



20 November 2020

Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
CANBERRA ACT 2600
By email: jcpaa@aph.gov.au

Submission to the inquiry into the *Auditor-General Act 1997* (Cth)

1. The National Environmental Law Association Ltd ACN 008 657 761 (NELA) welcomes the opportunity to contribute to the review of the *Auditor-General Act 1997* (Cth) (**Auditor-General Act**).
2. NELA is a national, multi-disciplinary, member-based association focused on environmental law and sustainability. One of NELA's objectives is to provide a forum for and to otherwise assist in the discussion, consideration and advancement of environmental law among the legal profession and the wider community. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management.
3. NELA has a national board, a division in Western Australia, more than 100 members across other Australian jurisdictions, and governance documents including a Board Charter, strategic plan and various other governance policies. In accordance with NELA's Communications Policy, NELA's Board has reviewed and endorsed this submission that was drafted for the Board by Hanna Jaireth.¹

¹ NELA also appreciates review comment that former APEEL co-convenor Rob Fowler provided. The NELA Board has a strong mix of directors from state and Territory Bars, private sector not-for profit law firms, government and academia, namely Dr Hanna Jaireth (ACT) President, Jess Hamdorf (WA) Immediate Past President and Director, Natasha Hammond (NSW) Vice-President and Company Secretary, Nadja Zimmermann (VIC) Treasurer, Matt Floro (NSW) Director, Tiphonie Acreman (VIC) Director, Dr Katie Woolaston (Qld) Director, Dr Michele Lim (NSW) Director, Matt Littlejohn (NT) Director, Rebecca Digney (TAS). The profiles of board members can be accessed on NELA's website www.nela.org.au/about/board-members/.

4. NELA conveys its views, as elaborated below, under three of the inquiry's terms of reference:

- ToR1 The governance framework as it relates to the Auditor-General and the Australian National Audit Office (**ANAO**), including the audit independence of the Auditor-General as an officer of the Parliament and the audit independence of the ANAO, and resourcing arrangements
- ToR3 The interaction of the Auditor-General Act and other relevant legislation including the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*
...
- ToR6 The Audit Priorities of the Parliament

NELA recommends that:

- the ANAO's governance framework and independence be strengthened
- the Auditor General Act and Administrative Arrangements Order be amended so that the ANAO becomes a parliamentary department, alongside the four other parliamentary departments
- rule 17AG(3) of the *Public Governance, Performance and Accountability Rule 2014* made under the PGPA Act be amended to include reference to the external scrutiny (reviews and decisions) applied by international governmental organisations including United Nations agencies, regional organisations and convention bodies, so as to enhance Australian Government transparency and accountability
- the operation of Regional Forest Agreements be audited as a matter of urgent priority and that amendments to the EPBC Act be considered if appropriate as a result of the audit, so as to better protect Australia's declining biodiversity

The ANAO's governance framework and strengthening the independence and operation of the ANAO

5. NELA regards the functions of the independent statutory ANAO, and the additional scrutiny work done by the Joint Committee of Public Accounts and Audit (**JCPAA**) and other parliamentary committees, as essential features of good governance in Australia. The ANAO reports to the Australian Parliament on its financial statement audits of Australian Government entities, and its performance audits of Australian Government programs and prescribed entities. The ANAO also produces publications and other communications, makes submissions to Parliament and corresponds with numerous entities. The ANAO's audit recommendations focus on economy, efficiency, effectiveness, ethicality, and statutory and policy compliance.² Such independent scrutiny enhances

² Australian Government, Australian National Audit Office (hereafter ANAO), *Auditor-General's mid-term report, 2020, 2* and *ANAO Corporate Plan 2020–21*.

public sector integrity, transparency and accountability, and contributes to better public sector performance.³

