



Auditor-General for Australia



4 October 2018

Senator Dean Smith  
Chair  
Joint Committee of Public Accounts and Audit

By email: [jcpaa@aph.gov.au](mailto:jcpaa@aph.gov.au)

Dear Senator Smith

**Australian National Audit Office (ANAO) submission: Inquiry into the issuing of a certificate under section 37 of the Auditor-General Act 1997—Inquiry based on Auditor-General Report No.6 (2018-19) Army's Protected Mobility Vehicle—Light**

I am writing to provide the Joint Committee of Public Accounts and Audit (JCPAA) with the ANAO's submission for the Committee's inquiry into the recent issuing of a certificate by the Attorney-General under section 37 of the *Auditor-General Act 1997* (the Act). I refer to this certificate in the submission as the 2018 certificate.

The submission notes that the Act sets out a framework which recognises that it is in the public interest for the Auditor-General to report independently and publicly to the Parliament. The Act therefore permits the Auditor-General to disclose information, as audit evidence, which might not otherwise be made public. Subsection 37(1) of the Act provides a check on this presumption of public disclosure by setting out the limited circumstances in which there may be a countervailing public interest in the non-disclosure of particular sensitive information. Subsection 37(1) provides that the Auditor-General must not include that information in a public report where the Auditor-General forms the opinion it would be contrary to the public interest to disclose it, or where the Attorney-General issues a certificate in respect of it.

In this first exercise of the certification power under subsection 37(1)(b) of the Act by the Executive, the Attorney-General's certificate was not limited to preventing the disclosure of 'particular information' to which prohibitions on release otherwise applied. The certificate required the omission of analysis by the ANAO and part of the audit conclusion relating to the audit objective, which was to assess the effectiveness and value for money of this Defence acquisition.

The Executive's first exercise of the certification power under subsection 37(1)(b) of the Act establishes a precedent which, if repeated, may affect Parliament's scrutiny of the Executive by limiting the Auditor-General's independent reporting to Parliament on the procurement and sustainment activities of Commonwealth entities, particularly but not solely in the defence context.

Part 6 of the submission outlines a range of matters which the Committee may wish to consider in the context of its current inquiry. The discussion is informed by the ANAO's experience relating to the recent certification process, and the two key themes considered in past reports of the Joint Committee of Public Accounts (JCPA) and JCPAA addressing section 37 of the Act and its antecedent, section 48F of the *Audit Act 1901*. As articulated by the JCPA in 1996 in Report 346, the key issues are: the appropriate scope of any Executive discretion to order the Auditor-General to omit information in a public report; and mechanisms allowing Parliament to monitor the exercise of any such Executive discretion.

Consistent with this, my dominant concern is that the operation of section 37 results in: Parliament not being fully informed about the operation of government because Parliament does not gain access to a full un-redacted report; and there is a lack of accountability mechanisms surrounding the decision taken by the Attorney-General to issue a certificate under subsection 37(1)(b) of the Act. These two issues could be substantially addressed by amending the Act to require any report prepared under subsection 37(5) of the Act to be provided confidentially to the JCPAA.

I trust the submission is of assistance to the Committee. My officers and I will be available to discuss the submission at the hearings scheduled for 19 October 2018.

Yours sincerely

Grant Hehir  
Auditor-General

**JCPAA INQUIRY INTO THE ISSUING OF A CERTIFICATE UNDER SECTION 37 OF THE  
*AUDITOR-GENERAL ACT 1997***

**INQUIRY BASED ON AUDITOR-GENERAL REPORT NO.6 (2018-19) *ARMY'S PROTECTED  
MOBILITY VEHICLE—LIGHT***

**AUSTRALIAN NATIONAL AUDIT OFFICE SUBMISSION**

**4 OCTOBER 2018**

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## **PART 1: BACKGROUND**

### **The audit**

1. The performance audit of the Department of Defence's (Defence) procurement of Hawkei protected mobility vehicles for the Australian Army (Auditor-General, 2018) commenced on 10 March 2017 and the report was presented for tabling on 11 September 2018. A chronology of key events is at Appendix H of this submission.
2. The objective of the audit was to assess the effectiveness and value for money of Defence's acquisition of light protected vehicles, under Defence project Land 121 Phase 4. The total budget and related funding for this capability is over \$2 billion.
3. While this was an audit of Defence, the vehicle manufacturer, Thales Australia Limited, received an extract of the proposed audit report under subsection 19(6) of the *Auditor-General Act 1997* (the Act), as it was considered to have a special interest in the content of the extract.

### **Certificate and Federal Court action**

4. As noted in the Australian National Audit Office's 2017-18 annual report (ANAO, 2018, p.30 and p.80), presentation of this report for tabling was expected to occur in December 2017. Its presentation was delayed as a result of an application made on 5 January 2018 by Thales Australia Limited to the Attorney-General. The Attorney-General was asked to consider issuing a certificate under subsection 37(1)(b) of the Act, prohibiting the inclusion of particular information in a public audit report on the grounds that 'it would unfairly prejudice the commercial interests of any body or person.'
5. Thales Australia Limited also obtained orders from the Federal Court of Australia on 29 January 2018 to restrain the publication of particular information in the proposed audit report. The Federal Court action was dismissed by consent on 9 July 2018, shortly after the issuance of the Attorney-General's certificate on 28 June 2018.
6. The Auditor-General received the certificate on 29 June 2018, almost six months after the application made by Thales Australia Limited. The Attorney-General sought written input from the Auditor-General in the course of his deliberations. As part of that process, the Auditor-General drew attention to his obligation under subsection 17(4) of the Act to present performance audit reports for tabling as soon as practicable after their completion. The Auditor-General was informed that a decision would be made without unreasonable delay.
7. Thales Australia Limited advised the Auditor-General on 20 August 2018 that it had made a second application to the Attorney-General for a certificate under subsection 37(1)(b) of the Act. It is understood that the second application was withdrawn following the Auditor-General's decision to remove certain information from the proposed audit report. The Auditor-General informed the Attorney-General, and the ANAO informed Thales Australia Limited, that while the Auditor-General did not agree that there were public interest grounds under section 37 of the Act to omit this particular information from a public report, it was removed because the Auditor-General believed that it best served the interests of the Parliament for the audit report to be tabled as soon as possible and the Auditor-General did not wish to risk holding up the report's tabling through a further extended consideration of an application under subsection 37(1)(b). The Auditor-General was comfortable with excluding this information from the public report as it did not have a material impact on the audit

findings. The information was included in the Auditor-General's confidential report to Ministers (discussed below) as it provided some additional assurance to them.

8. As reported in the performance audit, external legal costs of some \$223,000 (ex GST) were incurred by the ANAO to address issues relating to the certificate and Federal Court actions (Auditor-General, 2018, p.19).

9. Defence's procurement of Hawkei vehicles continued during the Attorney-General's considerations regarding a certificate, and the ANAO's performance audit engagement also continued in accordance with the ANAO Auditing Standards. The audit report was updated to reflect material events in the procurement until July 2018. This resulted in the ANAO incurring additional costs.

### **Reporting to Parliament on the certificate**

10. This was the first certificate issued under the Act. The Auditor-General advised the Joint Committee of Public Accounts and Audit (JCPAA) that a certificate had been issued, by correspondence on 5 July 2018.

11. The Auditor-General also wrote to the JCPAA and Presiding Officers about the Federal Court litigation on 20 April 2018, as the proceeding raised issues relating to the *Parliamentary Privileges Act 1997* and the performance of the Auditor-General's functions, and was therefore likely to be of significant interest to the Parliament.

12. Other related correspondence between the Auditor-General and the Parliament is referenced in the chronology at Appendix H of this submission.

13. Subsection 37(4) of the Act provides that if the Auditor-General omits particular information from a public report because the Attorney-General has issued a certificate in relation to the information, the Auditor-General must state in the report: that information (which does not have to be identified) has been omitted from the report; and the reason or reasons (in terms of subsection 37(2)) why the Attorney-General issued the certificate. A copy of the certificate was included as an appendix to the audit report. The certificate states that in the Attorney-General's opinion disclosure of certain information contained in the audit report:

... would be contrary to the public interest for one or both of the following reasons set out in s 37(2) of the Act:

- it would prejudice the security, defence or international relations of the Commonwealth (s 37(2)(a));
- it would unfairly prejudice the commercial interests of any body or person (s 37(2)(e)).

14. As noted above, Thales Australia Limited's January 2018 application to the Attorney-General was restricted to the grounds set out in subsection 37(2)(e) of the Act. The certificate issued in June 2018 went further and was also based on subsection 37(2)(a) of the Act.

### **Omissions under the certificate and limitation of scope**

15. The information required to be omitted by the certificate was omitted from the report presented to the Parliament.

16. Much of the information required to be omitted from the audit report to Parliament was analysis by the ANAO. Further, the required omissions reached into the Auditor-General's audit conclusion relating to the audit objective, which was to assess the effectiveness and value for money of this acquisition.

17. The Auditor-General's audit conclusion could not be included in full in the report to Parliament because the certificate required that the following parts of the audit conclusion be omitted:

- part of the overall conclusion against the audit objective, as set out in paragraph 10; and
- part of the conclusion formed against specific audit criteria, as set out in paragraph 13.

18. The requirement to omit part of the audit conclusion had the effect of limiting the scope of the audit, as that part of the conclusion that could not be reported was pervasive to the overall objective of the audit. The Auditor-General was therefore unable to provide a report to the Parliament which met the auditing standards under which ANAO audits are conducted. Accordingly, the Auditor-General included a disclaimer of conclusion in the public report to the effect that he was unable to table a report that contained a clear expression of his conclusion against the audit objective.

### **Public and confidential reports**

19. The Act provides that if the Auditor-General is required to omit information from a public report because of subsection 37(1), the Auditor-General may prepare a report under paragraph 37(5)(b) that includes the information concerned, and must give it to the Prime Minister, the Minister for Finance and any responsible Minister.

20. The Auditor-General provided a confidential report to the Prime Minister, the Minister for Finance and the Public Service, and the responsible Ministers—in this case the Minister for Defence and the Minister for Defence Industry—on 6 September 2018.

21. There were no omissions in that version of the report.

### **Disclosures to Parliament prohibited**

22. The Act further provides, in subsection 37(3), that the Auditor-General cannot be required and is not permitted to disclose information omitted under subsection 37(1) to a House of the Parliament, a member of a House of the Parliament, or any committee of the Parliament.

23. This prohibition in subsection 37(3) applies only to the Auditor-General and the ANAO, not to the Executive or other parties.

## PART 2: COMMENTARY ON THE 2018 CERTIFICATE

1. The Parliament has chosen to include a statutory process, in section 37 of the Act, to allow the Executive (through the Attorney-General) to require the Auditor-General to omit 'particular information' from a report to Parliament. While this is a check and balance to the information gathering powers given to the Auditor-General under the Act, it may impact on the Parliament's ability to hold the Executive to account, by reducing independence and transparency in the Auditor-General's reporting to Parliament.

