



24 April 2009

Ms Kris Veenstra  
Inquiry Secretary  
Joint Committee of Public Accounts and Audit  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Ms Veenstra

**INQUIRY INTO THE *AUDITOR-GENERAL ACT 1997* (the Inquiry)**

All Australian members of the Australasian Council of Auditors-General (ACAG), other than the Commonwealth Auditor-General, have been canvassed and submit the following comments in response to your invitation for ACAG to make a submission regarding the Inquiry. The views expressed in this submission represent those of all Australian (other than the Commonwealth Auditor-General) members of ACAG.

ACAG's response is in the same order as the Inquiry's terms of reference.

- a) *Whether the Act's focus on the Auditor-General's traditional assurance audit and performance audit roles gives the ANAO sufficient legislative backing for newer functions, for example the Defence "Major Projects Report" and, from July 2008, the Auditor-General's reviews of government advertising to give the public confidence that campaigns are legitimately authorized, properly targeted and non-political.*

ACAG has not researched the examples provided above or their legality. However, ACAG understands that the Commonwealth Auditor-General (the A-G) conducts this work under Section 20 *Audits etc. by arrangement* of the *Auditor-General Act 1997* (the Act). Where the work negotiated is an audit, then Section 20 (1) sub-sections (a) or (b) apply. Where the work negotiated is a review, then Section 20(1)(c) applies although the word review is not explicitly included in this Section. Instead, reference is made to "services ... of a kind commonly performed by auditors". Auditors commonly conduct "reviews".

ACAG also notes that under Section 20, any such audits or reviews are by arrangement (therefore negotiated) between the A-G and any person or body. This must mean that the "person or body" could refuse to have the audit or review conducted or seek to impose conditions with which the A-G may, or may not, wish to comply. For example, the person or body could agree to the conduct of an audit or review but limit the scope in such a way as to make the audit or review meaningless.

Therefore, ACAG considers that the Inquiry should consider broadening the Act in two respects:

- At least in situations where the Parliament has sought the completion of audits or reviews, such as those included in terms of reference (a), the Act should make explicit allowance for the conduct of such audits or reviews at the discretion of the A-G. That is, they should not be “by arrangement” audits.
- Explicit provision is included for the A-G to conduct reviews. For the benefit of the Inquiry, ACAG notes that the Auditing and Assurance Standards Board issues standards for audit engagements, assurance engagements and review engagements. Under these Standards, an audit provides reasonable assurance which is defined as:

a high, but not absolute, level of assurance. This is where the assurance practitioner’s objective is a reduction in performance engagement risk to an acceptably low level in the circumstances of the performance engagement as the basis for a positive form of expression of the assurance practitioner’s conclusion.

Whereas, a review provides limited assurance. In a limited assurance engagement the assurance practitioner’s objective is a reduction in performance engagement risk to a level that is acceptable in the circumstances of the assurance engagement, as the basis for a negative form of expression of the assurance practitioner’s conclusion. The acceptable performance engagement risk in a limited assurance engagement is greater than for a reasonable assurance engagement.

ACAG also notes that where the A-G is being requested, or obliged, to carry out additional functions, then appropriate resourcing should automatically follow.

***(b) Any amendments necessary to clarify the ANAO’s rights and obligations in relation to conducting audits and reviews.***

ACAG notes that under the existing Act, the A-G cannot “follow the dollar”. This applies to situations where, for example, a public service activity is outsourced to the private sector, for example an IT activity, or a grant is made to a private sector entity to fund the provision of a service, for example aged care. Another example might be a situation where the Commonwealth decides to support a particular business activity during times of financial uncertainty (see further commentary under terms of reference (e)).

The provision of a power to carry out a performance audit on matters relating to public money or property is necessary to provide the Auditor-General with the clear ability to examine the expenditure of public funds in areas where

Government enters into commercial arrangements with private parties for the provision of services. This is necessary to sustain the ability of the Auditor-General to carry out audits which examine whether the operations or activities of the whole or any part of the Commonwealth public sector are being performed effectively, economically and efficiently and in compliance with all relevant Acts.

