
Auditors-General: Policies and Politics*

Tony Harris

Seven years is a reasonable amount of time to spend as the Auditor-General of New South Wales. I think the law-makers in NSW are quite right in saying that it should be a seven year non-renewable term, because at the end of the seven years you're exhausted, and with any auditor-general they're looking for a change by that time. I think in my case they were looking for a change because in some respects I saw the job rather differently from those who went before me, and perhaps from those who would come after me. And as someone said in Canberra, that's a function of where you come from.

Because I had been a public servant in Canberra for over twenty years, and had also worked in Canberra as the head of a minister's office, I had been able to see all of the facets of the Commonwealth public service. And taking that knowledge to Sydney enabled me to apply it in the job of Auditor-General.

This upset a number of ministers because they hadn't before seen auditors-general who had actually audited the relationship between the ministry and the public service. I had made a decision early on to examine that relationship because I thought it was the most useful area to mine.

The law in NSW gives some limitations to the work of auditors-general, and it quite rightly says that auditors-general are not permitted to question the objectives of government policy. That's a sound piece of law, because ministers in their political environment should be able to define the destination that they wish to take the country during their term of office. So I was not allowed to comment on the government's

* This paper was presented as a lecture in the Department of the Senate Occasional Lecture Series at Parliament House on 19 May 2000.

policy objectives, but the means used to arrive at that destination did fall within the audit ambit. It fell within the audit ambit because the Act allowed me to examine the activities of government, to consider whether they were effective and met objectives, and whether they were economical and efficient. It also allowed me to look at whether they were lawful, as against applicable law. This performance audit function was legislated in 1992, the same year that I arrived in Sydney.

In some senses I was the first auditor-general to undertake this performance audit function. Prior to it being enacted there was strong opposition from the bureaucracy to performance audits. Indeed, when Gerry Gleeson was head of the NSW Premier's Department, when he saw himself as being fairly powerful in government, he described this period as the 'Wran-Gleeson era'. He objected to performance audits because he said they would lead auditors-general to question the policies of ministers—not the policy objectives, but the policies—and he was right.

The second discussion about this issue that I was aware of occurred between Ches Baragwanath, the famous Auditor-General from Victoria, and Premier John Cain, who had a discussion about the efficiency of cleaning schools. Baragwanath argued that contractors would cost less than staff to clean schools at the same quality. Premier Cain said that the objective was to employ staff to clean schools, to which Baragwanath responded by saying that the objective was to have clean schools. So we saw a debate about the aims versus the means of policy. As Paul Keating said when he was Prime Minister, there's a lot of confusion among politicians between those two issues. Many politicians turn the methods into the aims. They turn the route into the objective, whereas they should have their eye on policy objectives.

The test about policy objectives occurred fairly early in my time as Auditor General, when the lower house by a unanimous motion asked me to look at the sale of the State Bank of NSW to see whether the price was fair and reasonable. That gives you the clue about what the policy objective was. The government was not about selling the State Bank, full stop. It was about increasing the welfare of NSW residents by selling the State Bank, and to do that it had to get a fair and reasonable price. So they asked the Auditor-General to report before the Legislative Assembly agreed to the sale.

It occurred again under the Carr government when, by legislation, the parliament asked the Auditor-General to look at the sale of the Totaliser Agency Board (TAB). The reference was actually unbounded—'report on the sale of the TAB'. As part of the reference, we reported on whether the price was fair and reasonable. But we also reported on an objective that the government had set for itself—that the price it obtained from the sale of TAB would be no less than their unpublished reserve price for that sale. So again, you can see that it wasn't the sale of the TAB *per se* that was the objective of the government, it was a means to enhance the welfare of the state.

Having said that, ministers never became accustomed to the idea that their decisions could be subject to audit; that an appointed official (which auditors-general are), could examine the activities of a minister of state for the Crown. So when we reported on matters where the results were not agreeable to the government, you could sense that it was not an appreciated audit.

Many of these audits related to the tollways in Sydney. Sydney will have seven privately owned tollways in the metropolitan area by the time this government finishes its plans. We will have more tollways in Sydney than any other city in world. We are in advance of the rest of the world, which is a little bit of a worry in its own right, but it is a greater worry when we learn that the government never actually studied whether privately-owned tollways were important or useful or the most efficient way of developing roads in Sydney.

