annual report: *Auditor-General Act 1997* (Cth), ss 25 and 28 respectively.

²¹⁶ See *Financial Management and Accountability Act 1997* (Cth), ss 49 (Agency annual financial statements), 57(7).

²¹⁷ *Public Service Act 1999* (Cth), ss 63 (Department of State) and 70 (Executive Agency); *Financial Management and Accountability Act 1997* (Cth), s 57(7).

²¹⁸ See *Financial Management and Accountability Act 1997* (Cth), ss 55, 56.

Companies Act 1997 (Cth);²¹⁹ “performance audit” and “general performance audit” reports;²²⁰ reports “on any matter”,²²¹ and the ANAO’s annual report.²²² The annual reports under the *Public Service Act 1999* (Cth) are prepared in accordance with guidelines approved on behalf of the Parliament by the JCPAA.²²³ The ANAO’s annual report complies with these requirements, albeit in form the annual report is submitted to the President of the Senate and the Speaker of the House of Representatives rather than the Prime Minister and then tabled in Parliament.²²⁴ The concern is that the Auditor-General should not be “unduly restricted” in making reports, and that the Executive should not overly limit what information can be disclosed in reports.²²⁵ The major concern, however, is about information the Executive may consider it is not appropriate to disclose.²²⁶

The Executive’s limitations over what information can be disclosed by the Auditor-General has been a particularly sensitive issue because the proposed *Auditor-General Bill 1994* (Cth) sought to give the Attorney-General almost absolute authority to limit disclosure of almost any information with no justification and no indication that such a determination had been made.²²⁷ Following the introduction of the *Auditor-General Bill 1996* (Cth) the issue remained contentious,²²⁸ the House of Representatives and Senate rejecting proposed amendments²²⁹ albeit the provision finally adopted (set out below) reflected the earlier *Auditor-General Bill 1994* (Cth)²³⁰ subject to the Auditor-General reporting when information was not disclosed and the Attorney-General providing reasons for limiting disclosure.²³¹ The *Auditor-General Act 1997* (Cth) now provides:

- (1) The Auditor-General must not include particular information in a public report if:
 - (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or

²¹⁹ See *Commonwealth Authorities and Companies Act 1997* (Cth), s 9(1) and Sch 1.

²²⁰ *Auditor-General Act 1997* (Cth), ss 15(2) (Agencies under the *Financial Management and Accountability Act 1997* (Cth)), 16(4) (Commonwealth authorities and subsidiaries (except Government Business Enterprises (GBEs)) under the *Commonwealth Authorities and Companies Act 1997* (Cth)), 17(4) (Commonwealth companies and subsidiaries (except GBEs) under the *Commonwealth Authorities and Companies Act 1997* (Cth)), 18(2) (“Commonwealth public sector” (except GBEs)).

²²¹ *Auditor-General Act 1997* (Cth), s 25(1).

²²² *Auditor-General Act 1997* (Cth), s 28.

²²³ *Public Service Act 1999* (Cth), ss 63 (Department of State) and 70 (Executive Agency); Dept of the Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act Bodies* (2006).

²²⁴ See ANAO Annual Report 2006-07, n 186, p iii. Albeit the *Auditor-General Act 1997* (Cth) defines “Minister” to include the “President of the Senate and the Speaker of the House of Representatives”: *Auditor-General Act 1997* (Cth), s 5(1).

²²⁵ See JCPA Report No 346, n 5, pp 25-27; Senate Legal and Constitutional Affairs Legislation Committee (Auditor-General Bill 1996), n 12, pp vii-viii.

²²⁶ This has been variously stated: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, p 1745 (Gareth Evans, Shadow Treasurer); JCPA Report No 346, n 5, pp 25-27; Scrutiny of Bills Committee, Senate, *Fourth Report of 1997* (Senate Printing, 1997) p 52; Senate Legal and Constitutional Affairs Legislation Committee (Auditor-General Bill 1996), n 12, pp 7-11, 15-17.

