

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 29/01/2018 1:19:02 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged: Originating Application for Judicial Review - Form 66 - Rule 31.01(1)
File Number: NSD77/2018
File Title: THALES AUSTRALIA PTY LIMITED v AUDITOR-GENERAL FOR THE COMMONWEALTH
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: Interlocutory Hearing
Time and date for hearing: 01/02/2018, 10:15 AM
Place: Court Room 18B, Level 17 Law Courts Building Queen's Square, Sydney



A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

Dated: 29/01/2018 3:00:41 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Senate F&PA Committee

Tabled Document

Inquiry: SUPP. ESTIMATES

Date/Time: 23/10/2018, 11:19 AM

Witness Name: SENATOR PATRICK

Form 66
Rule 31.01(1)



Originating application for judicial review

No. of 2018

Federal Court of Australia
District Registry: New South Wales
Division: General

Thales Australia Limited ACN 66 008 751

Applicant

The Auditor-General for the Commonwealth

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Federal Court of Australia, 184 Phillip Street Sydney New South Wales 2000

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Thales Australia Limited ACN 66 008 751
Prepared by (name of person/lawyer) Ann Louise Donohue
Law firm (if applicable) Norton Rose Fulbright Australia
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Address for service Level 5, 44 Martin Place, Sydney New South Wales 2000
(include state and postcode)

[Form approved 01/08/2011]



The Applicant (**Thales**) applies to the Court under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**AD(JR) Act**) to review the decision of the Respondent (**Auditor-General**) made pursuant to s 37(1)(a) of the *Auditor-General Act 1997* (Cth) (or communicated) on 19 December 2017, and as varied on 11 January 2018 (**Decision**), alternatively under s 39B(1) of the *Judiciary Act 1903* (Cth), to quash the Decision and to make an order in the nature of a writ of prohibition. The Decision was:

- (a) to form an opinion that disclosure of the subject matter of paragraphs [4.48]-[4.53] (**Impugned Paragraphs**) of the Second Revised Draft Final Report dated 19 December 2017 was not contrary to the public interest by reason that it would unfairly prejudice the commercial interests of any body or person, pursuant to s 37(2)(e) of the *Auditor-General Act 1997* (Cth); and/or
- (b) not to exclude the Impugned Paragraphs or their subject-matter from the Auditor-General's final public report, to be published by tabling in Parliament during the week of 5 February 2018.

Details of claim

Thales is aggrieved by the Decision because:

1. The Auditor-General and the Australian National Audit Office (**ANAO**) has prepared in draft and is proposing to publish an audit report pursuant to s 17 of the *Auditor-General Act* entitled "Army's Protected Mobility Vehicle-Light" (**Report**), sections of which relate to the "Hawkei Protected Mobility Vehicle – Light" (**Hawkei**). The Hawkei is designed and manufactured by Thales under a contract with the Commonwealth of Australia, pursuant to which the Commonwealth owns intellectual property in the Hawkei.
2. Thales has expended significant resources in, *inter alia*, developing and marketing the Hawkei for overseas export.
3. On 6 November 2017, Thales was provided the statutory period of 28 days to respond to an audit extract of a draft of the Report provided by the Auditor-General under s 19 of the *Auditor-General Act*.
4. The audit extract included the subject-matter of the Impugned Paragraphs, being a cost-comparison between the Hawkei and the US Joint Light Tactical Vehicle (**JLTV**).
5. The vehicle cost-comparison in the Impugned Paragraphs is highly prejudicial to the commercial interests of Thales, the Commonwealth of Australia, and Australian entities in the supply chain for the production of the Hawkei. The vehicle cost-comparison in the Impugned Paragraphs purports to benchmark the cost and capability of the Hawkei and JLTV, in a way that implies that the JLTV is comparable and commensurable to the



Hawkei, but approximately half the price. This would prejudice Thales, the Commonwealth of Australia, and Australian entities in the supply chain for the production of the Hawkei because it would detrimentally impact the marketability, and therefore the export prospects, of the Hawkei.