A number of reports were done on this matter, and each report concluded that the government ought to examine whether privately-owned tollways were the most efficient way of providing roads in Sydney. The government never did, until after I left—although shortly towards the end of my appointment, the government did ask one day if I realised that privately-owned tollways were an expensive way of providing roads to Sydney road users. I said I did.

It doesn't really matter why tollways are expensive—what I found important was that there was no policy structure within NSW that allowed that issue to be discussed. If I run down this government's policies on tollways, you will see how difficult it is to avoid comment on policies. Quite soon after the Carr government was elected, it lifted the toll on the freeway between Sydney and Wollongong. It also provided a scheme called 'Cashback', where drivers of privately registered vehicles can get their tolls back from using the M4 and the M5 tollways. So the government was in the spirit of lifting tolls. At the same time it agreed to the imposition of a toll on the M2 privately-owned tollway, and it decided more recently to impose a toll on the privately-owned Eastern Distributor. It decided not to impose a tollway on the Anzac Bridge, which is an important link between the western suburbs and the city, but it will put a toll on the tunnel that feeds onto that bridge when it's built.

You can work out any possible permutation of toll policies that you want and this government will have had one of them, at least. When you ask why they have these policies, you find out that they're driven by intensely political considerations. The fact that they're political doesn't make them unreasonable—that's what democracy is about—but what is difficult is when ministers dress up political reasons into some kind of economic rational reason.

I can give you another example. When he first became Minister for Roads, Michael Knight decided, and announced, that he would move twenty million dollars from the road allocation from the northern suburbs to the western suburbs. The reason given was that the west had a higher need for roads. Had he not provided this reason, the activity would not have been auditable by me. It was an intensely political decision. The Labor government has no seats in the northern suburbs, and the coalition government had no seats in the western suburbs. So it seemed fairly obvious that moving money that the coalition had provided to the northern suburbs to Labor-held seats in the western suburbs was entirely politically rational. Had he stopped there that would have been fine, but he then added: 'we're doing this because of the higher unmet needs in western suburbs.' If you asked the department or the minister for the paperwork to support that statement, they could not show you any because no research was undertaken to come to that conclusion.

One of the reasons that auditors-general can be—and perhaps *need* to be—a little more aggressive in NSW, is the relationship between the Auditor-General and parliament on the one hand, and the relationship between parliament and government on the other hand. The NSW government is in a far superior position with respect to its parliament than governments in most other jurisdictions in Australia—apart, perhaps, from the Northern Territory and Queensland. Thus, if a bill is put up which the upper house (in minority ownership) amends in a way that the government does not like, the government will bring the bill back to the lower house, it will accept the amendments but will not proclaim them. So we seen a situation, which has happened now several times, where each house of parliament has approved a bill, has passed it, and the government has advised the Governor not to proclaim those parts of the bill to which the government objects.

I thought this was reasonably unusual when I came across it, and I had a discussion with the government about it. The first thing they asked was why it should concern me, which was not a bad question—why *should* the Auditor-General be concerned about laws being passed in this way? Fortunately, I had done some research, and discovered that in the United Kingdom the High Court (not the highest) had struck down acts because the government had done the same thing. The High Court said: ‘No, Parliament intended the *whole* to be passed, and for you to disagree with part of the whole does not make the Act lawful.’

I mentioned this to the NSW government, however it did not change it’s mind on the issue, and indeed has since repeated the practice. I consider that a highly questionable activity. The government can, and has, prorogued parliament in the middle of a year without notice of intention because it didn’t wish the upper house to sit and embarrass the government in its debate on a matter that the government would rather not debate.

The Appropriation Bill that appropriates funds for the NSW parliament is not a bill that the upper house can amend. Of course the Senate can amend bills relating to provisions for the appropriation acts in the federal parliament—in NSW the upper house can’t. There are a whole series of differences between the way governments in NSW treat their parliament and the way the federal parliament treats its governments so as to allow, or perhaps require—certainly inspire—a different kind of audit atmosphere.