2. In Report 386 (2001) the JCPAA considered that it was 'appropriate to have the Attorney-General provide a safeguard' as 'there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government' (JCPAA, 2001, p.41). However, in its first use of section 37, the Executive has adopted an unexpectedly broad interpretation of this provision.

3. The Act sets out a framework which recognises that it is in the public interest for the Auditor-General to report independently and publicly to the Parliament, unless there is a countervailing public interest in the non-disclosure of particular sensitive information. The Act therefore permits the Auditor-General to disclose information, as audit evidence, which might not otherwise be made public. In administering section 37(1)(a) of the Act, a key consideration for the Auditor-General is, therefore, whether there is any legal or other prohibition on the release of particular information in the form of audit evidence collected by the ANAO. However, the certificate was not limited to preventing the disclosure of 'particular information' to which prohibitions on release otherwise applied. The certificate went further and required the Auditor-General to omit analysis by the ANAO and part of the Auditor-General's audit conclusion relating to the audit objective, which was to assess the effectiveness and value for money of this Defence acquisition.

4. Further, after having worked through all national security issues with the Department of Defence in the course of the audit, the Auditor-General remains unaware as to why the reasons set out in paragraph 37(2)(a) of the Act—relating to prejudice to the security, defence or international relations of the Commonwealth—apply to the information that the certificate requires be omitted from the report to Parliament.

5. The certificate creates uncertainty in all future audits of Defence acquisition and sustainment—which represent a major portion of the ANAO's annual audit effort in the Defence portfolio—and potentially other audits of government acquisition. More broadly, in 2011 the Parliament gave the Auditor-General a new mandate to conduct performance audits of Commonwealth partners, so as to 'follow the money' provided by the Australian Government to companies and other parties for a Commonwealth purpose. In an environment where Defence acquisition and sustainment activities almost always involve private contractors, such audits require the ANAO to review, and the Auditor-General to report on, matters which, if they entail any actual or perceived negative comment, will almost always be seen by the private partner as prejudicing their commercial interest.

6. As discussed, in administering the Act, the Auditor-General's approach has been in favour of disclosure, in the public interest, unless the Auditor-General is of the opinion that the public interest is served by not disclosing 'particular information' which is otherwise prohibited from public release (for example, information with a national security classification). In the defence context, the ANAO seeks the advice of the Department of Defence to inform the Auditor-General's consideration of such matters, and the Auditor-General has also met on occasion with the Secretary of Defence and the Chief of the Defence Force to discuss the disclosure of sensitive information. There is always a balance



to be struck between the public interest in not disclosing information and the broader public interest in reporting transparently to the Parliament.

7. The treatment of sensitive information arises regularly in the context of Defence auditing, and it would be of concern if this certificate set a precedent for government to regularly suppress elements of an Auditor-General's conclusion and ANAO analysis in a public report, particularly where the conclusion and analysis contain information that is not otherwise protected from public disclosure.

8. The Auditor-General remains of the view that the public interest was clearly balanced in favour of disclosure of his full audit conclusion and the ANAO analysis, on the basis that the Parliament, the Executive and the public would reasonably expect to be informed as to whether Defence conducted an effective procurement process. Further, the Auditor-General has not received any information which would suggest the particular information the subject of the certificate could otherwise be withheld from the Parliament on the basis of a claim of public interest immunity.

9. Part 1 of this submission notes that the Executive's consideration of the certificate issued in June 2018 took almost six months. While the Auditor-General was invited to provide written input to the Attorney-General, the process involved no direct discussion with the Auditor-General. Further, it is not clear whether the Attorney-General was approached only by Thales Australia Limited for a certificate, or by other parties.

10. The considerations leading to the issuing of the certificate have not been made known nor explained to the Auditor-General, and the certificate does not provide detail on the substantive reasons for issuing the certificate. This is of particular concern because, as noted in Part 1 of this submission, Thales Australia Limited applied for a certificate on the grounds set out in subsection 37(2)(e) of the Act—relating to unfair prejudice to commercial interests—while the certificate issued in June 2018 went further and was also based on subsection 37(2)(a) of the Act.

11. As a consequence, there is limited transparency to Parliament regarding the substantive reasons for issuing the certificate. This lack of transparency also means that the certificate is of limited assistance to the Auditor-General's future consideration of the public interest under paragraph 37(1)(a) of the Act.

12. In summary, the certification process has been used expansively—to suppress the public disclosure of ANAO analysis and part of the Auditor-General's overall audit opinion—rather than narrowly to prevent the disclosure of 'particular information' in a public report (as audit evidence) which is otherwise prohibited from public release. The ANAO submits that this expansion of the certificate's use was not an outcome anticipated by the Parliament in its consideration of section 37 and its antecedents (discussed in Part 4 of this submission).

13. The 2018 certificate establishes a precedent which, if repeated, may affect Parliament's scrutiny of the Executive by limiting the Auditor-General's independent and public reporting to the Parliament on the procurement and sustainment activities of Commonwealth entities, particularly but not solely in the defence context. The certification process applies to all public reports of the Auditor-General, including performance audits under section 17 of the Act and audits of Commonwealth partners under section 18B of the Act.

### **PART 3: INDEPENDENCE OF THE AUDITOR-GENERAL**

1. As discussed in Part 2 of this submission, the 2018 certificate establishes a precedent which, if repeated, may affect the Parliament's scrutiny of the Executive arm of government by limiting the Auditor-General's independent and public reporting to Parliament.

2. This Part outlines the legislative basis of the Auditor-General's independence and the views expressed by the Parliament, through its Joint Committee of Public Accounts and Joint Committee of Public Accounts and Audit, on the relationship between the Parliament and the Auditor-General. This Part also references international standards which identify the right of the national auditor to report any findings to Parliament, and the way in which Parliamentary privilege is intended to protect independent reporting to Parliament by the Auditor-General.

#### **Independent officer of the Parliament**

3. Section 8 of the *Auditor-General Act 1997* provides that the Auditor-General is an independent officer of the Parliament.

4. In Report 346 *Guarding the Independence of the Auditor-General*, the Joint Committee of Public Accounts (JCPA) highlighted that the Auditor-General 'works first and foremost for the Parliament' (JCPA, 1996, p.35) and that the title of 'independent officer of the Parliament':

... is a symbol of the primary role of the Auditor-General who assists the Parliament in its role of scrutinising the exercise of authority and the expenditure of public funds by the Executive (JCPA, 1996, p.56).<sup>1</sup>

5. Over many years, the Joint Committee of Public Accounts and its successor, the Joint Committee of Public Accounts and Audit (JCPAA), have considered the Auditor-General and supporting Audit Office to be 'fundamental to maintenance of accountability of government officials and instrumentalities to Parliament and through Parliament to the people' (JCPA, 1989, p.v). In 1996, in the context of recommending that the Auditor-General be made an independent officer of the Parliament, the JCPA Chairman commented that:

It will be apparent in this report that the JCPA considers the independence of the Auditor-General to be absolutely fundamental to public accountability in Australia. If the Auditor-General is not properly resourced or does not have a legislative mandate to carry out an effective and broad scrutiny of the public sector, then Parliament itself is compromised in its ability to hold the Executive Government to account (JCPA, 1996, p.xii).

6. In its two reviews on the operation of the current *Auditor-General Act 1997*, the JCPAA reiterated that 'The independence of the Auditor-General is fundamental to public accountability in Australia' (JCPAA, 2010, p.51) and that:

A fully functioning and successful parliamentary democracy owes much to the accountability mechanisms that are in place to provide transparency for scrutiny of its operations. The Auditor-

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<sup>1</sup> As observed in JCPA Report 296 *The Auditor-General: Ally of the People*, the intention at the time of that report (1989) was to add meaning to Parliament's status as the Auditor-General's 'client' (JCPA, 1989a, p.xv). Following a recommendation in that report and JCPA Report 346, the Auditor-General was made an independent officer of the Parliament through the *Auditor-General Act 1997*, which took effect on 1 January 1998 and replaced the *Audit Act 1901*.

General, as an independent officer of the Parliament, plays a key role in the accountability framework by supporting the Parliament in its scrutiny of executive government (JCPAA, 2001, p.1).

7. In Report 386, the JCPAA Chairman commented that the Auditor-General's enabling legislation was kept under review:

In view of the Committee's significant legislative responsibilities to guard the independence of the Auditor-General (JCPAA, 2001, p.iii).

### **Principal elements of the Auditor-General's independence**

8. In Report 346 *Guarding the Independence of the Auditor-General* (JCPA, 1996), the JCPA inquired into and documented the principal elements of functional independence for the Auditor-General, which it summarised as follows:

- **personal independence** in relation to appointment and tenure;
- a **wide legislative mandate** empowering the Auditor-General to audit the complete spectrum of Commonwealth functions;
- **audit independence**, including freedom to determine the audit programme, and to decide the nature and scope of audits to be conducted;
- **unrestricted access to information** in performance of the audit function together with the right to report any findings to Parliament; and
- **adequate resourcing** to fulfil audit functions effectively (JCPA, 1996, p.11).

9. In Report 346, the JCPA considered the issue of an Attorney-General's certificate through the prism of the fourth of these principal elements of independence—unrestricted access to information in performance of the audit function *together with the right to report any findings to Parliament*. To protect the independence of the Auditor-General, the JCPA recommended that any certification process by the Executive be limited to the single ground of prejudice to national security, and that a process for Parliamentary oversight be introduced (see Part 4 of this submission).

10. In formulating the independence principles, the JCPA referenced the 1987 Auditing Standards published by the International Organization of Supreme Audit Institutions (INTOSAI). Subsequently, the *Mexico Declaration on SAI Independence* agreed by INTOSAI in 2007 identified eight core principles as essential requirements of proper and independent public sector auditing by Supreme (ie. national) Audit Institutions, including:

Principle 5: The right and obligation to report on their work. SAIs should not be restricted from reporting the results of their audit work. They should be required by law to report at least once a year on the results of their audit work (INTOSAI, 2007).

11. The text of the *Mexico Declaration on SAI Independence* is included at Appendix G of this submission.

### **Parliamentary privilege and independence**

12. As discussed further in Part 5 of this submission, the JCPAA has also commented on the role played by Parliamentary privilege in protecting independent reporting to the Parliament by the Auditor-General. In its 2001 review of the operation of the *Auditor-General Act 1997*, the JCPAA commented that:

The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government (JCPAA, 2001, p.16).

