

Report on State Finances

19 OCTOBER 2018



NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

STATE FINANCES

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Auditor-General's introduction

Pursuant to the *Public Finance and Audit Act 1983*, I present my Report on State Finances 2018.

I am pleased to once again report that I issued a clear audit opinion on the State's consolidated financial statements. This demonstrates the Government's focus on preparing high quality information on the State's financial position and performance for use by stakeholders.

However, there are two key areas I would like to see addressed to further support the preparation of the State's financial statements.

Firstly, some complex accounting matters are not being resolved until late in the financial reporting cycle. This has contributed to an increase in the number of errors in the financial statements key agencies are submitting for audit, particularly around assessing the value of physical assets. Better planning and earlier resolution of these matters would lead to more efficient processes.

Secondly, the State needs to implement five new accounting standards over the next two years. Agencies will need to devote significant resources and effort to collect the necessary information and assess the impact at the whole of government level. I will work with Treasury and relevant agencies to help them improve quality assurance controls over their financial reporting.

Throughout 2017-18 my office worked with Treasury on reforms to improve financial governance, budgeting and reporting arrangements across the sector. The Government Sector Finance Bill 2018 passed both houses of Parliament in June 2018. However, the Legislative Council returned other proposed changes to the *Public Finance and Audit Act 1983* to the Legislative Assembly for further consideration. Most of these changes relate to the Public Accounts Committee. At the time of writing, the cognate Bill had not been debated.

The budget result was a \$4.2 billion surplus. The consolidated financial statements at 30 June 2018 do not reflect the sale of 51 per cent of the State's investment in Sydney Motorway Corporation for which it received \$9.3 billion. The sale was announced on 31 August 2018.

Finally, I would like to thank the staff of Treasury for the way they approached the audit. Our partnership is critical to ensuring the quality of financial management and reporting.



Margaret Crawford

Auditor-General
19 October 2018



Audit result

The State's financial statements given a clear audit opinion.

Timely and accurate financial reporting enables informed decision making, effective management of public funds and enhances public accountability.

Since the introduction of mandatory 'early close procedures' in 2011-12, the number of significant errors in financial statements of agencies had fallen largely due to identifying and resolving complex accounting issues early.

In 2016-17, Treasury narrowed the scope of mandatory procedures to focus on physical asset valuations and pro-forma financial statements. Despite being broadened for 2017-18, we have observed an increase in the number of errors in agency financial statements.

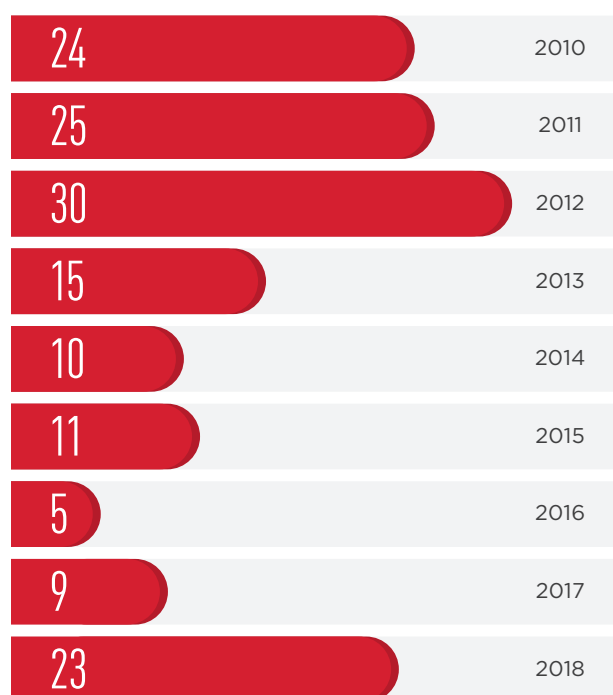
In 2017-18, twenty-three errors exceeding \$20 million were found in agencies' financial statements that make up the State's consolidated financial statements. This compares to only five in 2015-16.

The errors identified this year were the result of:

- incorrectly applying Australian Accounting Standards
- deficiencies in assessing the value of physical assets
- using inappropriate and inaccurate assumptions when measuring liabilities
- inaccurately reflecting inter-agency payables and receivables.

Quality financial reporting would be enhanced by responding to key accounting issues as soon as they are identified, and preparing accounting position papers for consideration by Treasury, agency Audit and Risk Committees and the Audit Office.

SIGNIFICANT ERRORS IN AGENCY FINANCIAL STATEMENTS EXCEEDING \$20M 2010-2018



Accounting matters

Key accounting matters addressed by the State in 2017-18.

Restatement of some of the State's previously reported asset and liability values.

The State corrected the previously reported values of some long-term liabilities (\$2 billion).

Accounting standards require the State to measure its long-term liabilities at the best estimate of the expenditures required to settle the obligations. The affected liabilities include claims liabilities of the Lifetime Care and Support Authority of NSW and the NSW Self Insurance Corporation, and scheme liabilities of the Long Service Corporation. The liabilities are adjusted by what is referred to as the 'discount rate' to reflect the decreasing value of money over time.

In the past, agencies used a variety of rates to discount these liabilities. Some liabilities were discounted using the estimated long-term fair value of 10-year TCorp bond yields while others were discounted using the expected return on investments. These discount rates did not comply with the requirements of Australian Accounting Standards and underestimated liabilities by \$2.0 billion.

In 2017-18, the State assessed the discount rates previously used in the Sector. It determined the market yield on Commonwealth Bonds best met the Accounting Standard requirements and used this rate to discount similar liabilities in relevant agencies. This resulted in a \$2.0 billion increase in the previously reported values of these liabilities and a similar decrease in retained earnings at 1 July 2016.

The State corrected previously reported values of certain Library assets (\$1.1 billion).

The value of the Pictorial Collection of the Library Council of NSW (the Library) was reassessed at 31 January 2018. During the valuation process the Library identified three errors in the 2015 valuations which overstated the previously reported asset values. The errors included:

- inconsistencies in the sampling technique (\$583m)
- double counting of some assets (\$376m)
- errors in population sizes (\$164m).

This resulted in a \$1.1 billion decrease in previously reported asset values and a corresponding decrease in the asset revaluation reserve at 1 July 2016.

Information system limitations continue at TAFE NSW.

TAFE NSW has experienced ongoing issues with its student administration system.

TAFE NSW has again implemented additional processes to verify the accuracy and completeness of revenue from student fees.

TAFE NSW expects to spend up to \$89 million on a new information system to address these issues. Modules of the new student enrolment system are planned to be in place by May 2019.



Accounting matters (Cont.)



Debt guarantee for Sydney Light Rail

In July 2018, the State, through Transport for NSW, entered into an agreement that provides a debt guarantee of up to \$500 million against a borrowing facility provided by two large banks to the consortium constructing the Sydney Light Rail. The borrowing facility has three tranches totalling \$500 million. The first tranche of \$100 million was advanced by those lenders to the consortium on 3 July 2018. The second tranche of \$100 million has been made available to be drawn down by the consortium. The remaining tranche cannot be advanced unless certain conditions are met, including the agreement of Transport for NSW.

Impairment of Allianz Stadium

The 2018-19 Budget provided new funding for stadium infrastructure with \$729 million for the construction of a new stadium at Moore Park to replace the Sydney Football Stadium (Allianz Stadium). The State reduced the reported value of Allianz Stadium by \$208 million from \$229 million to \$21 million, to reflect the decrease in the available useful life of the asset.



Relocation of Powerhouse Museum

The 2018-19 Budget provided \$245 million to construct the new Powerhouse Museum in Parramatta. Land and buildings at the Ultimo site were revalued to consider other possible uses of the site. The revaluation exercise added \$220 million to the reported value of the Ultimo site.

Accountability for the State's Cemetery Trusts

In 2016-17, the State determined that five Cemetery Trusts were controlled entities of the State. To date, only two of the five Trusts have accepted this position and submitted financial statements for audit. The Catholic Metropolitan, Northern Metropolitan and Southern Metropolitan Cemetery Trusts have not accepted they are controlled entities of the State and consequently did not submit financial statements to the Auditor-General for audit, which was a limitation of the scope of the audit of the Total State Sector Accounts. The combined assets and liabilities that have not been audited by the Audit Office were \$557 million at 30 June 2018.



Looking forward

Risks to the quality and timeliness of financial reporting.

Challenges associated with valuing the State's physical assets.

When we audit financial statements we focus on areas we consider higher risk. These areas often require the use of estimates and judgements.

The valuation of the State's physical assets is one such area. Fair value estimates are inherently complex and sensitive to assumptions and judgements. In the public sector, this may be exacerbated by the unique nature

of its assets, such as land under roads, preserved plant specimens, cultural collections and other heritage assets.

In 2017-18, valuations of physical assets added \$24.5 billion to the value of the State's balance sheet. These assets are now valued at \$339.2 billion. Our audits of these valuations identified:

The Library Council of NSW had three errors in the methodology previously used to value their pictorial assets (\$1.1 billion error).

The Royal Botanic Gardens and Domain Trust did not previously recognise a value for their Herbarium assets (\$284 million error).

Some revaluations within the Ministry of Health did not meet the requirements of Australian Accounting Standards or Treasury requirements (\$159 million error).

The Department of Justice used an incorrect valuation methodology (\$83 million error).

Some important matters agencies should consider when planning/conducting asset valuations include:

STARTING OUT

- Planning is important.
- Most effective revaluations include early engagement with all stakeholders, including auditors.
- Determine who needs to be involved and advised of progress with the revaluation – e.g. finance, internal audit, audit and risk committee.
- Ensure asset registers are complete and there is evidence to demonstrate the agency controls the assets.
- The effective date of the valuation can be any date after the financial year commences, but well before year end.

Looking forward (Cont.)

MANAGEMENT'S ROLE

- For large mass valuations consider using a suitable project management methodology to ensure the process remains 'on track' with sufficient oversight.
- Consider engaging an expert to perform the valuation, but maintain responsibility for the outcomes. Ensure the outcomes are reasonable and quality review the results, including the appropriateness of inputs and key assumptions.
- Compare pre and post valuation results on an individual asset basis. Where changes are significant and/or unexpected, document explanations from the valuer.
- Start revaluations early so they are completed by early close (around March). The timetable must allow time for a quality review of results and for the results to be recorded in the financial records.
- Revaluation workpapers must include the revaluation source data provided to the valuer and a reconciliation of the source data to the general ledger.

USING EXPERTS

- The terms of engagement should be documented in an engagement letter, which clearly details the proposed valuation methodology. It's important the valuer knows what is required from a policy perspective and clearly understands the accounting framework used to prepare the financial statements.
- Valuation reports should detail the key assumptions used, explain why the valuation approach was adopted and how the use of relevant observable input was maximised.
- Valuation reports should clearly differentiate between assets revalued using a cost approach and those using an income or market approach. They should explain why the approach used was the most relevant for the asset type.
- Consider using representative/statistical sampling for mass valuations and determine the extent of physical inspections that may be required.
- If a sampling technique is used, it should provide sufficient confidence that the sample is representative of the population.
- Significant judgements should be supported by relevant benchmark data or other analysis and observations. A common example in the public sector is to discount asset values to reflect restrictions on use.
- Ensure the valuer has considered the age and condition of the assets, and heritage/cultural aspects and/or other special factors.

