



Submission to the Review of the *Auditor-General Act 1997* (Cth)

If the Parliament wants to keep an effective interest in what is being done with power or resources provided by it to the government in the interests of the community as a whole, it must have a clear and formally independent and accountable channel through which it is advised regularly, consistently across programmes, by an official who is independent and apolitical and who can report ‘without fear of favour’; who has a clear unambiguous, legal requirement to look across the public sector as a whole; who has the power to allocate available resources according to assessment of risk; who has command of appropriate resources which are independent of the executive, with wide powers of access; and who has the power to report to the Parliament and others relevant as necessary/appropriate.¹

1. The Auditor-General and Australian National Audit Office (ANAO) are amongst Australia’s key accountability institutions. Through auditing the annual financial statements of Commonwealth entities and companies and their subsidiaries, in accordance with the *Public Governance, Performance and Accountability Act 2013* (Cth) (*PGPA Act*).² and providing information to the Parliament, the Auditor-General - supported by the Australian National Audit Office (ANAO) - promotes accountability and transparency in the public sector.
2. In recent years the Auditor-General has uncovered significant cases of misuse of public funds, including the Sports rorts scandal - in respect of which he concluded that the award of \$100 million in sports grants funding focussed on marginal electorates held by the Coalition as well as electorates that were to be targeted by the Coalition at the 2019 election³ - and, more recently, the purchase of the ‘Leppington Triangle’, which saw the Commonwealth pay \$29.8 million for a parcel of land valued a year later at \$3 million.⁴
3. The role of the Auditor-General is therefore vitally important, particularly where accountability frameworks are lacking. For example, in the context of the Sports rorts scandal, the fact that Sport Australia is not subject to the *Commonwealth Grant Rules and Guidelines* means that there is no legal requirement that the

¹ Former Commonwealth Auditor-General John Taylor, ‘Parliament and the Auditor-General’ in *Papers on Parliament No. 26: Republicanism, Responsible Government and Human Rights* (Department of the Senate, Parliament House, Canberra, August 1995) at 68.

² *Auditor-General Act 1997* (Cth) s 11.

³ Australian National Audit Office, “Award of Funding Under the Commonwealth Sport Infrastructure Program” 15 January 2020 <<https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program>> accessed 28 September 2020, at 24.

⁴ Australian National Audit Office, “Purchase of the ‘Leppington Triangle’ Land for the Future Development of Western Sydney Airport” 21 September 2020 <<https://www.anao.gov.au/work/performance-audit/purchase-the-leppington-triangle-land-the-future-development-western-sydney-airport>> accessed 28 September 2020, at 1-2.

reasons for funding decisions be documented.⁵ Furthermore, while Sport Australia's *Grant Management Framework* requires that reasons be documented, the Minister is not required to comply with the Framework.⁶

4. The importance of the ANAO's work is further heightened by the Government's unprecedented, rapidly-deployed spending in response to COVID-19.
5. Of central importance to the Auditor-General's ability to fulfil their role as an accountability institution is the extent to which they are independent, resourced and free to report their conclusions, as well as the breadth of their mandate. The Centre for Public Integrity considers that insufficient resourcing, as well as aspects of the *Auditor-General Act 1997* (Cth) (*the Act*) which limit both the mandate of the Auditor-General and their ability to report to Parliament, risk compromising the ability of the Auditor-General to perform their critical role within Australia's democracy.

Term of Reference 1: The governance framework as it relates to the Auditor-General and the Australian National Audit Office (ANAO), including the independence of the Auditor-General as an Officer of the Parliament and the audit independence of the ANAO, and resourcing arrangements