²²⁷ *Auditor-General Bill 1994* (Cth), cl 34 provided that the Auditor-General could not disclose “sensitive” information in a report to Parliament if the Attorney-General had issued a certificate that releasing the information would be contrary to the public interest, and the definition of “sensitive” information encompassed almost *all* information: see JCPA Report No 346, n 5, pp 25-26.

²²⁸ Senate Legal and Constitutional Affairs Legislation Committee (Auditor-General Bill 1996), n 12, pp 3-11, 15-24.

²²⁹ Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, pp 7108, 7116, 7148; House of Representatives, 3 March 1997, p 1775. The only concession made to amendments in the Senate was that the motion adopting the report of the committee request the Auditor-General to list in the annual report on the operations of the ANAO for the financial year 1997-1998 “a report on the appropriateness of commercial-in-confidence practices with recommendations on legislative regulation of such practices” (p 7148). This was subsequently addressed: Auditor-General, *Annual Report 1997-1998* (ANAO, 1998) pp 34-35.

²³⁰ *Auditor-General Bill 1994* (Cth), cl 34. See also JCPA Report No 346, n 5, p 26.

²³¹ *Auditor-General Act 1997* (Cth), s 37(4).

- (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).
- (2) The reasons are:
 - (a) it would prejudice the security, defence or international relations of the Commonwealth;
 - (b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
 - (c) it would prejudice relations between the Commonwealth and a State;
 - (d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth;
 - (e) it would unfairly prejudice the commercial interests of any body or person;
 - (f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.
- (3) The Auditor-General cannot be required, and is not permitted, to disclose to:
 - (a) a House of the Parliament; or
 - (b) a member of a House of the Parliament; or
 - (c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;information that subsection (1) prohibits being included in a public report.
- (4) If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:
 - (a) that information (which does not have to be identified) has been omitted from the report; and
 - (b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.²³²

The Senate committee recommending the adoption of this provision concluded that:

If dissatisfied with the Attorney-General's decision, the Parliament itself can sanction the Attorney-General for his behaviour. Therefore, it is unlikely that the Attorney-General will act in a way that the Parliament may consider inappropriate.²³³

Despite this assurance there remains a concern that the Attorney-General may issue a certificate (a suppression order) for particular information and the *only* justification apparent to the Parliament will be the Auditor-General's report of the Attorney-General's reasons.²³⁴ In effect, information about the Executive that is material to the Auditor-General's functions under the *Auditor-General Act 1997* (Cth) may be entirely excluded from the purview of Parliament.²³⁵

CONCLUSIONS

The role of the Auditor-General as auditor of the public sector is enshrined in the *Auditor-General Act 1997* (Cth) and covers matters of auditing, probity, propriety and statutory compliance.²³⁶ The evolution of the measures in the *Auditor-General Act 1997* (Cth) are significant because they show that the “independence” sought by the Parliament is tempered by symbolism and compromise on key

²³² *Auditor-General Act 1997* (Cth), s 37.

²³³ Senate Legal and Constitutional Affairs Legislation Committee (Auditor-General Bill 1996), n 12, p 10. See also JCPAA Report No 386, n 5, pp 39-41 stating that the Attorney-General's decision was reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

²³⁴ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 March 1997, pp 1749-1750 (Alexander Somlaly). Notably the JCPAA subsequently recommended that the *Auditor-General Act 1997* (Cth), s 37(4) be amended so that the phrase “If the Auditor-General decides to omit particular information” be “When the Auditor-General is required to omit particular information” to avoid any ambiguity so that when the Attorney-General has issued a certificate the Auditor-General must not include that information in a report tabled in Parliament: see JCPAA Report No 386, n 5, pp 38-41.

²³⁵ See Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, pp 7108-7109 (Andrew Murray). In general this may only be a theoretical possibility: see JCPAA Report No 386, n 5, p 40. Notably a similar provision in the *Audit Act 1901* (Cth) was relied on: see Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, p 7113 (Ian Campbell, Parliamentary Secretary to the Treasurer).

