



Australian Government

Attorney-General's Department

Joint Committee of Public Accounts and Audit

Inquiry into the publication of the Audit Report No.6 (2018-19) Army's Protected Mobility Vehicle - Light

Attorney-General's Department Submission

October 2018

Introduction

On 21 September 2018, the Attorney-General's Department was informed by the Joint Committee of Public Accounts and Audit (the Committee) that an inquiry had commenced into the publication of Audit Report No.6 (2018-19) *Army's Protected Mobility Vehicle – Light*.

The Attorney-General's Department is pleased to provide the following submission. We look forward to discussing any aspect of the submission with committee members.

Powers of the Attorney-General under Section 37 of the *Auditor-General Act 1997*

Under s37(1)(b) of the *Auditor-General Act 1997*, the Attorney-General may issue a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of particular information would be contrary to the public interest. The Attorney-General plays a critical role in determining – before information is disclosed and damage done – the extent of any public interest immunity claim that might otherwise be invoked through normal Parliamentary processes in relation to information contained in the Auditor-General's report. As far as we are aware, this is the first instance where an Attorney-General has been required to consider the question of whether to issue a certificate under s37(1)(b) of the *Auditor-General Act 1997*, which points simultaneously to the fact that it is a power of last resort and that it is necessary to have it if a situation arises where otherwise material would be published which was prejudicial to the interests of the Commonwealth. The power of the Attorney-General to issue a certificate has been in the Act since its enactment.

It is worth noting that in 1987, the then Attorney-General issued a certificate under s48F of the *Audit Act 1901*, the predecessor to the Auditor-General Act, in relation to an Efficiency Audit Report on RAAF Explosive Ordnances.

The issuance of a certificate by the Attorney-General under s37(1)(b) of the *Auditor-General Act 1997* also triggers s37(3) of the Act, which 'acts as a declaration for the purposes of s49 of the Constitution'.¹ The effect of this is to limit the powers of Parliament such that it cannot require the Auditor-General to disclose the information the subject of the certificate, which in turn ensures that, in complying with the Attorney-General's certificate, the Auditor-General is not in contempt of Parliament.

Section 37 of the *Auditor-General Act 1997* provides:

(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).

¹ Explanatory Memorandum to the Auditor-General Bill 1996, paragraph 71.

(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.

In the present case, the Attorney-General made his decision after careful consideration of the information provided to the Attorney-General, which included legal advice as well as submissions from Thales Australia, the former Minister for Defence, the former Minister for Defence Industry and the Auditor-General.

Other similar powers of the Attorney-General in relation to public interest tests and the release of information

The Attorney-General has similar powers under a range of other legislation;² in many cases these powers extend to determining what may be adduced as evidence in compulsory hearings or investigations as well as what information can be tabled in Parliament. In each case, the Attorney-General's intervention is effectively pre-empting public interest immunity claims that might otherwise be made with a view to preventing potentially harmful disclosures of information before they occur. The Attorney-General also has powers under legislation such as the *National Security Information (Criminal and Civil Proceedings) Act 2004* and the *Director of Public Prosecutions Act 1983*³ which go to more specific aspects of the public interest – namely, the protection of information that could prejudice national security or where non-disclosure is in the interests of justice.

The Attorney-General is uniquely positioned to make these assessments as both a member of the Cabinet and the First Law Officer. It is unlikely that any other office holder would be in a position to weigh up the various issues at stake in determining the public interests involved. The Attorney-General is also unlike other members of the Executive – as the First Law Officer he has general legal and constitutional policy responsibility in relation to Commonwealth laws, including in relation to laws that limit the Parliament's powers under s49 of the Constitution.

Matters considered in relation to the applications

On 5 January 2018 the Attorney-General received an application from Thales Australia Limited (Thales) (a service provider to the Department of Defence) to issue a certificate under s37(1)(b) of the *Auditor-General*

² For example, s149 *Law Enforcement Integrity Commissioner Act 2006*, s9 *Ombudsman Act 1976*, s70 *Privacy Act 1988*, ss36 and 36A *Administrative Appeals Tribunal Act 1975*, s14 *Administrative Decisions (Judicial Review) Act 1977*.

³ Section 8.

Act 1997 (the Act), on the basis that publication of certain information in the ANAO Report *Army's Protected Mobility Vehicle-Light* would unfairly prejudice Thales' commercial interests within the meaning of s 37(2)(e) of the Act.

On 29 January 2018, Thales initiated proceedings in the Federal Court of Australia against the Auditor-General and obtained an ex parte order to prohibit the publication of certain information in the report.

On 15 February 2018 the Attorney-General wrote to the Auditor-General requesting any further information to assist him in his consideration of whether he should issue a certificate. A response was received on 23 February 2018.

On 19 February 2018 the Attorney-General wrote to the then Minister for Defence and the Minister for Defence Industry (as the relevant Ministers) requesting information that they thought was relevant to the decision-making process.

On 17 April 2018 a response was received from the then Minister for Defence and the Minister for Defence Industry providing additional information and requesting the Attorney-General issue the certificate under s 37(1)(b). In addition to the ground nominated by Thales, the Defence Ministers also stated that disclosure would be contrary to the public interest because:

- it would prejudice the security, defence or international relations of the Commonwealth (s37(2)(a))

On 28 June 2018, the Attorney-General wrote to the Auditor General, Defence Ministers and Thales advising of his decision to issue the certificate as he was of the opinion that the disclosure of certain information contained in the ANAO's audit report would be contrary to the public interest for one or both of the following reasons:

- it would prejudice the security, defence or international relations of the Commonwealth (s37(2)(a) of the Act); and
- it would unfairly prejudice the commercial interests of any body or person (s37(2)(e) of the Act).

On 9 July 2018 the Federal Court proceedings were dismissed with the consent of all parties.

On 20 August 2018 Thales wrote to the Attorney-General enclosing a copy of a letter of the same date sent to the Auditor-General and requesting the Attorney issue a further certificate under s 37(1)(b) of the Act in relation to additional information included in the draft report Thales received on 8 August 2018. On 23 August 2018 the Auditor-General wrote to the Attorney-General to advise him that this additional information would be removed from the report without the need for the Attorney-General to issue a second certificate. The Auditor-General's letter provided extracts of the report as amended for tabling consistent with the request from Thales.

On 31 August 2018 the Attorney-General wrote to the Auditor-General acknowledging his letter and also to Thales, asking it to confirm its application for a certificate would be withdrawn. A copy of this letter was provided to the Minister for Defence.

The audit report was tabled on 11 September 2018.