## **PART 4: PARLIAMENTARY REVIEW OF SECTION 37 AND ANTECEDENT PROVISIONS IN THE *AUDIT ACT 1901***

1. Section 37 has been a feature of the *Auditor-General Act 1997* since it came into effect on 1 January 1998. Section 37 was preceded by section 48F of the *Audit Act 1901*, which was inserted in 1979 as part of expanding the Auditor-General's functions to include efficiency auditing.<sup>2</sup>

2. This Part provides an overview of inquiries and recommendations by the Joint Committee of Public Accounts and the Joint Committee of Public Accounts and Audit into these parts of the Auditor-General's enabling legislation.

### **AUDIT ACT 1901**

3. Section 48F(5) of the *Audit Act 1901* provided that:

The Attorney-General may issue to the Auditor-General a certificate certifying that the disclosure of information concerning a specified matter, or the disclosure of the contents of a specified document, would be contrary to the public interest-

(a) by reason that the disclosure would prejudice the security, defence or international relations of the Commonwealth;

(b) by reason that the disclosure would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) by reason that the disclosure would prejudice relations between the Commonwealth and a State;

(d) by reason that the disclosure would divulge any information or matter communicated in confidence-

(i) by or on behalf of the Government of the Commonwealth to the Government of a State or to a person receiving the communication on behalf of the Government of a State; or

(ii) by or on behalf of the Government of a State to the Government of the Commonwealth or to a person receiving the communication on behalf of the Government of the Commonwealth;

(e) by reason that the disclosure would be prejudicial to the commercial interests of a public authority of the Commonwealth or other body; or

(f) for any other reason specified in the certificate that could form the basis of a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the contents of the document should not be disclosed.

4. The full text of section 48F can be found at Appendix A of this submission.

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<sup>2</sup> Efficiency auditing was the precursor of what is now known as performance auditing.

## 1987 certificate of the Attorney-General

5. The Minister for Defence sought and obtained a certificate from the Attorney-General in 1987 under subsection 48F(5) of the *Audit Act 1901*, in respect to the Auditor-General's efficiency audit report *Department of Defence: RAAF explosive ordnance* (Auditor-General, 1987). The objective of the audit was to evaluate the adequacy and effectiveness of procedures and practices relating to the procurement, inspection, storage, handling and use of explosive ordnance within the RAAF.

6. The audit report (Auditor-General, 1987, pp.1-2) documented that:

- Formal comment on the audit report was provided by the Department of Defence in early October 1987.
- Having regard to the nature of the material examined during the audit, the Minister for Defence sought a certificate from the Attorney-General under sub-section 48F(5) of the Act, as he considered that the disclosure of certain information contained in the proposed audit report would be contrary to the public interest, in that the disclosure would prejudice the security and defence of Australia.
- The certificate was issued by the Attorney-General on 2 December 1987.
- A restricted report was prepared under sub-section 48F(6) of the Act and sent to the Prime Minister, the Minister for Defence, the Minister for Finance, and the Public Service Commission in accordance with sub-section 48F(7) of the Act.
- At the same time, a separate public report on the results of the audit, which did not disclose any of the information to which the certificate applied, was prepared in accordance with sub-section 48F(6) of the Act.

7. The Parliament's Joint Committee of Public Accounts (JCPA) reported on its review of the Auditor-General's efficiency audit report in Report 303 of November 1989.

### ***JCPA Report 303 (1989)***

8. The JCPA reported on objections by the Department of Defence to the release of the restricted report to the Committee, notwithstanding provisions in the Committee's legislation for confidential evidence to be collected. The Committee commented (JCPA, 1989b, pp.7-10) that:

The Committee is concerned that, by the Department objecting to the release of the restricted report, the Parliament is being denied the opportunity to examine matters of public administration when it is the Parliament to which the Department is accountable. Parliamentary committees often receive evidence which is confidential and yet still are able to report on such matters without breaching that confidentiality.

As the current Audit Act prescribes that restricted reports subject to an Attorney-General's certificate under s.48F not be tabled in Parliament, only the Executive is able to take action on issues the Auditor-General examines and on which he makes recommendations. This, in the Committee's view, is not appropriate as the Parliament should be able to review all reports of the Auditor-General.

9. The Committee's recommendation 1 was that:

For instances where the Joint Committee of Public Accounts is undertaking an inquiry into a Auditor-General's restricted report subject to an Attorney-General's certificate under s.48F(5) of the *Audit Act 1901*, information necessary for the conduct of the inquiry should be made available to the Committee. Where confidential documents that the Committee considers relevant to an inquiry are required, they should be provided on a restricted and in-camera basis (JCPA, 1989b, p.xi and p.10).

### **AUDITOR-GENERAL ACT 1997**

10. As discussed, section 37 has been a feature of the *Auditor-General Act 1997* since it came into effect on 1 January 1998. Section 37 provides that:

#### **37 Sensitive information not to be included in public reports**

- (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
  - (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.

11. The full text of section 37 can be found at Appendix B of this submission.

### **Parliamentary inquiries**

12. The inclusion of such a provision was considered by the Parliament's Joint Committee of Public Accounts (JCPA) in two reports issued between 1994 and 1996, in the context of reviewing the legislative package which replaced the *Audit Act 1901*.

#### **JCPA Report 331 (1994)**

13. On 29 June 1994, the Minister for Finance referred a package of three Bills to the JCPA for review. The three Bills, designed to replace the *Audit Act 1901*, were: the Auditor-General Bill 1994; the Financial Management and Accountability Bill 1994; and the Commonwealth Authorities and Companies Bill 1994.

14. As part of its review, the Committee considered clause 34(3)(e) of the proposed Auditor-General Bill 1994, which defined information as sensitive if its disclosure 'would prejudice the commercial interests of any body or person'. The Committee took evidence from a number of experts, including the Auditor-General of NSW, who stated that:

It is not clear why information that 'would prejudice the commercial interests of any body' should always be protected from disclosure. A similar clause in the Corporations Law affecting private auditors would be seen as odd (JCPA, 1994, p.76).

15. The Committee expressed a belief that Clause 34(3)(e) was unnecessarily broad and should be amended to allow the Auditor-General the discretion to determine whether the release of information would unfairly prejudice commercial interests. The Committee's recommendation 26 was that:

Clause 34(3)(e) of the Auditor-General Bill 1994 be amended to only classify information as sensitive if it unfairly prejudices the commercial interests of any body or person (JCPA, 1994, p.76).

16. This recommendation was implemented in the eventual *Auditor-General Act 1997*.

17. The Committee also reviewed Clause 34(2) of the proposed Auditor-General Bill 1994, which allowed the Auditor-General to prepare a private report including sensitive information and which required the Auditor-General to give any such report to the Prime Minister, Finance Minister and responsible Minister(s). The Committee observed that there was no opportunity for the Auditor-General to share reports containing sensitive information with Parliament or its Committees, and noted the concerns of the Auditor-General that:

I am rather uncomfortable about the fact that it is possible ... that I might feel a need to inform the Parliament about something that is sensitive. There is no way for me to do that ... I could go to the Prime Minister, the Minister for Finance or the Attorney-General, but that does not involve the Parliament ... (JCPA, 1994, p.77).

18. The Committee expressed a belief that, as a matter of principle, the Auditor-General should also have the ability to refer sensitive reports to the Parliament. It considered that the most appropriate way to achieve this would be if the Auditor-General was also required to show sensitive reports to the Chairman of the JCPA. The Committee's recommendation 27 was that:

Clause 34(2) of the Auditor-General Bill 1994 should be amended to require the Auditor-General to give a copy of a report containing 'sensitive' information to the Chairman of the Joint Committee of Public Accounts as well as to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any) (JCPA, 1994, p.xxi and p.77).

19. Recommendation 27 was not implemented in the eventual *Auditor-General Act 1997*.

20. Relevant extracts from the Committee's report can be found at Appendix C of this submission.

### ***JCPA Report 346 (1996)***

21. On 12 August 1996, the Finance Minister asked the Joint Committee of Public Accounts, in the context of preparing a revised set of Bills to replace the *Audit Act 1901*, on how best to effect government policy 'to guarantee independence for the Office of the Auditor-General from the Executive'. The Minister's reference invited the Committee to 'suggest appropriate measures that could be incorporated into the Auditor-General Bill, or other legislation, to support the functional independence of the Auditor-General, in keeping with the nature of that Office' (JCPA, 1996, pp.1-2).

22. As part of its review, the Committee stated that 'the principal purpose of the Auditor-General obtaining information is to enable complete and accurate reporting to the Parliament' and that 'the



Auditor-General must not be unduly restricted by the Executive from reporting audit information to the Parliament' (JCPA, 1996, p.25).

23. While the Committee did not have access to the proposed Auditor-General Bill 1996, it did comment on provisions in the Auditor-General Bill 1994 that it considered would have restricted the ability of the Parliament to seek advice from the Auditor-General if enacted. These provisions included Clause 34 of the Auditor-General Bill 1994, which provided that the Auditor-General could not release 'sensitive' information in a report to be tabled in Parliament if the Attorney-General had issued a certificate to the Auditor-General stating that release of the information would be contrary to the public interest. Clause 34 also provided for the Auditor-General to prepare an unabridged report (including the 'sensitive' information) but distribution of the unabridged report was restricted to the Ministry.

24. The Committee stated (JCPA, 1996, pp.26-27) that:

Clause 34, if enacted, would have compromised the Auditor-General's freedom to report to Parliament by giving the Executive a broad discretion to suppress 'sensitive' audit information from publication.

More disturbingly, the Bill did not provide any check whatsoever on the exercise of the Attorney-General's power to issue a certificate. The Parliament was not even to be informed that the Attorney-General had given a direction to the Auditor-General, let alone the reasons for the direction.

The Committee suggests that the inclusion of the same provision in the Auditor-General Bill 1996 would be inappropriate.

If the Auditor-General Bill is to contain a provision allowing the Executive discretion to prevent the disclosure of audit information to the Parliament, then the Committee considers that:

- the Executive should only have discretion to order the Auditor-General to suppress information where disclosure would be likely to prejudice national security; and
- there must be a mechanism allowing Parliament to monitor the exercise of any such Executive discretion, to guard against the abuse of the discretion.

The Committee believes that an Audit Committee [of the Parliament] could monitor the exercise of Executive discretion to withhold audit information from the Parliament. The Committee considers that if the Executive has a legislative discretion to order the Auditor-General to withhold information from the Parliament, then the Audit Committee should have the right to receive a copy of any suppressed information or an unabridged copy of the audit report from which 'sensitive' information has been excluded.

25. The JCPA further stated that:

The Committee accepts that the Executive will reserve the right to suppress the publication of audit information that would prejudice national security. However, the Committee considers that there must be a mechanism for the Parliament to check the exercise of Executive discretion in relation to directions to the Auditor-General to suppress audit information from the Parliament (JCPA, 1996, p.69).