²³⁶ *Auditor-General Act 1997* (Cth), ss 11-29. See also Auditor-General's Response to Report 296, n 5, pp 12-19.

measures that might have been expected to deliver greater “independence”. During the development and consideration of the *Auditor-General Act 1997* (Cth)’s forebears, the Senate had insisted on a number of measures going directly to the Auditor-General’s independence: the establishment of an independent audit committee of Parliament to both provide advice to the Auditor-General on the Parliament’s priorities on audits and to make recommendations to the Executive on the appropriation for the ANAO; that the appropriation for the ANAO be an appropriation of Parliament; that the practice of audit cost recovery from departments cease; that the Auditor-General be the sole auditor of government; and, that the Auditor-General be a statutory officer of the Parliament and a separate statutory authority.²³⁷ The subsequent *Auditor-General Bill 1994* (Cth) was introduced into the House of Representatives and referred to the Joint Committee on Public Accounts (JCPA),²³⁸ meanwhile the Senate referred to the JCPA a motion to establish an audit committee of the Parliament.²³⁹ The JCPA’s report supported the “principles behind the legislation”.²⁴⁰ This favourably accepted the Auditor-General’s mandate to audit the financial statements of all Commonwealth entities and establish the Auditor-General’s office as a statutory agency.²⁴¹ The main concerns were about restrictions on the Auditor-General’s mandate to conduct “performance audits”,²⁴² the Auditor-General’s mandate to set the terms and conditions of the Auditor-General’s office staff,²⁴³ and the involvement of the Parliament in establishing the Auditor-General’s office work priorities and appropriations.²⁴⁴ The *Auditor-General Bill 1994* (Cth) lapsed when the Parliament was prorogued.²⁴⁵

Before the *Auditor-General Bill 1996* (Cth) was introduced the Minister for Finance wrote to the JCPA seeking an inquiry into “appropriate measures that could be incorporated into the *Auditor-General Bill* ... to support the *functional independence* of the Auditor-General, in keeping with the nature of that Office” (emphasis added).²⁴⁶ The JCPA subsequently reported recommending, in part:

- the *Auditor-General Bill* state that the Auditor-General is an “Independent Officer of the Parliament”,²⁴⁷
- the Auditor-General have complete discretion in exercising his audit functions²⁴⁸ and a mandate to audit *all* Commonwealth entities (including GBEs);²⁴⁹

²³⁷ See Commonwealth, *Parliamentary Debates*, Senate, 3 March 1994, p 1453 (Gareth Evans, Minister for Foreign Affairs). These measures were in effect the recommendations of the JCPA Report No 296, n 2, pp xviii-xxviii.

²³⁸ See Commonwealth, *Parliamentary Debates*, House of Representatives, 29 June 1994, p 2278 (Kim Beazley, Minister for Finance).

²³⁹ See Commonwealth, *Parliamentary Debates*, Senate, 28 June 1994, p 2094 (Robert Ray, Minister for Defence) and 30 June 1994, p 2372 (Brian Gibson).

²⁴⁰ JCPA Report No 331, n 13, p 58.

²⁴¹ JCPA Report No 331, n 13, p 58.

²⁴² JCPA Report No 331, n 13, pp 63-67.

²⁴³ JCPA Report No 331, n 13, pp 78-83.

²⁴⁴ JCPA Report No 331, n 13, pp 97-109.

²⁴⁵ The Thirty-seventh Parliament was prorogued by the Governor-General on 29 January 1996: Commonwealth, *Parliamentary Debates*, Senate, 30 April 1996, p 1; House of Representatives, 30 April 1996, p 1.

²⁴⁶ JCPA Report No 346, n 5, p 2.

²⁴⁷ JCPA Report No 346, n 5, p 61. Adopted at *Auditor-General Act 1997* (Cth), s 8(1).

²⁴⁸ JCPA Report No 346, n 5, p 62. Adopted at *Auditor-General Act 1997* (Cth), s 8(4).

²⁴⁹ JCPA Report No 346, n 5, p 76. Adopted in part at *Auditor-General Act 1997* (Cth), ss 11, 15 (Agencies in accordance with the *Financial Management and Accountability Act 1997* (Cth)), 12, 16 (Commonwealth authorities and their subsidiaries in accordance with the *Commonwealth Authorities and Companies Act 1997* (Cth)), 13, 17 (Commonwealth companies and their subsidiaries in accordance with the *Commonwealth Authorities and Companies Act 1997* (Cth)), 18 (general performance audit of the “Commonwealth public sector”) *except* “performance audits” of GBEs unless requested.