6. NELA notes that in recent years the ANAO has conducted several performance audits that are relevant to the portfolios primarily responsible for federal environmental matters.⁴ As noted below, in response to the recommendations in those reports, programs were developed to strengthen the environmental agency's regulatory compliance framework and capabilities. Progress was not to the standard that the ANAO expected however.⁵ In 2019–20 the ANAO issued a very critical report on the implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).⁶
7. The ANAO has also reported that the delivery of services to Indigenous Australians, and regulatory activity, procurement and cyber security, are governance areas with the highest number of negative audit conclusions in recent years.⁷
8. NELA regards recognition of the central role that Indigenous Australians can and should play in managing country in Australia, including its natural and cultural heritage, as an ongoing challenge to good governance in Australia.
9. The value of independent monitoring, audit and compliance assessment in relation to the EPBC Act has been recognised in the two 10-yearly reviews of the EPBC Act, and ANAO reports. Professor Graeme Samuel AC's interim report in 2020 on the EPBC Act invited feedback on a proposal to include independent monitoring, reporting and assurance of compliance with national environmental standards.⁸
10. The implementation of those standards may be delegated to the states and territories under bilateral agreements that devolve development approval powers, despite significant concerns amongst many environmental stakeholders about that devolution.⁹

³ ANAO, *Auditor-General's mid-term report*, above n 2, 2; ANAO *Corporate Plan 2020–21*.

⁴ ANAO, *Management of Commonwealth National Parks* (2019), ANAO, *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*, ANAO Report No. 43 2013–14 (2014), ANAO, *Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*, ANAO Audit Report No 7 2015–16 (2016); ANAO, *Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on Audit: Report No 36 of 2016–17*. See also: ANAO, *Government Advertising: June 2015 to April 2019: Report No. 7 of 2019–20* (2019); *Commonwealth Resource Management and the Clear Read Principle: Report No. 14 of 2019–20* (2019); ANAO, *Probity Management in Rural Research and Development Corporations: No. 21 of 2019–20* (2019); ANAO, *Bilateral Agreement Arrangements Between Services Australia and Other Entities: No. 30 of 2019–20* (2020); ANAO, *Design and Establishment of the Regional Investment Corporation: No. 41 of 2019–20* (2020).

⁵ ANAO, *Monitoring Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval: Follow-on audit*, above n 4.

⁶ ANAO, *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999: Report No. 47 of 2019–20* (2020)

⁷ ANAO, *Auditor-General's mid-term report*, 2020, 3–4 (online pagination).

⁸ G Samuel AC, *Independent Review of the EPBC Act – Interim Report*, June 2020, 15, 56–7, 81.

⁹ H Jaireth and M Figg, 'Dispute resolution and the 'EPBC Act bilaterals'' (2014) 19 *Local Government Law Journal* 197–209; EDO, 'EPBC Act reform: National environmental law reform on a knife edge', 4 September 2020 <<https://www.edo.org.au/2020/09/04/epbc-independent-review-vs-fasttrack-bill/>>; L Cox 'Coalition prepared transfer of environmental powers to states months before EPBC review reported', *The Guardian*, 10 November 2020.

11. The 2009 Hawke review of the EPBC Act made numerous recommendations about the need for performance audit and oversight of the implementation of various sections of the EPBC Act.¹⁰ Those recommendations, and a very critical ANAO audit report in 2014, saw some strengthening of the environment department's regulatory capability and compliance activities, with various compliance policy documents developed, including a framework, a plan, a policy and independent audit and audit report guidelines.¹¹
12. NELA considers that a strong and effective independent monitoring, compliance and audit capability for development assessment and approval, and the implementation of other domestic and international environmental responsibilities are both essential to good governance, whether or not the implementation of national environmental standards are devolved to the states and territories.
13. Various sections of the Auditor-General Act provide for the statutory independence of the ANAO. The Auditor-General is an officer of the Parliament, has a fixed term appointment of ten years, and can only be removed by the Governor-General at the request of both Houses of Parliament.
14. However, the Auditor-General has identified several constraints on its independence:
 - As an Australian Public Service (APS) entity under the *Public Service Act 1999* (Cth), the ANAO sits within the portfolio of Prime Minister and Cabinet and is subject to APS statutory and policy frameworks.¹²
 - Under s 105D of the PGPA Act a responsible Minister can prevent the publication of certain materials pertaining to intelligence, security or law enforcement in an audit report. The Attorney-General can also prevent the Auditor-General from disclosing prescribed categories of sensitive information, including intergovernmental communications, Cabinet information, matters prejudicial to commercial interests, security defence and international relations, and sub judice matters.
 - In 2018 an ANAO report on the Army's Protected Mobility Vehicle – Light was tabled as redacted, following the issuance of a certificate under s 37 of the Auditor General Act. The Auditor-General reported:

*The issuance of a section 37 certificate presented one of the most significant challenges to the independence of the office of the Auditor-General in recent times, with the potential to affect the Parliament's scrutiny of the executive by limiting the Auditor-General's independent reporting to Parliament.*¹³

¹⁰ Australian Government, Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair, 2009). See for example recommendations 4, 6, 24, 38, 44.

¹¹ Australian Government, Department of Agriculture, Water and the Environment, 'Compliance auditing' <https://www.environment.gov.au/epbc/compliance-and-enforcement/auditing>

¹² ANAO, *Auditor-General's mid-term report*, above n 2, 9.

¹³ *ibid* 10.

15. NELA regards the independence of the ANAO as fundamental to its status and reputation. NELA is concerned that the Auditor-General has had an independent report to Parliament redacted by the issuing of a s 37 certificate notwithstanding that the Auditor-General is already prevented by the Parliament from including any information in a public report that would be contrary to the public interest in relation to such matters¹⁴ and the ANAO routinely engages with entities subject to an audit while developing its audit report.¹⁵
16. NELA recommends that the ANAO's governance framework and independence be strengthened.

Establishing the ANAO as a parliamentary department

17. NELA understands that a number of Members of Parliament (**MP**) from across the political spectrum have expressed concerns about security of funding for the ANAO, and that it has been suggested by at least one MP that the ANAO should become a parliamentary department.¹⁶
18. NELA agrees that the independence and performance of the ANAO would be enhanced if the ANAO were to be made a Parliamentary department. The ANAO would then be funded under a separate annual Appropriation Bill because the Australian Parliament as the legislature, is an arm of government at least partially independent of the executive government.¹⁷ Annual appropriation bills are subject to scrutiny in estimates hearings and parliamentary debate, as is the main appropriation legislation. Such a change would require amendments to the Auditor-General Act that establishes the ANAO as a listed entity under the PGPA Act with staff employed under the Public Service Act 1999 and to the Australian Government's Administrative Arrangements Order.
19. NELA recommends that the Auditor General Act and Australian Government Administrative Arrangements be amended so that the ANAO becomes a parliamentary department, alongside the four other parliamentary departments.¹⁸

The ANAO needs more funding

20. In 2020 the ANAO reported that its capacity to complete audits has been reduced due to resource pressures. The ANAO notes that it operates in an increasingly complex public sector environment, faces increased market costs for qualified resources and has to analyse increasing volumes of financial and other data when conducting audits. The ANAO reported that without increased funding it would have to reduce the number of

¹⁴ ANAO, *Auditor-General's mid-term report*, above n 2, 6.

¹⁵ See also: D Dingwall, 'Threats to audits as agencies push to redact reports', *The Sydney Morning Herald* 19 October 2018 <<https://www.smh.com.au/politics/federal/threat-to-audits-as-agencies-push-to-redact-reports-20181019-p50apv.html>> and K. Ziesing, 'Senate concerned about precedent set by AAO report on Hawkei' *Australian Defence Magazine* 25 October 2018 <<https://www.australiandefence.com.au/defence/general/senate-concerned-about-precedent-set-by-anao-report-on-hawkei>> .