Resourcing arrangements

6. The Centre for Public Integrity considers it to be a matter of grave concern that the resourcing of the Auditor-General is being reduced, rather than reinforced, at a time when the complexity and volume of its work is increasing.
7. UN Resolution 69/228 of 2014 acknowledges the role that Supreme Audit Institutions (*SAIs*), like the Auditor-General and ANAO, play in "fostering governmental accountability for the use of resources and their performance in achieving development goals"⁷ and encourages Member States to "give due consideration to the independence and capacity-building of supreme audit institutions in a manner consistent with their national institutional structures".⁸ It also encourages Member States to apply the Mexico Declaration on Supreme Audit Institutions' Independence of 2007, Principle 8 of which enumerates the following requirements in respect of resourcing:
 - *"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 fulfil their mandate;*
 - *SAIs have the right of direct appeal to the Legislature if the resources provided are insufficient to allow them to fulfil their mandate."*

⁵ Australian National Audit Office, "Award of Funding Under the Commonwealth Sport Infrastructure Program" 15 January 2020 <<https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program>> accessed 28 September 2020, at 23.

⁶ Ibid.

⁷ UN Resolution 69/228 of 2014, "Promoting and fostering the efficiency, accountability, effectiveness and transparency of public administration by strengthening supreme audit institutions" <<https://undocs.org/en/A/RES/69/228>> accessed 20 January 2021.

⁸ Ibid.

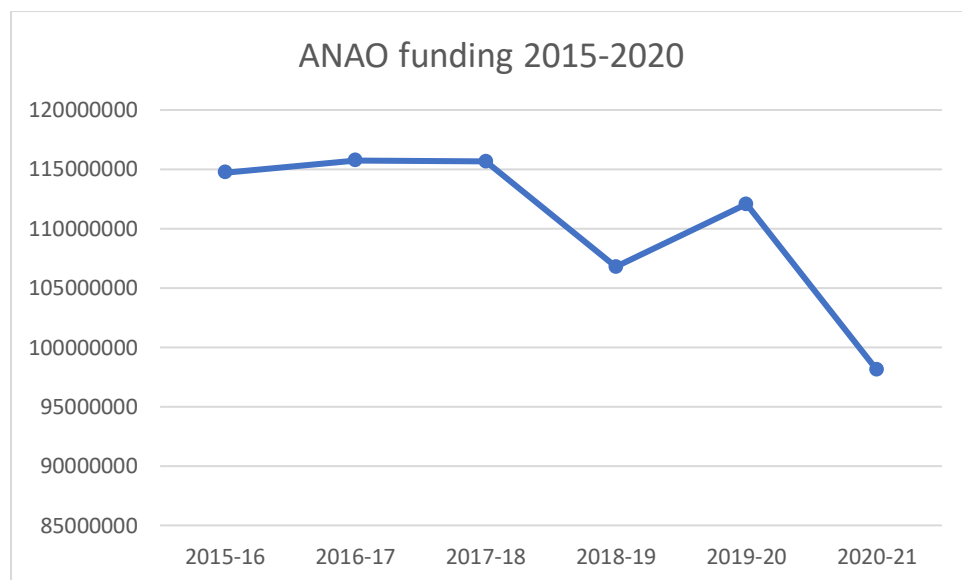
8. It is self-evident that the ability of the Auditor-General and the ANAO to perform their statutory functions is dependent upon sufficient funding, and that funding reductions are at odds with capacity-building. Yet the ANAO has faced dramatic funding cuts since 2016-17, with the total resourcing made available to it from the Portfolio Budget Statements dropping in real terms by \$24,079,800 since its peak in 2016-17. This is equivalent to a 19.7% funding cut:⁹

Total resourcing made available to the ANAO 2015-2021¹⁰

Year	Funding
2015-16	\$114,719,000
2016-17	\$115,742,000
2017-18	\$115,667,000
2018-19	\$106,772,000
2019-20	\$112,051,000
2020-21	\$98,110,000

Percentage reduction since 2016-17 peak¹¹

Nominal cut	\$17,632,000	15.2%
Real cut (including CPI)	\$24,079,800	19.7%



9. The ANAO's 2019-20 Annual Report makes clear the scale of the fiscal challenge facing the Auditor-General and ANAO: the ANAO has experienced an overall reduction in appropriation revenue since the 2013-14 financial year, and for the

⁹ Department of Prime Minister and Cabinet, Portfolio Budget Statements 2015/16-2020/21.