WHAT ABOUT INTERVENING YEARS?

- Perform revaluations with sufficient regularity to ensure asset carrying values in the financial statements reflect fair value.
- Indexation alone is not normally a substitute for a full revaluation. A full revaluation may be needed to accurately establish fair values if asset values move significantly when indices are applied to them.
- Where indexation is used between full revaluations, the indices should be appropriate for the type of asset being assessed.
- Indexing can be unreliable in assessing whether the fair value of assets has moved over time. For example, some assets are valued based on re-collection cost estimates, which may fall over time due to improved re-collection methods and technology.

COMMUNICATION

- For mass or complex valuations, key stakeholders, including auditors, should be involved at the scoping stage and invited to planning meetings with valuers.
- Management should meet with the auditors regularly to discuss progress and outcomes.
- When issues are identified, management should consult with and seek advice from Treasury.

Looking forward (Cont.)

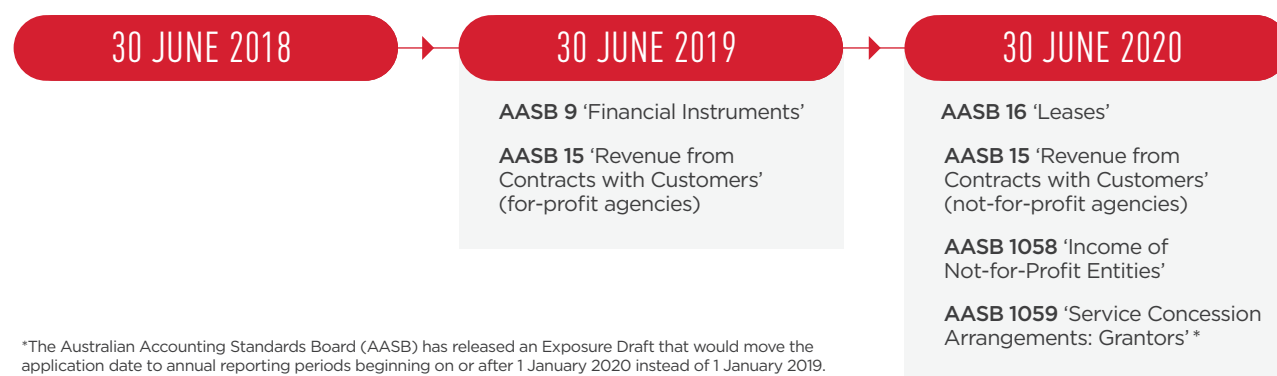
The State will need to implement five new accounting standards over the next two years.

The State has started developing processes it considers necessary to effectively implement the requirements of five new accounting standards. The changes are significant and will impact the financial position and results of agencies and the State.

The new requirements increase the risk of errors in the financial statements. To minimise this risk, agencies will need to devote resources and effort to collect the necessary information and assess the impact of the accounting changes at the whole of government level.

Treasury is liaising with and obtaining information from agencies to assess the impact of the new standards at the whole of government level. Treasury is also liaising with other Treasuries throughout Australia on common implementation issues. To help agencies implement the new standards, Treasury is developing guidance, preparing position papers on proposed accounting treatments, and mandating options within the new standards that agencies need to adopt on transition.

KEY DATES



AASB 9 'Financial Instruments' introduces a simplified model for classifying and valuing financial assets. It also introduces a new method for calculating impairment (decreases in asset values), which may result in agencies recognising impairment losses earlier.

AASB 15 'Revenue from Contracts with Customers' will change the timing and pattern for recognising revenue and increase related financial reporting disclosures.

AASB 1058 'Income of Not-for-Profit Entities' provides guidance to help not-for-profit entities account for:

- transactions conducted on non-commercial terms
- the receipt of volunteer services.

AASB 15 and AASB 1058 will significantly impact agencies' financial statements, particularly in relation to grant income.

AASB 16 'Leases' will change the way lessee agencies recognise, account for and report operating leases in financial statements. With a few exceptions, such as low value and short-term leases, existing operating leases will need to be recognised as 'right of use' assets with corresponding liabilities recorded and disclosed in the Statement of Financial Position. Previously, operating lease payments were expensed as incurred and future lease payments were simply disclosed as commitments

in a note to the financial statements. This change will impact all agencies with existing operating leases, but more particularly, those with large lease portfolios.

AASB 1059 'Service Concession Arrangements: Grantors' provides guidance for public sector entities (grantors) who enter into service concession arrangements with private sector operators for the delivery of public services. These agencies will need to recognise previously unrecorded service concession assets and liabilities in their financial statements.

The transition and implementation of the new accounting standard requirements will take significant time and effort. Agencies will have to:

- review current contracts with customers, grant agreements, lease agreements and arrangements with private sector operators
- ensure contracts and lease registers are complete
- assess whether existing systems can capture the necessary key information
- train staff and ensure guidance is given to those who oversight financial reporting
- consider the impact on stakeholders.

The State's result

A \$4.2 billion surplus, \$1.5 billion more than was budgeted.

The Total State Sector comprises 304 entities controlled by the NSW Government.

The General Government Sector, which comprises 212 entities, generally provides goods and services funded centrally by the State.

The non-General Government Sector, which comprises 92 Government businesses, generally provides goods and services, such as water, electricity and financial services that consumers pay for directly.

A principal measure of a Government's overall performance is its Net Operating Balance (Budget Result). This is the difference between the cost of General Government service delivery and the revenue earned to fund these sectors.

WHAT CHANGED FROM 2017 TO 2018?

\$

4.2b

2017-18 General Government Budget Result

Change in revenues compared to 2016-17



Dividends and distributions

2016-2017	Change	2017-2018
2.4b	1.3b	3.7b

Due to:

- Increases in dividends from Sydney Water (\$255 million), Water NSW (\$60 million) and the Port Authority of NSW (\$195 million).
- An increase in the dividend from Landcom (\$200 million) as profits retained in prior years to fund certain projects were not spent.
- Returns from investments in managed funds increased by \$649 million as the State increased the value of its investment using proceeds from the lease of Ausgrid and Endeavour Energy assets.



Taxation

2016-2017	Change	2017-2018
30.8b	537m	31.3b

Due to:

- Increases in land tax (\$564 million) driven by land valuations used to calculate land tax assessments.
- Increases in payroll tax (\$553 million) and other taxes (\$419 million).
- Stamp duty receipts were \$1.0 billion lower largely due to additional duty in the prior year of \$718 million relating to the lease of Ausgrid and Endeavour Energy assets.

The State's result (Cont.)



Grants & Subsidies

2016-2017	Change	2017-2018
31.4b	509m	31.9b

Includes:

- Increase in the receipt of general purpose grants relating to GST collected by the Australian Government (\$753 million).
- Decreases in national partnerships and specific purpose payments received from the Australian Government (\$305 million), mainly due to the timing of major road projects.
- An increase in Commonwealth Health Reform funding (\$338 million).
- An increase in grants associated with the National Education Reform Agreement for Education (\$233 million).



Sale of Goods and Services

2016-2017	Change	2017-2018
8.2b	349m	8.5b

Includes:

- Increases in education revenue (\$133 million).
- Higher fees for services in transport to produce property plant and equipment (\$89 million).

2016-2017	Change	2017-2018
5.5b	185m	5.3b

Other revenues

Change in expenses compared to 2016-17



Recurrent Grants & Subsidies

2016-2017	Change	2017-2018
12.6b	1.3b	13.9b

Due to:

- A \$613 million increase in grants for the delivery of aging, disability (including NDIS), homecare, community and public housing services.
- Increase in grants paid to the local government sector (\$342 million).



Employee Costs

2016-2017	Change	2017-2018
34.9b	1.2b	36.1b

Due to:

- Wage inflation increases (\$701 million).
- Increased workers' compensation and long service leave costs (\$337 million).



Other operating expenses

2016-2017	Change	2017-2018
18.3b	1.4b	19.7b

Includes:

- Increased expenditure by Transport for NSW (\$283 million) for major rail projects and the new rail timetable.
- Increased expenditure by the Department of Education (\$165 million) to address the maintenance backlog, and higher school operating expenses.

2016-2017	Change	2017-2018
6.8b	103m	6.9b

Other expenses



5.7b

2016-17 General Government Budget Result

Fiscal responsibility

The State maintained its AAA credit rating.

The object of the Fiscal Responsibility Act 2012 is to maintain the State's AAA credit rating.

The Government manages NSW's finances in alignment with the *Fiscal Responsibility Act 2012* (the Act).

The Act establishes the framework for fiscal responsibility and the strategy to protect the State's AAA credit rating and service delivery to the people of NSW.

The legislation sets out targets and principles for financial management to achieve this.

New South Wales has credit ratings of AAA/Stable from Standard & Poor's and Aaa/Stable from Moody's Investors Service.

THE FISCAL TARGETS FOR ACHIEVING THIS OBJECTIVE ARE:

General Government annual expenditure growth is lower than long term average revenue growth.

General Government expenditure grew by 5.4 per cent in 2017-18. This was lower than the long-term revenue growth rate of 5.6 per cent.

Eliminating unfunded superannuation liabilities by 2030.

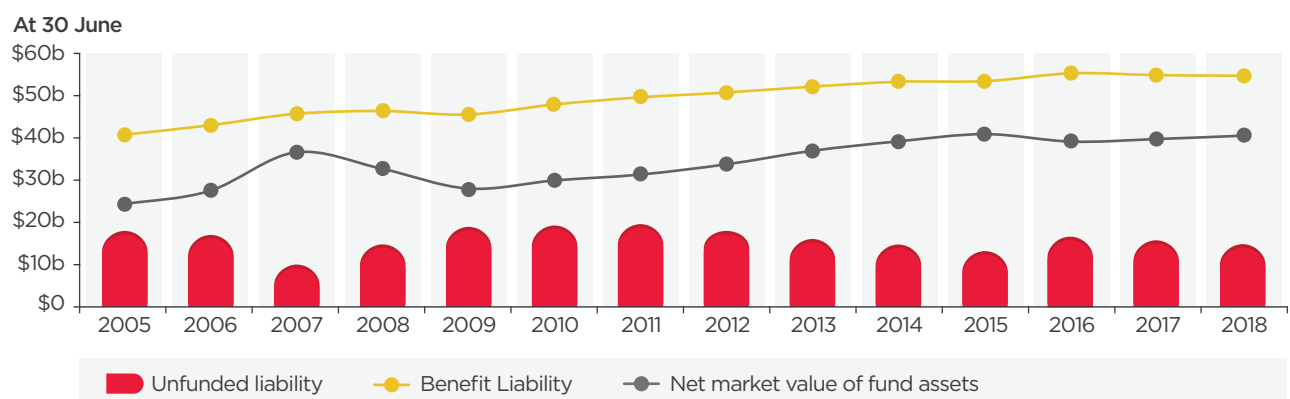
The Act sets a target to eliminate unfunded superannuation liabilities by 2030.