- the staff of the ANAO assist the Auditor-General²⁵⁰ and be directed only by the Auditor-General in performing their duties;²⁵¹
- the JCPAA have a role in the appointment,²⁵² resourcing and reviewing of the Auditor-General;²⁵³
- the ANAO appropriations be identified separately from the other appropriations of the Executive and Parliament;²⁵⁴
- the Finance Minister make the entire appropriation for the ANAO available to the Auditor-General;²⁵⁵
- the Auditor-General only be limited to disclosing information where the “information would be likely to prejudice national security” and report this to the Parliament with reasons;²⁵⁶
- any directions given to the Auditor-General by the Executive be in writing and reported to the Parliament;²⁵⁷ and
- the Auditor-General be able “to report to Parliament on any matter at any time as the Auditor-General sees fit”.²⁵⁸

The measures not taken up in the *Auditor-General Act 1997* (Cth) were:

- That any direction from the Executive be in writing.²⁵⁹ This was perhaps obviated to some extent by giving the Auditor-General absolute discretion in the performance of his functions.²⁶⁰
- That the ANAO appropriation be set out in a separate schedule;²⁶¹
- That the Auditor-General’s auditing mandate extends to GBES.²⁶²
- That the exclusion of sensitive information be confined to only “information would be likely to prejudice national security”, the *Auditor-General Act 1997* (Cth) covering a significantly wider range of information;²⁶³
- That the JCPAA approve the nominated Auditor-General and conduct public confirmation hearings.²⁶⁴

²⁵⁰ JCPA Report No 346, n 5, p 62. Adopted at *Auditor-General Act 1997* (Cth), s 39. See also *Financial Management and Accountability Act 1997* (Cth), s 5; *Financial Management and Accountability Regulations 1997* (Cth), reg 5 and Sch 1 (item 116).

²⁵¹ JCPA Report No 346, n 5, p 62. Adopted at *Auditor-General Act 1997* (Cth), s 40(2).

²⁵² JCPA Report No 346, n 5, p 65. Adopted in part at *Auditor-General Act 1997* (Cth), s 9 and Sch 1 (item 2).

²⁵³ JCPA Report No 346, n 5, p 67. Adopted at *Public Accounts and Audit Committee Act 1951* (Cth), s 8(1)(g)-(l). See also *Audit (Transitional and Miscellaneous) Amendment Act 1997* (Cth), s 3 and Sch 2 (item 1129).

²⁵⁴ JCPA Report No 346, n 5, p 68. This has not been adopted: see, eg, *Appropriation Act (No 1) 2008-2009* (Cth), Sch 1 (Prime Minister and Cabinet Portfolio).

²⁵⁵ JCPA Report No 346, n 5, p 68. Adopted at *Auditor-General Act 1997* (Cth), s 50.

²⁵⁶ JCPA Report No 346, n 5, p 68. Adopted in part at *Auditor-General Act 1997* (Cth), s 37(2).

²⁵⁷ JCPA Report No 346, n 5, p 71. This was not adopted at all.

²⁵⁸ JCPA Report No 346, n 5, p 76. Adopted at *Auditor-General Act 1997* (Cth), s 25(1).

²⁵⁹ See JCPA Report No 346, n 5, pp 70-71.

²⁶⁰ See *Auditor-General Act 1997* (Cth), ss 8(4), 40(2). The concern at the time was that the *Financial Management and Accountability Bill 1994* (Cth) proposed that the Auditor-General provide information to the Finance Minister on request, and that this should be modified to limit such requests. However, the *Financial Management and Accountability Act 1997* (Cth), s 50 makes no such concessions, despite the assurances provided to the JCPAA at the time: see JCPA Report No 346, n 5, p 70.

²⁶¹ JCPA Report No 346, n 5, p 68.

