Supplementary
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Australian National Audit Office

18 June 2009

Ms Sharon Grierson MP
Chair
Joint Committee of Public Accounts and Audit
Parliament House
CANBERRA ACT 2600

Dear Ms Grierson

I refer to my letter of 9 April 2009 attaching the ANAO's submission to the Committee's Inquiry into the *Auditor-General Act 1997*.

Paragraph 30 of our submission refers to the conduct of performance audits of Government Business Enterprises (GBEs) in which the Commonwealth holds a majority interest, and advises that the ANAO would seek legal advice to clarify whether there are any legal impediments to the Auditor-General's performance audit mandate being extended to such entities.

The ANAO has now received advice from the Australian Government Solicitor to the effect that there are no legal impediments to this course of action. A copy of this advice is attached for the Committee's information. In the light of this advice, the ANAO considers that the Auditor-General's performance audit mandate should also be extended to allow the conduct of performance audits in Commonwealth controlled GBEs. This is consistent with the view expressed in our earlier submission that the authority to conduct performance audits in all Australian Government entities is an important principle that is central to the Auditor-General's mandate.

I would also like to take the opportunity to suggest another section of the Act that warrants consideration. As the Committee would be aware, a number of amendments to the Act took effect on 25 February 2009. These included amendment of sub-sections 19(4) and (5) to give legislative recognition to extracts of audit reports and to require the Auditor-General to include in the final audit report any comments received from recipients of either a full proposed report, or an extract of a proposed report. In respect of comments received on a full proposed report, the amendments give legislative backing to the ANAO's long standing practice. The requirement relating to including comments received from recipients of an extract of a proposed report in the final audit report is a new requirement. Previously, our practice was to take these comments into account in finalising the report and, where appropriate, the comments were incorporated into the final report.

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As the Committee would be aware, these amendments have their origin in the Committee's Report No 386 that recommended:

> If the recipient of the proposed report gives written comments to the Auditor-General within 28 days after receiving the proposed report, the Auditor-General must consider, and include, those comments, in full, in the final report and any summary documents. (Recommendation 3)

The new arrangements with respect to publishing responses received from entities subject to audit, who receive the full proposed report, are working well. However, our recent experiences have highlighted some practical issues in meeting the requirement to include comments received on the extracts of the proposed report in the final audit report.

A number of our audits will typically involve the need to provide report extracts to a number of external parties including, for example, contractors, sub-contractors, and former APS personnel for the purpose of confirming the report's factual accuracy and to meet our procedural fairness obligations. In some cases at least, the ANAO has had limited or no contact with these parties during the course of the audit. This can lead to situations where the comments received are not directly relevant to the audit findings, or to the extract of the report provided for comment. This can result in extended consultation with the parties concerned. It can also result in the ANAO considering it necessary to include in the final report ANAO comment on the comments received. In some cases, it is appropriate for the ANAO to provide ANAO comments to the parties prior to the report being finalised and tabled. These processes inevitably lead to delays in finalising the audit report and require additional resources to be expended on matters that generally are not central to the audit.

The inclusion of such comments, particularly lengthy comments, can also have the unintended effect of distracting from the central focus of the audit, which is administration by the responsible agency or agencies of the program or activity subject to audit.

On balance, the ANAO considers that a more appropriate arrangement would be for the Auditor-General to be required to include in the final audit report any comments received from Australian Government entities that are the subject of the audit. The inclusion of any other comments received should be at the discretion of the Auditor-General, taking into account their impact on the report taken as a whole. Such an amendment would reflect the practice that existed prior to the recent amendments to the Act and would not, in our view, be inconsistent with the Committee's original recommendation referred to above.

Yours sincerely

Ian McPhee
Auditor-General

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17 June 2009

Mr Russell Coleman
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Dear Mr Coleman

Performance audits of Commonwealth companies

1. Recently, we discussed the matter of performance auditing of certain 'Commonwealth companies', that is, companies that are controlled but not wholly-owned by the Commonwealth (see the definition of 'Commonwealth company' in s 5 of the *Auditor-General Act 1997* (A-G Act) and s 34 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act)).

2. Under the A-G Act at present the Auditor-General may conduct a performance audit of such a company but not one that is a GBE. GBEs are prescribed by regulations made for the purposes of the CAC Act. (For a list of the current company GBEs see reg 4(2) of the *Commonwealth Authorities and Companies Regulations 1997.*) The Auditor-General may conduct a performance audit of a wholly-owned Commonwealth company that is a GBE only by 'invitation', eg, by the JCPAA or a responsible Minister.

3. Therefore, under the current legislative regime, if the Commonwealth establishes a company which it controls but does not wholly own to undertake a particular commercial activity, which company is prescribed as a GBE, then that company would not be subject to a performance audit by the Auditor-General. Theoretically, that company could be the subject of a performance audit, that is, if it were not prescribed as a GBE. We say 'theoretically' because it would seem unlikely that it would not be prescribed, given that it would be established for a commercial purpose.

4. In our view, there would not be a legal impediment to amending the A-G Act to provide for the performance auditing of such controlled but not wholly-owned companies. (We assume a relevant legislative amendment would be necessary on the basis that the current policy approach reflected in the legislation does not contemplate that a controlled but not wholly-owned GBE would be subject to performance auditing. Even wholly-owned GBEs are only subject to performance auditing by 'invitation' - see above.)

5. While there may not be a legal impediment to such an amendment it might give rise to policy issues that may need to be the subject of debate. For example, at the time of the introduction of the Auditor-General Bill 1996 the then Government had reflected on the matter of performance auditing in relation to the investment interests of private shareholders and the possibility that this could give rise to claims of 'oppression' of minority private shareholders. This consideration is reflected in the following passage in the Second Reading Speech to the Auditor-General Bill 1996 (1996 *Hansard* House of Representatives at 8343):

> '...if the body concerned is a partially privatised Commonwealth company, however, it would not be subjected to a performance audit. In this regard, the government has reflected on the need to continue the principle, as already accepted under the *Audit Act 1901*, of forbearance in consideration of the investment interests of private shareholders in such companies.
>
> Performance audits are an extra feature on the accountability landscape peculiar to public sector bodies. It does not follow, however, that the often high parliamentary profile given the reports of such audits would always be beneficial to the interests of the companies' private investor/shareholders. To avoid the claim that, through imposing this extra tier of performance auditing, the Commonwealth was, thus, 'oppressing' the minority private shareholders, the Auditor-General's surveillance over the operations of partially privatised Commonwealth companies is to be exclusively as the mandated external auditor of their financial statements'.

6. While an amendment along the lines outlined above may give rise to a policy debate it is difficult to see how it would lead to a successful argument, from a strictly legal perspective, that future minority private investors would be 'oppressed' within the meaning of that concept as it has been used in the context of the *Corporations Act 2001* (see, in particular, ss 232 and 233). In particular, investors would be buying into a company in circumstances where they would be aware that performance auditing was part of the accountability framework. In any event, if there was a real concern that this argument could arise at some time in the future it would of course be possible to make it clear in the amendment that the requirement for any performance auditing would not give rise to a relevant finding of 'oppression'.

7. We would be happy to discuss the matter further.

Yours sincerely

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