¹⁰ Source: Department of Prime Minister and Cabinet, Portfolio Budget Statements 2015/16-2020/21.

¹¹ Source: Department of Prime Minister and Cabinet, Portfolio Budget Statements 2015/16-2020/21.

third consecutive year it has reported an operating deficit (of \$3.117 million, in comparison to \$4.778 million in 2018-19).¹² The Auditor-General has attributed these losses to a number of factors, some of which include the increased complexity of audit work and the absence of funding to audit newly-created Commonwealth enterprises;¹³ as the Independent Auditor has concluded, they are also the consequence of reduced funding.¹⁴

10. The decrease in funding has coincided with an *increase* in entities to audit. Between 2017-18 and 2019-20, 13 new entities requiring audit activities were created: these include WSA Co and Australian Naval Infrastructure,¹⁵ for example, with their enormous budgets. No additional funds were provided to enable these audit activities to take place.¹⁶
11. As the Independent Auditor reported in her 2020 performance audit of the ANAO, the ANAO is subject to an “efficiency dividend” which is in place as a Government saving measure to “encourage efficiencies in the operations of Commonwealth entities”.¹⁷ However, as the Independent Auditor also acknowledged, the ANAO’s audits must be delivered under the ANAO Auditing Standards; because these establish minimum requirements, the potential for efficiency gains in the ANAO’s delivery of its services is limited.¹⁸
12. The ANAO has described the situation with regard to efficiency and productivity gains as follows:

Options for efficiency and productivity have been explored and implemented or are in the process of being implemented; however, they are not keeping pace with reductions to appropriation while the costs of delivering quality audit products continue to increase. The ANAO is now in a position where, in order to deliver the mandated financial statement

¹² Australian National Audit Office, “Annual Report 2019-20”, <https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/601091e0-bf1e-4246-aca6-27e2f5653ea7/upload_pdf/ANAO_Annual-Report_2019-2020.pdf;fileType=application%2Fpdf> accessed 28 September 2020, at 36; Australian National Audit Office, “ANAO Annual Report 2018-19” 14 August 2019 <<https://www.anao.gov.au/work/annual-report/anao-annual-report-2018-19>> accessed 28 September 2020.

¹³ Australian National Audit Office, “ANAO Annual Report 2018-19” 14 August 2019 <<https://www.anao.gov.au/work/annual-report/anao-annual-report-2018-19>> accessed 28 September 2020; Australian National Audit Office, “ANAO Annual Report 2019-20” 21 September 2020 <https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/601091e0-bf1e-4246-aca6-27e2f5653ea7/upload_pdf/ANAO_Annual-Report_2019-2020.pdf;fileType=application%2Fpdf>, at 36.

¹⁴ “Performance Audit of Internal Budgeting and Forecasting Processes and Practices, Australian National Audit Office”, Report by the Independent Auditor, September 2020 <https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/a2f79d90-d200-40e5-918e-afb49d6e86fd/upload_pdf/Independent-Auditor-report-ANAO-September-2020.PDF;fileType=application%2Fpdf> accessed 28 September 2020, at 18.

¹⁵ WSA Co Corporate Plan 2018-19 <https://westernsydney.com.au/sites/default/files/2019-06/2018-19_WSA_Co_Corporate_Plan.pdf> accessed 28 September 2020, at 8; Minister for Finance, “Australian Naval Infrastructure Up and Running” 14 June 2017 <<https://www.financeminister.gov.au/media-release/2017/06/14/australian-naval-infrastructure-and-running>> accessed 28 September 2020.

¹⁶ “Performance Audit of Internal Budgeting and Forecasting Processes and Practices, Australian National Audit Office”, Report by the Independent Auditor, September 2020 <https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/a2f79d90-d200-40e5-918e-afb49d6e86fd/upload_pdf/Independent-Auditor-report-ANAO-September-2020.PDF;fileType=application%2Fpdf> accessed 28 September 2020, at 19.

¹⁷ Ibid at 18.