¹⁶ P Karp, 'Coalition accused of trying to avoid scrutiny after audit office budget cut', *The Guardian*, 8 October 2020.

¹⁷ R Webb, 'Budget Guide', E-brief, Department of the Parliamentary Library, Australian Parliament, 2001.

¹⁸ The Department of Parliamentary Services, the Department of the Senate, the Department of the House of Representatives and the Parliamentary Budget Office.

performance audits it conducts, with a consequent reduction in Australian Government agencies' transparency and accountability to the Parliament.¹⁹

21. The ANAO's call for an additional \$6.3 million in 2020–21 and an additional \$9.1 million in 2023–24 is reported to have wide political support and followed criticism of a \$14 million budget cut to the ANAO in 2020.

The ANAO should be given statutory responsibility to monitor compliance with national environmental legislation and any devolved arrangements

22. The Interim Report of the Samuel review recommended that an independent compliance and enforcement regulator be established to monitor the implementation of and compliance with the EPBC Act, that is properly resourced with a full toolkit of powers available to it. This has not drawn support from the Australian Government.²⁰
23. Even if the Australian Parliament were to agree that an independent regulator such as a national Environment Protection Authority (EPA) should be re-established, as NELA would support, it is imperative that another independent audit authority be given statutory responsibilities for auditing the implementation of national environmental laws. A national EPA responsible for the implementation and enforcement of national environmental laws and standards, may have an internal audit function, but being subject to external audit would enhance the accountability and transparency of its operations.
24. External and independent audit of the implementation of national environmental laws continues to be essential because to date those laws have not arrested a concerning decline in environmental indicators arising from land-use change, habitat loss and degradation, and feral animal and invasive plant species, with threats to sustainability increasing.²¹ Climate change is also exacerbating the risks of natural disasters, with devastating consequences for Australia's biodiversity, world heritage properties, national heritages places, and wetlands of international importance.²²
25. NELA supports a recommendation that the Australian Panel of Experts on Environmental Law (APEEL) made in 2017. APEEL recommended that a special section be established within the ANAO with responsibility for monitoring and reporting on the performance of national environmental agencies and laws. APEEL saw this as an important integrity and accountability mechanism that would provide transparency in evaluating and reporting on whether reformed legislation was working effectively and achieving its objectives, and whether the implementation of the legislation was delivering continuous improvement in environmental protection and sustainability.²³

¹⁹ ANAO Corporate Plan 2020–21.

²⁰ M Slezak, 'Federal environment law review calls for independent cop, but Morrison Government rules it out', *ABC News*, 20 July 2020.

²¹ G Samuel AC, Executive summary, *Independent Review of the EPBC Act – Interim Report*, June 2020.

²² Royal Commission into National Natural Disaster Arrangements, *Report*, October 2020, 354–355.

²³ The Australian Panel of Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law (2017)*, 20–23.

<https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/59bb6fe3f43b55b154728d29/1505456149104/APEEL+Blueprint+for+environmental+laws.pdf>

26. NELA considers that consistent with the principle of ANAO independence, the ANAO should have discretion as to how it conducts its audit of national environmental legislation, but the Auditor-General Act should be amended to give the ANAO that responsibility, with its funding increased commensurate with that significant responsibility.

The interaction of audit legislation and parliamentary oversight

27. The JCPAA under s 46 of the PGPA Act has an oversight role in relation to various aspects of public administration including a power to approve rules made to the annual reporting requirements of Australian Government entities. Under Rule 17AG of the PGPA Act annual reports are required to include a section on management and accountability, including information about significant developments in external scrutiny of an entity, and the entity's response to that scrutiny:

17AG Information on management and accountability

(1) For the purposes of paragraph 17AD(d), this section sets out the requirements for the information on the management and accountability of the entity for the period that is to be included in the annual report.