There is also a difference in the relationship between parliament and the Auditor-General. In the Commonwealth—indeed, in half of the jurisdictions in Australia which have bicameral (two chamber) parliaments—we have joint committees which look at the auditors-generals’ reports. In NSW that committee belongs to the lower house. The chair of the committee is a government member—a ‘minister-elect’, if you like. If the chairmanship is conducted well, then he can be assured that he will get a ministry later on. So the whole relationship between the Public Accounts Committee in NSW and the Public Accounts and Audit Joint Committee in the Commonwealth with the Auditor-General differs. I suppose this became self-evident when, quite early in the piece, the Deputy Chair of the Public Accounts Committee decided to tell me a story. He came from the country, and he decided to speak as if he had a piece of straw in his mouth. He said:

Y'know Tony, me dad said to me once, 'there's nuthin' that unites political parties more than when someone attacks their benefits', and I said to dad, 'that can't be right, you can't have labor and liberal joined together just because someone attacks their benefits'—and y'know, me dad was right, Tony. Me dad was right.

And that was all about not attacking parliamentary superannuation schemes—which I left until later in my appointment. But we did have a look at parliamentary superannuation schemes because one member, having served six years and six months in parliament, missed out on the superannuation package, and that cost him one million dollars. I thought one million dollars for seven years suggested that there was something wrong with the scheme. I have argued quite strongly, but to no avail, that the parliamentary superannuation schemes in existence in most jurisdictions are archaic and do not match the standards that apply to the rest of the community. You can see from that 'straw in the mouth' story that parliamentarians in NSW were quite happy to join together when they saw an issue important to them—and not necessarily important to the public, or in the public interest—threatened.

There was another issue of concern about the Public Accounts Committee that caused me great problems, and that was the issue of privatisation. The Public Accounts Committee put out a report quite early saying that because the government had no monies available, public infrastructure should be provided by private companies. As the NSW Treasury will tell you quite confidently, that's a flawed analysis. You can't say that the public sector is capital constrained in ways that the private sector is not. The private sector is as much capital constrained—perhaps more—than the public sector. You can't just go along and build public hospitals, public schools and public roads with the expectation that you would receive no revenues or profits from your investments. So what we're saying is that the private sector has the money to build a tolled road, but the public sector does not. This was once true because the Loan Council put caps on the capacity of state governments to borrow funds, up to the mid-1980s. So they came to an agreement that this was their tranche for the year, and they could not borrow any more than that tranche.

This was quite frustrating for the NSW government and led to issues like the Eraring power station, which was owned by the banks. It provided a public service and it was run, maintained and paid for by the public service, but was owned by the banks and the banks provided electricity to customers in Sydney. That was a charade.

Similarly, the Sydney Harbour Tunnel was built from private funds, but the public sector guaranteed those funds and, under a formula, ensured that those funds were topped up to the extent that was necessary—and it was to a very large extent—to pay off the bonds. In other words, the bondholders knew that Macquarie Street was behind the bonds, not the putative dealer in the bonds.

The private sector is capital constrained. But saying that we've run out of money and that the private sector should do the work, caused all sorts of problems for audits of effectiveness when we saw that the private sector was actually more expensive than the public sector in particular areas of infrastructure provision—and the Public Accounts Committee had said that this could not be so. It *is* so, and we've got organisations like the former Industry Commission (now Productivity Commission)

and the Economic Planning and Advisory Council to the Prime Minister pointing out that in some circumstances—such as when the private sector cannot manage the risk as well the public sector—private provision of infrastructure is going to be more expensive to the users than public provision.

It also led to interesting agreements such as that concerning the Port Macquarie Base Hospital, where the government paid for a hospital twice and gave it away once. This occurred because we paid for the hospital—we tendered for its construction and had it built. The management of it was tendered out to a private firm and, as part of the agreement, we agreed to provide it with scheduled Medicare payments for private services. We didn't realise at the time (because we didn't think about this very much) that within the Medicare schedule is an amount of money because of capital. So we were paying Mayne Nickless as though they owned the hospital (when they didn't) for the life of the hospital—which will enable them to recoup all of the investments that they did not make in the hospital. And at the end of the contract we had agreed to give the hospital and the land to Mayne Nickless as well. And so that famous sentence: we paid for it twice, and gave it away once.