¹⁸ Ibid at 16.

*audit functions, we need to reduce the number of discretionary performance audits provided to the Parliament.*¹⁹

13. While it is logical - and would presumably have been foreseeable - that the ANAO has been forced to respond to reduced funding by reducing its performance audit activity, it is also alarming. Whereas in 2016-17, 59 performance audits were performed, in 2019-20 that number fell to 42 and it is predicted to fall to 38 by 2023-24.²⁰ This equates to 29% fewer performance audits now than were conducted in 2016-17, with that decrease predicted to rise to 36% by 2023-24.
14. The Joint Committee of Public Accounts (*JCPA*) in its 1996 Report concluded that one of the principal elements of functional independence for the Auditor-General is adequate resourcing to fulfil audit functions effectively.²¹ The Centre for Public Integrity echoes this conclusion and urges the Committee to seek from the Government a commitment to sufficiently fund the Auditor-General and ANAO in order to enable them to fulfil their statutory functions and perform their critical role within Australia's democracy.
15. Structural changes to assist in guaranteeing adequate resourcing of the Auditor-General and ANAO could include a requirement that the Joint Committee of Public Accounts and audit (*JCPAA*) table its recommendation on the Auditor-General's budget submission (made to the Prime Minister under ss 8(1)(j) and (l) of the *Public Accounts and Audit Act 1951* (Cth)).

The ANAO as a parliamentary department with the Auditor-General as its head

16. It has been suggested that structuring the ANAO as a parliamentary department with the Auditor-General as its head would serve to reinforce their independence.
17. Some of the benefits of such a change include that it would make clearer the Auditor-General's position as an independent officer of the Parliament, and staff would no longer be clearly identifiable as belonging to the Executive. Insofar as independence of the Auditor-General must not only exist but be *seen* to exist (in order to promote public trust in government), these are not unimportant considerations- particularly in circumstances where the Australasian Council of Auditors-General 2020 Independence Update found the Commonwealth came in seventh out of 11 jurisdictions surveyed.²²

Term of Reference 3: The interaction of the Act and other relevant legislation including the *Public Governance, Performance and Accountability Act 2013*, the *Public Accounts and Audit Committee Act 1951*, *Freedom of Information Act 1982*, and the *Parliamentary Privileges Act 1987*

18. The Centre for Public Integrity considers that one aspect of the PGPA Act requiring attention is s 19, which establishes a duty to keep the responsible Minister and

¹⁹ Australian National Audit Office, "ANAO Annual Report 2019-20" 21 September 2020 <https://parlinfo.aph.gov.au/parlInfo/download/publications/tailedpapers/601091e0-bf1e-4246-aca6-27e2f5653ea7/upload_pdf/ANAO_Annual-Report_2019-2020.pdf;fileType=application%2Fpdf>, at 36.

²⁰ Ibid at 20; the number of performance audits completed in 2019-20 is reported as 42 in the ANAO's Annual Report, but 44 in the Independent Auditor's Report (at 20).

²¹ Report 346, "Guarding the Independence of the Auditor-General" (JCPA, 1996), 11.

²² Australasian Council of Auditors General, "Independence of Auditors General" <https://www.acag.org.au/files/Final%20Report%20on%20Independence%20of%20Auditors%20General.pdf> accessed 20 January 2021.

Finance Minister informed of certain matters. As the Auditor-General is the accountable authority of a Commonwealth entity, they are required by this section to give the responsible Minister or the Finance Minister “any reports, documents and information” in relation to the ANAO as that Minister requires. This section should be clarified to avoid the possibility of the Auditor-General being required to provide draft reports to the Executive, without oversight by the Parliament.