26. The JCPA's recommendation 9 was intended to address the Committee's 'serious concerns about the broad and unfettered discretion that would have been given to the Executive, had the Auditor-General Bill 1994 been enacted, to exclude sensitive audit information from reports to Parliament' (JCPA, 1996, p.69). The Committee recommended (JCPA, 1996, p.69) that:

*The Auditor-General Bill should provide that:*

*(a) the Executive may only direct the Auditor-General to exclude sensitive audit information from a report to the Parliament where disclosure of the information would be likely to prejudice national security;*

*(b) where the Executive orders the Auditor-General to suppress sensitive audit information on the grounds of national security, the Audit Committee [of Parliament] should receive an unabridged copy of the audit report and/or a copy of the suppressed information; and*

*(c) where sensitive information is excluded from an audit report, the fact of the exclusion and the reasons for the exclusion should be reported to the Parliament in the audit report.*

27. Recommendations 9(a) and 9(b) were not implemented in the eventual *Auditor-General Act 1997*.

28. More broadly, the Committee stated that:

As a matter of broad principle, the Committee considers that the Audit Committee of Parliament should play a role in monitoring the exercise of any Executive direction to the Auditor-General (JCPA, 1996, p.69).

29. The Committee's recommendation 10 (JCPA, 1996, p.71) was intended to protect the independence of the Auditor-General by including in the new Auditor-General Bill a requirement that:

*If the Executive gives any direction to the Auditor-General, then:*

*(a) such direction should be in writing and should be reported to Parliament by inclusion in a schedule in the Annual Report of the Auditor-General; and*

*(b) the Executive should immediately report the substance of the direction, and the reasons for the direction, to the Audit Committee of Parliament.*

30. Recommendation 10 was implemented in the form of section 54 of the eventual *Auditor-General Act 1997*. However, section 19 of the *Public Governance, Performance and Accountability Act 2013* fails to acknowledge the status of the Auditor-General as an independent officer of the Parliament and requires the Auditor-General, as the accountable authority of a Commonwealth entity, to give the responsible Minister or the Finance Minister 'any reports, documents and information' in relation to the activities of the ANAO as that Minister requires. The broad scope of section 19 creates a risk that the Auditor-General could be given a direction, without the involvement of the Parliament, to provide draft audit reports and/or audit working papers to the Executive.

31. Relevant extracts from the Committee's report can be found at Appendix D of this submission.

32. The JCPA's successor, the JCPAA, reviewed the operation of the *Auditor-General Act 1997*, including section 37 and the application of Parliamentary privilege, in reports issued in 2001 and 2010. In the context of the 2001 inquiry, the JCPAA Chairman commented that the Auditor-General's enabling legislation was kept under review 'In view of the Committee's significant legislative responsibilities to guard the independence of the Auditor-General' (JCPAA, 2001, p.iii).

### ***JCPAA Report 386 (2001)***

33. The *Auditor-General Act 1997* (the Act) came into effect on 1 January 1998. In its 2001 review of the operation of the Act, the Joint Committee of Public Accounts and Audit observed that:

The Attorney-General is part of executive government. One of the roles of the Auditor-General is to review the activities of executive government. Therefore, the Attorney-General may have a conflict of interest, when determining that certain information should be restricted from public access under section 37(1)(b). In view of this, the Committee examined the constraints that apply to the Attorney-General (JCPAA, 2001, pp.39-40).

34. The Committee noted that the Victorian Auditor-General's legislation gave 'unfettered discretionary authority to the Victorian Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to Parliament.' The Committee further noted that in terms of comparison, the Victorian approach did not include any 'statutory prescription of the evaluative criteria to be applied by the Victorian Auditor-General to disclosure questions.' The Victorian legislation also did not have 'provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings' (JCPAA, 2001, pp.38-39).

35. The Committee considered it 'appropriate to have the Attorney-General provide a safeguard' given that, in the context of the Commonwealth Government's broader responsibilities as compared to the States, 'there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government' (JCPAA, 2001, p.41). The Committee also noted that:

... there are several accountability mechanisms to ensure that the Attorney-General's certificate is subject to scrutiny. These include the:

- Attorney-General's certificate being subject to the *Administrative Decisions (Judicial Review) Act 1977*;
- Attorney-General being subject to questions in Parliament; and
- the risk of public dissent if the Auditor-General put forth a strong case for reporting certain information, and the Attorney-General restricted publication.

36. The Committee's recommendation 4 focused on the alignment between subsection 37(4) of the *Auditor-General Act 1997* against the Explanatory Memorandum for the Auditor-General Bill. Minor wording changes were recommended to facilitate alignment.

37. Relevant extracts from the Committee's report can be found at Appendix E of this submission.

## PART 5: PARLIAMENTARY PRIVILEGE

1. As noted in Part 1 of this submission, Thales Australia Limited sought orders in the Federal Court in the course of the audit of Defence's procurement of its Protected Mobility Vehicle—Light to restrain the publication of particular information in the Auditor-General's report. The proceedings concerned the scope of section 16 of the *Parliamentary Privileges Act 1987* and how it applies to the Auditor-General's transacting of the business of the Parliament.

2. This Part provides an overview of the Federal Court action and past inquiries and recommendations into Parliamentary privilege by the JCPAA.

### 2018 Federal Court action against the Auditor-General

3. Thales Australia Limited sought orders from the Federal Court of Australia on 29 January 2018 to restrain the publication of particular information in the Auditor-General's proposed performance audit report. The Federal Court granted Thales Australia Limited ex parte interim orders restraining the publication of this information during the proceeding. The Auditor-General sought summary judgment in respect of Thales Australia Limited's application on the basis that it had no reasonable prospects of success by reason of the operation of section 16 of the *Parliamentary Privileges Act 1987*. The Federal Court action was dismissed by consent on 9 July 2018, shortly after the issuance of the Attorney-General's certificate on 28 June 2018.

4. The Auditor-General wrote to the Chair of the Joint Committee of Public Accounts and Audit and the Presiding Officers about the Federal Court litigation on 20 April 2018, as the proceeding was likely to be of significant interest to the Parliament for the following reasons:

- First, the proceeding concerned the privileges afforded to Parliament and, specifically, the meaning and scope of section 16 of the *Parliamentary Privileges Act 1987*.
- Secondly, the proceeding raised questions about the competency of a Court to review the actions of the Auditor-General as an independent officer of Parliament, done in the course of, or for the purposes of, the transacting of the business of the Parliament.
- Thirdly, the outcome of the proceeding may have affected the Auditor-General's performance of functions as Auditor-General, including the core function of conducting audits and reporting to Parliament on matters of importance arising from those audits.

### Parliamentary inquiries

5. The JCPAA had considered the application of Parliamentary privilege to the work of the Auditor-General in its two reports on the operation of the *Auditor-General Act 1997*, issued in 2001 and 2010.

#### **JCPAA Report 386 (2001)**

6. The *Auditor-General Act 1997* (the Act) came into effect on 1 January 1998. In its 2001 review of the operation of the Act, the JCPAA commented that:

The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the

Auditor-General from legal action so that it may provide a fearless account of the activities of executive government (JCPAA, 2001, p.16).

7. The Committee reported that its inquiry had revealed some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Advice from the Solicitor-General and the AGS had suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports, and working papers for the purpose of preparing audit reports. The AGS stated that 'unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament' (JCPAA, 2001, pp.16-17).

8. The Committee considered that there might be justification for amending legislation to provide certainty that draft reports and extracts of draft reports would attract privilege when they are circulated in accordance with the Act:

The principal reason for wanting to provide this certainty is to remove the opportunity for a person who might be adversely referred to in a draft report or extract of a draft report, to use the threat of litigation in an attempt to influence the final form of the Auditor-General's findings (JCPAA, 2001, p.17).

9. The Committee's Recommendation 1 (JCPAA, 2001, p.118) was that:

*The Committee suggests that the Privileges Committees of both the Senate and the House of Representatives examine whether Australian National Audit Office draft reports and extracts of draft reports attract Parliamentary privilege, and if they do not, should they attract Parliamentary privilege.*

10. Relevant extracts from the Committee's report can be found at Appendix E of this submission.

#### **JCPAA Report 419 (2010)**

11. In February 2009 the JCPAA resolved to review whether the provisions of the *Auditor-General Act 1997* remained adequate in the modern public sector environment, noting at the time that eight years had passed since the Committee's last such review.

12. In its 2010 report the Committee noted that its previous recommendation on Parliamentary privilege had not, to date, been taken up by either committee. The Committee again recommended that this issue be taken up by the Privileges Committees. The Committee's recommendation 8 (JCPAA, 2010, p.36) was that:

*The Committee suggests that the Privileges Committee of both the Senate and the House of Representatives examine in more detail the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers, noting the Auditor-General's status as an 'independent officer of the Parliament'.*

13. Relevant extracts from the Committee's report can be found at Appendix F of this submission.

## PART 6: MATTERS FOR CONSIDERATION

1. As discussed in Part 2 of this submission, the certification process has been used expansively—to suppress the public disclosure of ANAO analysis and part of the Auditor-General's overall audit opinion—rather than narrowly to prevent the disclosure of 'particular information' in a public report (as audit evidence) which is otherwise prohibited from public release. The 2018 certificate establishes a precedent which, if repeated, may affect Parliament's scrutiny of the Executive by limiting the Auditor-General's independent public reporting to the Parliament on the procurement and sustainment activities of Commonwealth entities, particularly but not solely in the defence context.

2. This Part outlines a range of matters which the Committee may wish to consider in the context of its current inquiry, focusing on Parliamentary scrutiny of confidential audit reports, the operation of section 37 and Parliamentary oversight of the certification process, and the application of Parliamentary privilege to the work of the Auditor-General.

### Key issues

3. As indicated in Part 4 of this submission, two key themes are evident in the JCPA and JCPAA's past reports addressing section 37 of the *Auditor-General Act 1997* and its antecedent, section 48F of the *Audit Act 1901*. As articulated by the JCPA in Report 346 (JCPA, 1996, pp.26-7), they are:

- the appropriate scope of any Executive discretion to order the Auditor-General to suppress information in a public report; and
- mechanisms allowing Parliament to monitor the exercise of any such Executive discretion, to guard against the abuse of the discretion.

4. To assist the Committee, a number of matters are outlined below which the Committee may wish to consider in the context of its current inquiry. They relate to:

- A. Parliamentary scrutiny of the confidential audit report provided to Ministers by the Auditor-General on 6 September 2018;
- B. the operation of section 37 and Parliamentary oversight of the certification process; and
- C. the application of Parliamentary privilege to the Auditor-General's work.

### A. Parliamentary scrutiny of confidential audit report to Ministers

5. As discussed, subsection 37(3) of the *Auditor-General Act 1997* provides that the Auditor-General cannot be required and is not permitted to disclose information omitted under subsection 37(1) to a House of the Parliament, a member of a House of the Parliament, or any committee of the Parliament.