This approach is also supported by the Administrative Review Council's Report No 42, *The Contracting out of Government Services* which addressed the potential for contracting and the consequent 'privatising' of the relationship between service providers and members of the public to result in accountability mechanisms traditionally provided by ministerial responsibility and Parliamentary oversight no longer being as effective. The Council went on to make recommendations to avoid loss or diminution of government accountability where actions of a contractor affect delivering government services.

Similarly the United Kingdom's 2001 Report,  *Holding to Account, The Review of Audit and Accountability for Central Government*, by Lord Sharman of Redlynch made recommendations for audit to have direct access to contractors and others.

Therefore, in addition to being able to audit (financial and performance audit) the public sector entity responsible for managing the outsourced activity or making the grant, the A-G should also have the authority to audit (financial audit or performance audit work) or otherwise investigate the private sector entity to the extent of the public funding provided. This provision exists in the mandates of other jurisdictions in Australia. An example is set out on Attachment 1.

The phrase "financial audit" here means an examination of the accounts and financial records of the private sector entity. However, and quite properly, the A-G should not be the auditor responsible for opining on the statutory financial reports of those private sector entities.

Another matter the Inquiry might consider concerning the rights and obligations of the A-G in conducting audits relates to access to Cabinet documents. Part 5 *Information-gathering powers and secrecy* of the Act provides the A-G with access powers relating to information, documents, persons and premises. There are times when an Auditor-General needs to consider Cabinet documents as part of the conduct of an audit or review in order to be aware of decisions by Cabinet that relate to the subject area or matter under audit or review or to substantiate other evidence and representations which have been obtained. The ability for the A-G to access these documents should be explicit in the Act.

This has been mandated in Western Australia by the inclusion of paragraph 59 in the Explanatory Memorandum to the Western Australian Auditor-General Bill 2006 which reads:

*The clause ensures that the Auditor General has the power to access all information necessary for the performance of his or her functions. Access to Cabinet documents would be available and claims of legal professional privilege would not be maintainable.*

Also, ACAG notes that the Victorian *Audit Act 1994* explicitly provides the Auditor-General with access to Cabinet documents. Section 11 of the act is a general power to request documents. This power is supplemented by section 12(1) which provides specifically that no obligation to maintain secrecy, or other restriction on the disclosure of information, furnished to a public servant, imposed by an enactment or rule of law or cabinet confidentiality applies to information required under section 11. This provision puts beyond doubt the ability to access any cabinet document. Relevant extracts from this legislation are included at attachment 2.

***(c) Whether there should be changes to the categories of agencies that the Auditor-General audits, in particular section 16 of the Act which limits the Auditor-General's capacity to audit Government Business Enterprises (GBEs).***

ACAG notes that the A-G can only audit a GBE, or any of its subsidiaries, should the A-G be requested to do so by the Responsible Minister, the Treasurer or the JCPAA. ACAG believes that the A-G should automatically be the auditor of all GBEs and their subsidiaries. All other Australian jurisdictions and New Zealand are the auditors of their GBEs, or equivalent entities, and of their subsidiaries. This enables the Auditors-General in these jurisdictions to conduct audits and performance audits (or, in the case of Queensland and the Northern Territory, performance systems audits). Note however that, while the Auditor-General in South Australia does not have the mandate to conduct performance audits, the mandate enables the conduct of efficiency and economy audits.

To assist the Inquiry, at Attachment 3 is the definition of State entity from one Australian jurisdiction. This definition embraces all public sector entities in that jurisdiction and appoints the Auditor-General in that jurisdiction as the auditor of all of those entities.

***(d) Any proposed amendments to the Act which would strengthen the audit independence of the ANAO and the Auditor-General's capacity to fulfill his role as an Independent Officer of the Parliament***

See observations noted previously regarding the A-G's capacity to "follow the dollar" and to audit GBEs. Other than this, ACAG has no comment under this term of reference.

*(e) The Auditor-General's capacity to examine the financial and performance outcomes from Commonwealth investments in the private sector and Commonwealth grants made to State and local governments*

We assume that, in this context, "investment" means the taking of equity in a private sector entity. ACAG does not consider that the A-G should be appointed the auditor of private sector entities in which the Commonwealth has made a non-controlling equity investment. If the equity investment is of a size which means that the entity is controlled (as that term is defined in Australian Accounting Standards) by the Commonwealth or by a Commonwealth entity then the entity would be a Commonwealth entity and the A-G should be the auditor.