Term of Reference 4: The Auditor-General’s capacity to initiate audits into, and examine the performance of, all entities in the Australian Government sector

19. As a matter of logic, the Auditor-General’s capacity to initiate audits into, and examine the performance of, all entities in the Australia Government sector is limited by the resourcing available to it (indeed, as we noted at above paragraph 13, the consequence of reductions to the ANAO’s resourcing is that it is now producing 29% fewer performance audits than it was in 2016-17, with that decrease predicted to rise).
20. In addition, the Act in its current form contains a number of mandate-limiting provisions. Section 17(2) of the Act provides that the Auditor-General may only conduct a performance audit of a corporate Commonwealth entity that is a Government Business Enterprises (*GBE*), or of any of its subsidiaries, or of a wholly-owned Commonwealth company that is a GBE, or of any of its subsidiaries, on request by the JCPAA. The same restriction applies in respect of audits of performance measures (s 18A(2)) and assurance reviews (s 19A(2)).
21. A further mandate-limiting provision is found at s 18B(1)(a), which provides that the Auditor-General may only conduct a performance audit of a Commonwealth partner which is, is part of, or is controlled by the Government of a State or Territory, at the request of the responsible Minister or the JCPAA.
22. We note that entities jointly controlled by corporate Commonwealth entities are also not currently within the mandate of the Auditor-General as a result of the definition of “subsidiary” at s 8 of the PGPA Act, and this too requires rectification.
23. We urge the Committee to pursue the recommendation made by its predecessor’s 1996 Report - namely, that the Auditor-General’s mandate extend to performance audits of GBEs - ²³ as well as to recommend the extension apply equally to audits of performance measures and assurance reviews, and to amend the PGPA Act as required to ensure that entities jointly controlled by corporate Commonwealth entities fall within the Auditor-General’s mandate.

Term of Reference 5: Accessibility and transparency of reports and audit conclusions, including the operation of section 37 of the Act

24. There is an inextricable nexus between the accessibility and transparency of the Auditor-General’s reports and audit conclusions, and the fulfilment of the Auditor-General’s mandate. As former Auditor-General KF Brigden AO observed, “In practical terms, impairment of the auditor’s independence is synonymous with

²³ Report 346, “Guarding the Independence of the Auditor-General” (JCPA, 1996), Recommendation 14.

impairment of audit effectiveness”;²⁴ in turn, an impairment of audit effectiveness equates to an impairment of accountability.

25. A number of principles of the Mexico Declaration are directed at enshrining the independence of SAls:

- Principle 5 states that “SAls should not be restricted from reporting the results of their audit work”; and
- Principle 6 states that SAls should be “free to decide the content of their audit reports, as well as to “make observations and recommendations in their audit reports” and to “publish and disseminate their reports, once they’ve been formally tabled or delivered to the appropriate entity”

Section 37(1) of the *Auditor-General Act 1997* (Cth)

26. In the course of the ANAO audit which culminated in the report *Auditor-General’s Report No. 6 of 2018-19: Army’s Protected Mobility Vehicle - Light*, the Attorney-General issued a certificate under s 37(1) of the Act requiring that certain information be omitted from the Auditor-General’s report. Auditor-General Hehir has described this incident in the following terms:

*The certificate included omission of parts of the audit conclusion in the report and, as a result of this, I was prevented from fully concluding against the audit objective - which was ‘to assess the effectiveness and value for money of Defence’s acquisition of light protected vehicles’. This resulted in, for the first time, an ANAO performance audit being tabled with a disclaimer of conclusion to the effect that I was not able to prepare a report that expressed a clear conclusion on the audit objective in accordance with the ANAO Auditing Standards.*²⁵

27. At the time, Auditor-General Hehir described this not only as the most significant issue for 2018-19, but also as the most significant in his time as Auditor-General.²⁶

28. That the issue arose after Thales Australia Limited applied to the Attorney-General to have a certificate issued under s 37(1)(b) on the ground that the inclusion of particular information in the public audit report “would unfairly prejudice the commercial interests of any body or person” is particularly alarming.²⁷

29. On 9 December 2020, the Administrative Appeals Tribunal granted Senator Rex Patrick’s Freedom of Information review application in respect of the redacted report.²⁸ The unredacted version, which is now publicly available, reveals that sections which had been redacted following the issuing of the s 37 certificate include confirmation that the ANAO informed Defence in August 2017 of its

²⁴ John Taylor, “*Parliament and the Auditor General*”, Papers on Parliament No 26, August 1995
“https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/-/-/link.aspx?id=0D0F15AD116D457A8DE526509F900225&z=z accessed 15 January 2021.