6. The commercial prejudice identified at [5] above would be “unfair” within the meaning of s 37(2)(e) of the *Auditor-General Act* because the vehicle cost-comparison in the Impugned Paragraphs is itself unfair, does not comply with applicable Auditing Standards, and is of no probative value. That is because the comparison involves comparing vehicles which have relevantly different characteristics and qualities, using public domain material (in relation to the JLTV) which does not disclose the full terms of the transactions, and the comparison fails to take into account benefits to the Commonwealth which it would not obtain on a purchase of the JLTV. The vehicle cost-comparison has little or no value in explaining the performance of the audited entity in achieving its purposes.
7. Correspondence was exchanged with the Auditor-General between 30 November 2017 and 13 December 2017, in which Thales identified and explained that the subject matter of the Impugned Paragraphs would unfairly prejudice the commercial interests of Thales, the Commonwealth of Australia, and Australian entities in the supply chain for the production of the Hawkei.
8. On 19 December 2017, Thales was notified that the Auditor-General had formed an opinion on the public interest under section 37 of the Act. On 11 January 2018, Thales was informed that the Auditor-General proposed to publish (by tabling in the Parliament of the Commonwealth) the ANAO’s proposed final report in the week beginning 5 February 2018.
9. On 12 January 2018, by email from James Couche to David Brunoro, Thales gave notice in writing under s 13(1) of the AD(JR) Act requesting that the Auditor-General supply it with a statement in writing setting out the findings that he had made on material questions of fact, referring to the evidence or other material on which those findings were based, and giving reasons for the Decision.
10. The Decision is contrary to the interests of Thales.

Grounds of application

Thales has not yet been provided with any statement of reasons explaining the Decision and may amend its Grounds once provided with such a statement.

1. Pursuant to s 5(1)(h) of the ADJR Act, there was no evidence or other material to justify the formation of the opinion by the Auditor-General that the subject matter of the



Impugned Paragraphs would not unfairly prejudice the commercial interests of Thales, the Commonwealth of Australia, and Australian entities in the supply chain for the production of the Hawkei.

Particulars

- a. The Auditor-General did not have proper evidence or material to justify the comparison with the JLTV, in that the Auditor-General's audit team had access only to media releases and media reports, not auditable data.
 - b. The Hawkei and the JLTV are not meaningfully comparable because the vehicles are built to specifications that are significantly different, or not meaningfully comparable without a comprehensive identification of the differences between the vehicles, the differences in the commercial terms and the differences in the benefits to the Commonwealth.
 - c. The Hawkei and the JLTV are not commensurable, in the sense that there is no reliable common measure to compare and analyse the ordinal value of the two vehicles.
 - d. The ANAO in its conduct of the performance audit did not comply with relevant Auditing Standards, including because it failed to obtain sufficient and appropriate audit evidence. Further particulars of the non-compliance with Auditing Standards may be given following evidence.
2. Pursuant to s 5(1)(e) of the ADJR Act, the Decision was an improper exercise of the power conferred by the *Auditor-General Act* because, in its analysis of value, the Auditor-General failed to take a relevant consideration, being:
- a. the differences between the Hawkei and the JLTV;
 - b. the incomplete information available to the Auditor-General in respect of the sales of the JLTV the subject of the comparison;
 - c. the significant additional operational benefits associated with the Hawkei as compared to the JLTV; and
 - d. the significant secondary and tertiary benefits, both of a financial and non-financial nature attending the Hawkei and its future profitability.
3. Pursuant to s 5(1)(d) of the ADJR Act or s 39B(1) of the *Judiciary Act*, by reason of the facts referred to in paragraphs 1 and 2 above the Decision was not authorised by s 37 of the *Auditor-General Act*, because no reasonable decision maker in the position of the Auditor-General could have formed the opinion that he formed.