External scrutiny

(3) The annual report must include information on the most significant developments during the period in external scrutiny of the entity, and the entity's response to that scrutiny, including particulars of:

(a) judicial decisions, or decisions of administrative tribunals or the Australian Information Commissioner, made during the period that have had, or may have, a significant effect on the operations of the entity; and

(b) any report on the operations of the entity given during the period by:

(i) the Auditor-General, other than a report under section 43 of the Act (which deals with the Auditor-General's audit of the annual financial statements for Commonwealth entities); or

(ii) a Committee of either House, or of both Houses, of the Parliament; or

(iii) the Commonwealth Ombudsman; and

(c) any capability reviews of the entity that were released during the period.

28. NELA recommends that Rule 17AG(3) be amended to include reference to regional and international reports concerning Australia and the decisions of international organisations including convention bodies and multilateral regional organisations. Annual reports may include sections on international engagement, but it would be appropriate to also include international reviews in the external scrutiny section of each annual report. Such reviews are often co-operative, non-judicial and non-confrontational, so as to enable formal

dispute settlement procedures to be avoided and for norms and expected compliance standards to be clarified and better implemented.²⁴

29. In 2019 for example, the Organisation for Economic Co-operation and Development (OECD) published a significant, detailed, and critical review of Australia's environmental performance.²⁵ The review noted that Australia remains one of the most carbon-intensive OECD countries that needs to develop a long-term strategy that integrates energy and climate policies to support progress towards reducing greenhouse gas emissions. It also noted that Australia needs to address the pressures on our rich biodiversity that arise from our fast-growing urban coastal populations and associated infrastructure developments, and that Australia needs to do more to monitor biodiversity and protect threatened species. In its 2018–19 annual report, the Department of Environment and Energy noted briefly in its international engagement section that the department supported the OECD to prepare the review and participated in strategic meetings.²⁶ The OECD Review findings, and any proposed national response, were not noted in the Department of Agriculture, Water and Energy's annual report for 2019–20.²⁷
30. The Australian Government has reporting obligations under various multilateral environmental agreements including the World Heritage Convention,²⁸ the Antarctic Treaty, the Ramsar Convention, the United Nations Framework Convention on Climate Change, the Paris Agreement, and the Convention on Biological Diversity. Some human rights treaties provide for independent complaints mechanisms that have generated communications from stakeholders impacted by climate change.²⁹
31. To facilitate independent scrutiny and to provide an accessible historical record, it is important that significant reviews done for or by international entities be listed in the external scrutiny section of agencies' annual reports.
32. NELA does not suggest that there has been any deliberate attempt to conceal international review reports, with funding constraints a likely explanation for less-than-ideal disclosure in some annual reports on some agency websites. NELA also notes that information may be accessible online from other sources. However, annual reporting is a

²⁴ United Nations Environment Program, *Training Manual on International Environmental Law* (2006) 44.

²⁵ OECD, *OECD Environmental Performance Reviews: Australia 2019*, <<https://doi.org/10.1787/9789264310452-en>>. See also OECD, *Press release: Australia needs to intensify efforts to meet its 2030 emissions goal* <<http://www.oecd.org/environment/australia-needs-to-intensify-efforts-to-meet-its-2030-emissions-goal.htm>>.

²⁶ Australian Government Department of the Environment and Energy, *Annual Report 2018–19* <<https://www.awe.gov.au/sites/default/files/2020-01/annual-report-2018-19-environment-and-energy.pdf>>.

²⁷ Australian Government, Department of Agriculture, Water and the Environment, *Annual Report 2019–20* <<https://www.transparency.gov.au/annual-reports/departement-agriculture-water-and-environment/reporting-year/2019-20>>.

²⁸ A Morton, UNESCO expressed concern over bushfire damage to Australia's Gondwana rainforests, *The Guardian*, 28 Nov 2019; P Hannam, Warragamba Dam plan stirs World Heritage Committee worry over 'values', *The Sydney Morning Herald*, 3 July 2019 <<https://www.smh.com.au/environment/conservation/warragamba-dam-plan-stirs-world-heritage-committee-worry-over-values-20190703-p523wr.html>>.