The State's funding plan is to contribute amounts escalated by five per cent each year so the schemes will be fully funded by 2030. In 2017-18, the State made employer contributions of \$1.7 billion, which is largely consistent with contributions over the past five years. Treasury expects superannuation liabilities will be fully funded by 2030 based on the funding program at the last triennial review (December 2015).

For fiscal responsibility purposes, the State uses AASB 1056: Superannuation Entities. This standard discounts superannuation liabilities using the expected return on assets backing the liability.

Using this method, the State's unfunded superannuation liability was \$14.0 billion at 30 June 2018 (\$15.0 billion at 30 June 2017). The unfunded liability is \$3.4 billion less than it was when the Act was introduced.

SUPERANNUATION FUNDING POSITION SINCE INCEPTION OF THE ACT



Fiscal responsibility (Cont.)

The unfunded superannuation liability in the State's financial statements is \$56.4 billion.

This is because it uses a different measurement basis than AASB 1056. In financial statements, accounting standards (AASB 119 Employee Benefits) require the State to discount liabilities using the Government bond rate.

The two approaches produce significantly different results. In the current economic climate with lower interest and discount rates, the approach under AASB 119 provides a significantly higher liability.

Purpose	AASB 119: Employee Benefits	AASB 1056: Superannuation Entities
	Financial Statements for Employer	Financial Statements of Superannuation Funds
State's Superannuation Unfunded Liability	\$56.4 billion	\$14.0 billion
Discount rate	2.65 per cent	5.5 – 7.4 per cent
Discount rate used	Government bond rate	Expected return on assets backing the liability

A five-year review of the Fiscal Responsibility Act 2012 is overdue

The Act requires the Treasurer to review it as soon as possible after 28 August 2017. The purpose of the review is to assess whether:

- the Act's policy objectives remain valid
- the terms of the Act remain appropriate for securing those objectives.

The review must also assess the State's long-term average general government revenue growth.

The Act was due to be reviewed as soon as possible after 28 August 2017 and the findings tabled in each House of Parliament by 28 August 2018. At the date of this report, the Treasurer has not tabled a review of the Act.

The State's revenues

Revenues increased by \$3.2 billion to \$86.7 billion in 2017-18.

Revenues were underpinned by growth in taxation and Australian Government grant revenues, but stamp duties fell.

Tax revenue for the Total State Sector increased by \$746 million, or 2.5 per cent compared to 2016-17, primarily due to a:

- \$582 million increase in land tax from growth in land values
- \$562 million increase in payroll tax from NSW employment and wages growth
- \$1 billion decrease in stamp duty due to lower than expected growth in property market transactions, volumes and prices. In 2016-17, stamp duty included \$718 million from the leases of Ausgrid and Endeavour Energy assets.

The State expects total stamp duties will fall to \$9.5 billion in 2018-19, a decrease of almost \$2.0 billion from 2016-17.

The State received Australian Government grants and subsidies of \$30.9 billion in 2017-18.

The State received \$444 million more in grants and subsidies from the Australian Government than it did in 2016-17. This was due to increases in GST revenues (\$753 million) and special purpose payments (\$683 million).

There was a decrease in National Partnership payments (\$992 million), mainly due to the timing of major road



projects including the Pacific Highway (Woolgoolga to Ballina), WestConnex and Western Sydney Infrastructure Program.

In 2017-18, sales of goods and services were \$1.1 billion higher than in 2016-17. This reflected increased transaction revenue at Sydney Water (\$139 million), the Department of Education (\$133 million), WestConnex (\$145 million), Department of Finance, Services and Innovation (\$111 million) and Sydney Trains (\$83 million).

Other dividends and distributions were \$803 million higher than in 2016-17 mainly reflecting higher investment returns on TCorp investments.

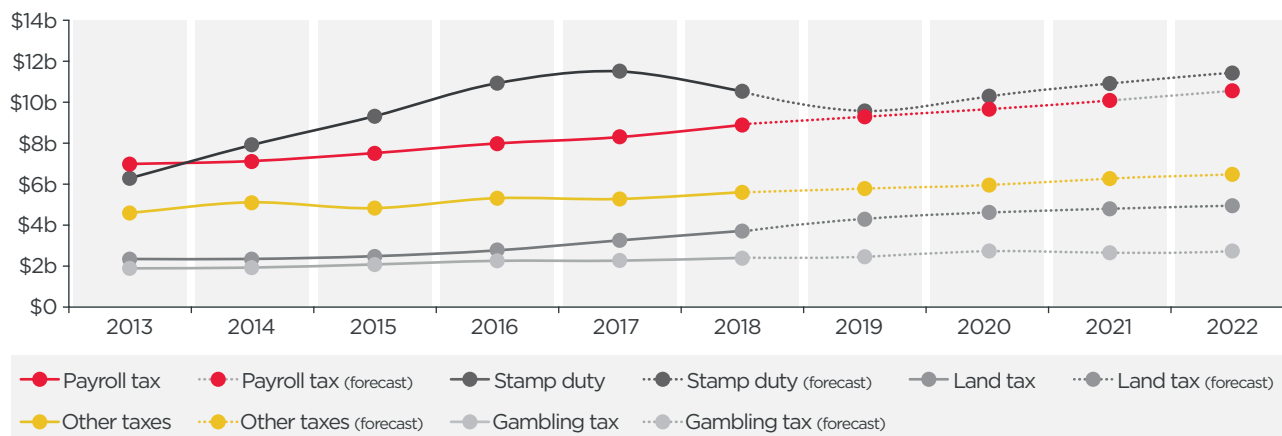
\$ 83.5b **3.9** **86.7b** Total Revenue

Key revenues include:

	2016-2017	Change %	2017-2018	
	35.4b	2.8	36.3b	Taxation, Fees, Fines, and Other
	31.4b	1.6	31.9b	Grants & Subsidies
	14.1b	8.1	15.2b	Sales of Goods and Services

TRENDS IN TAX COLLECTION (General Government Sector)

Year ended 30 June



SOURCE: 2013 - 2018: Report on State Finances (audited), 2019 - 2022: NSW Budget Papers (unaudited).

The State's expenses

Expenses increased \$4.9 billion to \$84.2 billion in 2017-18.

Overall expenses increased 6.1 per cent compared to 2016-17. Most of the increase was due to higher employee and operating costs.

Salaries and wages increased by 3.6 per cent compared to 2016-17.

Salaries and wages increased to \$31.1 billion from \$30 billion. This was due to inflation linked salary and wage increases and a reported increase in front line staff. The Government wages policy aims to limit growth in employee remuneration and other employee related costs to no more than 2.5 per cent per annum.

Operating expenses increased by 7.8 per cent from 2016-17.

Within operating expenses, payments for supplies, services and other expenses increased, in part, due to:

- increased costs of major rail projects, WestConnex, B-Line bus program and a new rail timetable
- addressing the maintenance backlog and higher school operating expenses of the Department of Education.

Health costs remain the highest expense of the State.

The Australian Bureau of Statistics introduced a revised Classification of the Function of Government Australia Framework (COFOG-A) effective 1 July 2017. This resulted in some re-classification of expenditure between purposes and now shows State expenses are highest in:











- Health (25.5 per cent)
- General Public Services (25.0 per cent)
- Education (19.6 per cent).

General Public Services includes the executive and legislative branches, financial affairs, public debt transactions and general public service transactions.

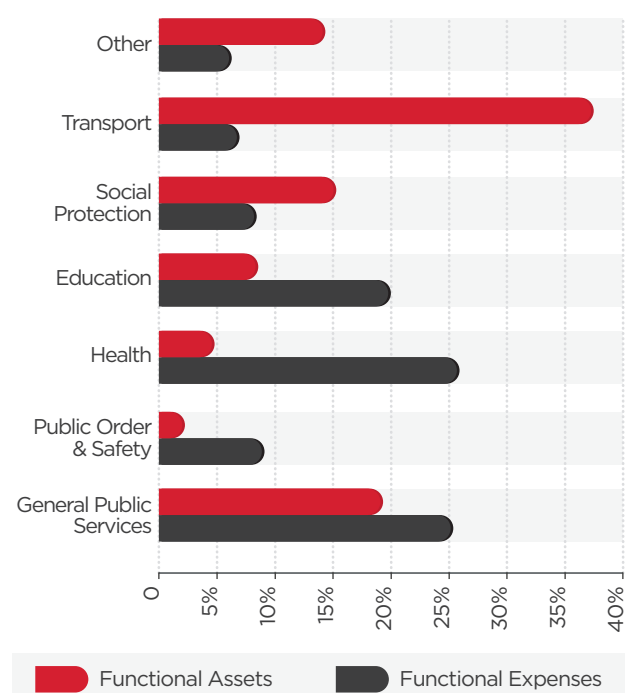
The graph highlights the annual expenditure by function and the value of assets to deliver those services.

\$ 79.3b  6.1 84.2b Total Expenses

Key expenses include:

	2016-2017	Change %	2017-2018	
	32.8b	 3.8	34.1b	Employee Expenses
	21.6b	 7.8	23.3b	Operating Costs
	9.7b	 12.7	10.9b	Grants & Subsidies
	7.2b	 6.6	7.6b	Depreciation
	4.6b	 2.8	4.7b	Superannuation Expense

EXPENSES & RELATED ASSETS BY FUNCTION



The State's assets

Assets grew by \$35.6 billion to \$443 billion in 2017-18.

Valuing the State's physical assets.

The State had physical assets with a fair value of \$339 billion at 30 June 2018. This includes land and buildings (\$161.6b) and Infrastructure (\$160.2b).

Our audits assess the reasonableness and appropriateness of assumptions used to value physical assets. This includes obtaining an understanding of the valuation methodologies used and judgements made. We also review the completeness of asset registers and the mathematical accuracy of valuation models.

Net movements between years include additions, disposals, depreciation and valuations. This year, revaluations of physical assets added \$24.5 billion to the value of the State's assets. This was mainly attributable to the following agencies:

- Department of Education - \$8.5 billion
- Roads and Maritime Services - \$7.4 billion.

The State's financial assets increased by \$308 million in 2017-18 (\$27.5 billion in 2016-17).

In 2016-17, the significant increase in financial assets was primarily from the sale or lease of the following government assets and businesses:

- In June 2017, the Government leased 50.4 per cent of Endeavour Energy assets, which followed the long-term lease 50.4 per cent of Ausgrid's assets in December 2016. The Government received proceeds of \$24.0 billion from these transactions.
- A 35-year concession for providing titling and registry services, effective 30 June 2017, was granted to a private sector operator. The Government received \$2.6 billion cash for the concession.

