

Sections 32 and 33 – Access Powers of the Auditor-General

Introduction

- 3.1 The effective conduct of a performance or financial statement audit requires the Auditor-General to have full and free access to Commonwealth records and premises. The Auditor-General requires access to records and premises to be able to obtain information. This information forms the evidence on which to base the Auditor-General's opinion about the efficiency and effectiveness of program administration, or in relation to a statement audit whether the financial statements are a true and fair view of a department's financial position.
- 3.2 Sections 32 and 33 of the Act provide the legislative framework for the access powers of the Auditor-General. Section 32 outlines the power of the Auditor-General to obtain information and section 33 empowers the Auditor-General to enter and remain on premises occupied by a Commonwealth agency.
- 3.3 The Committee has long held a view that the Auditor-General's access powers should be increased to include within its scope access to the premises of Commonwealth contractors. Several government departments and a private sector peak body gave evidence to the Committee supporting this view. This chapter examines this issue.

Section 32 – Overview

- 3.4 Section 32 provides the Auditor-General with wide powers to obtain information from any person. This includes directing a person to provide the Auditor-General with information, give evidence under oath or surrender documents under their control.
- 3.5 Section 32 is divided into five sub-sections. The section is reproduced, in full, below:

Section 32 – Power of the Auditor-General to obtain information

- (1) *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 that the Auditor-General requires;*
 - (b) *to attend and give evidence before the Auditor-General or an authorised official;*
 - (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 or answers to questions be given either orally or in writing (as the Auditor-General requires);*
 - (b) *the information or answers to questions be verified or given on oath or affirmation.*
- The oath or affirmation is an oath or affirmation that the information or evidence the person will give will be true, and my be administered by the Auditor-General or by an authorised person.*
- (3) *A person must comply with a direction under this section. Maximum penalty: 30 penalty units.*
- (4) *The regulations may prescribe scales of expenses to be allowed to persons who are required to attend under this section.*
- (5) *In this section:*
- authorised official** means an FMA official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.*

- 3.6 The powers of the Auditor-General to direct a person to provide information is not restricted to public sector agencies. However,

the audit process relies on the process of discovery. The ANAO needs to look through records and documents to determine the relevant information. If the ANAO does not know a document exists, then it cannot request that it be provided.

Section 33 – Overview

- 3.7 Section 33 outlines the powers of the Auditor-General to access premises. The Act empowers the Auditor-General to enter and remain on any property occupied by a Commonwealth agency. However, this power to enter premises does not extend to Commonwealth contractors.
- 3.8 Section 33 is divided into four sub-sections. The section is reproduced, in full, below:

Section 33 – Access to premises etc.

- (1) *The Auditor-General or an authorised official:*
- (a) *may, at all reasonable times, enter and remain on any premises occupied by the Commonwealth, a Commonwealth authority or a Commonwealth company; and*
 - (b) *is entitled to full and free access at all reasonable times to any documents or other property; and*
 - (c) *may examine, make copies of or take extracts from any document.*
- (2) *An authorised official is not entitled to enter or remain on premises if he or she fails to produce a written authority on being asked by the occupier to produce proof of his or her authority. For this purpose, **written authority** means an authority signed by the Auditor-General that states that the official is authorised to exercise powers under this Division.*
- (3) *If an authorised official enters, or proposes to enter, premises under this section, the occupier must provide the official with all reasonable facilities for the effective exercise of power under this section.*

Maximum penalty: 10 penalty units

- (4) *In this section:*

authorised official means an **FMA** official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.

premises includes any land or place.

Background

- 3.9 In *Report 379 – Contract Management in the Australian Public Service*, the Committee recommended that the Minister for Finance and Administration make legislative amendments to allow the Auditor-General to access premises of Commonwealth contractors. The Government rejected the proposal stating that it was more appropriate to pursue the issue of the Auditor-General access powers through administrative means.
- 3.10 The Government committed to developing a standard access clause that may be inserted into government contracts and request for tender documents. The Department of Finance and Administration (DoFA) and the Australian National Audit Office (ANAO) have been working jointly to develop the access clauses. The access clauses are not mandatory.
- 3.11 The access clauses provide the ANAO and Commonwealth agencies with access to information held by contractors, including third party subcontractors, for the purpose of audits. Information about the access clauses can be obtained on DoFA's website under *Best Practice Police Guidance – Standard Access Contract Clauses*.

Standard access clauses

- 3.12 The Committee sought to determine the progress of including the standard access clauses in government contracts. The Auditor-General advised that 'standard audit and access clauses have now been agreed to by the Minister for Finance and Administration and will very shortly be added to the competitive tendering and contracting (CTC) tool kit.'¹ The Auditor-General stated:

It is also understood that the revised procurement guidelines will include reference to these clauses. We now

1 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.20.

propose to write to all agencies and draw their attention to the standard clauses.²

- 3.13 DoFA said that the guidelines have been agreed with the Auditor-General and stated:

I think you will find on our website a Commonwealth procurement tool kit which includes details of those standard access clauses.³

- 3.14 DoFA reiterated that the access clauses will not be mandatory. Agencies 'are required to take account of those guidelines' but 'they are not mandatory.'⁴

- 3.15 Defence has long been the most prominent opponent of moves for the Auditor-General to have access to the premises of Commonwealth contractors. In previous inquiries, Defence has maintained that this could increase contractors' costs and, in any event, sufficient powers already exist. The Committee sought Defence's view on the standard access clauses developed by the ANAO and DoFA.