In the case of the former (where the Commonwealth takes a non-controlling equity interest), the A-G should have explicit power (if not granted already) to audit the Commonwealth "investor" agency as to what was achieved in financial and performance terms by their investment(s).

ACAG notes however that the Commonwealth has in recent times provided financial support to entities such as ABC Learning. It is ACAG's view that in such circumstances the "follow the dollar" principle should again apply. Providing statutory access provisions would also serve to more equitably and effectively provide for audit coverage in these cases and overcome the inherent uncertainty and risk associated with the current non mandatory standard clause in individual contracts approach.

With regard to Commonwealth grants made to State and local governments ACAG notes:

- Where the grant is made to a State or Territory Government and that State or Territory Government is required to acquit the grant in some manner to the Commonwealth, ACAG considers that any audit of that acquittal should remain the responsibility of the relevant State or Territory A-G.
- Where the grant is made to a State or Territory Government but no acquittal is required, any local audit activity should again remain the responsibility of the relevant State or Territory A-G (however, see further comment in the final paragraph under this term of reference).

Under this term of reference, ACAG also gave consideration to situations where the Commonwealth may have given a guarantee to a financial institution or to a State or Territory Government. The economic difficulties currently facing Australia, and the world in general, gives rise to situations where revised auditing powers may need to be considered in the Commonwealth's interest. ACAG recommends that the Inquiry give consideration to these changed circumstances, the reporting responsibilities placed on financial

institutions and State or Territory Governments and the resulting auditing arrangements needed to ensure compliance with the terms of those guarantees.

The Commonwealth is introducing, via new intergovernmental agreements, revised funding and accountability arrangements between the Commonwealth and the States and Territories. Bearing in mind ACAG's comments under (f) *Other item 2* below relating to existing secrecy provisions in the Act, the Inquiry should consider recommending discussions between jurisdictions aimed at eliminating legislative and administrative impediments to cooperation between Auditors-General across Australia and to facilitate the conduct of audits across jurisdictions in the public interest. However, in doing so, any such discussions or potential resulting audits should not conflict or compromise each State or Territory Auditor-General's statutory responsibility of service to his/her jurisdictional Parliament. Nor should this compromise the role of those Parliaments in determining what it expects from their respective Auditor-General.

**(f) Other**

While there were no other terms of reference, there are two further matters ACAG believes the JCPAA should consider as part of its Inquiry.

1. The first relates to reporting by Commonwealth entities of information about their non-financial performance (referred to below as "performance information").

ACAG understands that the Commonwealth's performance reporting and outcomes-output frameworks are under review. In the event that Commonwealth entities are required to include in annual reports performance information, then ACAG believes it should be a requirement that such information is audited. This would enable users of such annual reports to be assured that the performance information reported is relevant to stated objectives, appropriate for assessing performance and whether or not information reported fairly represents actual performance.

2. The second relates to certain secrecy provisions in the *Auditor-General Act 1997*. ACAG considers that the secrecy requirements in Section 36 should be reviewed as they may be unduly restrictive and hinder the exchange of information to better inform the A-G. Section 36 provides:

*"AUDITOR-GENERAL ACT 1997 - SECT 36*

**Confidentiality of information**

(1) If a person has obtained information in the course of performing an Auditor-General function, the person must not disclose the information except in the course of performing an Auditor-General

function or for the purpose of any Act that gives functions to the Auditor-General.

Penalty: Imprisonment for 2 years.”

This may be interpreted as preventing the exchange of information with other parties where that exchange may assist or better inform the A-G. Other Audit Offices have generally not had the same problem since their secrecy requirements are usually modified by a provision along the lines of NSW *Public Finance and Audit Act* Section 38 subsection (2):

“Nothing in subsection (1) applies to or in respect of:  
(a) the conduct of any matter necessary for the proper administration of this Act or the prescribed requirements  
(b) .....

The opportunity to comment is appreciated and I trust you will find ACAG’s comments useful.