The Government implemented reforms relating to the use of the State's financial assets.

In 2017-18, the Asset and Liability Committee, which advises the Government on balance sheet management, recommended the following policy actions and frameworks to help manage the State's financial risks and opportunities:

- expanding the scope of cash management reforms to give the State a whole-of-government view on the use of surplus funds. Treasury advises these reforms have centralised funds management of approximately \$3.0 billion

- endorsing a new whole-of-government Foreign Exchange (FX) Risk Policy (effective 1 July 2018) to effectively manage the State's FX risk
- expanding management of the State's debt portfolio to minimise interest rate risks, reduce interest costs where possible, and extend the average weighted life of the General Government's debt portfolio towards eight years
- endorsing establishment of a 'sustainability bond' program to further diversify and expand the State's bond investor base and raise awareness of the Government's social and environmental initiatives.






The State has established the NSW Generations Fund to maintain debt at sustainable levels.

The State established the NSW Generations Funds (NGF) in June 2018 to support debt retirement and to fund community-focused initiatives. The Government has indicated it will initially capitalise the NGF with \$3.0 billion from its reserves.

The NSW Generations Funds Act 2018 requires an audit of each NSW Generations Fund by the Auditor-General (including a report by the Auditor-General on whether payments from the Funds have been made in accordance with the Act). The first audit of the fund will be for the period up to 30 June 2019.

\$ 407b 8.7 443b Total Assets

Key assets include:

	2016-2017	Change %	2017-2018	
Physical Assets				
	147.0b	9.0	160.2b	Infrastructure
	143.4b	12.7	161.6b	Land and Buildings
Financial Assets				
	27.7b	4.6	26.4b	Equity Investments
	20.6b	5.2	19.5b	Cash and Receivables
	40.5b	6.5	43.1b	Investments and Placements

The State's liabilities

Liabilities increased \$5.1 billion to \$189 billion in 2017-18.

Valuing the State's liabilities relies on actuarial assessments.

Nearly half of the State's liabilities relate to its employees. They include unfunded superannuation, and employee benefits, such as long service and recreation leave.

Valuing these obligations involves complex estimation techniques and significant judgements. Small changes in assumptions can materially impact the values and the financial statements.

The State's superannuation obligations fell \$2.2 billion in 2017-18.

The State's \$56.4 billion unfunded superannuation liability represents obligations to past and present employees less the value of assets set aside to meet those obligations. The unfunded superannuation liability fell from \$58.6 billion to \$56.4 billion in 2017-18.

The State's borrowings at 30 June 2018 were \$700 million higher than they were at 30 June 2017.

The State's borrowings totalled \$71.3 billion at 30 June 2018.




TCorp issues bonds to raise funds for NSW Government agencies. These are actively traded in financial markets, which provides price transparency and liquidity to public sector borrowers and institutional investors. All TCorp bonds are guaranteed by the NSW Government.

The Government manages its debt liabilities through its balance sheet management strategy. The strategy extends to TCorp, which applies an active risk management strategy to the Government's debt portfolio.

General Government Sector debt has been restructured by replacing shorter-term debt with longer-term debt. This lengthens the portfolio to match liabilities with the funding requirements for infrastructure assets.

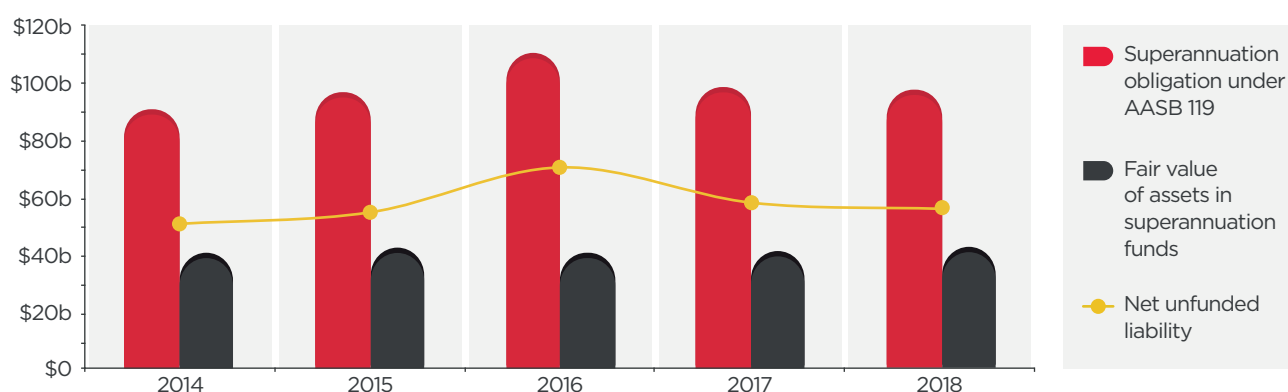
\$ 184b 2.8 189b Total Liabilities

Key liabilities include:

	2016-2017	Change %	2017-2018	
	58.6b	3.7	56.4b	Unfunded Superannuation
	18.3b	4.7	19.1b	Other Employee Benefits
	70.6b	1.0	71.3b	Borrowings

TREND IN UNFUNDED SUPERANNUATION LIABILITY

At 30 June



In focus:

Restart NSW and Asset Recycling.



Restart NSW is funding new infrastructure.

Restart NSW funds Rebuilding NSW, the Government's 10-year plan to invest \$20 billion in new infrastructure. Its infrastructure projects, including Sydney Metro City and Southwest, WestConnex and stadia are primarily funded by proceeds from the Government's asset recycling program.

At 30 June 2018, the Restart NSW Fund held \$21 billion with \$19.4 billion invested of this in the NSW Infrastructure Future Fund.

Almost 19 per cent of payments directed to rural and regional infrastructure projects.

Section 9 of the Restart NSW Fund Act 2011 requires Restart NSW financial statements to include:

- total Fund payments for infrastructure projects in rural and regional areas outside metropolitan Sydney, Newcastle and Wollongong
- whether the payments represent at least 30 per cent of total payments from the Fund for infrastructure projects.

The financial statements included these required details. Over the past six years to 30 June 2018, 18.5 per cent of payments have gone to projects in these areas. In 2017-18, 17.2 per cent of Restart NSW Fund payments were directed to infrastructure projects in rural and regional areas.

The 2018-19 budget papers include details on how the Government intends to use the Fund.

ASSET TRANSACTIONS

The State sold 51 per cent of Sydney Motorway Corporation (WestConnex)

On 31 August 2018, the Government announced the sale of 51 per cent of Sydney Motorway Corporation (SMC) to Sydney Transport Partners for \$9.3 billion.

The State will recognise its 49 per cent equity interest in SMC, in a new entity, Roads Retained Interest Pty Ltd.



The State sold its stake in the Snowy Hydro Limited

The Commonwealth Government's 2017-18 budget announced future plans to buy some or all of NSW's 58 per cent stake in the Snowy Hydro Limited.

The State finalised the sale on 29 June 2018 and received net proceeds of \$4.07 billion, \$122 million less than the carrying value of the investment. Consequently, the \$122 million was recognised as a loss in the 2017-18 operating result.



In focus:

Financial Management Transformation program.

The **Financial Management Transformation (FMT) program** aims to change and improve financial governance, budgeting and reporting arrangements in the New South Wales public sector.

New Financial Management system

PRIME is the Information Technology (IT) solution component of the FMT program. It replaces several historical systems. PRIME provides financial and performance information within one IT platform for all agencies in the NSW public sector. The system cost the State around \$48 million, which was within the original budget.

During the year the system's expected life was revised up from 10 years to 15 years, meaning the annual expense for using the asset decreases as it now extends over an additional five years.

In 2019-20, I intend to conduct a performance audit on aspects of the State's financial management transformation program implementation.



THE PROGRAM'S PROGRESS IN 2017-18

The State's 2017-18 financial statements were prepared using the PRIME IT system.

The PRIME system was used by all agencies to report financial information to Treasury and for preparing the State's 2017-18 financial statements and 2018-19 budget.

Implementing PRIME was challenging. Many issues (1,811 at time of audit) and change requests (409) were raised relating to the functionality of the system in the period following implementation.

Treasury implemented an optimisation program to address the underlying issues. Enhancements identified through engagement with users and agencies were prioritised with 12 requirements delivered in a new release.

Our 2017-18 audit evaluated the design, implementation and operating effectiveness of key controls in the PRIME system and we identified a number of moderate control issues:

Focus Area	What did we find?
User access and activity review	<ul style="list-style-type: none"> Inadequate periodic system access reviews over privileged and user accounts. Some activities of administrator/privileged accounts were not always reviewed by management.
User roles and access matrix	<ul style="list-style-type: none"> Excessive system privileges for several users and system access not being aligned with user job requirements. Segregations of duties restrictions were not consistently applied.
Account and access administration	<ul style="list-style-type: none"> Dormant accounts on the PRIME production database which had never been used. Generic accounts with undocumented purposes and responsibilities to review/oversight such accounts.
Password configuration and default account settings	<ul style="list-style-type: none"> Passwords did not comply with the requirements of the IT password policy.

These were pervasive and precluded us from relying on IT controls in our audit approach.

Legislative reform

New legislation aims to establish a single framework for public sector financial management.

The legislative reform proposes significant changes to promote and support the performance, transparency and accountability of government agencies and government officials involved in financial management of the State.



PROGRESS IN 2017-18

The Government Sector Finance Bill 2018 (GSF Bill) was introduced to Parliament on 24 May 2018.

The Bill will replace the following four separate pieces of legislation:

- the *Public Finance and Audit Act 1983* (the PFA Act)
- the *Public Authorities (Financial Arrangements) Act 1987* (the PAFA Act)
- the *Annual Reports (Departments) Act 1985*
- the *Annual Reports (Statutory Bodies) Act 1984*

The PFA Act will be renamed the Government Sector Audit Bill 2018 (GSA Bill), and will be amended to remove those provisions being relocated to the GSF Bill. Provisions relating to government sector audits, the Auditor General and the Audit Office of New South Wales will remain in the GSA Bill.

The GSF Bill was approved by NSW Parliament on 7 June 2018. However, it has not yet received assent by the NSW Governor because the related or 'cognate' legislation, the Government Sector Finance Legislation (Repeal and Amendment) Bill 2018, was returned by the Legislative Council to the Legislative Assembly for further consideration and amendment. These amendments mainly relate to the operations of the Public Accounts Committee.

Until both Bills are approved by Parliament and assented to by the NSW Governor, they are not Acts in New South Wales. If approved, the Government plans to commence the legislation in two phases: 1 December 2018, and 1 July 2019.

