Complaint regarding Auditor-General Report   
No 3 of 2018

Standing Committee on Public Accounts

May 2020

Report 12

Committee membership

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Resolution of appointment

At its meeting of 13 December 2016 the Legislative Assembly resolved to create ‘a Standing Committee on Public Accounts to:

(i) examine:

(A) the accounts of the receipts and expenditure of the Australian Capital Territory and its authorities; and

(B) all reports of the Auditor-General which have been presented to the Assembly;

(ii) report to the Assembly any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and

(iii) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question’.[[1]](#footnote-1)

On 26 October 2017 the Legislative Assembly resolved to amend the above resolution as follows:

“Insert after (e)(i)(A), the words:

(AA) matters relating to market and regulatory reform (excluding Access Canberra), public sector management, taxation and revenue.” [[2]](#footnote-2)

Terms of reference

Auditor-General’s Report No. 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson* was presented to the Speaker of the Legislative Assembly for the ACT on 21 February 2018, and tabled in the Assembly on 22 February 2018.[[3]](#footnote-3)

Under the Resolution of Appointment for Committee, the Audit report stood referred to the Committee for its consideration. On 28 February 2018, the Committee was briefed on the audit report by the Auditor-General. On that day it agreed to inquire further into the report and advised the Assembly on 20 March 2018.[[4]](#footnote-4)

Under the Committee’s Resolution of Appointment, effective terms of reference for the inquiry are to examine the Audit report and report to the Legislative Assembly.

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Executive summary

This report concerns a complaint from a person involved in the sale of Block 30, Section 34 Dickson, expressing a grievance about the Auditor-General’s conduct of the performance audit which was reported in Auditor-General Report No 3 of 2018: *Tender for Block 30 (formerly Block 20) Section 34 Dickson*. In response to this complaint, the Committee agreed that there could be a clearer distinction between the first and second phases of negotiations, and the Committee’s report on the performance audit deals with them in separate chapters.

The Committee does not find the Complainant’s other arguments persuasive and does not consider that the Complainant was unfairly dealt with by the Auditor-General.

After considering the complaint the Committee recommends that the Legislative Assembly for the ACT develop and implement a protocol for dealing with complaints against the Auditor-General and other officers of the Assembly.

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Recommendations

[Recommendation 1](#_Toc34119225)

[3.42 The Committee recommends that the Legislative Assembly for the ACT design and establish a protocol for dealing with complaints against the Auditor-General and other officers of the Assembly.](#_Toc34119226)

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# The inquiry

* 1. Background

On 21 February 2018, the Auditor-General provided a Performance Audit report entitled *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson* to the Speaker of the Legislative Assembly of the ACT, for tabling in the Assembly.[[5]](#footnote-5)

The Audit report found that the EDD did not achieve the ACT government’s sale objective of pursuing ‘an open, contestable and transparent market process’. It also found that there were indications that the EDD did not achieve value for money,[[6]](#footnote-6) due to ‘significant’ weakness in the Directorate’s management of the tender. There was a ‘high risk’ that the EDD had ‘relinquished considerable financial value’ to the Tradies and that it sold Block 30 in breach of relevant provisions of the *Planning and Development Act 2007*.[[7]](#footnote-7)

* 1. Conduct of the Committee’s inquiry

On 28 February 2018, the Committee was briefed by the Auditor-General on Auditor General Report No 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson* and it subsequently agreed to inquire further into the report. It advised the Assembly to this effect on 20 March 2018.[[8]](#footnote-8)

During the Committee’s inquiry, Mr Greg Ellis, former Director, Sustainable Land Strategy in the Economic Development Directorate, who came within the scope of the Auditor-General’s report, made a complaint to the Speaker of the Assembly regarding the conduct of the Audit. The Speaker referred the matter to the Committee for its consideration, and the Committee decided to consider the complaint as part of the inquiry.

In the course of its inquiry into Auditor General Report No 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, the Committee held one *in-camera* hearing regarding the complaint considered in this report.

* 1. Structure of this report

This report consists of:

* the present Chapter 1, which is an introduction to the report;
* Chapter 2, which considers a complaint by Mr Greg Ellis, the former Director, Sustainable Land Development, Economic Development Directorate, regarding the conduct of the Audit and its findings; and
* Chapter 3, which provides Committee comment on Mr Ellis’ representations to the Speaker and the Committee.