Yours sincerely



Glenn Poole  
Convener  
ACAG Executive

**ACAG's submissions to the JCPAA Inquiry into the *Auditor-General Act 1997***

**Example of legislation enabling an Auditor-General to "follow the dollar"**

ACAG includes here extracts from Tasmania's *Audit Act 2008* as they relate to that Auditor-General's powers to "follow the dollar".

**23. Examinations and investigations**

The Auditor-General may at any time carry out an examination or investigation for one or more of the following purposes:

- (c) investigating any matter relating to public money or other money, or to public property or other property;
- (f) examining the efficiency, effectiveness and economy with which a related entity of a State entity performs functions –
  - (i) on behalf of the State entity; or
  - (ii) in partnership or jointly with the State entity; or
  - (iii) as the delegate or agent of the State entity.

Of relevance to section 23(f), is section 22 which reads:

**22. Audits of accounts of related entities**

If a State entity performs any of its functions –

- (a) in partnership or jointly with another person or body; or
- (b) through the instrumentality of another person or body; or
- (c) by means of a trust –

the accountable authority must give written notice of that fact to the Auditor-General, and the person, body or trust is referred to as a "related entity" of the State entity.

**24. Audits at request of Treasurer**

(1) The Auditor-General may carry out any audit that the Treasurer requests the Auditor-General to carry out.



(2) Without limiting subsection (1), where a grant or advance of money is made by the Government to a person for specific purposes, the Treasurer may request the Auditor-General to audit the accounts of that person to ascertain whether the money granted or advanced has been expended in accordance with the purposes of the grant or advance.

In addition, sections 37 to 39 provide the information gathering powers that extend to any person. The *Audit Act 2008* can be found at

["http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc\\_id=49%2B%2B2008%2BAT%40EN%2B20090330090000;histon=;prompt=;rec=;term="](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=49%2B%2B2008%2BAT%40EN%2B20090330090000;histon=;prompt=;rec=;term=)

### **37. Power to obtain information**

(1) For the purpose of an audit, the Auditor-General may, by written notice, direct a person to do all or any of the following:

(a) to provide the Auditor-General with any information or explanation that the Auditor-General requires;

(b) to attend and give evidence before the Auditor-General or an authorised person;

(c) to produce to the Auditor-General any documents in the custody or under the control of the person.

(2) The Auditor-General may direct that –

(a) the information, explanation or answers to questions be given either orally or in writing (as the Auditor-General requires); and

(b) the information, explanation or answers to questions be verified or given on oath or affirmation that the information or evidence the person will give will be true.

(3) The Auditor-General or an authorised person may administer an oath or affirmation for the purposes of this section.

(4) A person who, without reasonable excuse, fails to comply with a direction under this section within 14 days of receiving it commits an offence.

Penalty: Fine not exceeding 500 penalty units.

(5) A person who is required under subsection (1) to attend under this section is entitled to be paid such expenses as the Auditor-General considers reasonable.

### **38. Access to accounts, information, money and property**

(1) For the purpose of an audit, the Auditor-General, or an authorised person, is entitled to full and free access at all reasonable times to –

(a) all accounts, information, documents, systems and records that the Auditor-General considers to be relevant to the audit; or

(b) public money or other money; or

(c) public property or other property –

that is or are in the possession of any person and the Auditor-General or an authorised person may make copies of or take extracts from any of the accounts, information, documents and records.

(2) For the purpose of subsection (1), the Auditor-General may cause a search to be made in, and extracts to be taken from, anything in the custody of the Treasurer or in any office of any person, without paying any fee for doing so.

(3) Subject to subsection (6), the Auditor-General or an authorised person may, at all reasonable times, enter and remain on any premises in order to exercise powers under this section.

(4) A person who prevents the Auditor-General or an authorised person from entering premises under this section is guilty of an offence and is liable on summary conviction to a fine not exceeding 500 penalty units.

(5) If an authorised person enters, or proposes to enter, premises under this section, the occupier must provide the authorised person with all reasonable facilities for the effective exercise of powers under this section.

Penalty: Fine not exceeding 500 penalty units.