In its December 2017 report on the efficiency and effectiveness of the Audit Office of NSW, the Public Accounts Committee recommended that a 'follow-the-dollar' mandate is required in order to restore the oversight that the Auditor-General has traditionally had over public spending. An update to the Act would be a practical response to the contemporary concept of 'commissioning' where government services are increasingly provided by not-for-profit and private providers on behalf of government.

Policy reform

The new PRIME system and legislative reform should enable the Government to move towards an outcome-based budget approach. The policy changes aim to drive a greater focus on results and the effectiveness of State expenditure.

The Public Accounts Committee stated independent assurance of performance based outcome statements by the Audit Office of NSW of government organisations is likely to provide value for money but more importantly enhance the effectiveness of government.



PROGRESS IN 2017-18

The Government is transitioning to outcomes based budgeting.

For the first time, the State prepared its budget using State Outcomes. Outcome budgeting aims to align financial and performance reporting with governance and decision making.

For each cluster, financial and performance information is presented against one of forty-six State Outcomes covering all activities delivered by the NSW Government. Outcome indicators associated with each outcome will show the progress the Government is making on achieving these outcomes. The effectiveness of reporting on the indicators would be enhanced if independent assurance was also part of the reporting framework. State Outcomes builds on the 2017-18 budget process where agencies built their financial information around the programs they provide to the community. Multiple agencies within a cluster can contribute programs to a program group, ensuring the focus is on what the Government is trying to achieve.

This framework is expected to enable performance monitoring and targeted reviews to assess whether services and outputs are:

- appropriately designed and properly targeted to meet the needs of citizens
- relevant and effective in achieving the State Outcomes
- delivered efficiently and effectively.



Appendix one – Prescribed entities

Section 45 of the *Public Finance and Audit Act 1983* requires the Auditor-General to perform audits of the financial statements of entities prescribed for the purposes of that section.

The following were prescribed entities as at 30 June 2018:

Entity/Fund	Latest financial statements audited	Type of audit opinion issued
Agricultural Scientific Collections Trust	30 June 2018	Unmodified
AustLII Foundation Limited	31 December 2017	Unmodified
Belgenny Farm Agricultural Heritage Centre Trust	30 June 2018	Unmodified
The Brett Whiteley Foundation	30 June 2018	Unmodified
Buroba Pty Ltd	30 June 2018	Unmodified
C. B. Alexander Foundation	30 June 2017	Unmodified
City West Housing Pty Ltd	30 June 2018	Unmodified
The Commissioner for Uniform Legal Services Regulation	30 June 2018	N/A ^(a)
Cowra Japanese Garden Maintenance Foundation Limited	31 March 2018	Unmodified
Cowra Japanese Garden Trust	31 March 2018	Unmodified
Crown Employees (NSW Fire Brigades Firefighting Staff Death and Disability) Superannuation Fund	30 June 2018	Unmodified
Eif Pty Limited	30 June 2018	Unmodified
Energy Investment Fund	30 June 2018	Unmodified
Central Coast Council Water Supply Authority (formerly Gosford City and Wyong City Council Water Supply Authorities)	30 June 2017	Unmodified
Home Building Compensation Fund	30 June 2018	Unmodified
The funds for the time being under the management of the New South Wales Treasury Corporation, as trustee	30 June 2018	Unmodified
The Illawarra Health and Medical Research Institute Limited	30 June 2018	Unmodified
The Legal Services Council	30 June 2018	Unmodified
Macquarie University Professorial Superannuation Scheme	30 June 2018	Unmodified
Minister administering the <i>Environmental Planning and Assessment Act 1979</i> (a corporation)	30 June 2018	Unmodified
Corporation Sole 'Minister administering the <i>Heritage Act 1977</i> ' (a corporation)	30 June 2018	Unmodified
National Art School	31 December 2017	Unmodified
Networks NSW Limited	^(b)	N/A
NSW Fire Brigades Superannuation Pty Limited	30 June 2018	Unmodified
Parliamentary Contributory Superannuation Fund	30 June 2018	Unmodified
The superannuation fund amalgamated under the <i>Superannuation Administration Act 1991</i> and continued to be amalgamated under the <i>Superannuation Administration Act 1996</i> (known as the SAS Trustee Corporation Pooled Fund)	30 June 2018	Unmodified

Entity/Fund	Latest financial statements audited	Type of audit opinion issued
The trustees for the time being of each superannuation scheme established by a trust deed as referred to in section 127 of the <i>Superannuation Administration Act 1996</i>	30 June 2018	Unmodified
The trustees for the time being of The Art Gallery of New South Wales Foundation	30 June 2018	Unmodified
Trustee of the Home Purchase Assistance Fund	30 June 2018	Unmodified
Trustees of the Farrer Memorial Research Scholarship Fund	31 December 2017	Unmodified
United States Studies Centre	31 December 2017	Unmodified
Universities Admissions Centre (NSW and ACT) Pty Limited	30 June 2017	Unmodified
University of Sydney Professorial Superannuation System	31 December 2017	Unmodified
Valley Commerce Pty Ltd	30 June 2018	Unmodified

a Included as part of the Legal Services Council.

b Deregistered 3 August 2016.



Appendix two – Legal opinions

The Auditor-General is required by section 52(2) of the *Public Finance and Audit Act 1983* (PF&A Act) to publish any requests for a legal opinion submitted to the Attorney General or the Crown Solicitor under section 33 of the PF&A Act.

Three legal opinions were received since my last 'Report on State Finances', which was released on 24 October 2017.

The three opinions were related to:

- whether the Auditor-General is to be the auditor of joint organisations and county councils under s. 422(1) of the *Local Government Act 1993*
- whether the 'secrecy' provision in s. 38 of the *Public Finance and Audit Act 1983* could be relied upon in response to a question, or a demand for a document, by a non-statutory Parliamentary committee
- whether the 'secrecy' provision in s. 38 of the *Public Finance and Audit Act 1983* could be relied upon in response to questions, or a demand for documents, by the Public Accounts Committee.

Sensitive: Legal



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Local Government Act 1993 - County councils and joint organisations

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Prepared for: AUD018 Audit Office of NSW
Date: 7 August 2018
Client ref: Liz Basey
CSO ref: 201802643 T08 Alexandra Brown

Sensitive: Legal

1. Summary of advice

- 1.1 You seek my urgent advice as to whether the Auditor-General is to be the auditor for joint organisations and county councils under s. 422(1) of the *Local Government Act 1993* ("LG Act").
- 1.2 As to question 1, subject to certain exceptions that are not presently relevant, the *LG Act* applies "to county councils in the same way as it applies to councils" with such exceptions and modifications (if any) as the regulations may provide (s. 400(1), *LG Act*). Part 3 of Ch. 13 (ss. 408-427) of the *LG Act* contains provisions regarding financial management, including auditing, of councils. As there are no relevant exceptions or modifications in the regulations, Pt. 3 of Ch. 13 applies to county councils in the same way as it applies to councils and, by application of s. 422(1), the Auditor-General is to be the auditor for a county council.
- 1.3 As to question 2, other than the "excluded provisions" and any modification or exclusion in the regulations, the *LG Act* applies "to a joint organisation in the same way as it applies to a council" (s. 400ZH(1), *LG Act*). As Pt. 3 of Ch. 13 is not an "excluded provision", that Part applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by cl. 397N of the *Local Government (General) Regulation 2005*). By application of s. 422(1), the Auditor-General is to be the auditor for a joint organisation.
- 1.4 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct me that it is accepted throughout the sector that the Auditor-General is to be the auditor for county councils. Your office currently contracts out the audits of all ten county councils.
- 2.2 You are concerned because s. 422(1) of the *LG Act* provides that "The Auditor-General is to be the auditor for a council" but there is no specific reference in that provision to the Auditor-General being the auditor for a county council or a joint organisation.

3. Advice sought

- 3.1 By letter dated 30 July 2018, you seek my urgent advice as to the following questions:
 - "1. Is it reasonable to conclude that I do not have the mandate to audit county councils on the basis the Act does not specifically appoint me as the auditor of county councils? Or could it be argued that as the provisions in Chapter 13, Part 3 of the Act on financial management apply to county councils in the same way as councils, county councils are subject to my oversight in the same way as councils? Are there other considerations I should be aware of?

2. Do the principles that apply to the audit of county councils apply in the same way to joint organisations?"
- 3.2 I understand question 2 to be asking whether Pt. 3 of Ch. 13 of the *LG Act* applies to joint organisations, and, specifically, whether the Auditor-General is to be the auditor for a joint organisation.
- 3.3 You also seek my advice on any other issues I consider relevant. Whilst I have not raised any other issues in this advice, I would of course be pleased to provide further advice, if required.

4. Advice

Question 1 – county councils

- 4.1 The provisions with respect to financial management of councils are found in Pt. 3 of Ch. 13 of the *LG Act* (ss. 408-427). Division 2 of Pt. 3 of Ch. 13 is concerned with, among other things, the obligation on a council to prepare financial reports and to refer them for audit (s. 413); the auditing of a council's financial reports (s. 415); the time for preparation and auditing of a council's financial reports (s. 416); and the reports to be prepared by a council's auditor (s. 417).
- 4.2 Division 3, "Auditors", of Pt. 3 of Ch. 13 includes s. 422, which relevantly provides:
- "(1) The Auditor-General is to be the auditor for a council.
 - (2) The Auditor-General may appoint, in writing, a person (whether or not that person is employed in the Public Service) or a firm to be an auditor for the purposes of this Act."
- 4.3 Division 3 also provides for access to and production of documents to the Auditor-General (s. 423), including access to records of deposit-taking institutions (s. 424), in addition to setting out secrecy provisions (s. 425) and imposing an obligation on the Auditor-General to communicate with the Minister (s. 426). Division 2A of Pt. 3 of Ch. 13 includes provision for the Auditor-General to conduct performance audits of all or any particular activities of one or more councils.
- 4.4 County councils are dealt with in Pt. 5 of Ch. 12. Section 400 is concerned with the application of the *LG Act* to county councils, and relevantly provides as follows:
- "(1) This Act (except Part 1 and Divisions 1 and 2 of Part 2 of Chapter 9, Chapter 10, section 365, Part 7 of this Chapter and the provisions of Chapter 15 concerning the making and levying of ordinary rates) applies:
 - (a) to county councils in the same way as it applies to councils, and
 - (b) to the members of county councils in the same way as it applies to the councillors of councils,with such exceptions and modifications (if any) as the regulations may provide."
- 4.5 The effect of s. 400(1)(a) is that the *LG Act* applies "to county councils in the same way as it applies to councils" with the exception of those provisions specified in parentheses

and with such exceptions and modifications (if any) as the regulations provide. As explained above, the provisions relevant to the auditing of councils are found in Pt. 3 of Ch. 13. None of these provisions are specified in s. 400(1) as not applying to county councils, nor do the regulations make any exceptions or modifications to the application of Ch. 13 to county councils (see *Local Government (General) Regulation 2005* ("the Regulation")).