Privatisation was not done well, for a series of reasons—in the main because the private sector is significantly more adroit than the public sector in the negotiation of these agreements. Canberrans are currently seeing issues dealing with the Bruce Stadium, and I gather that the Auditor-General here is running into legal difficulties because the private sector participants in that deal wish to make sure their reputations are not sullied.

There was no chance of sullyng the reputation of the private sector in NSW. They out-did the government every time. I had nothing but praise for them. And when they saw the drafts of the report, they couldn't conclude that they had been libelled.

There are a couple of other issues that I want to talk to you about concerning auditing and democracy. One of them concerns a limitation in our accountability train that is becoming quite important, at least in NSW, and I suspect it will become important in other jurisdictions. Though I can, I don't particularly want to criticise the way that governments have moved their Senior Executive Service (SES) on to contracts. I could repeat the South Australian Auditor-General's comments, when he said that contracts that allow SES executives to be fired for no reason and with no notice do not always permit the SES to undertake its lawful responsibilities under the Public Service Act. If it did, SES executives would be fired.

Rather than go down that track, let me just say that the kind of SES which started in NSW and is now in nearly all states and the Commonwealth has changed the nature of the public sector and the public service. We now have people in very senior positions in state and Commonwealth public service who are not trained in the public sector. They do not fully appreciate how the structure works, what the norms and rules are or what the law is for operations within the state and within the Commonwealth.

I can give you two rather bitter examples of this in NSW. I was attending an annual general meeting of one of our large, state-owned corporations, established under the Corporations Act. Ministers were having trouble with the state law, because it imposed some requirements on them (concerning Board appointments) that they

would rather not meet. The head of the co-ordinating agency said in public to the meeting: ‘well, let us deem that the law does not apply on this occasion.’ My audit risk escalates straight away when I have heads of agencies talking like that. Happily, one of the ministers there thought that was advice he would rather not have, and they met the conditions of the law.

Subsequently we came across the question of Phillip Smiles (former NSW MP). A situation occurred concerning the former member of parliament who’d been convicted of a heinous offence—since overturned by appeal. Beforehand, the question arose: if he were convicted of this offence, would he be entitled to a parliamentary pension? The government and the parliament obtained three legal opinions on this question, each of which said (because they came from government lawyers) the member would *not* be entitled to a pension if he were convicted on these matters.

The member *was* convicted and he *was* paid a pension, which he commuted into cash. I started to look at this issue and to ask how this could occur. I suppose I started to look at the issue because I’d been told that a senior minister had received one of these legal opinions and had torn it up and thrown it in the bin because it was not the kind of advice that he wanted. So we looked at this matter in some depth and eventually passed it on to the Independent Commission Against Corruption.

However, during the course of this case I spoke to another head of a co-ordinating agency who had received the legal opinion and I asked why he hadn’t done something with it, or why he hadn’t told people what was in the opinion. The head of the department said that it wasn’t his responsibility to pass legal advice on to others. So purportedly the agency that decided to pay the pension had not received legal advice on the matter. It has always been a troubling question why the government and the parliament should seek three legal opinions if they weren’t going to do anything with them—because in the end, nothing was done with them.

Law is being downplayed to a very significant extent in NSW, and I think it is being downplayed to an extent in the Commonwealth arena as well. I can give you many examples—that every year for the last several years the NSW government has spent monies unlawfully, and that over the last several years the Public Accounts Committee has never looked at the issue. On one occasion the unlawful expenditure was over three billion dollars. This was not accidental, in the sense that someone made a mistake. The government had been advised for a number of years that they had been spending, and were continuing to spend, monies unlawfully.

The same offence occurred in Canberra. I remember being called to a Senate Estimates Committee in Canberra to explain why we’d spent eleven thousand dollars more than had been appropriated. That *was* a mistake, but it said something about our systems that allowed that mistake to occur. But when you have a three billion dollar mistake you would think that the NSW parliament might wish to give that some attention. The parliament finds it very difficult to give it attention, because in NSW the parliament sits for about 40 days a year. In the Commonwealth the parliament is scheduled to sit for 72 days this year.