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# Complaint by the former Director, Sustainable Land Development

* 1. Background

Mr Ellis, the former Director, Sustainable Land Strategy, objected at the conduct and findings of Auditor General Report No 3 of 2018: *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*.

On 15 January 2018, he lodged a document with the Speaker of the Assembly which was a complaint regarding the Auditor-General, referred to here as the ‘first complaint’. Later, at the Committee’s request, Mr Ellis lodged a revised document, intended to capture further elements of grievance which had been brought forward in other documents submitted to the Committee, referred to here as the ‘second complaint’.

The Committee notes that because the first complaint was received and referred to the Committee by the Speaker of the Assembly, it is to this document that the Committee responds in its communications with the Speaker. The second complaint shares the concerns raised in the first complaint and adds some further points. References below to ‘the Complainant’ are references to Mr Ellis.

* 1. First complaint, 15 January 2018

The first complaint set out thirteen main grievances.[[9]](#footnote-9)

* + - 1. Handling of the Complainant’s responses to drafts of the Audit report

Three grievances related to the handling of the Complainant’s responses to drafts of the Audit report, being that:

* 1. the Audit report did not properly reflect the Complainant’s comments and feedback in response to drafts of the Audit report;[[10]](#footnote-10)
* 2. the Complainant did not receive appropriate sections of draft reports under relevant sections of the *Auditor-General Act 1996*;[[11]](#footnote-11) and
* 3. the Complainant was not afforded sufficient time to consider and respond to sections of draft reports under relevant sections of the *Auditor-General Act 1996.*[[12]](#footnote-12)

The first two grievances hinge on Sections 17 and 18 of the *Auditor-General Act 1996*, where the Act provides that:

* an audit report ‘must include the substance of any comments’ received by the Auditor-General;[[13]](#footnote-13)
* the Auditor-General ‘must give a draft of the report (the proposed report), or, if the auditor-general considers that only part of the proposed report relates to a person, a part of the proposed report’;[[14]](#footnote-14) and that
* the Auditor-General ‘may also give all or part of the proposed report to anyone else’ the Auditor-General considers ‘has a direct interest in the proposed report’.[[15]](#footnote-15)

The third grievance, regarding time given to consider and respond to a draft audit report, hinges on the Act providing that if the Auditor-General ‘gives a person all or part of a proposed report’, the Auditor-General must give the person written notice ‘stating that the person may give written comments about the proposed report…before the end of 14 days after the day the notice is given to the person’, or a longer period at the Auditor-General’s discretion.[[16]](#footnote-16)

* + - 1. Complainant’s capacity to recall the matters considered in the Audit

Three grievances related to the Complainant’s capacity to recall the matters considered in the Audit, being that:

* 4. the Auditor-General relied on evidence from the Complainant when he said he could not recall the matter, and that this amounted to a ‘flawed methodology’;[[17]](#footnote-17)
* 5. the Auditor-General had declined to go through such records as were available with the Complainant;[[18]](#footnote-18) and that
* 6. the Auditor-General forbade the Complainant to discuss matters under consideration with other persons within the scope of the audit.[[19]](#footnote-19)

These grievances hinged on the Complainant’s claim that he could not recall the events covered in the Audit. He considered reliance by the Auditor-General on these incomplete recollections to constitute a ‘flawed methodology’. His response was to propose that the Auditor-General give him access to such documentary evidence as existed and that he review it with the Auditor-General as a prompt for his further recollection. The Auditor-  
General declined the offer.

The Complainant considered that another way to respond to his incomplete recollection of events was to discuss them with other persons within the scope of the Audit. He complained that the Auditor-General prevented him from doing this by issuing a notice under the *Auditor-General Act*, ‘giving a direction to a person prohibiting or restricting the disclosure of protected information’.[[20]](#footnote-20)

* + - 1. Responses to perceptions of bias

Three grievances concerned the Complainant’s views on perceptions of bias on the part of the ACT government in favour of the Tradies, and reasons for not terminating the sale process rather than seeking to negotiate amended terms, that is that:

* 7. the Auditor-General was not persuaded, and should have been, of the Complainant’s arguments about government preference for Tradies in the transaction and his view of the implications of such: i.e., that there was government pressure to treat Tradies favourably which EDD took care to resist;[[21]](#footnote-21)
* 8. the Audit report made unfounded claims of wrong-doing on the part of the Complainant;[[22]](#footnote-22) and that
* 9. the Auditor-General drew on evidence selectively to support pre-determined findings: that is—in the Complainant’s view—that the Auditor-General sought to support a pre-determined view that in conducting the sale officers were acting at odds with their instructions from the Executive.[[23]](#footnote-23)

These grievances hinged on testimony provided to the Auditor-General in which the Complainant stated that ‘it was clear that the government wanted the Tradies to win’ the tender.[[24]](#footnote-24)

* + - 1. Business imperatives against terminating sale process

One grievance concerned what the Complainant said were business imperatives which worked against obtaining a new valuation or terminating the sale process, that is that:

* 10. the Auditor-General was not persuaded and should have been of business imperatives which made it inadvisable to obtain a new valuation for Block 30 or terminate the sale process.[[25]](#footnote-25)

This grievance focused on Audit findings: first, that the Complainant should have obtained a new valuation of Block 30 if he thought that the original valuation made incorrect assumptions and, second, that the EDD should have terminated the sale when it found that it could not proceed on the original terms. The Complainant argued that if the EDD obtained a new valuation, or terminated the sale process, it would have prevented sale on terms favourable to the government, for some time. Any sale price would have been considerably lower once the ACT government had obtained a new valuation or the halted the sale process.[[26]](#footnote-26)

* + - 1. Adverse reflections

Three grievances concerned what the Complainant argued was the Auditor-General’s reckless handling of material reflecting on the Complainant, amounting to adverse reflections on his reputation, that is that:

* 11. the Auditor-General did reputational harm to the Complainant by circulating sections of draft Audit report, referring to the complainant, to other persons within the scope of the audit;[[27]](#footnote-27) and that
* 12. the Auditor-General assumed that lack of documentary evidence meant that such evidence did not exist.[[28]](#footnote-28)

These grievances hinged on questions of ‘methodology’ on the part of the Auditor-General. The first relates to a process in which the Auditor-General circulates part or whole of draft audit reports to people within the scope of an audit if they are mentioned, under relevant sections of the *Auditor-General Act*.[[29]](#footnote-29) The second concerns a matter considered at some length in hearings, as to whether there were appropriate records of decisions and actions regarding the sale. Hearings established that there were no such records in the official filing and record management system used by EDD.[[30]](#footnote-30)

* + - 1. Periods of negotiation

One grievance concerned the presentation in the Audit report of matters in the first and second periods of negotiation, that:

* 13. the Auditor-General did not properly demarcate negotiating periods, the first between December 2012 and December 2013 and the second between December 2013 and December 2014, and wrongly attributed responsibility for divergences from terms of the RFT to the Complainant.[[31]](#footnote-31)

The Complainant asserted that his involvement in negotiating terms for the sale of Block 30 ended in December 2013. Further negotiations took place over the following twelve months, finishing in December 2014. The Audit report had failed sufficiently to distinguish between the period of negotiations for which he was responsible and that for which he was not. His view was that the Audit report had wrongly attributed to the Complainant changes to terms which had taken place in the second period of negotiation.[[32]](#footnote-32)

* 1. Second complaint, 23 August 2018

The second complaint included the grievances set out in the first complaint, and a further six grievances, resulting in a total of 19 grievances.

* + - 1. Whether Audits consider recent matters

A further grievance was that, in the Complainant’s view:

* 14. Audit reports by convention focus on recent events involving current public servants.[[33]](#footnote-33)

The Complainant asserted that audit reports typically did not consider ‘historical’ matters, where participants in events were no longer serving public servants. This formed part of the Complainant’s argument that the Auditor-General had adopted a ‘flawed methodology’ by relying on his incomplete recollection of events.