- 4.6 Accordingly, in my view, it follows that the effect of s. 400(1)(a) is that Pt. 3 of Ch. 13 (which contains the financial management provisions) applies to county councils in the same way as it applies to councils. In particular, this means that, by application of s. 422, the Auditor-General is to be the auditor for a county council.
- 4.7 For completeness, I note that I am not aware of anything in the extrinsic materials that accompanied the introduction of the *LG Act*, including the provisions with respect to county councils, which would support a different interpretation of s. 400(1)(a).

Question 2 – joint organisations

- 4.8 Part 7 of Ch. 12 of the *LG Act* contains provisions relating to joint organisations. This Part was inserted into the *LG Act* by the *Local Government Amendment (Regional Joint Organisations) Act 2017* ("Regional Joint Organisations Act"), and commenced on 15 December 2017¹.
- 4.9 Section 400ZH addresses the application of the *LG Act* to joint organisations. Section 400ZH(1) provides:

“(1) Except as provided by subsection (3), this Act applies:

- (a) to a joint organisation in the same way as it applies to a council, and
- (b) to the representatives on the board of a joint organisation in the same way as it applies to the councillors of councils, and
- (c) to the executive officer of a joint organisation in the same way as it applies to the general manager of a council.”

- 4.10 Subsection (3) lists “excluded provisions” of the *LG Act* that do not apply to or in respect of a joint organisation. Parts 2 and 4 of Ch. 13 and ss. 438T, 438ZA and 438ZB are excluded provisions (s. 400ZH(3)(i)). The excluded provisions do not include any of the provisions in Pt. 3 of Ch. 13 (which contains the financial management provisions). The regulations may modify the application of any provision of the *LG Act* that applies to or in respect of a council for the purpose of its application to a joint organisation, or exclude a provision of the *LG Act* from applying to or in respect of a joint organisation (s. 400ZH(5)). As your instructions note, cl. 397N of the *Regulation* modifies the application of s. 413(1) of the *LG Act* with respect to the time in which the first financial reports are required to be prepared for a joint organisation under Pt. 3 of Ch. 13 of the *LG Act*.

¹ By proclamation of the Governor dated 13 December 2017 (NSW Government Gazette, Commencement Proclamation No 730, 2017).

- 4.11 In my view, s. 400ZH(3)(i) evinces a deliberate and specific intention to exclude the application of those provisions of Ch. 13 specified therein to joint organisations and to render the remainder of that Chapter applicable to joint organisations in the same way as it applies to councils, unless modified or exempted by the regulations. Other than cl. 397N of the *Regulation*, I am not aware of any regulation that modifies the application of a provision of Pt. 3 of Ch. 13 of the *LG Act* to joint organisations.
- 4.12 For completeness, I note that the following comments made on behalf of the Minister in the Second Reading speech accompanying the introduction of the *Regional Joint Organisations Act* provide support, in general terms, for the interpretation of s. 400ZH set out above (Legislative Council Hansard, 15 November 2017, pp.52-56):
- "To protect the public interest, the bill will generally require joint organisations to meet the standards of conduct and good governance, transparent reporting, accountability and oversight expected of councils, councillors and council staff.
- In new subsections 400ZH (1) and (2), the bill provides that most provisions in the [*LG Act*] apply to joint organisations and their office holders and staff in the same way as it applies to local councils.
- ...
- Where particular provisions of the [*LG Act*] that apply to councils are not appropriate to be applied to a joint organisation, they are explicitly excluded by new section 400ZH (3). There is also a regulation-making power to prescribe further provisions of the [*LG Act*] as either applying or not applying to joint organisations. This allows for some flexibility if it becomes apparent that further or fewer provisions of the Act should apply as joint organisations' governance and operations are further developed and become more complex over time.
- Joint organisations are also intended to operate with minimal cost and red tape. For that reason there is a broad regulation-making power that will allow adjustments to be made to a range of standard governance requirements, including planning and reporting requirements that would apply to councils. This will help to make sure that joint organisations remain lean and effective."
- 4.13 In summary, the effect of s. 400ZH of the *LG Act* is that Pt. 3 of Ch. 13 applies to a joint organisation in the same way as it applies to a council (subject to the modified application of s. 413(1) by reason of cl. 397N of the *Regulation*). Accordingly, by application of s. 422(1) of the *LG Act*, the Auditor-General is to be the auditor for a joint organisation.

Signed:


Lea Armstrong
Crown Solicitor

Sensitive: Legal



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Section 38 *Public Finance and Audit Act* and powers of Parliamentary Committees

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Prepared for: AUD018 Audit Office

Date: 10 August 2019

Client ref: D1811513 Liz Basey

CSO ref: 201802302 T08 Tom Chisholm

Sensitive: Legal

1. Summary of advice

- 1.1 You seek my advice on whether the "secrecy" provision in s. 38 of the *Public Finance and Audit Act 1983* ("PFA Act") could be relied upon in response to a question, or a demand for a document, by a non-statutory Parliamentary committee.
- 1.2 Applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question.
- 1.3 The Solicitor General's opinion is that it is more likely than not that a court would find a committee has power to require a witness to produce a document to it. I think it probably follows that s. 38 of the *PFA Act* could not be relied upon to resist a summons, or other demand, from a committee to produce a document.
- 1.4 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Advice sought

- 2.1 By letter of 6 July 2018, the Auditor-General seeks my advice in relation to the powers of Parliamentary committees to ask questions, or require the production of documents, which might breach the "secrecy" provision in s. 38 of the *PFA Act*.
- 2.2 I confirm that, as discussed with your Ms Liz Basey on 3 August 2018, this advice only addresses the powers of two non-statutory committees: the Public Accountability Committee, and the Public Works Committee ("the Committees"). I will prepare a further advice relating to the powers of the statutory Public Accounts Committee.
- 2.3 Your questions¹ are:
 1. Am I (or any member of my staff) under an obligation to answer questions in these Parliamentary Committees when doing so would otherwise breach s. 38 of the *PFA Act*?
 2. Am I (or any member of my staff) under an obligation to produce documents to these Parliamentary Committees when doing so would otherwise breach s. 38 of the *PFA Act*?
- 2.4 I am not asked to advise in relation to the *Government Sector Finance Bill 2018* or the *Government Sector Finance Legislation (Repeal and Amendment) Bill 2018*.

¹ I have re-formulated these questions slightly for convenience, as discussed with your Ms Basey on 3 August 2018.

3. Advice

Question 1 – questions asked by a Committee

Section 38 of the PFA Act

- 3.1 Section 38 of the *PFA Act* provides that: (emphasis added)

"38 Secrecy

- (1) The Auditor-General, an auditor and an authorised person shall **preserve and aid in preserving secrecy** with respect to all matters and things that come to the knowledge of the Auditor-General, auditor or authorised person in the exercise of the functions of the Auditor-General, auditor or authorised person under this Act and the prescribed requirements and shall **not communicate to any person** any such matter or thing.
- (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, or
 - (b) proceedings for an offence relating to public money, other money, public property or other property or for the recovery of public money, other money, public property or other property, or
 - (c) disciplinary proceedings brought against an officer of an authority, or
 - (d) a report or communication authorised or required to be made by or under this Act or the prescribed requirements, or
 - (e) a report or communication that the Treasurer authorises the Auditor-General to make to a person for the purposes of a due diligence or similar process relating to the sale of any government undertaking."

Parliamentary Evidence Act – giving evidence before a committee

- 3.2 The *Parliamentary Evidence Act 1901* ("*PE Act*") applies to the giving of evidence by witnesses before a Parliamentary committee. A committee may (by an order signed by the Chair) summon a person "to attend and give evidence" before the committee: s. 4(2).
- 3.3 Section 11(1) of the *PE Act* provides that², if any witness "refuses to answer any lawful question during the witness's examination", the witness shall be deemed guilty of a contempt of Parliament.³ A Committee may therefore compel a witness to answer any "lawful question".
- 3.4 My predecessor and the Solicitor General have consistently advised that a "lawful question" is one which a person is compellable to answer according to the established

² Subject to an exception relating to religious confessions.

³ The witness may then be committed for such offence "into the custody of the usher of the black rod or sergeant-at-arms"; and, if the House so orders, to gaol for a period not exceeding one month, by a warrant under the hand of the President or Speaker: s. 11.

usages of law: *Crafter v Kelly* [1941] SASR 237 at 241-2. A question is *not* a "lawful question" if the answer to the question would (without necessarily being exhaustive):

1. be outside the committee's terms of reference;
 2. require a (non-expert) witness to express an opinion;
 3. be subject to legal professional privilege;
 4. be subject to public interest immunity; or
 5. contravene the privilege against self-incrimination.
- 3.5 I note, however, that Bret Walker SC has recently expressed a different view in an advice provided to the Clerk of a Select Committee of the Legislative Council (14 January 2015).⁴ It is possible that the Committees may proceed on the basis of that alternative view, but it is not a view that I or the Solicitor General favour.

The Committees

- 3.6 The Public Accountability Committee was established as a standing committee by the Legislative Council on 15 March 2018. Its principal function is to inquire into and examine the public accountability, financial management, regulatory impact and service delivery of New South Wales government departments, statutory bodies or corporations. The Public Accountability Committee is also to inquire into and report on any matter referred to it by resolution of the House, and may also adopt a "self-reference".
- 3.7 The Public Works Committee was also established as a standing committee by the Legislative Council on 15 March 2018. Its principal function is to inquire into and report on public works to be executed where the estimated cost of completing such works exceeds \$10 million. The Public Works Committee is also to inquire into and report on any matter referred to it by resolution of the House, and may also adopt a "self-reference".
- 3.8 Since these committees are non-statutory, it is necessary to consider the interaction between s. 38 of the *PFA Act* and the relevant provisions of the *PE Act*.

"Secrecy" provisions and "lawful questions" under the PE Act

- 3.9 The Solicitor General has provided several advices on whether statutory "secrecy" or non-disclosure provisions can be relied on by a witness to resist answering an otherwise "lawful question". The Solicitor General has noted that this issue has generated considerable division of legal opinion. The question is whether the relevant statutory provision is intended to prohibit the disclosure of information to a Parliamentary

⁴ "Parliament of New South Wales – Legislative Council Select Committee on Ombudsman's 'Operation Prospect'" of 14 January 2015.

committee, and so entitle the witness to refuse to answer a question posed by the committee on the basis that it is not a lawful question. The context in which this question is asked includes the existence of Parliamentary privileges, namely the immunities of the Houses of Parliament and the powers of the Houses to protect their processes. The Solicitor General also noted that it is uncontroversial that these privileges extend to Parliamentary committees.