Interlocutory Orders sought

1. Orders 2-4 below be heard instanter.
2. The Applicant has leave to file in Court this Originating Application and the affidavit of Gary Mark Hines sworn 29 January 2018, upon the undertaking of the Applicant's lawyer to pay the filing fees due.
3. The Applicant has leave under r 10.24 *Federal Court Rules 2011* to serve the Originating Application and the affidavit of Gary Mark Hines sworn 29 January 2018 on the Respondent via email to grant.hehir@anao.gov.au by 5:00 pm 29 January 2018.
4. Orders 5-7 below be made returnable by 10.15 am on 31 January 2018 under r 1.39 and r 17.01(2) *Federal Court Rules 2011*.
5. Order, that until further order, the Respondent be restrained from publishing the Impugned Paragraphs, or the information contained in the Impugned Paragraphs, to the public.
6. Order that the Respondent produce to the Applicant by 7 days:
 - a. an un-redacted copy of the latest or final draft of the Report that is proposed to be published; and
 - b. a copy of so much of any audit file maintained by the Respondent and/or the ANAO as concerns the the information contained in the Impugned Paragraphs;
7. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth), on the ground that the order is necessary to prevent prejudice to the proper administration of justice, order that publication or other disclosure of:
 - a. the subject matter of the Impugned Paragraphs; and
 - b. paragraphs 19, 21, 23, 25, 35, 37 and 44 of the affidavit of Gary Mark Hines sworn 29 January 2018 and the confidential exhibit to that affidavit;

is prohibited until further order or until the proceeding is determined, and those documents be placed in a sealed enveloped marked "Suppressed – not to be opened by anyone other than by a judge of the court". This order applies throughout the Commonwealth of Australia.

Final Orders sought

1. An order under s 16(1)(a) of the ADJR Act quashing or setting aside the Decision, with effect from the date on which the Decision was made.
2. Alternatively to 1, an order under s 39(1)(a) of the Judiciary Act in the nature of certiorari quashing the Decision and an order in the nature of a writ of prohibition preventing the



Auditor-General from publishing the Impugned Paragraphs, or the information contained in the Impugned Paragraphs, to the public.

3. A declaration that disclosure of the information being the subject matter of the Impugned Paragraphs would be contrary to the public interest, within the meaning of s 37(1)(a) of the *Auditor-General Act 1997* (Cth), on the ground that it would unfairly prejudice the commercial interests of Thales, the Commonwealth of Australia, and other Australian entities in the supply chain for the production of the Hawkei.
4. Alternatively to 3, an order under s 16(1)(b) of the ADJR Act referring the matter to the Auditor-General for further consideration according to law.
5. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth), on the ground that the order is necessary to prevent prejudice to the proper administration of justice, order that publication or other disclosure of:
 - a. the subject matter of the Impugned Paragraphs; and
 - b. paragraphs 19, 21, 23, 25, 35, 37 and 44 of the affidavit of Gary Mark Hines sworn 29 January 2018 and the confidential exhibit to that affidavit;is prohibited until further order, and those documents be placed in a sealed enveloped marked "Suppressed – not to be opened by anyone other than by a judge of the court". This order applies throughout the Commonwealth of Australia.
6. An order that the Respondent pay the Applicant's costs of and incidental to the application.
7. Such further or other orders as the Court considers appropriate.

**Applicant's address**

The Applicant's address for service is:

Place: c/- Ann Donohue

Norton Rose Fulbright Australia

Level 5, 44 Martin Place

Sydney New South Wales 2000

Email: ann.donohue@nortonrosefulbright.com; peter.richard@nortonrosefulbright.com

The Applicant's address is 7 Murray Rose Avenue, Sydney Olympic Park New South Wales 2127.

Service on the Respondent

It is intended to serve this application on the Respondent.

Date: 29 January 2018

A handwritten signature in cursive script, appearing to read "Ann Louise Donohue".

Signed by Ann Louise Donohue
Lawyer for the Applicant