6. This prohibition applies only to the Auditor-General and the ANAO, not to members of the Executive or other parties.

7. In 1989, following objections by the Department of Defence to the release of the Auditor-General's restricted report to the JCPA, that Committee recommended that:

For instances where the Joint Committee of Public Accounts is undertaking an inquiry into a[n] Auditor-General's restricted report subject to an Attorney-General's certificate under s.48F(5) of the *Audit Act 1901*, information necessary for the conduct of the inquiry should be made available to the Committee. Where confidential documents that the Committee considers relevant to an inquiry are required, they should be provided on a restricted and in-camera basis (JCPA, 1989, p.xi and p.10).

8. In recent years the Department of Defence has repeatedly offered, in the context of the JCPAA's review of the annual Defence Major Projects Report, to provide the Committee with confidential in-camera briefings and information on sensitive matters. Similar offers have repeatedly been made to other Parliamentary committees, including the Joint Standing Committee on Foreign Affairs, Defence and Trade, and the Senate Foreign Affairs, Defence and Trade Legislation Committee.

9. The JCPAA may wish to consider accepting any such offer by the Department of Defence relating to the confidential audit report provided to Ministers on 6 September 2018.

## **B. Operation of section 37 and Parliamentary oversight of the certification process**

10. As discussed, the Executive has a broad discretion under section 37 and the certification process lacks transparency. Section 37 does not include any process or timeframe for the Executive's consideration of applications for a certificate, there is no requirement to consult with the Parliament or the Auditor-General in the Executive's deliberations, and there is no process for Parliamentary scrutiny of the certification process other than strictly formal reporting to Parliament as provided for under subsection 37(4) of the Act. This limits Parliament's ability to monitor the exercise of Executive discretion and guard against the abuse of the discretion.

11. The Committee may wish to consider six matters going to the operation of section 37, which are outlined below. The discussion in this section is informed by: the previous findings and recommendations of the JCPA and JCPAA into section 37 of the *Auditor-General Act 1997* and section 48F of the *Audit Act 1901* (discussed in Part 4 of this submission); and the ANAO's experience relating to the recent certification process (discussed in Parts 1 and 2 of this submission).

### ***i. Consider distinguishing between types of disclosures***

12. In report 346 (1996) the JCPA accepted that the Executive will reserve the right to suppress the publication of audit information that would prejudice national security (JCPA, 1996, p.69). In Report 386 (2001) the JCPAA considered it 'appropriate to have the Attorney-General provide a safeguard' as 'there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government' (JCPAA, 2001, p.41).

13. Consideration could be given to making a distinction between disclosures in a public audit report which may prejudice defence and national security (part of subsection 37(2)(a)) or involve the disclosure of Cabinet deliberations or decisions<sup>3</sup> (subsection 37(2)(b)), and public disclosures relating to the other matters contained in subsections 37(2)(c) to 37(2)(f) of the Act.

14. The Parliament, through the JCPAA, could be consulted on a confidential basis before any decision is made by the Executive to issue a certificate for any of the reasons set out in subsections 37(2)(c) to 37(2)(f) of the Act.

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<sup>3</sup> The ANAO has well established processes and protocols relating to the public reporting of Cabinet matters.

**ii. Consider a Parliamentary process if a proposed certificate affects the audit conclusion or information not otherwise prohibited from disclosure**

15. As discussed in Part 2 of this submission, the June 2018 certificate was not limited to protecting the disclosure of 'particular information' to which legal or other prohibitions on release otherwise applied. The certificate went further and required the Auditor-General to omit analysis by the ANAO and part of the Auditor-General's audit conclusion relating to the audit objective, which was to assess the effectiveness and value for money of this acquisition. Further, the Auditor-General has not received any information which would suggest the particular information the subject of the certificate could otherwise be withheld from the Parliament on the basis of a public interest immunity claim.

16. Where the Executive considers issuing a certificate affecting any part of an Auditor-General's audit conclusion, or requiring the omission of information which is not otherwise prohibited from public disclosure, for any of the reasons stated in subsections 37(2)(a) to 37(2)(f) of the Act, the Parliament, through the JCPAA, could be consulted on a confidential basis before any decision is made by the Executive to require such an omission.

**iii. Consider the disclosure of all applications for a certificate to Parliament and their referral to the Auditor-General in the first instance**

17. As noted in Parts 1 and 2 of this submission, it is unclear whether the Attorney-General was approached only by Thales Australia Limited for a certificate, or by other parties. It would be appropriate for the Parliament and the Auditor-General to be informed in a timely manner of all applications to the Executive for a certificate. The Act does not provide for this at present.

18. Further, on receipt of any application for a certificate by the Executive, it would be appropriate for the Auditor-General to be asked to first consider the public interest under subsection 37(1)(a) of the Act, and to advise the Parliament, the applicant and the Executive of the outcome. The Auditor-General is best placed, in the first instance, to consider any claims for the omission of information from a public audit report, drawing on audit evidence collected by the ANAO and having regard to any legal or other prohibitions applying to the public disclosure of particular information. As noted in Part 2 of this submission, in the defence context, the ANAO seeks the advice of the Department of Defence to inform the Auditor-General's consideration of such matters, and the Auditor-General can, and has, arranged to meet with the Secretary of Defence and the Chief of the Defence Force to discuss the disclosure of sensitive information.

19. Under this approach, the Executive would only consider issuing a certificate under subsection 37(1)(b) of the Act after the Auditor-General has had an opportunity to consider any application for the omission of information in a public report, under subsection 37(1)(a).

**iv. Consider a time limit for issuing any certificate**

20. As noted in Part 1 of this submission, the Executive's consideration of the certificate issued in June 2018 took almost six months. Defence's procurement of Hawkei vehicles continued during these deliberations and the ANAO's performance audit engagement also continued in accordance with the ANAO Auditing Standards. The audit report was updated to reflect material events in the procurement until July 2018, resulting in additional audit costs. The Auditor-General informed the Executive (through the Attorney-General) on a number of occasions of his obligation under subsection 17(4) of the Act to present performance audit reports for tabling as soon as practicable after their completion, and was informed that a decision would be made without unreasonable delay.



21. To avoid undue delay to the completion of an audit and reporting to Parliament, and to prevent additional avoidable costs, a time limit could be placed on Executive decision-making under subsection 37(1)(b).

22. The Act currently provides for a consultation period of 28 calendar days for the receipt of entity comments on a draft performance audit report. This may also be a reasonable time period for Executive consideration of any application for a certificate. Additional time may be required if other processes are introduced to enhance Parliamentary scrutiny of the operation of section 37.

**v. Consider the provision of substantive reasons for any certificate**

23. As noted in Part 2 of this submission, there is limited transparency to Parliament regarding the Executive's substantive reasons for issuing the June 2018 certificate, and the Act only provides for strictly formal reporting to the Parliament on any certificate. Subsection 37(4) states that if the Auditor-General omits particular information from a public report because the Attorney-General has issued a certificate under subsection 37(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 37(2)) why the Attorney-General issued the certificate.

24. Further, the considerations leading to the issuing of the certificate have not been made known nor explained to the Auditor-General, and the certificate does not provide detail on the substantive reasons for issuing the certificate. As a consequence, the Auditor-General remains unaware as to why the reasons set out in subsection 37(2)(a) of the Act apply to the information that the certificate requires be omitted from the Auditor-General's report to Parliament. This is of particular concern because, as noted in Parts 1 and 2 of this submission, Thales Australia Limited applied for a certificate on the grounds set out in subsection 37(2)(e) of the Act—relating to unfair prejudice to commercial interests—while the certificate issued in June 2018 went further and was also based on subsection 37(2)(a) of the Act, relating to prejudice to the security, defence or international relations of the Commonwealth. The certificate and certification process are therefore of limited assistance to the Auditor-General's future consideration of the public interest under subsection 37(1)(a) of the Act.

25. Transparency and accountability to the Parliament would be strengthened if substantive reasons were provided to the Parliament on a confidential basis, through the JCPAA, if a certificate is issued by the Executive.<sup>4</sup> The provision of substantive reasons for any certificate would also assist the Auditor-General in the administration of subsection 37(1)(a) of the Act.

**vi. Consider requiring the Auditor-General to provide any confidential report to the Parliament**

26. As noted in Part 4 of this submission, the JCPA recommended in 1994 that the Auditor-General be required to give a copy of a report containing 'sensitive' information to the Chairman of that Committee as well as to Ministers (JCPA, 1994, p.77). That Committee also recommended in 1996 that

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<sup>4</sup> An analogous process formerly operated under the *Freedom of Information Act 1982* (Cth). Up until 2009, Ministers could issue certificates which had the effect of conclusively determining that a document ought not be disclosed, including on public interest grounds. FOI applicants could ask the Administrative Appeals Tribunal to determine whether reasonable grounds existed justifying the issuing of the certificate. If the Tribunal held that no reasonable grounds existed, the Minister could either revoke the certificate or give a notice refusing to revoke it. If a notice was given, it was then laid before both Houses of Parliament, and read aloud by the Minister in the House in which they sat. This created an ultimate parliamentary accountability for decisions to certify the non-disclosure of information under the FOI Act.

where the Executive orders the Auditor-General to suppress sensitive audit information on the grounds of national security, the Audit Committee of Parliament should receive an unabridged copy of the audit report and/or a copy of the suppressed information (JCPA, 1996, p.69).

27. Transparency and accountability to the Parliament would be further strengthened if the Auditor-General were required to provide any confidential report to the JCPAA, in addition to Ministers. This approach would also ensure unfettered reporting from the Auditor-General to the Parliament.

### **C. Parliamentary privilege**

28. As discussed in Part 1 of this submission, issues of Parliamentary privilege arose in the context of a Federal Court action brought against the Auditor-General in the course of this audit. The parties to the litigation incurred substantial legal costs. External legal costs of some \$223,000 (ex GST) were incurred by the ANAO to address issues relating to the certificate and Federal Court actions (Auditor-General, 2018, p.19).

29. As noted in Part 5 of this submission, the JCPAA has previously considered the application of Parliamentary privilege to the work of the Auditor-General in reports 386 (2001) and 419 (2010), and identified a number of uncertainties.

30. The recent events indicate there would be benefit in resolving any uncertainties.

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## **APPENDICES**

## APPENDIX A

### AUDIT ACT 1901 – SECTION 48F

#### Reports concerning efficiency audits

Inserted by No. 8, 1979, s. 40

#### SECTION

48F. (1) Where the Auditor-General carries out an efficiency audit of operations of a relevant body under this Act, he shall prepare and sign a report of the results of the audit.

(2) A report of the results of an efficiency audit of operations of a relevant body carried out by the Auditor-General-

(a) may include such information as he thinks desirable in relation to matters referred to in the report;

(b) shall set out his reasons for opinions expressed in the report; and

(c) may include any recommendations arising out of the audit that he thinks fit to make.