* + - 1. Car parking spaces

Two further grievances were that, in the Complainant’s view:

* 15. the Auditor-General was not persuaded, and should have been, of the Complainant’s account regarding car parking spaces required under the terms of the RFT;[[34]](#footnote-34) and that
* 16. the Auditor-General was not persuaded and should have been of the Complainant’s argument that negotiations had provided for 154 replacement public car parks as originally specified.[[35]](#footnote-35)

These grievances hinged on the question of what was required, and what was provided for, in the final contract of sale by way of replacement car parking spaces on Block 30. It related to EDD’s statement of support for a minimum of 84 replacement car parking spaces when the RFT had put the figure at 154. The Complainant claimed that the Tradies had agreed to make up the difference between the 84 spaces specified in its tender and the original RFT requirement of 154 spaces by providing spaces in its club building.[[36]](#footnote-36)

* + - 1. Meetings

A further grievance was that, in the Complainant’s view:

* 17. the Auditor-General had wrongly considered that there were 40 ‘meetings’ between EDD and the Tradies in the context of negotiations.[[37]](#footnote-37)

This grievance hinged on terminology for ‘meetings’. The Audit report quoted evidence provided by the Chief Financial Officer of the Tradies that 40 meetings, ‘either in person or by telephone’ had been held in the course of negotiations between EDD and the Tradies. The Auditor-General had stated that Audit ‘would have expected some documentation about what was happening’ in these exchanges.[[38]](#footnote-38) The Complainant objected to these exchanges being called ‘meetings’. He expressed doubt as to whether, if they were not face-to-face meetings, there was an obligation to make records of each contact.[[39]](#footnote-39)

* + - 1. Deliberative information

A further grievance was that, in the Complainant’s view:

* 18. the Auditor-General used her powers to release details of cabinet materials ‘selectively’.[[40]](#footnote-40)

This grievance hinged on the Auditor-General’s exercise of her discretion under the *Auditor-General Act 1996*, which provides that:

The auditor-general may include deliberative information in a report for the Legislative Assembly only if the auditor-general considers that it is in the public interest to include the information.[[41]](#footnote-41)

The Complainant argued that the Auditor-General exercised her discretion to ‘to reveal advice’ in October 2011 but not in September 2012. The Audit report stated that in October 2011 the EDD provided advice to Cabinet which expressed support for a direct sale of Block 30 to the Tradies. Cabinet approved the sale by tender in September 2012.[[42]](#footnote-42) The Complainant argued that the Audit report had failed to:

examine whether advice may have been given to Cabinet up to and including September 2012, which not only canvassed the additional risks on potential purchasers due to a lack of site information and the unfinished status of the Dickson master plan, but which may also have explicitly advised that the implications of such risks were bound to undermine the stated sale objective.[[43]](#footnote-43)

* + - 1. Government objectives

A further grievance was that, in the Complainant’s view:

* 19. the Auditor-General took too narrow a view of the ACT government’s objectives for the sale of Block 30.[[44]](#footnote-44)

The Audit report stated that the EDD ‘did not achieve the government’s objective of ensuring the tender was “open to all interested parties and is fully transparent”’.[[45]](#footnote-45) The Complainant argued that:

the government’s ‘sole’, or even primary, objective for the tender was not that it should be open and competitive or that is should “maximise value” as the Chief Minister put it. It was that it had to be put to market when the government wanted it put to market because it had an ulterior political motive.[[46]](#footnote-46)

This ‘ulterior motive’, the Complainant argued, was a ‘determination to get the block to market before the October 2012 election’ which was, in his view, part of the government’s determination that the Tradies should have the opportunity to bid for the sale before the election. He regarded this as inimical to the Government’s stated objective for the sale.[[47]](#footnote-47) His view was that a failure by the Auditor-General to take this into account had resulted in the Audit report suggesting that he and other officers conducted the tender process in a way that was at odds with government authorisation and intent.[[48]](#footnote-48)

# Committee comment

* + - 1. Feedback (grievances 1, 2 & 3)

The Complainant claimed that the Audit report did not sufficiently reflect his responses to drafts of the Audit report. The Committee notes that the *Auditor-General Act 1996* allows the Auditor-General discretion by requiring that Audit reports ‘include *the substance* of any comments’ [emphasis added].[[49]](#footnote-49) The Act empowers and obliges the Auditor-General to distinguish between what is or is not substantial. Without viewing the Complainant’s comments, it is difficult for the Committee to come to a view. However, the Audit report shows signs of considerable attempts to reflect the views of the Complainant. In conducting an audit, the Auditor-General balances different imperatives, one of which is that Audit reports are able effectively to consider matters within their scope.