(6) An authorised person is not entitled to enter or remain on premises if the authorised person fails to produce a written authority on being asked by the occupier to produce proof that the entry is authorised.

### **39. Duty to give information overrides other duties and rights**

(1) A person is not excused from giving information or an explanation, answering a question or producing a document under section 37 on the ground that the information, explanation or answer, or the production of the document, might tend to incriminate the person.

(2) A person must give information or an explanation, answer a question or produce a document as required under section 37 despite any duty of secrecy or confidentiality that the person has under another written law, and the person does not commit an offence under another written law by doing so.

(3) If a person gives information or an explanation, answers a question or produces a document under section 37, neither –

(a) the giving of the information or explanation, answering of the question or production of the document; or

(b) anything obtained as a direct or indirect result of the giving of the information or explanation, answering of the question or production of the document –

is admissible in evidence against that person in any civil or criminal proceedings, except –

(c) proceedings for an offence against this Division; or

(d) proceedings under Chapter XII of the *Criminal Code*.

**ACAG's submissions to the JCPAA Inquiry into the *Auditor-General Act 1997***

**Relevant extracts from the Victorian *Audit Act 1994* regarding access to Cabinet papers**

**11 Power to call for persons and documents**

**S. 11(1) amended by No. 93/1997 s. 14(a).**

(1) For the purpose of carrying out functions or powers under this Act or any other Act, the Auditor-General or a person authorised in that behalf by the Auditor-General may, in writing, require such persons as he or she thinks fit to appear personally before him or her at a time and place named, and to produce to him or her all such documents in the possession, custody or control of such a person as appear to be necessary for the purposes of their examination.

**12 Access to information**

**S. 12(1) amended by Nos 93/1997 s. 14(e)(i)(ii), 53/1999 s. 15(1)(a).**

(1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons employed in the public service or by an authority, where imposed by an enactment or rule of law or Cabinet confidentiality, applies to the disclosure of information required by the Auditor-General, a person authorised by the Auditor-General under section 11 or a person assisting the Auditor-General for the purposes of anything done under this Act.

**ACAG's submissions to the JCPAA Inquiry into the *Auditor-General Act 1997***

**Example of legislation enabling an Auditor-General to audit Government Business Enterprises (or equivalent) and their subsidiaries – definition of State entity with the Auditor-General having the authority to audit all State entities**

ACAG includes here extracts from Tasmania's *Audit Act 2008* as they relate to that Auditor-General's powers to conduct financial statement audits, investigations, compliance audits and performance audits of State entities.

**Section 4 Interpretation**

"State entity" includes –

- (a) an agency; and
- (b) a council; and
- (c) a Government Business Enterprise; and
- (d) a State-owned company; and
- (e) a State authority that is not a Government Business Enterprise; and
- (f) the council, board, trust or trustees, or other governing body (however designated) of, or for, a corporation, body of persons or institution, that is or are appointed by the Governor or a Minister of the Crown; and
- (g) a Corporation within the meaning of the *Water and Sewerage Corporations Act 2008*;

"related entity" has the meaning given to that expression in section 22;

**18. Auditor-General to be auditor of financial statements of all State entities**

(1) The Auditor-General is to audit the financial statements and any other information submitted by a State entity or an audited subsidiary of a State entity under section 17(1).

**23. Examinations and investigations**

The Auditor-General may at any time carry out an examination or investigation for one or more of the following purposes:

- (a) examining the accounting and financial management information systems of the Treasurer, a State entity or a subsidiary of a State entity to determine their effectiveness in achieving or monitoring program results;
- (b) investigating any matter relating to the accounts of the Treasurer, a State entity or a subsidiary of a State entity;
- (c) investigating any matter relating to public money or other money, or to public property or other property;
- (d) examining the compliance of a State entity or a subsidiary of a State entity with written laws or its own internal policies;
- (e) examining the efficiency, effectiveness and economy of a State entity, a number of State entities, a part of a State entity or a subsidiary of a State entity;
- (f) examining the efficiency, effectiveness and economy with which a related entity of a State entity performs functions –
  - (i) on behalf of the State entity; or
  - (ii) in partnership or jointly with the State entity; or
  - (iii) as the delegate or agent of the State entity.