- 3.10 The Solicitor General expressed the general view that a statutory prohibition on disclosure of information will only be held to apply to disclosure to a Parliamentary committee if that is done *expressly* or by *necessary implication*.
- 3.11 I defer to the views of the Solicitor General. It is therefore not necessary for me to consider this issue in further detail, or to refer to any of the differing legal opinions (including of my predecessor) that the Solicitor General referred to. I would only add that the principle applied by the Solicitor General - that legislation will be presumed not to diminish the "privileges" of Parliament or its committees, unless it does so expressly or by necessary implication - has been accepted in several Australian cases.⁵

Whether s. 38 PFA Act applies to evidence before the Committees

- 3.12 As I have recently advised,⁶ the prohibition in s. 38 of the *PFA Act* is expressed in wide terms. Those to whom s. 38 applies must:
1. "preserve and aid in preserving secrecy" (with respect to matters and things that come to their knowledge in the exercise of their functions under the *PFA Act* and the prescribed requirements); and
 2. "shall not communicate to any person" any such matter or thing.
- 3.13 These requirements do not apply in any of the circumstances specified in s. 38(2). None of these circumstances expressly apply to disclosures to Parliament or its committees. It is not necessary to consider whether there may be any specific circumstances in which any of these exceptions may apply to disclosures to Parliament or its committees.
- 3.14 There are no other provisions in the *PFA Act* that relate to disclosures to Parliament or to any *non-statutory* committees.
- 3.15 Section 58 of the *PFA Act* relates to giving evidence before the Public Accounts Committee, which is constituted by s. 54 of the *PFA Act* as a committee of the

⁵ *Criminal Justice Commission v Parliamentary Criminal Justice Commission* (2002) 2 Qd R 8 at 23; [2001] QCA 218; *Aboriginal Legal Service of Western Australia Inc. v State of Western Australia*; (1993) 9 WAR 297 at 304; (1993) 113 ALR 87 at 108; and see also *R v. Smith, ex parte Cooper* [1992] 1 Qd R 423 at 430.

⁶ CSO ref: 201802375 Advice 1, especially at [4.3].

Legislative Assembly. The Act does not, however, expressly deal with giving evidence by the Auditor-General or her staff to the Public Accounts Committee, or with evidence of matters and things that have come to the attention of the Auditor-General or her staff in exercising functions under the *PFA Act*.

- 3.16 The provisions relating to giving evidence to the Public Accounts Committee, therefore, do not deal with the matters and things to which the "secrecy" provision in s. 38 of the *PFA Act* relates. Section 38 is also in a different part of the Act and (as noted above) makes no reference to disclosures to the Public Accounts Committee.
- 3.17 In *Sydney Water Corporation v The Persons Listed in the Schedules t/as PricewaterhouseCoopers* [2008] NSWSC 361, the Court rejected the submission of the then Auditor-General that he could rely upon s. 38 of the *PFA Act* to resist producing documents to a Court under a subpoena. The Court applied authorities which have held, in relation to non-disclosure or "secrecy" provisions, that a court is not a "person".⁷ The Court distinguished *Re NSW Grains Board* [2002] NSWSC 913; (2002) 171 FLR 68, on the basis that there is no "reasonable excuse" for non-compliance with a subpoena.
- 3.18 Section 38 of the *PFA Act* does not expressly apply to Parliament or its committees. I also cannot identify any reason why s. 38 would be said to apply, by necessary implication, to the giving of evidence before a non-statutory Parliamentary committee. I do not think a committee, or its members, would be a "person" for the purposes of s. 38. This conclusion is consistent with the similar approach adopted in the *Sydney Water Corporation* case.
- 3.19 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before either Committee.
- 3.20 I would be pleased to provide further advice, if required, on the options available to a witness who is concerned either that a question may not be a "lawful question",⁸ or that it would harm the public interest for certain evidence to be given in public.

Question 2 – request by a Committee to produce documents

Whether a committee can require production of documents

- 3.21 In *Egan v Willis*, the High Court found that the Council has power to compel the Executive Government to produce State papers, as this power is "reasonably necessary"

⁷ At [24], referring to authorities (including in particular *Hilton v Wells* (1985) 157 CLR 57) summarised at [14]-[19].

⁸ For reasons such as those outlined at [3.4] above.

for the Council to exercise its functions.⁹ There is no Australian judicial authority on whether a House may authorise one of its non-statutory *committees* to require production of documents to it.

- 3.22 Legislative Council Standing Order 208(c) provides that a committee has power to "send for and examine persons, papers, records and things".
- 3.23 My predecessor had taken the view that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered that the terms of Standing Order 208(c) are ambiguous; and that if Standing Order 208(c) does purport to empower a Parliamentary committee to require the production of documents, there is doubt as to whether it is authorised by s. 15(1)(a) of the *Constitution Act 1902*. My predecessor took a similar approach in the advice you refer to in your instructions,¹⁰ concluding that the Public Accounts Committee has no power to require the production of documents from the Auditor-General or any other person.
- 3.24 Section 15 of the *Constitution Act* permits, relevantly, the making of Standing Orders regulating the orderly conduct of the Council. In addition to powers conferred by statute, the Council has powers which are reasonably necessary for the exercise of its functions.¹¹
- 3.25 The Solicitor General has previously indicated that he was inclined to prefer the opinion of Lovelock and Evans (former Clerks of the Council), that Standing Order 208(c) does allow a committee of the Council to require the production of documents from a witness before the Committee.
- 3.26 Mr Bret Walker SC has recently advised that a committee may compel a person required to attend to give evidence to produce documents, under the *PE Act*.¹² Mr Walker relied on the power conferred by s. 4(2) of the *PE Act*, that a person "may be summoned to attend and *give evidence* before a committee". Mr Walker preferred the view that the giving of "evidence" by a witness could include the production of documents to the committee.
- 3.27 Consistently with Mr Walker's view, a committee of the Council recently issued a summons under the *PE Act* requiring a witness not only to attend to give evidence, but

⁹ (1998) 195 CLR 424 at 453-454, [45]-[51] (Gaudron, Gummow and Hayne JJ); and at 495, [137]-[138] (Kirby J).

¹⁰ CSO ref: AUD018.83.1a. I note that this advice was published by the former Auditor-General in Volume 1 of his 2001 Report to Parliament.

¹¹ See generally *Egan v Willis*, discussed above.

¹² 'Parliament of New South Wales, Legislative Council: Orders for papers from bodies not subject to direction or control by the Government', 18 November 2015, available at <https://www.Parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/56633/Opinion%20from%20Bret%20Walker%20SC.pdf>.

also to produce a document (which related to a current tender process). I note that, by contrast, committees have not generally sought to test or enforce the view they had power under Standing Order 208(c) to require production of documents.

- 3.28 The Solicitor General recently indicated that, in his view, it is "*more likely than not*" that if the question were to be the subject of a decision of a court, a finding would be made that a committee of the NSW Parliament has the power to call for a witness to attend and give evidence, including by the production of a document. This would, however, be subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness.
- 3.29 The Solicitor General considered that there may be some argument as to whether such a power resides in the *PE Act*, Standing Order 208(c), or a power based on reasonable necessity. If the power does exist, however, it would be likely to emerge in any court proceedings (even if the only basis initially relied upon by the committee was a summons issued under the *PE Act*).
- 3.30 I defer to the opinion of the Solicitor General.

Whether s. 38, PFA Act applies to production of documents

- 3.31 The Solicitor General has not, as far as I am aware, been asked to consider whether a statutory "secrecy" provision such as s. 38 of the *PFA Act* could be relied upon in response to a demand, or the issue of a summons, by a committee requiring production of a document.
- 3.32 The Solicitor General (advising jointly with Ms Anna Mitchelmore) has, however, considered the equivalent question in relation to the power of the Council to require production of State papers, under Standing Order 52. The Solicitor General has acknowledged that this may involve a "difficult question", before inclining to the view that "a statutory non-disclosure provision could only affect the powers of the Council if it did so by express reference or necessary implication".
- 3.33 I therefore also approach the present question on the basis that express words, or necessary implication, are required in order to displace a Parliamentary "privilege". I think this principle would apply to the "privilege" (or power), to require the production of documents from a witness, irrespective of whether that power ultimately derives from the *PE Act*, Standing Order 208(c), or reasonable necessity.
- 3.34 If the power were derived from the *PE Act*, a question would arise about the interaction between the *PE Act* and s. 38 of the *PFA Act*. The *PE Act* is silent on any limits on the "giving of evidence" by way of production of a document.

- 3.35 I doubt, essentially for the reasons given in my answer to Question 1, that s. 38 of the *PFA Act* would apply so as to displace, or diminish, any power of a committee to require a witness to produce a document to it.
- 3.36 I therefore think it probably follows from the opinions of the Solicitor General that:
1. a Committee would have power to require the Auditor-General or her staff, when called as a witness, to produce a document to it; and
 2. s. 38 of the *PFA Act* could not be relied upon to resist a summons, or other demand, from a Committee to produce a document.
- 3.37 I note the Solicitor General's view that a witness could, in these circumstances, make a claim of privilege such as public interest immunity and legal professional privilege.

Final comment

- 3.38 The legal questions addressed here are complex and significant. If a Committee were to issue a summons, or other demand, to the Auditor-General or her staff for the production of documents of a kind to which s. 38 applies, I would recommend the Auditor-General consider seeking my advice. That advice could consider, if required, the prospects of any court proceedings to challenge the issue of such a summons or other demand. I would likely seek a further opinion from the Solicitor General.
- 3.39 I also confirm that I am not asked to advise whether s. 38 of the *PFA Act* would apply if the Auditor-General were, at the invitation of the Committee, to produce a document *voluntarily*.

Signed:


Lea Armstrong
Crown Solicitor

Sensitive: Legal



CROWN SOLICITOR

NEW SOUTH WALES

Advice

Section 38 *Public Finance and Audit Act* and powers of Parliamentary Committees – Advice 2

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Prepared for: AUD018 Audit Office

Date: 12 September 2018

Client ref: Liz Basey

CSO ref: 201802302 T08 Tom Chisholm

Sensitive: Legal

1. Summary of advice

- 1.1 You seek my advice on whether the "secrecy" provision in s. 38 of the *Public Finance and Audit Act 1983* ("*PFA Act*") could be relied upon in response to questions, or a demand for documents, by the Public Accounts Committee.
- 1.2 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before the Committee.
- 1.3 I do not think there can be any certainty about whether the Committee currently has power to compel the production of documents from a witness. I prefer the view, however, particularly in light of the Solicitor General's recent opinions, that the Committee does have such a power.
- 1.4 On that basis, I do not think that s. 38 of the *PFA Act* could be relied upon to resist a demand for production of documents.
- 1.5 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Advice sought

- 2.1 In my first advice¹ I considered whether the "secrecy" provision in s. 38 of the *PFA Act* could be relied upon in response to questions, or a demand for documents, by two non-statutory committees of the Legislative Council. In this advice I consider the same issues in relation to the Public Accounts Committee, a committee of the Legislative Assembly constituted by the *PFA Act*.
- 2.2 Your questions are:
 1. Am I (or any member of my staff) under an obligation to answer questions in the Public Accounts Committee when doing so would otherwise breach s. 38 of the *PFA Act*?
 2. Am I (or any member of my staff) under an obligation to produce documents to the Public Accounts Committee when doing so would otherwise breach s. 38 of the *PFA Act*?
- 2.3 I am not asked to advise in relation to the *Government Sector Finance Bill 2018* or the *Government Sector Finance Legislation (Repeal and Amendment) Bill 2018*.