(3) Where the Auditor-General prepares a report that he proposes to make with respect to the results of an efficiency audit of operations of a relevant body carried out by him under this Act, the Auditor-General shall, before signing the proposed report, furnish a copy of the proposed report to the body in order that the body may furnish to the Auditor-General any comments on the proposed report that it desires to make.

(4) Where a copy of a proposed report of the results of an efficiency audit of operations of a relevant body has been furnished to the body under sub-section (3) and

(a) the Auditor-General has received comments from the body on the proposed report and has considered those comments; or

(b) a period of not less than 28 days has elapsed from the date on which the copy of the proposed report was furnished to the body and the Auditor-General has not received any comments from the body,

the proposed report, or that report amended in such manner as the Auditor-General thinks fit having regard to any comments furnished to him by the body, may be signed by the Auditor-General as his report of the results of that efficiency audit.

(5) The Attorney-General may issue to the Auditor-General a certificate certifying that the disclosure of information concerning a specified matter, or the disclosure of the contents of a specified document, would be contrary to the public interest-

(a) by reason that the disclosure would prejudice the security, defence or international relations of the Commonwealth;

(b) by reason that the disclosure would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) by reason that the disclosure would prejudice relations between the Commonwealth and a State;

(d) by reason that the disclosure would divulge any information or matter communicated in confidence-

(i) by or on behalf of the Government of the Commonwealth to the Government of a State or to a person receiving the communication on behalf of the Government of a State; or

(ii) by or on behalf of the Government of a State to the Government of the Commonwealth or to a person receiving the communication on behalf of the Government of the Commonwealth;

(e) by reason that the disclosure would be prejudicial to the commercial interests of a public authority of the Commonwealth or other body; or

(f) for any other reason specified in the certificate that could form the basis of a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information or the contents of the document should not be disclosed.

(6) Where information, or the contents of a document, to which a certificate under sub-section (5) applies is disclosed to the Auditor-General in the course of the carrying out of an efficiency audit of operations of a relevant body, the Auditor-General may include any of the information, or any of the contents of the document, in a restricted report of the results of the audit prepared by him, and, if he does so, he shall also prepare and sign a separate report of the results of the audit that does not include any of the information or any of the contents of the document.

(7) Where the Auditor-General prepares a restricted report of the results of an efficiency audit of operations of a relevant body, he shall forward copies of the report to the Prime Minister, to the Minister and to the Public Service Board and, if the relevant person in respect of the body is not the Prime Minister or the Minister, he shall also forward a copy of the report to the relevant person in respect of the body.

(8) Subject to sub-section (9), where the Auditor-General prepares a report (other than a restricted report) of the results of an efficiency audit of operations of a relevant body-

(a) he may include the report in the next report made by him under section 51 that includes his report with respect to the accounts, or financial statements, of that body;

(b) he may include the report in a report made by him, otherwise than under section 51, with respect to the financial statements of the body, being a report a copy of which is required by an enactment to be laid before each House of the Parliament; or

(c) he may treat the report as a special report and transmit signed copies of the report to each House of the Parliament.

(9) Sub-section (8) does not apply to a relevant body (not being a Department of State or a Department of the Parliament)-

(a) that is specified in the regulations as a relevant body to which sub-section (8) does not apply; or

(b) that is included in a class of relevant bodies specified in the regulations as a class of relevant bodies to which sub-section (8) does not apply.

(10) Where the Auditor-General prepares a report (other than a restricted report) of the results of an efficiency audit of operations of a relevant body carried out by him, being a relevant body to which, by virtue of regulations in force under sub-section (9), sub-section (8) does not apply, the Auditor-General shall furnish copies of the report to the body and to the relevant person in respect of the body and to the Public Service Board.

(11) In this section-

(a) a reference to a restricted report of the results of an efficiency audit of operations of a relevant body carried out by the Auditor-General shall be read as a reference to a report of the results of such an audit that includes any information, or any of the contents of a document, to which a certificate under sub-section (5) applies; and

(b) a reference to the relevant person in respect of a relevant body shall be read as a reference-

(i) in the case of a Department of State—to the Minister administering that Department or another Minister acting for and on behalf of that Minister;

(ii) in the case of the Department of the Senate—to the President of the Senate;

(iii) in the case of the Department of the House of Representatives—to the Speaker of the House of Representatives;

(iv) in the case of the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff or the Joint House Department—to the President of the Senate and the Speaker of the House of Representatives; and

(v) in the case of any other relevant body-

(A) to the Minister declared by regulations to be the relevant person in respect of that body; or

(B) if no Minister has been so declared to be the relevant person in respect of the body, to the Minister administering the Department of State responsible for dealing with matters relating to the body, or another Minister acting for and on behalf of that Minister.

## APPENDIX B

### **AUDITOR-GENERAL ACT 1997 (as at 21 February 2018)**

#### **37 Sensitive information not to be included in public reports**

- (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
  - (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 omits 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.
- (5) If, because of subsection (1), the Auditor-General:
  - (a) decides not to prepare a public report; or
  - (b) omits particular information from a public report;the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and any responsible Minister.
- (6) In this section:

**information** includes written comments on the proposed report or the extract that are received by the Auditor-General under subsection 19(4).

**public report** means a report that is to be tabled in either House of the Parliament.

**State** includes a self-governing Territory.



## APPENDIX C

### **JCPA Report 331: 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**

September 1994

#### EXTRACTS

##### Chapter 4

4.77 Clause 34 of the AG Bill states that the Auditor-General must not release particular information if the Auditor-General is 'of the opinion' that the information is 'sensitive' or if the Attorney-General has issued a certificate stating that the information is sensitive. Clause 34(3) defines 'sensitive information' as information whose disclosure would be 'contrary to the public interest'. Clauses 34(3)(a)-(f) list types of information that should be treated as sensitive, such as Cabinet deliberations or information that would prejudice relations between the Commonwealth and a State.

4.85 Clause 34(3)(e) defines information as sensitive if its disclosure 'would prejudice the commercial interests of any body or person'. Several commentators believe that the Clause is too broad. The Auditor-General of NSW stated that:

It is not clear why information that 'would prejudice the commercial interests of any body' should always be protected from disclosure. A similar clause in the Corporations Law affecting private auditors would be seen as odd.

4.88 The Committee believes that Clause 34(3)(e) is unnecessarily broad as it stands and could be amended to allow the Auditor-General the discretion to determine whether the release of information would unfairly prejudice commercial interests.

##### **Recommendation 26:**

*Clause 34(3)(e) of the Auditor-General Bill 1994 be amended to only classify information as sensitive if it unfairly prejudices the commercial interests of any body or person (JCPA, 1994, p.xxi and p.76).*

4.90 Clause 34(2) allows the Auditor-General to prepare a private report including sensitive information. If such a report has been prepared, then the Auditor-General must give copies to the Prime Minister, the Finance Minister and the responsible Minister or Minister(s) (if any).

4.91 However, there is no opportunity for the Auditor-General to share reports containing sensitive information with Parliament or its Committees. As the Auditor-General explained:

I am rather uncomfortable about the fact that it is possible ... that I might feel a need to inform the Parliament about something that is sensitive. There is no way for me to do that ... I could go to the Prime Minister, the Minister for Finance or the Attorney-General, but that does not involve the Parliament ...

4.92 The JCPA believes that, as a matter of principle, the Auditor-General should also have the ability to refer sensitive reports to the Parliament. The most appropriate way to achieve this is if the Auditor-General is also required to show sensitive reports to the Chairman of the JCPA.

**Recommendation 27:**

*Clause 34(2) of the Auditor-General Bill 1994 should be amended to require the Auditor-General to give a copy of a report containing 'sensitive' information to the Chairman of the Joint Committee of Public Accounts as well as to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any) (JCPA, 1994, p.xxi and p.77).*

## APPENDIX D

### JCPA REPORT 346: *Guarding the Independence of the Auditor-General*

October 1996

#### EXTRACTS

##### Chapter 1

1.28 The Committee believes that the community expects the Parliament to hold the Executive to account for the use of public funds:- disclosures of profligacy or fraud in the use of public monies, and incompetence or inefficiency in the management of public services, naturally provoke public outrage.

1.29 The Parliament, in turn, relies on the Auditor-General to provide expert independent advice to help it to fulfil its function of scrutinising Executive agencies. The Auditor-General performs a function which makes an important contribution to effective Parliamentary scrutiny but which the Parliament itself lacks the technical expertise and resources to exercise.

1.30 If the Parliament cannot ensure the independence of the Auditor-General from the Executive, and if the Executive can effectively inhibit the effective discharge of audit functions by starving the Auditor-General of resources, then the chain of public accountability is broken.

1.31 The Parliament—and, in particular, Parliamentary committees which examine the financial affairs and the performance of government agencies in detail—are becoming increasingly reliant on the Auditor-General to hold the Government of the day to account. The increasing complexity of arrangements for government service delivery—particularly contracting out of public services to private enterprise—and the devolution of financial management to line managers, are challenges to public accountability that can only be met with the assistance of a well equipped and fiercely independent Auditor-General.

##### Chapter 2

2.60 The principal purpose of the Auditor-General obtaining information is to enable complete and accurate reporting to the Parliament.

2.61 The Committee believes that the Auditor-General should have a discretion not to disclose certain classes of sensitive-information to the Parliament.

2.62 However, the Committee considers the Auditor-General must not be unduly restricted by the Executive from reporting audit information to the Parliament.

2.63 The President of the Senate, Senator [the] Hon Margaret Reid, drew the Committee's attention to provisions in the Auditor-General Bill 1994 that, if enacted, would have restricted the ability of the Parliament to seek advice from the Auditor-General.

2.64 Clause 34 of the Auditor-General Bill 1994 provided that the Auditor-General could not release 'sensitive' information in a report to be tabled in Parliament if:

- the Auditor-General was of the opinion that release of the information would be contrary to the public interest; or
- if the Attorney-General had issued a certificate to the Auditor-General stating that release of the information would be contrary to the public interest.

2.65 Clause 34 provided for the Auditor-General to prepare an unabridged report (including 'sensitive' information) but distribution of the unabridged report was restricted to the Ministry.

2.66 The Bill defined 'sensitive' information as:

... information whose disclosure would be contrary to the public interest for any of the following reasons:

- 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 a State to the Commonwealth;
- e) it would 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.

2.67 The Committee could not visualise any form of moderately interesting information about the activities of government that would not fit into one or other of the categories above. In the context of this inquiry into the independence of the Auditor-General, the Committee is not concerned about the Auditor-General's discretion to restrict publication of audit information that might fit into any of the above categories.

2.68 However, the Committee is most concerned that it was intended to give the Attorney-General a similarly wide discretion. Clause 34, if enacted, would have compromised the Auditor-General's freedom to report to Parliament by giving the Executive a broad discretion to suppress 'sensitive' audit information from publication.

2.69 More disturbingly, the Bill did not provide any check whatsoever on the exercise of the Attorney-General's power to issue a certificate. The Parliament was not even to be informed that the Attorney-General had given a direction to the Auditor-General, let alone the reasons for the direction.