There are other instances about law that suggest that it is an issue that is worth examining. The Commonwealth Attorney-General has described himself as ‘foremost

a politician'. If he is foremost a politician, then his capacity to carry out the responsibilities that he used to have—to help the Commonwealth fulfil its constitutional obligation to uphold the law—becomes reduced. If the Attorney-General of the Commonwealth says that he cannot defend the judiciary because he's a politician, then there are other issues that he cannot do well either, because he is a politician. He cannot look at, for example, the GST advertising that we're seeing now. And he cannot ask himself 'is that lawful?' because, as a politician, that kind of question is not one that he would wish to ask. This puts a very big burden on auditors-general now, because auditors-general are typically not legally trained. But typically, legal issues are now becoming significantly more important, as the public service considers them to be significantly less important.

A lot can and did happen in seven years. We won the Olympic Games (although most of us were praying that Beijing would win), and we had the minister at the time saying that we were going to make a twenty-seven million dollar profit from the Games. The Games, at last count, are going to cost NSW taxpayers about \$2.2 billion. We have seen the role of parliament diminished further as governments ignore laws that both houses have passed. We've seen freedom of information become tighter. We've seen commercial-in-confidence issues become more apparent when public servants decline to answer questions asked by senators on the public's behalf.

In many ways, it's a good time for me to have become a journalist—at least I can say what I think.



Question — I'd like to refer to the point you made about NSW parliamentary superannuation. I was absolutely appalled to read that this was sneaked through on Christmas Eve by one of the independents. It seemed obvious that they had all been caucusing away together behind the scenes and that they expected this to go through without any obstacles. I think an alert reporter from the *Sydney Morning Herald* found out about it, and then there was a lot of hypocritical dissembling by some of the politicians denying that they really knew what it was about. I thought it was a very sad comment on the lack of accountability by parliamentarians.

Tony Harris — It's worth explaining that a little more. It was a very technical amendment moved by an independent member of the upper house. When I say 'technical', it was a very difficult amendment to draft and a very difficult amendment to understand. And whenever you see an independent member moving a technical amendment which is unanimously adopted, you have to start worrying. When it occurs at midnight on the last day of a parliamentary sitting for the year before the house is prorogued, then your suspicions should rise a mite more. When it is referred to the lower house within five minutes and is passed without even a vote being counted, then your suspicions can be heightened again. But I wouldn't say that we relied solely on the journalists on that occasion. The Audit Office had an understanding of what was occurring, and was preparing itself to advise the rest of the parliament about it, because in truth most members of the parliament did not know. It was done by a very select group of people. Somehow—and it wasn't through our

office—an intrepid journalist found out and he made the most of it. It didn't help the reputation of parliament very much, unfortunately.

Question — You just informed us about the Macquarie Hospital. I remember that quite a large group of people objected to its privatisation. There was a public meeting and a number of politicians attended and told people that it would have better service, a reduction in the cost of refurbishment, and other things. I am quite shocked by what you have told us today about what actually happened—that the hospital was given away to a private concern to make a profit from sick people. I would like to know, in accordance with the Constitution, what we could do to stop such things? Do you have a right to take the government to the High Court, or any other measures to stop this? We have had enough of politicians telling us all sorts of things, for example in the ACT they destroyed a quite wonderful and structurally sound hospital, only to build a private hospital. I wonder if the land was given away to this organisation, too?

Tony Harris — You'll have to ask John Parkinson the last question. The solution to all of this is for the government to become much freer with information. The High Court has said on more than one occasion that there is a limit to the capacity of the parliament and the government to withhold information from the people and its representatives in the kind of democracy Australia has. In fact that was a unanimous finding of the High Court in a case called, I think, *Longey v the ABC*. That startling change to the law in Australia is represented by one sentence: 'The High Court's unanimous finding that there is a limitation to the power of the government and the Parliament to withhold information from the people.' When I was writing about this stunning change in law in the *Financial Review* early this year, I thought I would ask the Attorney-General of NSW (because his department was involved in the case of refusing information to the upper house) and the Attorney-General of the Commonwealth (because the High Court is a Commonwealth matter) for their views on this stunning change to the law. They had no views. You see, they're politicians, and it's not really helpful for attorneys-general to say that the basis of our Freedom of Information Act, the basis of the public service limitations—the regulations and laws preventing public servants speaking—are affected by this High Court decision.