¹ CSO ref: 201802302 Advice 1.

3. Advice

Question 1 – questions asked by the Committee

- 3.1 The Public Accounts Committee is constituted by s. 54 of the *PFA Act*, as a committee of the Legislative Assembly.
- 3.2 The functions of the Committee are specified in s. 57(1) of the *PFA Act*. The first specified function is to examine the consolidated financial statements and general government sector financial statements transmitted to the Legislative Assembly by the Treasurer. The second specified function is to examine the financial reports of "authorities of the State",² being financial reports that have been audited by the Auditor-General or an auditor appointed under s. 47(1), or laid before the Legislative Assembly by a Minister of the Crown. Other functions are to examine opinions and reports of the Auditor-General transmitted with the consolidated financial statements and general government sector financial statements, or laid before the Legislative Assembly with the financial report of an authority of the State; and to examine any report of the Auditor-General laid before the Legislative Assembly.
- 3.3 Section 58 of the *PFA Act* relates both to the giving of evidence before the Committee and to the production of documents to the Committee. Section 58(1) provides that, subject to that section, the Committee "shall take all evidence in public". Section 58(2) provides that, where in the opinion of the Committee, any evidence proposed to be given "relates to a secret or confidential matter", the Committee may, and at the request of the witness shall, take the evidence in private. Where evidence is taken in private, the consent of the witness is required before the Committee may disclose or publish that evidence: ss. 58(4), (7).
- 3.4 The *PFA Act* does not, as I noted in my first advice (at [3.15]-[3.16]), expressly deal with giving evidence by the Auditor-General or her staff to the Committee, or with evidence of matters and things that have come to the attention of the Auditor-General or her staff in exercising functions under the *PFA Act*. The provisions relating to giving evidence to the Committee do not deal with the matters and things to which the "secrecy" provision in s. 38 of the *PFA Act* relates. Section 38 is also in a different part of the Act, and makes no reference to disclosures to the Committee.
- 3.5 I adopt the approach of the Solicitor General that a statutory prohibition on disclosure of information will only be held to apply to disclosure to a Parliamentary committee if that is done expressly or by necessary implication (see [3.9]-[3.11] of my first advice).
- 3.6 I do not think, for similar reasons discussed in my first advice (particularly at [3.17]-[3.18]), that the Committee or its members would be regarded as a "person" for the

² As defined in s. 53.

purposes of s. 38(1) of the *PFA Act*. I also cannot identify any reason why s. 38 would be said to apply, by necessary implication, so as to restrict the giving of evidence before the Committee. The fact that s. 58 provides certain protections in dealing with evidence relating to "secret or confidential matters" may provide further support for this conclusion.

- 3.7 In my view, applying the approach of the Solicitor General, s. 38 of the *PFA Act* could not be relied upon by the Auditor-General, or any other witness, to resist answering an otherwise lawful question before the Committee.

Question 2 – request by the Committee to produce documents
Whether the Committee can require production of documents

- 3.8 Section 58(11) of the *PFA Act* provides that the production of documents to the Committee "shall be in accordance with the practice of the Legislative Assembly with respect to the production of documents to select committees of the Legislative Assembly".
- 3.9 Standing Order 288 of the Legislative Assembly provides that a committee "*shall have power* to send for persons, papers, records, exhibits and things" (emphasis added).
- 3.10 Section 58 of the *PFA Act* includes various protections where, in the opinion of the Committee, the whole or a part of a document which is produced (or proposed to be produced) in evidence by a witness "relates to a secret or confidential matter". These protections are the same as those applying to oral evidence relating to secret or confidential matters (see [3.3] above).³
- 3.11 As you are aware, my predecessor had advised that the Committee has no power to require the production of documents from any person, including the Auditor General.⁴ My predecessor had considered that s. 58(11) of the *PFA Act* is not a source of power to require production, but goes only to the *procedure* in relation to the production of documents. He pointed out that there are several provisions in other Acts which *expressly* confer committees with a power to compel the production of documents, but that this was not done in the *PFA Act*.
- 3.12 My predecessor had also considered that it should not be conceded that Parliamentary committees have the power to require the production of documents. He considered

³ Where a direction is given under s. 58(2) that a document be treated as confidential, the contents of that document shall be *deemed* to be *evidence* given by the person producing the document and taken by the Committee in private: s. 58(3). The effect of that deeming provision is that the provisions relating to disclosure and publication of *evidence* that relates to a secret or confidential matter (ss. 58(4)-(10)) also apply to confidential documents for which a direction has been made under s. 58(2).

⁴ CSO ref AUD018.83, 1 February 2001. There were no relevant differences in the legislative provisions.

that the terms of Standing Order 288 were ambiguous; and that if Standing Order 288 does purport to empower a Parliamentary committee to require the production of documents, there is doubt whether it is authorised by s. 15(1)(a) of the *Constitution Act 1902*.

- 3.13 My predecessor's advice must now, however, be considered in light of the subsequent opinions of the Solicitor General on whether non-statutory committees have power to compel the production of documents. I refer to my previous advice at [3.21]-[3.30].
- 3.14 The Solicitor General's opinions related to the powers of non-statutory committees of the Legislative Council. The relevant Standing Orders of the Legislative Assembly are, in substance, identical to those of the Legislative Council.⁵ Section 15(1)(a) of the *Constitution Act*, which authorise the making of Standing Orders, applies to both the Legislative Assembly and the Legislative Council. I am also inclined to doubt, adopting the Solicitor General's approach, that any "inherent" (or "implied") powers of non-statutory committees of the Legislative Assembly to require production of documents from a witness would be less than the powers of committees of the Legislative Council.⁶
- 3.15 It is not entirely clear how "the practice of the Legislative Assembly with respect to the production of documents to select committees" of the Legislative Assembly is to be determined for the purposes of s. 58(11). It could be argued that "the practice" should be determined by examining the actions taken, or not taken, by particular committees of the Legislative Assembly in relation to the production of documents. This was the view my predecessor took in an advice for another client. (My understanding of the current practice, in this sense, is that committees of the Legislative Assembly do not generally seek to compel witnesses or other persons to produce documents.)
- 3.16 I doubt, however, that this is the correct way to ascertain the practice of select committees of the Legislative Assembly. I prefer the view that the practice is to be determined, at least primarily, by reference to the Standing Orders of the Legislative Assembly (or by any applicable legislative provisions, as discussed further below at [3.22]). The Standing Orders, made under s. 15(1)(a) of the *Constitution Act*, are the primary rules governing the practices and procedures of each House, including their committees. In my view, Standing Order 288 of the Legislative Assembly - in providing that a committee "*shall have power*" to send for persons, papers, records, exhibits and things - is a clear assertion of the power of a committee to compel the production of documents. In view of the Solicitor General's opinion that it is more likely than not that a court would find a committee (of the Legislative Council) has power to require the

⁵ Standing Order 208(c) of the Legislative Council; Standing Order 288 of the Legislative Assembly.

⁶ In *Egan v Willis* (1998) 195 CLR 424 the High Court found that the Legislative Council has power to compel the Executive Government to produce State papers, as this power is "reasonably necessary" for that House to exercise its functions. See [3.21] of my first advice.

production of documents from a witness, I do not see any particular basis to read down the terms of Standing Order 288.

- 3.17 In addition, it is clear from the provisions in s. 58 of the *PFA Act* that the legislative scheme envisages that documents relating to "secret or confidential matters" would be produced to the Committee. There are significant protections relating to such documents, including protecting persons who produce such documents by requiring their consent to any further publication. It is of course possible that some people may wish to produce such sensitive material voluntarily to the Committee. On the other hand, I am inclined to think (as with oral evidence about such matters) that it is more likely that these provisions can be seen to complement a power to *compel* a person to produce documents.
- 3.18 I note that the relevant Standing Order at the time the *PFA Act* was enacted (SO 360) provided that all select committees "shall have power to send for persons, papers, and records".⁷ This is, for present purposes, effectively the same as the current Standing Order 288. It is therefore not necessary to decide whether s. 58(11) should be interpreted in light of the Standing Orders as they were at the time s. 58 was enacted, or in light of the Standing Orders as amended from time to time.
- 3.19 In conclusion, I do not think there can be any certainty about whether the Committee has power to compel the production of documents from a witness. I prefer the view, however, particularly in light of the Solicitor General's recent opinions, that the Committee *does* have such a power.
- 3.20 The better view is that this power derives from s. 58(11) of the *PFA Act*, which gives statutory force to the "practice" of the Legislative Assembly. That "practice", as reflected in the Legislative Assembly's Standing Orders, is an assertion by the House that its committees have this power.
- 3.21 I also note, as discussed in my first advice (at [3.26]), that Mr Walker SC has recently advised that s. 4(2) of the *Parliamentary Evidence Act 1901* ("*PE Act*") enables a committee to issue a summons requiring the production of documents from a witness. If that view were correct, the *PE Act* could be said to constitute a statement of the "practice" of committees of the Legislative Assembly. Alternatively, it could be said that s. 58(11) of the *PFA Act* does not exclude, or detract from, the power conferred on the Committee by the *PE Act* to issue a summons requiring the production of documents from a witness. The outcome, on either approach, would be that the Committee could issue a summons under the *PE Act* requiring production of documents from a witness.

⁷ Historical Standing Orders are available on the Legislative Assembly's website:
<https://www.parliament.nsw.gov.au/la/houseprocedures/Pages/Historical-Standing-Orders.aspx>.

- 3.22 I have shown a draft of this advice to the Solicitor General, who has indicated that he agrees with it. The Solicitor General also observed that (whilst the Walker view is arguable) there is a good argument that the *PE Act* itself does not confer power on a non-statutory committee to compel the production of documents. That power is, instead, more likely to be found to derive from Standing Order 288 and the principle that the Legislative Assembly has all the powers that are "reasonably necessary" to exercise its functions.

Whether s. 38 PFA can be relied upon

- 3.23 I therefore proceed on the basis that the Committee does have statutory power (deriving from either s. 58(11) of the *PFA Act* or s. 4(2) of the *PE Act*) to compel witnesses to produce documents.
- 3.24 I do not think that s. 38 of the *PFA Act* could be relied upon to resist a demand for production of documents. The reasons for this conclusion are very similar to those outlined above in my answer to Question 1.
- 3.25 It may well be, however, that other claims of "privilege" could be made in response to a request, or demand, for the production of documents. If further advice is required on that question, I would recommend that it be sought, if possible, from the Solicitor General.

Signed:



Lea Armstrong
Crown Solicitor

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