



Response to Questions on Notice

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Army's Protected Mobility Vehicle—Light—Auditor-General Report No. 6 (2018-19)

Australian National Audit Office

GENERAL COMMENTS

Nil

SPECIFIC QUESTIONS ON NOTICE

Question One:

Do you feel, in the context of the Act, that disclosing to this committee is the same thing as talking about something that is already before the committee?

Background to question in proof Hansard:

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***Senator Patrick:** Thank you. I'd like to table two documents. One of them is advice from the Clerk in relation to this particular matter. I table it so it is available to both the members of the committee and to witnesses. The second is the initiating application of Thales in the Federal Court. It's actually already been tabled in the FPA committee. Auditor-General, it's clear in the Act that you can't disclose anything that is subject to the section 37 certificate.*

***Mr Hehir:** Yes.*

***Senator Patrick:** However, it's very clear in the application before the court and now before this committee—assuming there's been no issue in tabling—that value for money was in fact an issue and was part of the controversy. Do you feel, in the context of the Act, that disclosing to this committee is the same thing as talking about something that is already before the committee?*

***Mr Hehir:** Yes. I can't make any statement as to what the nature of the material was that was redacted from my audit report.*

***Senator Patrick:** It's very clear that this comes down to the word 'disclose'—this is black-letter lawyer kind of territory. Disclose means 'to reveal'. In this instance you don't need to reveal anything. It's very plain and obvious from the court application that value for money was in fact the subject of the controversy, or was at least one element of the controversy. Perhaps you want to take some advice on that?*

***Mr Hehir:** I will go and take further advice. The advice that I have to date would lead me to a view that if I was to make any commentary of the nature you're talking about, it would be in breach of the Act in effect. But I will take further advice.*

Response

I have received legal advice that the correct interpretation of 'disclose' in subsection 37(3) of the Auditor-General Act 1997 is to communicate or provide, therefore I cannot discuss the information the

subject of the Attorney-General's certificate. Attached is a copy of legal advice received from the Australian Government Solicitor dated 13 December 2018.

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Our ref. 18000860

13 December 2018

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Dear Mr Larkin

Auditor-General Act 1997 – meaning of ‘disclose’ in section 37(3)

1. Thank you for your request for advice on the meaning of ‘disclose’ in s 37(3) of the *Auditor-General Act 1997* (the Act).

SHORT ADVICE

2. Your specific questions and our short answers are as follow.

1 Q *What is the meaning of ‘disclose’ in s 37(3) of the Act?*

A We consider the legally correct interpretation of ‘disclose’ in s 37(3) is to communicate or provide, rather than reveal or divulge.

2 Q *Can the Auditor-General discuss with the Joint Committee of Public Accounts and Audit (the JCPAA) information the subject of a certificate of the Attorney-General under s 37(1)(b) of the Act where that information is already before the Parliament?*

A No. Applying what we consider to be the legally correct interpretation of the meaning of ‘disclose’ in s 37(3) of the Act, the Auditor-General would lack the power to do so.

BACKGROUND

3. A question has arisen about the effect of s 37(3) of the Act in circumstances where the Attorney-General has issued a certificate under s 37(1)(b) of the Act in relation to particular information and subsequently the Auditor-General is asked by a member of a Parliamentary committee (such as the JCPAA) to discuss with the committee the information which is the subject of the Attorney-General’s certificate but which is known to the committee. The committee may or may not know that the information it has is the subject of the Attorney-General’s certificate.
4. Section 37 provides as follows:

37 Sensitive information not to be included in public reports

- (1) The Auditor-General must not include particular information in a public report if:

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- (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).
- (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.
- (3) The Auditor-General cannot be required, and is not permitted, to disclose to:
- (a) a House of the Parliament; or
 - (b) a member of a House of the Parliament; or
 - (c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;
- information that subsection (1) prohibits being included in a public report.
- (4) If the Auditor-General omits particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:
- (a) that information (which does not have to be identified) has been omitted from the report; and
 - (b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.
- (5) If, because of subsection (1), the Auditor-General:
- (a) decides not to prepare a public report; or
 - (b) omits particular information from a public report;
- the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a

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copy of each report under this subsection to the Prime Minister, the Finance Minister and any responsible Minister.

