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Senator Dean Smith
Chair
Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
Canberra ACT 2600

Joint Committee of Public Accounts and Audit inquiry into the publication of Auditor-General's report No. 6 (2018-19) Army's Protected Mobility Vehicle – Light (the Inquiry)

We refer to the public hearing of the Inquiry held on Friday 19 October 2018. We address below issues arising from the hearing as they concern Thales Australia Limited (Thales).

1. Parliamentary privilege

- 1.1. Thales is particularly concerned by certain comments made by Senator Rex Patrick during the course of the hearing. Senator Patrick alleged that Thales, in the course of proceedings before the Federal Court of Australia earlier this year, breached parliamentary privilege by tendering evidence which included a draft report prepared by the Australian National Audit Office (ANAO).¹ Senator Patrick asserted that the tender occurred at an ex parte hearing, at which the AGS was not present and the ANAO not represented.
- 1.2. Senator Patrick appears to have alleged that Thales (and the lawyers representing it, including senior counsel who appeared before Bromwich J on 29 January 2018) may be in contempt of Parliament for a contravention of section 16 of the Parliamentary Privileges Act 1987 (Cth) (the PP Act). Thales recognises that to be a serious matter.
- 1.3. Thales denies that allegation. There are a number of reasons why Senator Patrick's allegation is wrong. The first reason, which is fundamental, is that the draft report was not tendered, at the ex parte hearing on 29 January 2018 or at all. Thales sets out its response in further detail below.
- 1.4. Section 16 of the Parliamentary Privileges Act 1987 (Cth) (PP Act) provides:

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

¹ Commonwealth of Australia, Proof Committee Hansard, Joint Committee of Public Accounts and Audit, Army's protected mobility vehicle – light – Auditor-General's report No. 6 (2018-19), Friday 19 October 2018, page 7.

OPEN



(c) *drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.*

- 1.5. There is a threshold question concerning whether parliamentary privilege attaches to extracts of draft reports prepared by the Auditor-General (or the ANAO). As is made clear by part 5 of the submission of the ANAO to this Inquiry dated 4 October 2018, it may be accepted, for present purposes, that this question is far from settled. Nonetheless, we emphasise that Thales considers the correct position is that parliamentary privilege does not attach to draft reports prepared by the Auditor-General (or the ANAO) or does not prevent the tender of a draft report for the purpose of seeking to quash a decision of the Auditor-General as to the content of a proposed report. The reason why that is the correct position is outlined in the written submissions filed on behalf of Thales with the Federal Court.
- 1.6. Accepting this uncertainty, no contravention of section 16 of the PP Act occurred during the course of the Federal Court proceedings.
- 1.7. First, the draft report was not “tendered or received”, nor were questions asked, statements or submissions made concerning a draft report for the purposes set out in section 16 of the PP Act.
- 1.8. Second, section 16 of the PP Act does not operate as a per se prohibition against using or referring to documents which attract parliamentary privilege in court proceedings. Use for the identified purposes is all that is proscribed. This is clear from limited proscriptive terms of the PP Act, and was accepted by counsel for the Auditor-General at a case management conference on 22 February 2018 before Griffiths J.² That is, tender of or reference to the draft report is not per se prohibited.
- 1.9. Third, as already identified Thales disagrees with the premise, namely that the draft report attracts parliamentary privilege.
- 1.10. Moreover, the affidavit to which heavily redacted extracts of a draft report was exhibited was at all times subject to orders preventing its publication or dissemination. We set out below a timeline of the relevant events.
 - i. **29 January 2018** – Thales filed an originating application in the Federal Court of Australia for judicial review of the decision of the Auditor-General not to exercise his power under section 37 of the *Auditor-General Act 1997* (Cth) (the AG Act).
 - ii. **29 January 2018** – In support of its originating application, Thales filed the affidavit of Gary Hines dated 29 January 2018. Justice Bromwich made orders that publication or other disclosure of certain parts of that affidavit be prohibited until 1 February 2018. This is the *ex parte* hearing to which Senator Patrick referred. The exhibit to Mr Hines affidavit was not tendered by senior counsel appearing for Thales on that occasion³.
 - iii. **1 February 2018** – Justice Jagot extended the order prohibiting publication or other disclosure of certain parts of the affidavit of Gary Hines indefinitely.
 - iv. **22 February 2018** – In a case management conference before Justice Griffiths, a separate affidavit to which the same heavily redacted extracts of a draft report was annexed was handed to his Honour but the affidavit was not read and the annexure was not tendered. His Honour returned this affidavit to Thales. We add that the Auditor-General was represented at that hearing by the AGS, and no objection was taken by the solicitor appearing for the Auditor-General to the affidavit being handed to Griffiths J.
 - v. **2 July 2018** – The Attorney-General advised Thales that a certificate had been granted pursuant to section 37 of the AG Act.

² Transcript of Proceedings, *Thales Australia Limited v Auditor-General for the Commonwealth* (Federal Court of Australia, No. NSD 77 of 2018, Griffiths J, 22 February 2018) 8.

³ Transcript of Proceedings, *Thales Australia Limited v Auditor-General for the Commonwealth* (Federal Court of Australia, No. NSD 77 of 2018, Bromwich J, 29 January 2018), page 6 lines 15-22.

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vi. **9 July 2018** – Justice Griffiths made orders that the proceeding be dismissed by consent.

2. Thales' role

- 2.1. While no evidence has been put before the Joint Committee suggesting that Thales improperly or unlawfully sought the intervention of the Attorney-General under the AG Act, Thales reiterates that it was entitled to write to the Attorney-General advising him that the draft report provided to Thales contained sections which would unfairly prejudice the commercial interests of Thales and also prejudice the security, defence or international relations of the Commonwealth and therefore attracted the protection to which those interests are clearly entitled by section 37(2)(e) and (a) of the AG Act. Thales, as it was entitled to do, requested that the Attorney-General exercise a statutory power, a power expressly created by the AG Act.
- 2.2. Importantly, it was and remains Thales' view that the impugned paragraphs were misconceived, flawed or otherwise contained information such that their publication would occasion 'unfair prejudice' to the commercial interests of both Thales and the Commonwealth of Australia in the terms of the AG Act.
- 2.3. By its actions in corresponding with the Attorney-General and Auditor-General and in commencing proceedings in the Federal Court of Australia, Thales availed itself of the statutory protections expressly afforded to it (and to all other persons and corporations dealing with the Commonwealth of Australia) under the AG Act.
- 2.4. Thales considers that its views relating to a number of paragraphs of the draft report were ultimately vindicated by the Attorney-General's decision to issue a certificate. Whether the mechanisms for overseeing the decision-making power conferred on the Attorney-General by section 37 of the AG Act are sufficient is not a matter on which it is appropriate for Thales to comment.

Yours sincerely

CHRIS JENKINS
Chief Executive
Thales Australia

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