²⁹ O Cordes-Holland, 'The sinking of the Strait: the implications of climate change for Torres Strait Islanders' human rights protected by the ICCPR', (2008) 9 *Melbourne Journal of International Law* 405.

governance mechanism with specific processes of parliamentary tabling and scrutiny, such as through committee inquiries into annual reports, estimates hearings, questions on notice etc. As such, those annual reports ought to provide an accurate representation of Australia's performance as an international citizen of the society of states operating under the rule of law – a status that the Australian Government values.³⁰

33. NELA recommends that rule 17AG(3) of the *Public Governance, Performance and Accountability Rule 2014* made under the PGPA Act be amended to include reference to external scrutiny (reviews and decisions) applied by international governmental organisations including United Nations agencies, regional organisations and convention bodies so as to enhance transparency and accountability.

The Audit Priorities of the Parliament

34. The ANAO is not subject to direction in relation to the priority it accords its audits, whether an audit is to be conducted, or how it is conducted (s 8(4)). However, the Auditor-General is required to consider any priorities that the JCPAA has identified.³¹
35. NELA welcomes the JCPAA's reinstatement of the review of the operation of Regional Forest Agreements (RFAs) as a Parliamentary priority for 2020–21 for the ANAO's audits of the portfolio of Agriculture, Water and Environment.³²
36. The devolution of governance responsibilities for native forest industries to the states and territories pursuant to RFAs has been accompanied by inadequate compliance. The] required five-yearly RFA reviews have been either not done or have been completed late, and they have not considered adequately the impact of climate change, including worsening bushfires and extreme weather events, on the biodiversity values of forest areas.³³
37. Several decisions of the Federal Court of Australia concern VicForests' logging of forest coupes that provide habitat for the critically endangered threatened species, Leadbeater's Possum, and the Greater Glider that is listed under the EPBC Act as vulnerable. A 2018 decision currently on appeal included a finding that some of that logging had been unlawful.³⁴
38. The 2009 Hawke Review of the EPBC Act had recommended that RFAs be retained in the EPBC Act, but 'be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance', and that the reviews of the RFAs should include an

³⁰ Prime Minister the Hon Scott Morrison MP, *The Lowy Lecture 'In our Interest'*, Sydney Town Hall, 3 October 2019 <<https://www.pm.gov.au/media/speech-lowy-lecture-our-interest>>.

³¹ ANAO, *Annual Report 2019–20*, 4.

³² Australian Parliament, Joint Committee of Public Accounts and Audit, *Annual Report 2019–20*, 'Audit Priorities of the Parliament for 2020-21' <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/Annual_Report2019-20/Report/section?id=committees%2freportjnt%2f024492%2f73266>.

³³ See 'About RFAs', Australian Government, Department of Agriculture, Water and the Environment, 'Regional Forest Agreements', with information about each RFA <<https://www.agriculture.gov.au/forestry/policies/rfa>>; D Jacobs, 'Regional Forest Agreements: limitations and current opportunities', (2017) 32(4) *Australian Environment Review* 94–101.

³⁴ *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178 (currently on appeal), and at least five subsequent decisions.

assessment of the performance of RFAs in terms of meeting their agreed outcomes 'including protecting biodiversity and continuous improvement of a State's Ecologically Sustainable Forest Management framework', with the EPBC Act to be amended in the event that an RFA review is not completed within a specified timeframe, or a review has indicated serious non-performance.³⁵

39. NELA recommends that the operation of RFAs nationally be audited as a matter of urgent priority and that amendments to the EPBC Act be considered if appropriate as a result of the audit, so as to better protect Australia's declining biodiversity.
 40. Thank you for considering NELA's recommendations.
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³⁵ Australian Government, Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, recommendation 38 and government response, agreeing in part.