(6) In this section:

information includes written comments on the proposed report or the extract that are received by the Auditor-General under subsection 19(4).

public report means a report that is to be tabled in either House of the Parliament.

State includes a self-governing Territory.

DISCUSSION

5. Section 37(3) provides that the Auditor-General must not be required, and is not permitted, to 'disclose' to a House of the Parliament, a member of a House of the Parliament or a committee of the Parliament 'information that s 37(1) prohibits being included in a public report'.

Meaning of 'disclose'

6. The term 'disclose' is not defined in the Act. The *Macquarie Dictionary* (online version) gives the following meaning for the term:
1. to cause to appear; allow to be seen; make known; reveal: *to disclose a plot*.
 2. to uncover; lay open to view.
7. There are many cases to the effect that 'revelation' is central to the concept of disclosure: see, for example, *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606 at 615, *Bank of Valletta PLC v National Crime Authority* (1999) 164 ALR 45 at 64; *Green v AMP Life Ltd* [2005] NSWSC 95 at [18] and *Tim Barr Pty Ltd v Narui Gold Coast Ply Ltd* [2008] NSWSC 1070 at [19]. In *Nakhl Nasr v New South Wales* [2007] NSWCA 101, Campbell JA (with whom Beazley JA and Hodgson JA agreed) collated various judicial expressions on the meaning of disclosure, observing that:
- The essence of disclosure of information is making known to a person information that the person to whom the disclosure is made did not previously know: *R v Skeen and Freeman* (1859) Bell 97; 169 ER 1182 ('uncovering ... discovering ... revealing ... imparting of what was secret ... [or] telling that which had been concealed'); *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606 at 614-5 ('... a statement of fact by way of disclosure so as to reveal or make apparent that which (so far as the "discloser" knows) was previously unknown to the person to whom the statement was made'); *R v Gidlow* [1983] 2 Qd R 557 at 559 ('telling that which has been kept concealed'); *Dun and Bradstreet (Australia) Pty Ltd v Lyle* (1977) 15 SASR 297 at 299; *A-G v Associated Newspapers Ltd* [1994] 2 AC 238 at 248 ('to open up to the knowledge of others'); *Real Estate Opportunities Limited v Aberdeen Asset Managers Jersey Limited* [2007] EWCA Civ 197 at [78] ('the revelation of information for the first time').
8. However, consistently with the scope of the ordinary meaning of the term, the cases do not suggest that there can never be a 'disclosure' where there is no revelation. On the contrary, some of the cases noted above clearly recognise that there can be. In *R v Gidlow* Connolly J noted (at 559) that in *R v Skeen and Freeman* it was acknowledged by one of the judges 'that there may be disclosure [of a fact] within

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the meaning of a provision ... although there has been prior communication of the fact on some very limited basis'. Furthermore, and not unexpectedly, the cases indicate that the statutory context is important in determining the meaning of 'disclose'. This includes the purpose of the provision and the operation and effect of associated provisions.