2.70 The Committee suggests that the inclusion of the same provision in the Auditor-General Bill 1996 would be inappropriate.

2.71 If the Auditor-General Bill is to contain a provision allowing the Executive discretion to prevent the disclosure of audit information to the Parliament, then the Committee considers that:

- the Executive should only have discretion to order the Auditor-General to suppress information where disclosure would be likely to prejudice national security; and
- there must be a mechanism allowing Parliament to monitor the exercise of any such Executive discretion, to guard against the abuse of the discretion.

2.72 The Committee believes that an Audit Committee [of the Parliament] could monitor the exercise of Executive discretion to withhold audit information from the Parliament. The Committee considers that if the Executive has a legislative discretion to order the Auditor-General to withhold information from the Parliament, then the Audit Committee should have the right to receive a copy

of any suppressed information or an unabridged copy of the audit report from which 'sensitive' information has been excluded (see Recommendation 9).

## Chapter 4

### ***Role of the Audit Committee in monitoring the exercise of Executive discretion***

4.40 As a matter of broad principle, the Committee considers that the Audit Committee of Parliament should play a role in monitoring the exercise of any Executive direction to the Auditor-General.

4.41 In Chapter 2, the Committee indicated its serious concerns about the broad and unfettered discretion that would have been given to the Executive, had the Auditor-General Bill 1994 been enacted, to exclude sensitive audit information from reports to Parliament.

4.42 The Committee accepts that the Executive will reserve the right to suppress the publication of audit information that would prejudice national security. However, the Committee considers that there must be a mechanism for the Parliament to check the exercise of Executive discretion in relation to directions to the Auditor-General to suppress audit information from the Parliament.

#### 4.43 **Recommendation 9**

*The Auditor-General Bill should provide that:*

*(a) the Executive may only direct the Auditor-General to exclude sensitive audit information from a report to the Parliament where disclosure of the information would be likely to prejudice national security;*

*(b) where the Executive orders the Auditor-General to suppress sensitive audit information on the grounds of national security, the Audit Committee should receive an unabridged copy of the audit report and/or a copy of the suppressed information; and*

*(c) where sensitive information is excluded from an audit report, the fact of the exclusion and the reasons for the exclusion should be reported to the Parliament in the audit report.*

4.44 In his submission to this inquiry, the Auditor-General, Mr Pat Barrett, drew the Committee's attention to Clause 51 of the Financial Management and Accountability Bill 1994 which would have required the Auditor-General to provide information to the Minister for Finance on request. The Department of Finance informed the Committee that a special exemption had been included in the Auditor-General Bill 1994 to provide that the Auditor-General only had to comply with a request for information under Clause 51 if the chief executives of at least two other agencies also had to comply with the same request. The Committee considers this to be an inadequate safeguard in a situation where the potential for damage to the Auditor-General's independence has been acknowledged.

4.45 The Committee considers that this is another potential circumstance where it would be appropriate for the Audit Committee to be informed of the reasons for an Executive direction.

4.46 The Committee considers that the Parliament, and in particular its Audit Committee, should be informed—by the Minister responsible—of any Executive direction to the Auditor-General.

4.47 In light of the fact that the Committee has not seen the Auditor-General Bill 1996, the Committee cannot comment on specific provisions. However, the Committee states its in-principle

position that any exercise of Executive discretion in relation to the Auditor-General should be reported to the Audit Committee.

**4.48 Recommendation 10**

*The Auditor-General Bill should require that:*

*If the Executive gives any direction to the Auditor-General, then:*

*(a) such direction should be in writing and should be reported to Parliament by inclusion in a schedule in the Annual Report of the Auditor-General; and*

*(b) the Executive should immediately report the substance of the direction, and the reasons for the direction, to the Audit Committee of Parliament.*

## APPENDIX E

### JCPAA REPORT 386: *Review of the Auditor-General Act 1997*

August 2001

#### EXTRACTS

##### Parliamentary Privilege

2.25 The audit process relies on a free flow of information on a continuous basis. The Committee recognises that the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.

2.26 This inquiry revealed that there is some uncertainty as to whether Parliamentary privilege applies to Auditor-General working papers and draft reports. Recent advice from the Solicitor-General and the AGS suggested that it would be proper to proceed on the basis that Parliamentary privilege applies to draft reports, and working papers for the purpose of preparing audit reports. The AGS stated that 'unless and until a court decides to the contrary, the Auditor-General could properly argue that the creation of working papers and the preparation of draft reports are part of proceedings in Parliament'.

2.27 It should be noted that the Solicitor-General's advice focused on the creation of working papers for the purpose of preparing audit reports. The Committee notes that the Solicitor-General's advice did not comment on the application of Parliamentary privilege to working papers which are not directly linked to the creation of an audit report. The AGS stated that 'other material which has been prepared independently of the performance audit report but which is referred to in the report would not necessarily attract Parliamentary privilege.'

2.28 The AGS suggested that legislative amendments could be enacted to clarify the application of Parliamentary privilege to ANAO draft reports and working papers. The ANAO had reservations that legislative amendment was warranted. The Committee, however, believes that further Parliamentary scrutiny of this matter is warranted.

2.29 The Committee, based on the evidence provided, accepts that until a court decides to the contrary, it is proper for the Auditor-General to proceed on the basis that Parliamentary privilege does apply to ANAO draft reports and working papers created for the purpose of preparing audit reports or financial statement audit reports. The legal advice provided to the Committee, however, did not comment on the application of Parliamentary privilege to extracts of draft reports. The significance of extracts of draft reports is examined in the next section.

2.30 The Committee considered that there may be justification for amending legislation to provide certainty that draft reports and extracts of draft reports would attract privilege when they are circulated in accordance with the Act. The principal reason for wanting to provide this certainty is to remove the opportunity for a person who might be adversely referred to in a draft report or extract of a draft report, to use the threat of litigation in an attempt to influence the final form of the Auditor-General's findings. The Committee also considered that there is an argument for giving the Auditor-General certainty as to their privileged status, since the Act requires that they be circulated. The Committee was not persuaded of any need for legislation to give greater clarity to the privileged status of working papers or draft reports and extracts of draft reports before they are circulated.

2.31 The work of the Auditor-General is critical to the operation of good government and is a key accountability mechanism which supports the Parliament's scrutiny of Executive Government. Therefore, the Committee believes that it is appropriate that the Privileges Committees of both the Senate and the House of Representatives examine, in more detail, the application of Parliamentary privilege to ANAO draft reports, extract[s] of draft reports and working papers.

2.32 The purpose of making the following recommendation, is to ensure that the Privileges Committees of both the Senate and the House of Representatives can participate in the debate about the application of Parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers.

2.33 **Recommendation 1**

*The Committee suggests that the Privileges Committees of both the Senate and the House of Representatives examine whether Australian National Audit Office draft reports and extracts of draft reports attract Parliamentary privilege, and if they do not, should they attract Parliamentary privilege.*

**Attorney-General's Certificate – section 37(1)(b)**

4.7 A certificate issued by the Attorney-General is a safeguard to prevent the Auditor-General from publishing sensitive information in an audit report. If the Attorney-General considers that the information in a proposed audit report is too sensitive to be published, the Attorney-General can issue a certificate preventing the Auditor-General from publishing the information.

4.8 The Attorney-General's certificate is governed by section 37(2) of the Act and clarified in the Explanatory Memorandum (EM). The EM states where:

... the Attorney-General has issued a certificate to the Auditor-General stating that disclosure would be contrary to the public interest, the Auditor-General must not include that information in a report which is to be tabled in either House of the Parliament.

4.9 The ANAO raised a concern during the inquiry that there is an inconsistency between section 37(1)(b) and section 37(4) of the Act. Section 37(1)(b) specifies that the Auditor-General must not include particular information in a public report if the Attorney-General has issued a certificate to the Auditor-General stating that disclosure of the information would be contrary to the public interest.

4.10 However, section 37(4), states that 'If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate...' The use of the words *If* and *decides* suggests that the final determination whether to include sensitive information in a report rests with the Auditor-General. To remove the uncertainty, the Auditor-General suggested that the Act be amended to make the power of the Attorney-General consistent with the intentions expressed in the EM.

4.11 In considering the Auditor-General's proposal, the Committee noted that the Victorian Auditor legislation gives 'unfettered discretionary authority to the Victorian Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to Parliament.' In terms of comparison, the Victorian approach does not include any 'statutory prescription of the evaluative criteria to be applied by the Victorian Auditor-General to disclosure questions.' The Victorian legislation also does not have 'provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings.'



4.12 The Committee sought comment from the Auditor-General about the alternative approach applying to the Victorian Auditor-General. The Auditor-General stated:

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

4.13 Similarly, DoFA commented that the Attorney-General could advise the Auditor-General that something may in fact have a security implication.

4.14 From a practical perspective, the Auditor-General commented that even when examining sensitive issues 'we have been able to get the major issues across to the parliament without having to run the gauntlet of disclosing unnecessarily confidential and/or secure information.'

#### **Accountability mechanisms for the Attorney-General**

4.15 The Attorney-General is part of executive government. One of the roles of the Auditor-General is to review the activities of executive government. Therefore, the Attorney-General may have a conflict of interest, when determining that certain information should be restricted from public access under section 37(1)(b). In view of this, the Committee examined the constraints that apply to the Attorney-General.

4.16 The Committee received advice from the Australian Government Solicitor which indicated that the Attorney-General's Certificate was subject to review under the *Administrative Decisions (Judicial Review) Act 1977*. However, the Auditor-General stated that this processes would be 'unduly bureaucratic'. The Auditor-General concluded:

... it would be a very brave Attorney-General and government if an Auditor-General put a fairly persuasive case in the public interest and we could not get satisfactory resolution.

4.17 The Auditor-General and DoFA noted that there are other mechanisms to question the appropriateness of the Attorney-General in issuing a certificate to prevent the Auditor-General from reporting. The Auditor-General stated:

What the Auditor-General would do would be to simply say in the report that this element had been excised on the basis of a decision made by the Attorney-General. Then the Attorney-General would be subject to questioning in the House.

4.18 Similarly, DoFA stated:

... the Auditor-General still has the right to advise parliament that in fact parts of his report or parts of the information have actually been deleted for reasons that by the Attorney-General has. The Attorney-General is then accountable to parliament directly for that decision making process.

#### **Conclusions**

4.19 The Auditor-General proposed that section 37(4) of the Act be amended to reflect the intentions expressed in the Explanatory Memorandum. The Committee agrees with this position.

4.20 The Committee acknowledges that the Victorian model provides the Victorian Auditor-General with more discretion and freedom to determine what to report. However, the Committee considers it appropriate to have the Attorney-General provide a safeguard given that, in the context of the Commonwealth Government's broader responsibilities, there may be exceptional circumstances relating to such issues as defence and national security which require the input of executive government.