But that's the solution, because if you have information, and if information is more widely available, then people who are interested and have the time and the skills can actually look at it, and make a case. Whereas at the moment it's the auditors-general, with their limited budgets, who are the only ones who have unlimited access—and even in NSW we don't have unlimited access to all documents. Legal documents and cabinet documents are excluded from our purview.

So that's the arena on which I would be agitating. The High Court has said that, for democracy to work, people must have access to information and that governments cannot have an untrammelled power to withhold it. Let us find out what the new boundaries are within which we can demand information, so that we can exercise our responsibilities under the Constitution, come election time.

Question — Would you like to comment on the contracting ability of the public service, and in particular the quality of specialist advice provided by public servants, whether it's in the areas of health, law or engineering?

Tony Harris — In NSW we have great difficulty with public service contracting, tendering and negotiating these agreements. Firstly, because they're not trained to do so. This is a widespread new phenomenon we are grappling with.

Secondly, we are not rewarded for doing so. In the private sector they will lose their jobs if the contract performs poorly, and they will receive significant benefits if it is profitable. That sharpens your mind. We don't have that pencil-sharpener in the Commonwealth.

Thirdly, we are negotiating from the wrong position. The best deal that I ever saw in NSW was the government's decision not to build a new railway station just south of the Sydney Harbour Bridge. And that was the first time I ever saw a government make an announcement that they were going to do something, and then decide that it was too expensive, and they wouldn't do it. This is what happens to us all the time—we say, 'let's go to Hawaii at Christmas', and come the time and it's too expensive, then we won't go. We actually contemplate, after we've made some in-principle decisions, and can be quite happy to back out. Certainly the private sector is quite happy to back out if it's not profitable. But rarely do you see governments backing out.

So we had Mr Baird—now a member of the House of Representatives, once the Minister for Transport in NSW—say, 'the new Southern Railway between Sydney and the airport would be built without one dollar of public monies'. He was quite right—it was \$700 million by the time the deal was done. We did not, in that period of time, think, 'hey, can we afford to spend 700 million dollars on something that we had budgeted not to spend anything on?'

So we have that difficulty, as well as the hiring of advisers. The Roads and Traffic Authority (RTA) hired advisers for the Eastern Distributor (which might be a 400 million dollar deal) and offered \$10,000 for advice on the financial aspects. Now \$10,000 would not buy you a day's time from a decent financial advisory firm or investment bank. It actually went up to \$100,000 as RTA, over time, felt that \$10,000 wasn't enough. But still the advice wasn't sufficient to match the complexity of the deal, and so we didn't do very well.

There's no easy solution to this, other than ministers understanding that they should be able to walk away from deals that are too expensive, from an understanding that the public sector isn't really yet geared up for this kind of negotiation.

I'll give you another example. In the Commonwealth we sold the Foreign Affairs building—a purpose-built building because it has in its basement some of our security apparatus. We sold it—and then we leased it back of course, because it was a purpose-built building for Foreign Affairs. The people who bought it said that this was a no-brainer. What does that mean—a no-brainer? We've got a triple-A government paying more than triple-A rates for a building. We don't have any exposure to this building, the Commonwealth built it, the Commonwealth is occupying it, we don't have any substantial risk about owning it, but it's as if we lent the money to the Commonwealth and we got better than triple-A rates. So they call that a no-brainer.

And we're going to do it again with Defence buildings. We're going to be selling Defence buildings and we're going to be leasing them back, and we're going to be making money out of this. The private sector isn't going to make money, we are. The private sector doesn't exist to make money, apparently. I just don't understand the logic of it—you might as well sell Parliament House and lease it back.

So sometimes our structure's not right and our incentives are not right—there's no easy solution, though it is a problem that's worth recognising.

Question — If you'd made a complaint to the Auditor-General, as a journalist and as a citizen, about illegal or unlawful decisions made by public servants, and if the Auditor-General investigated and found that the complaint was justified and that five million dollars of public money had been unlawfully allowed, but that it wasn't corrupt because this problem was going on in the whole of that department—if you made your report and nothing was done about it in your local legislature and it received half an inch of column space in your local media, what would your reaction be and what would you do next?