²⁶² See *Auditor-General Act 1997* (Cth), ss 11-13, 15-18. Further, the mandate also does not extend to “performance audits” of persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (Cth) allocated for the purposes of the *Financial Management and Accountability Act 1997* (Cth), s 5 (“Agency”) and *Financial Management and Accountability Regulations 1997* (Cth), reg 4(1) (s 15(3)). This extends of “performance audits” of the staff of senators and members, and potentially extends to others (most notably the “National Media Liaison Service” (otherwise known as aNiMaLS)): see Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, pp 7065-7066 (Ian Campbell and Dee Margetts).

²⁶³ See *Auditor-General Act 1997* (Cth), s 37(2).

²⁶⁴ See JCPA Report No 346, n 5, p 65.

With the introduction and debate about the *Auditor-General Act 1996* (Cth) there was a limited focus on those matters raised by the JCPAA but not adopted,²⁶⁵ and instead there was proclamation of the Auditor-General's "functional independence".²⁶⁶

The *Auditor-General Bill 1996* is designed to achieve a number of related purposes: foremost, the re-establishment of the Office of the Auditor-General of the Commonwealth of Australia, but in a way that both symbolically and practically strengthens the *functional independence* of the office beyond that available under current laws. The bill declares the Auditor-General to be an "independent officer of the parliament", as an expression of the primary and unique relationship which the office has with the parliament. In keeping with the government's publicly stated commitment to confer genuine functional independence on the Auditor-General, a range of statutory safeguards are included in the bill to prevent inappropriate influence being exerted on the Auditor-General by either the executive or the parliament (emphasis added).²⁶⁷

The "functional independence" has been retained and the JCPAA appears to consider the existing arrangements in the *Auditor-General Act 1997* (Cth) are satisfactory to "guard the independence of the Auditor-General".²⁶⁸ While the *Auditor-General Act 1997* (Cth) has undoubtedly addressed some aspects of the "independence" of the Auditor-General, this article demonstrates that the matrix of legalities delivers "functional independence" that belies complete "independence". This "functional independence" depends on the Parliament being vigilant and the members of both the Senate and House of Representatives distinguishing between their role as Parliamentarians (representing their electorates) and their party affiliations and discipline. As this article clearly demonstrates, the Auditor-General is potentially *not* completely independent of the Executive, and the rhetoric of the Auditor-General being an independent officer of the Parliament needs to be considered within the potential influences exercised over the Auditor-General.²⁶⁹ The salient caution remains:

for public sector audit to be politically useful to the Executive, the extent of its intrusions in public sector audit have had to be downplayed and disguised to enhance the appearance of independence.²⁷⁰

As a consequence, the symbolism of the Auditor-General's "independence" should be carefully assessed against his performance and this depends on the Parliament's vigilance.

²⁶⁵ See Commonwealth, *Parliamentary Debates*, Senate, 29 September 1997, pp 7065-7074, 7108-7118, 7119-7122, 7148 (Ian Campbell (Parliamentary Secretary to the Treasurer), Dee Margetts, Andrew Murray, Nicholas Sherry and Peter Cook). Notably an amendment proposed in the Senate that would have prevented the Attorney-General restricting the Parliament's access to information considered by the Auditor-General (see *Auditor-General Act 1997* (Cth), s 37(3)) was rejected by the House of Representatives and this was subsequently agreed by the Senate: see Commonwealth, *Parliamentary Debates*, Senate, 2 October 1997, pp 7453-7454, 7467-7471; House of Representatives, 1 October 1997, pp 8962-8965.

²⁶⁶ See also *Explanatory Memorandum Auditor-General Bill 1996* (Cth) p 1 providing: "The Auditor-General Bill creates the office of the Auditor-General for the Commonwealth and defines the powers and functions of that office to support its *functional independence*" (emphasis added).

²⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 1996, p 8342 (John Fahey, Minister for Finance); Senate, 5 March 1997, p 1350 (Ian Campbell, Parliamentary Secretary to the Treasurer).

²⁶⁸ See, eg, JCPAA Report No 386, n 5, pp iii and 3.

²⁶⁹ See Senate Legal and Constitutional Affairs Legislation Committee (*Auditor-General Bill 1996*), n 12, pp 13-24.

²⁷⁰ Funnell, n 9 at 112.