4.21 The Committee notes that there are several accountability mechanisms to ensure that the Attorney-General's certificate is subject to scrutiny. These include the:

- Attorney-General's certificate being subject to the *Administrative Decisions (Judicial Review) Act 1977*;
- Attorney-General being subject to questions in Parliament; and
- the risk of public dissent if the Auditor-General put forth a strong case for reporting certain information, and the Attorney-General restricted publication.

4.22 In view of this, the Committee considers that the original intention of section 37(1)(b), as expressed in the EM, should be confirmed through amendment to section 37(4). The Auditor-General supports this amendment.

#### **Recommendation 4**

4.23 *The Committee recommends that the Government amend section 37(4) of the Auditor-General Act 1997, to read:*

*[If] **When** the Auditor-General [decides to] **is required 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.*

## APPENDIX F

### JCPAA REPORT 419: *Inquiry into the Auditor-General Act 1997*

December 2010

#### EXTRACTS

##### Parliamentary privilege

3.96 Parliamentary privilege refers to the special rights and immunities that belong to both Houses of Parliament, their committees and their Members. These rights are considered essential for the proper operation of the Parliament. These rights and immunities allow the Houses, their committees and Members to carry out their proper roles without obstruction or fear of prosecution.

3.97 In its 2001 review of the Act, the JCPAA reported:

The tabling of a performance audit report or financial statements audit report in Parliament becomes part of 'proceedings in Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statement[s] contained in a tabled report.

3.98 However, there was a lack of clarity around whether ANAO draft reports, extracts of draft reports and working papers attract parliamentary privilege given these documents are not tabled and hence may not be considered 'proceedings in Parliament'.

3.99 The JCPAA recommended, therefore, that the Privileges Committee of both the Senate and the House of Representatives examine this question.

3.100 To date, this recommendation has not been taken up by either committee.

3.101 This issue was raised at the hearing on 19 October 2009. At that hearing, Mr Russell Coleman indicated that this is an issue that does 'come up...from time to time', legal advice having been sought in the past by the ANAO:

There are often issues in relation to that as to whether that information subject to a discovery motion could be subject to parliamentary privilege. Some years ago, we did get advice from the then Solicitor-General. He at the time concluded that the relevant provisions of the relevant act ... should be read widely. Therefore, not only our reports but also effectively our working papers were subject to parliamentary privilege. I think he also concluded that it was not beyond doubt. The courts generally do not rule on this matter.

3.102 The point was also made at that hearing that while it is unclear whether privilege is attached to draft reports and extracts of draft report[s] there are penalties for not adhering to the relevant confidentiality requirements.

##### Committee comment

3.103 While there is no urgency attached to addressing this issue, the Committee reiterates the relevant comments its predecessor made in Report 386:

The audit process relies on a free flow of information on a continuous basis ... the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-

General from legal action so that it may provide a fearless account of the activities of executive government.

3.104 The Committee again recommends that this issue be taken up by the Privileges Committees.

**Recommendation 8**

3.105 *The Committee suggests that the Privileges Committee of both the Senate and the House of Representatives examine in more detail the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers, noting the Auditor-General's status as an 'independent officer of the Parliament'.*

## APPENDIX G

### Mexico Declaration on SAI Independence (2007)

#### Preamble

From the XIX Congress of the International Organization of Supreme Audit Institutions (INTOSAI) meeting in Mexico:

Whereas the orderly and efficient use of public funds and resources constitutes one of the essential prerequisites for the proper handling of public finances and the effectiveness of the decisions of the responsible authorities.

Whereas the Lima Declaration of Guidelines on Auditing Precepts (the Lima Declaration) states that Supreme Audit Institutions (SAIs) can accomplish their tasks only if they are independent of the audited entity and are protected against outside influence.

Whereas, to achieve this objective, it is indispensable for a healthy democracy that each country have a SAI whose independence is guaranteed by law.

Whereas the Lima Declaration recognizes that state institutions cannot be absolutely independent, it further recognizes that SAIs should have the functional and organizational independence required to carry out their mandate.

Whereas through the application of principles of independence, SAIs can achieve independence through different means using different safeguards.

Whereas application provisions included herein serve to illustrate the principles and are considered to be ideal for an independent SAI. It is recognized that no SAI currently meets all of these application provisions, and therefore, other good practices to achieve independence are presented in the accompanying guidelines.

#### RESOLVES:

To adopt, publish, and distribute the document entitled "Mexico Declaration on Independence"

#### General

Supreme Audit Institutions generally recognize eight core principles, which flow from the Lima Declaration and decisions made at the XVIIth Congress of INTOSAI (in Seoul, Korea), as essential requirements of proper public sector auditing.

#### Principle 1

**The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework**

Legislation that spells out, in detail, the extent of SAI independence is required.

#### Principle 2

**The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties**

The applicable legislation specifies the conditions for appointments, re-appointments, employment, removal and retirement of the head of SAI and members of collegial institutions, who are

- appointed, re-appointed, or removed by a process that ensures their independence from the Executive (see ISSAI-11 Guidelines and Good Practices Related to SAI Independence);
- given appointments with sufficiently long and fixed terms, to allow them to carry out their mandates without fear of retaliation; and
- immune to any prosecution for any act, past or present, that results from the normal discharge of their duties as the case may be.

### **Principle 3**

#### **A sufficiently broad mandate and full discretion, in the discharge of SAI functions**

SAIs should be empowered to audit the

- use of public monies, resources, or assets, by a recipient or beneficiary regardless of its legal nature;
- collection of revenues owed to the government or public entities;
- legality and regularity of government or public entities accounts;
- quality of financial management and reporting; and
- economy, efficiency, and effectiveness of government or public entities operations.

Except when specifically required to do so by legislation, SAIs do not audit government or public entities policy but restrict themselves to the audit of policy implementation.

While respecting the laws enacted by the Legislature that apply to them, SAIs are free from direction or interference from the Legislature or the Executive in the

- selection of audit issues;
- planning, programming, conduct, reporting, and follow-up of their audits;
- organization and management of their office; and
- enforcement of their decisions where the application of sanctions is part of their mandate.

SAIs should not be involved or be seen to be involved, in any manner, whatsoever, in the management of the organizations that they audit.

SAIs should ensure that their personnel do not develop too close a relationship with the entities they audit, so they remain objective and appear objective.

SAI should have full discretion in the discharge of their responsibilities, they should cooperate with governments or public entities that strive to improve the use and management of public funds.

SAI should use appropriate work and audit standards, and a code of ethics, based on official documents of INTOSAI, International Federation of Accountants, or other recognized standard-setting bodies.

SAIs should submit an annual activity report to the Legislature and to other state bodies— as required by the constitution, statutes, or legislation—which they should make available to the public.

### **Principle 4**

#### **Unrestricted access to information**

SAIs should have adequate powers to obtain timely, unfettered, direct, and free access to all the necessary documents and information, for the proper discharge of their statutory responsibilities.

## **Principle 5**

### **The right and obligation to report on their work**

SAIs should not be restricted from reporting the results of their audit work. They should be required by law to report at least once a year on the results of their audit work.

## **Principle 6**

### **The freedom to decide the content and timing of audit reports and to publish and disseminate them**

SAIs are free to decide the content of their audit reports.

SAIs are free to make observations and recommendations in their audit reports, taking into consideration, as appropriate, the views of the audited entity.

Legislation specifies minimum audit reporting requirements of SAIs and, where appropriate, specific matters that should be subject to a formal audit opinion or certificate.

SAIs are free to decide on the timing of their audit reports except where specific reporting requirements are prescribed by law.

SAIs may accommodate specific requests for investigations or audits by the Legislature, as a whole, or one of its commissions, or the government.

SAIs are free to publish and disseminate their reports, once they have been formally tabled or delivered to the appropriate authority—as required by law.

## **Principle 7**

### **The existence of effective follow-up mechanisms on SAI recommendations**

SAIs submit their reports to the Legislature, one of its commissions, or an auditee's governing board, as appropriate, for review and follow-up on specific recommendations for corrective action.

SAIs have their own internal follow-up system to ensure that the audited entities properly address their observations and recommendations as well as those made by the Legislature, one of its commissions, or the auditee's governing board, as appropriate.

SAIs submit their follow-up reports to the Legislature, one of its commissions, or the auditee's governing board, as appropriate, for consideration and action, even when SAIs have their own statutory power for follow-up and sanctions.

## **Principle 8**

### **Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources**

SAIs should have available necessary and reasonable human, material, and monetary resources—the Executive should not control or direct the access to these resources. SAIs manage their own budget and allocate it appropriately.

The Legislature or one of its commissions is responsible for ensuring that SAIs have the proper resources to fulfill their mandate.

SAIs have the right of direct appeal to the Legislature if the resources provided are insufficient to allow them to fulfill their mandate.

**APPENDIX H**

**Auditor-General Report No.6 (2018-19) Army's Protected Mobility Vehicle—Light**

**Chronology of key events**

Audit commenced	10 March 2017
Proposed audit report provided to Department of Defence for comment under s 19(1)(a) <i>Auditor-General Act 1997</i>	3 November 2017
Extract of proposed audit report provided to Thales Australia Limited for comment under s 19(6) <i>Auditor-General Act 1997</i>	6 November 2017
Thales Australia Limited application to Attorney-General under s 37(1)(b) <i>Auditor-General Act 1997</i>	5 January 2018
Thales Australia Limited obtained interlocutory orders from Federal Court of Australia	29 January 2018
Auditor-General's correspondence to JCPAA Chair and Presiding Officers advising that issues of Parliamentary Privilege had arisen in the Federal Court action	20 April 2018
Attorney-General issues certificate under s 37(1)(b) <i>Auditor-General Act 1997</i>	28 June 2018
Auditor-General receives certificate	29 June 2018
Auditor-General's correspondence to JCPAA Chair advising on the Attorney-General's decision to issue a certificate	5 July 2018
Federal Court orders that the action be dismissed, by consent of the parties	9 July 2018
Auditor-General's correspondence to JCPAA Chair advising of dismissal of the Federal Court action	10 July 2018
Auditor-General's correspondence to Presiding Officers and JCPAA Chair advising that Attorney-General had issued a certificate and that Federal Court action had been dismissed by consent of the parties	2 August 2018
Thales Australia Limited correspondence to Auditor-General advising it had applied to Attorney-General for a second certificate under s 37(1)(b) <i>Auditor-General Act 1997</i>	20 August 2018
Attorney-General's correspondence to Auditor-General confirming receipt of second application for a certificate from Thales Australia Limited and advising of intention to write to Thales Australia Limited seeking confirmation that application had been withdrawn (following Auditor-General's decision to not include certain information in proposed public report)	31 August 2018
Confidential audit report provided to Ministers	6 September 2018
Public report tabled	11 September 2018