Tony Harris — It's probably true that there's a difference in definition between corruption and illegality. Not everything that is illegal is necessarily corrupt. Corruption has this air of self-gain about it, or crass negligence or issues like that. So I probably wouldn't necessarily criticise an auditor-general for coming to a conclusion that it wasn't corrupt. However, if it's unlawful, it's unlawful. And if it is unlawful, then it's a matter that should be reported to parliament—and that's all an auditor-general can do—and then it's up to parliament to determine what they should do.

As a journalist I was questioned about unlawful spending before an upper house committee at the beginning of this year, and they asked: 'are you like a judge—we pass the laws and you just have to judge according to the laws?' And I said, 'yes—you pass the laws and it's not for me to question them, or make value judgements about them. If they're broken in a material way then I have to report them to parliament and it's up to you to determine whether your laws are sensible or not. Mind you, if your laws are not sensible, then there's something wrong with parliament. If you're saying that your own laws are silly, then there's something wrong with you.'

I can't be responsible for the press, either, as an Auditor-General. All I can do is try to put material out, as the law allows, in an understandable way, and if the press don't comprehend this, then try the ABC.

Question — On the supremacy of economics over finance, every report you have produced has said, 'look, this might have appeared financially clever, but it was economically dumb'—particularly in relation to infrastructure, which you've just alerted us to. You have articulately outlined the problem and the conflict, but what I'm curious about is how this has happened. How has finance taken over from economics? Is it a problem in public perception, or in people's understanding, or in our accounting standards? How can we have a Federal Treasurer say, 'hey, we've got our government debt down to seven per cent of GDP', rather than saying 'we have reduced public assets by 200 million dollars'? Different framing, but the same thing. What is the root cause of the problem?

Tony Harris — A lot has to do with presentation. We're having an argument with this government today about what the underlying deficit is, or the underlying surplus. I call it an underlying deficit of about \$1.7 billion. So yes it has a lot to do with presentation.

It used to be that if you sold buildings, then that went straight to your bottom line because it reduced your spending. The revenue that you received from the sale of the building reduced your spending. We are trying to mediate that by improving the standards, and certainly the GFS standards now introduced by the Australian Bureau of Statistics give you a much better idea about what is going on.

But there is still this problem of time, and also of classifying things properly. So when, in NSW, we said to a builder that we needed to have a building for lawyers to service the courts, we gave them the block of land and asked them to build us a building which we would then rent from them for the economic life of the building. Then the building will be destroyed as required by the Tax Office, in order for the tax deduction of depreciation to be obtained. When that happens, you start to scratch your head. I would say we owned that building—just as I would say we own the Sydney Harbour Tunnel—and the government will object to that, because if they own the building they also own a liability which they didn't wish to book.

So yes, there is a lot to do with accounting standards and the like, that we have to be quite diligent about and seek to improve. And even when the standards don't allow us to say something is what it is, we can at least describe it fulsomely in the report so that people can make up their own mind.

Question — What is the future for auditors-general? We've had Ches's experiences in Victoria, you've had some interesting experiences yourself from time to time, and then in the late eighties to early nineties there were the experiences of the Commonwealth Australian National Audit Office. What's your view about the future of auditors-general in terms of more independence, or less independence—are they more in the sights of government now?

Tony Harris — That's a good question, and I don't know the answer. I hesitate to say we should go down the South African route and make the Auditor-General a constitutional officer.

Having said that, in NSW—as much as the government humph'ed and haa'ed and showed its displeasure from time to time—they increased the budget and Bob Carr did go public saying that he welcomed the difference between NSW accountability and Victorian accountability under Kennett. In NSW we had an Independent Commission Against Corruption, we have an active Ombudsman, we have an active Auditor-General, and we see that as an important part of the competitive advantage that this state has.

And indeed, I've heard that from the business sector as well. Leightons would not have tendered for the casino licence in Sydney, except that the accountability arrangements in NSW were a lot better than they were in those states where they did tender and lost the race. You can think about that sentence later on. They obviously

thought that they had lost the race unfairly in some states, and of course they won the race in NSW against Packer—which was some race.

So you must take encouragement from the fact that, as much as they mutter, they still fund the office and they still increase it's funding, expand its functions and claim some benefit.