²⁵ Australian National Audit Office, “*Annual report 2018-19*” <https://www.anao.gov.au/work/annual-report/anao-annual-report-2018-19> accessed 4 December 2020.

²⁶ Australian National Audit Office, “*Annual report 2018-19*” <https://www.anao.gov.au/work/annual-report/anao-annual-report-2018-19> accessed 4 December 2020.

²⁷ Auditor-General submission to Senator Dean Smith 4 October 2018.

²⁸ *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2020] AATA 4964 (9 December 2020).

preliminary finding that the Hawkei did not appear to represent value for money when compared to the Joint Light Tactical Vehicle,²⁹ as well as the conclusion that “defence has not clearly demonstrated that the acquisition provides value for money, as it did not undertake robust benchmarking in the context of a sole-source procurement”.³⁰ How these issues are capable of affecting the Commonwealth’s security, defence or international relations - one of the bases upon which the s 37 certificate was issued - remains unclear.

30. The Centre for Public Integrity considers that the certification process provided for by s 37 is, in its current form, capable of compromising the ability of the Auditor-General to effectively fulfil their mandate of providing independent, accurate advice to the Parliament to aid in accountability and transparency of public sector.

31. We note that concerns regarding the operation of this certification process are not novel. In Report 346 of 1996, the JCPA at Recommendation 9 urged 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 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.”

32. We further note that the JCPAA in Recommendation 3 of its Report 478 recommended that the following issues, raised by the Auditor-General in his submission to the Inquiry which was the subject of that Report, be referred for further consideration in this current review:

- whether there should be provision for a confidential report to be provided to at least the Chair of the JCPAA, along with relevant Ministers;
- whether the JCPAA should be consulted on a confidential basis if a proposed certificate affects the audit conclusion or information not otherwise prohibited from disclosure;
- whether there should be a distinction between types of certificates and at least a requirement for confidential consultation with the JCPAA before certificates are issued for non-national security matters; and
- whether substantive reasons should be provided when a certificate is issued.

33. The Centre for Public Integrity strongly endorses the adoption of all of these measures: they are essential for promoting transparency in respect of s 37 certificates. We also consider that the JCPA’s 1996 recommendation that the Executive may only direct the Auditor-General to exclude sensitive audit

²⁹ Unredacted version of “Auditor-General Report No. 6 2018-19 - Army’s Protected Mobility Vehicle - Light” at 68.

³⁰ Ibid at 6.

information from a report to the Parliament where disclosure of the information would be likely to prejudice national security, should be given serious consideration: the interests of the Australian people in knowing how public monies have been spent cannot justifiably be subordinated to - for example - a claim by a private organisation that its commercial interests (howsoever defined) would be affected by the Australian Parliament receiving certain information.

34. Insofar as the Auditor-General is mandated to report to the Parliament rather than the Executive, and the Parliament is constitutionally empowered to scrutinise the Executive, the prohibition contained at s 37(3) of the Act (preventing the Auditor-General from disclosing to a House of the Parliament, a member of the Parliament, or a parliamentary committee, information that s 37(1) prohibits being included in a public report) should also be removed, or its application amended.

Conclusion

35. The Committee's timely review of the *Auditor-General Act 1997* (Cth) provides a real opportunity to reinforce the independence, resourcing and mandate of the Auditor-General and ANAO. Insofar as such reviews are undertaken only once every ten years, it is also a relatively rare opportunity and the impetus to maximise its potential to achieve these ends is therefore even greater.
36. The Centre for Public Integrity urges the Committee to take the necessary actions to reinforce the independence, resourcing and mandate of the Auditor-General and ANAO, thereby ensuring their effectiveness as key integrity institutions, and in turn promoting accountability and transparency within Australia's system of government.