Section 37 – purpose, operation and text

9. Section 37(3) needs to be read in light of other provisions in s 37, and the purpose of 37. The broad purpose of s 37 is to prevent the harms described in s 37(2) that might otherwise be expected to result from the performance by the Auditor-General of his or her public reporting functions under the Act.
10. Section 37 does this by imposing a prohibition on the Auditor-General including particular information in a public report if the 'disclosure of the information' (that would flow from the inclusion of the information in a public report) would be contrary to the public interest, as assessed by either the Auditor-General or the Attorney-General, for any of the reasons mentioned in s 37(2).
11. It is notable that the reasons mentioned in s 37(2) draw a distinction between 'disclosure' of information, deliberations or decisions and 'divulging' confidential information (see, eg, s 37(2)(b) and (d)). The ordinary meaning of 'divulge' is 'to disclose or reveal (something private, secret, or previously unknown)' (*Macquarie Dictionary*, online version). This suggests that the term 'disclosure' as used throughout s 37 does not necessarily involve revelation and may include simply the communication or provision of information.
12. Where the Attorney-General has issued a certificate to the Auditor-General under s 37(1)(b) in relation to particular information, it is clear that the Auditor-General is prevented from including the particular information in a public report. In broad terms, the effect of a s 37(1)(b) certificate is that the Parliament is prevented by the Attorney-General (a member of the Executive) from having access to the information. It is irrelevant to the operation of the prohibition in s 37(1) whether or not the particular information the subject of the Attorney-General's certificate is already, or subsequently becomes, known to the Parliament, a parliamentary committee or a member of the Parliament or of a committee. Section 37(1) is intended to limit the Auditor-General's reporting functions to Parliament, where one of the preconditions in s 37(1)(a) or (b) is met.
13. The further restrictions on the Auditor-General imposed by s 37(3) are designed to buttress the restriction in s 37(1), and in this way advance the broad purpose of s 37 we have described above. This is clear from the terms of s 37(3), which restrict the disclosure by the Auditor-General of 'information that subsection (1) prohibits being included in a public report'.
14. It is also clear that s 37(3) is intended to operate as a declaration of Parliament's powers, privileges and immunities for the purpose of s 49 of the Constitution. This is confirmed by the explanatory memorandum to the Auditor-General Bill 1996. The effect is that, in relation to information which s 37(1) prohibits being included in a public report, s 37(3) operates to limit the scope of the powers and privileges of the

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Parliament (which would normally enable a House of Parliament or a parliamentary committee to compel the Auditor-General to provide the information). This feature of s 37(3) marks it out from an ordinary secrecy provision.

15. In our view, it is clearly consistent with the purpose of s 37(1)(b), and the effect of s 37(3) as a declaration of Parliament's powers for the purpose of s 49 of the Constitution, for the restriction relating to disclosure in s 37(3) to be read as a restriction on the communication or provision of the information that is prohibited by s 37(1)(b) from inclusion in a public report.
16. In our view, it would be at odds with the purpose and operation of s 37(1) if the Auditor-General was permitted (in his or her 'complete discretion' (see s 8(4) of the Act)) to provide the Parliament, a committee or a member with the information that could not be included in a public report as a result of the Attorney-General's certificate under s 37(1)(b) because the Auditor-General considers the information is known to the Parliament, committee or member. There is also the difficult practical question of how the Auditor-General would come to be in a position to know with certainty that the Parliament, committee or member knows the relevant information. And there is a further practical question of what good purpose would be served by the Auditor-General, in his or her discretion, providing the Parliament, committee or member with the relevant information where the Auditor-General knows for certain that the Parliament, committee or member already has the same information.
17. It would also be a strange result if s 37(3), despite its intended effect as a declaration for the purpose of s 49 of the Constitution, prevented the Auditor-General from being required by Parliament or a committee to provide the Parliament or a committee with relevant information which was not already before it but did not prevent the Auditor-General from being required by Parliament or a committee from providing Parliament or a committee with the relevant information where the information was said to be already before the Parliament or committee. There is no clear reason why s 37(3), as a declaration for the purpose of s 49 of the Constitution, should be given such a limited effect.

Conclusion

18. The overall impression gained from s 37 is that where the prohibition in s 37(1)(b) applies the section is intended to substantially limit what the Auditor-General is lawfully able to do with, or in relation to, the information the subject of the Attorney-General's certificate. The parameters of the Auditor-General's functions and powers in this regard are tightly constrained by s 37. As set out above, this includes the statements the Auditor-General is required to include in a public report under s 37(4) and the report the Auditor-General is authorised to prepare for Ministers under s 37(5).
19. Although it is possible to argue that 'disclose' in s 37(3) of the Act means reveal or divulge, we consider the correct interpretation of that term, reading s 37(3) in context and having regard to the purpose of s 37, is that it means communicate or provide. For this reason, in any discussions with the JCPAA the Auditor-General should not provide to the JCPAA information that is subject to the Attorney-General's certificate

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under s 37(1)(b) where the information is already before the JCPAA. It would not, in our view, make any difference whether or not the JCPAA is aware that the information is the subject of the Attorney-General's certificate.

20. Please contact me if you would like to discuss this advice or require any further assistance.

Yours sincerely

Damian Page
Deputy General Counsel

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