Access to the premises of Commonwealth contractors

- 3.16 The pace of technological innovation and the changing business and competitive environment has required government agencies to be more responsive to change. Government agencies are required to be more flexible and to explore new ways of delivering services to the public.

- 3.17 An increasing trend has been to contract out to private contractors services previously performed by government. As the private sector becomes increasingly enmeshed in the delivery of public goods and services, the public requires a mechanism to stay informed and the parliament needs a tool to keep executive government accountable. The Victorian Auditor-General stated:

...as the way governments carry out their business gets increasingly sophisticated and involves partnerships or contractual arrangements with the private sector, information held with respect to what is essentially

2 Mr Pat Barrett, Australian National Audit Office, *Transcript*, p.20.

3 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.34.

4 Mr Jonathan Hutson, Department of Finance and Administration, *Transcript*, p.34.

government activity is actually held by the private sector party. At times there even gets to be a debate about whose information it is.⁵

- 3.18 The evidence to the inquiry generally supported the need for the Auditor-General to have the power to access the premises of Commonwealth contractors. CPA Australia, for example, supported this position. CPA Australia stated:

... we do believe that, when you are talking about audits and the broader scope of getting into private sector premises, you do need some sort of legislative framework around that in order to be more accountable to the parliament and to the community.⁶

- 3.19 CPA Australia supported having a legislative framework in addition to some guidance such as the procurement guidelines. CPA Australia also noted that the standard access clauses needed to be worked through more thoroughly over time.

- 3.20 Similarly, the Department of the Environment and Heritage (DEH) supported the Auditor-General to have access to third party premises. In their submission, the DEH stated this will become 'increasingly important as more services are outsourced, and enables the ANAO and therefore indirectly the Department to impose more accountability on service providers.'⁷

- 3.21 The Department of Education, Training and Youth Affairs (DETYA) had already begun inserting standard access clauses in their contracts. DETYA stated that they never had a problem with contractor resistance. DETYA stated:

In fact our contractors appear to have accepted those provisions as a fair and reasonable part of our requirements as a purchaser of their services.⁸

- 3.22 Similarly, the Department of Foreign Affairs and Trade (DFAT) did not encounter any objection from private contractors. DFAT stated:

5 Mr Wayne Cameron, Victorian Auditor-General, *Transcript*, p. 17.

6 Mr Adam Awty, CPA Australia, *Transcript*, p.5.

7 Department of Environment and Heritage, *Submission No. 5*, p.2.

8 Mr Peter Grant, Department of Education, Training & Youth Affairs, *Transcript*, p.56.

We do have standard clauses and we have never had any problems with our contractors in permitting access to the Auditor-General.⁹

3.23 In evidence to the Committee, Defence stated while it would attempt to follow the guidelines, a contract is a negotiable document. Defence noted that there are security issues involved and discussed a range of scenarios in which companies in the Defence industry would not allow unrestricted access. Defence stated:

There is no way in which the company concerned would accept an unrestricted right of access by an Australian government authority, even the Auditor-General, to the records of that company, if it implied that they could go into secure areas where even we do not have access.¹⁰

3.24 Defence maintained that if access is provided, companies would want to seek a range of caveats. These caveats would limit the access to relevant financial areas and maybe whether the information could be published.

Conclusions

3.25 The Committee considers that the increasing role of the private sector in the provision of public goods and services requires an administrative mechanism to ensure the Auditor-General has access to the premises of Commonwealth contractors. The Auditor-General requires this power to obtain documentation and information to arrive at an opinion about the efficiency and effectiveness of program administration.

3.26 The Committee notes that standard access clauses have been developed jointly by the ANAO and DoFA and are available on the DoFA website. The ANAO has also committed to writing to all government departments informing them of the standard access clauses.

3.27 The Committee considers that the standard access clauses should be included in all government contracts unless there are strong reasons not to. In those cases where government agencies decide not to include in their contracts clauses which give the

9 Ms Annabel Anderson, Department of Foreign Affairs and Trade, Transcript, p.68.

10 Mr Michael Roche, Department of Defence, *Transcript*, p.42.

Auditor-General access to the premises of Commonwealth contractors, then they must account for this decision.

- 3.28 The following approach provides a framework that will help to ensure that Parliament is kept informed of agencies non-compliance with Auditor-General access clauses. Agencies will need to notify their non-compliance in their Annual Reports. This provides relevant committees of the Senate and House of Representatives, as part of their power to review the annual reports of agencies, with the opportunity to scrutinise agencies regarding their decisions.

Committee resolution

- 3.29 **The Committee has resolved that, as part of its power to review and change the Annual Report Guidelines, it will require government agencies to include in their Annual Reports:**
- **a list showing all contracts by name, value, and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.**