The best way for an auditors-general to survive, it seems to me, is to become relevant to the public, because in the end it is the public interest that they are serving. Although the parliament plays a very important part in that, parliament is also occupied by politics. So if the Auditor-General can ensure that the subjects they examine are meaningful—which probably means they are controversial—then the public will support you. If you avoid controversy, then you avoid the important issues. If you follow and look for the controversial issues and don't wait to be asked, if you write your reports in ways that can be easily disseminated or understood, then the public will support you—and having the public behind you is a hell of a lot better than having most ministers.

Question — You have said that in many cases the law has been broken, and I think you said in one instance it was for three billion dollars. It's obvious that the Act requires you to report to the parliament which passes those laws, but is there any mechanism where the responsible ministers or governments can be hauled before a court for breaking the law?

Tony Harris — You might have seen this happen in Victoria, when the Director of Public Prosecutions wanted to charge the Premier for contempt. And you might remember that the Premier had the law changed, so that it was only the Deputy that could charge ministers for contempt. When you start to see those sorts of responses, you must start to worry about the structure of accountability in the state. And of course we had great reasons to worry.

In NSW, if a minister has spent monies unlawfully and is charged by someone and convicted by court, it's a criminal offence. But I don't expect to see a publicly appointed officer go and charge a minister. We have these laws, but presumably they're not meant to be enforced.

I've actually thought about this a little. Who has the standing to stop governments from unlawful acts? It's not clear. I think the Auditor-General in NSW has the standing to go and get a determination from the Supreme Court, and once having the determination of the government from the Supreme Court, the government would be loath I think to continue that activity.

Although standing has improved significantly following the Batemans Bay Aboriginal case considered in the High Court a year or so ago, it used to be that people who were busybodies couldn't go to court to seek relief against the government. Now the High Court has widened that view, so that if you have an indirect interest in the matter you may go and seek relief. Of course, if you do go, you need your \$500,000 as well. So it's quite an interesting issue. I suppose what we should do is try to have an enlivened Opposition, and you do in Canberra. But with only 40 sitting days a year, you do not have an enlivened Opposition in NSW.

Question — You've argued persuasively that the public has the right to know what contractual deals the government is up to. But how would you propose that that information on contracts be made available, and what limitations, if any, should there be on that?

Tony Harris — I don't think there is much in an executed contract that you could describe as requiring protection. Certainly, if it's a large and complex contract, as we see when we're talking about water filtration plants or Eastern Distributors, there would probably be 300 people in Sydney who know the details of those contracts. And if that's a secret, then lots of things are secrets. It cannot be argued successfully that that information ought to be restricted. There may very occasionally be material in a contact which has commercial value (because it hasn't been patented or is subject to copyrights), but once it's executed—except for those rare occasions—the whole thing should be made public.

Now how do you get that done? I'm trying to persuade the press media that we have to start to train public servants in the law, because there would be very few public servants in the Commonwealth that know that the Freedom of Information Act does not prohibit access to Cabinet documents. So if a public servant says: 'No, you can't have look at that because it's a Cabinet document', then that is an invalid reason. So we have to train public servants in what it means.

It wasn't so long ago that estimates of future expenditure or estimates of GDP or inflation growth were not information. If you asked for Treasury's estimates for inflation for the next year, you were told that it didn't have to be provided under FOI, as it was not information. That was true, and not only was it true, it was upheld by the Administrative Appeals Tribunal. So we have taken the issue some way by training and by having the courts properly interpret the law. But more than that, we have to get an occasion where we are refused a document, take it to the High Court and say 'is this one of those powers which you say the government doesn't have?' Because the Auditor-General is not going to do it and I don't think the government of either persuasion is going to do it—we might get an Opposition that promises to do it, but I could tell you about that, too.

The Carr Opposition were very concerned about political advertising and put up a bill to significantly reduce the capacity of political advertising, which the Fahey Government rejected. The Collins Opposition put up the same bill to the Carr Government, and the Carr Government rejected it. Yet when you actually point out these issues to governments, and ask how they can be taken seriously when they behave like that, they don't even get embarrassed.

So, we need to find an appropriate occasion, and test it. The High Court is just looking for a case, but finding out what the case is and who can present it is the problem.