Without access to further information, the Committee is not able to assess the claim that the Auditor-General did not provide sections of the draft report which referenced the Complainant. Again, it appears from the Audit report that the Auditor-General took care to provide the Complainant with access to sections and whole drafts of the Audit report. The Complainant, however, reduced the force of these arguments when he declined opportunities to read and to discuss the whole draft report.[[50]](#footnote-50)

The claim by the Complainant that the Auditor-General did not give him sufficient time to consider drafts of reports, as provided for under the *Auditor-General Act*, is based on a misunderstanding of the Act. The Act provides that the Auditor-General should give a person a ‘proposed report notice’ when the Auditor-General gives that person part or whole of a draft report for comment. It provides that the Auditor-General must give 14 days or ‘a longer period stated in the notice’ in which to respond. However, it also provides that the Auditor-General ‘need not give a proposed report notice in relation to more than 1 proposed report, or part of a proposed report’. Hence the 14–day period only applies to the *first instance* in which the Auditor-General provides access to a draft report.[[51]](#footnote-51) This grievance does not stand up to scrutiny.

Recollection (Grievances 4, 5 & 6)

The Complainant claimed that, in relying on his incomplete recollection, the Auditor-General had adopted a ‘flawed methodology’. He also claimed that being prevented from looking at records with the Auditor-General, and from contacting other persons within the scope of the Audit, compounded this by preventing access to information which could have assisted his recollection.

First, the Committee notes that this inquiry has been distinctive in that several witnesses claimed a poor capacity to recollect matters within the scope of the Audit.[[52]](#footnote-52)

Second, it is a doubtful proposition that a person should be shielded from answering questions because they claim not to remember events.

Third, the Complainant’s wish to consult records in the company of the Auditor-General, and to be permitted to speak to other persons within the scope of the Audit would, if granted, appear to undermine one of the key means available to the Auditor-General to assess the evidence provided. This is the ability to take evidence separately and compare accounts to establish common elements or discontinuities. Providing persons within the scope of an Audit with the opportunity to view records or discuss matters with other persons would give a person so-inclined the opportunity to provide an ‘augmented’ account that was consistent with written records and the accounts of others rather than an independent, testable account. If agreed to, this would have the potential to undermine the ability of the Auditor-General to determine truth or falsehood in the course of an audit by comparing separate accounts.[[53]](#footnote-53)

* + - 1. Perceptions of bias (grievances 7, 8 & 9)

The Complainant claimed that he and other officers had responded to an apparent bias on the part of government by applying greater care to questions of probity during the sale process. In his view, the fact that the Auditor-General resisted this view was evidence of bias against the Complainant.

The evidence does not support these claims. If, as the Complainant argued, there was heightened attention to probity, this should have resulted in greater attention to record-keeping, which did not occur.

A second claim was that the Auditor-General had shown bias against the Complainant in putting the view that he and other officers were working at odds with policy, authorisation and instructions provided by the government. There is a logical error, and perhaps a failure to understand the practice and role of the Auditor-General, which reduces the force of this argument. The Audit report considered verbal evidence provided by the Complainant in which he stated that ‘it was clear that the government wanted the Tradies to win’ the tender. It found ‘no evidence to substantiate this belief’.[[54]](#footnote-54)

The Complainant construed this as placing blame on him and fellow officers involved in the tender and subsequent negotiations. Alternatively, it could relate to questions of scope for Audit reports. Audit reports deal with evidence. A statement that there is no evidence does not mean that events did not occur. It only says that there is no evidence to the standard required for an Audit report. It is more accurate to say that the Audit report leaves the question of government preference on the outcome of the RFT an open question. This works against the view, on the part of the former Director, that the Audit report singled him out for blame.

* + - 1. Business imperatives (Grievance 10)

The Complainant argued that the EDD had pursued a revised valuation for Block 30, or stopped the negotiation process after the tender had been awarded, rather than making concessions to the Tradies, it would have reduced value from the sale.[[55]](#footnote-55) This is an expression of the view that the capacity of governments to act in their ‘commercial’ best interest is inherently at odds with their obligations as public entities to act transparently and accountably. The Complainant appears to take the view that government should have wide discretion government to act in its commercial dealings, as for a private entity.

However, as Seddon puts it in *Government Contracts: Federal, State and Local*:

in relation to public tendering, there is a vital extra ingredient, the importance of which cannot be overstated: the government body is under a responsibility to use public money in the best possible way. This responsibility involves not only securing the best deal through open and effective competition but also the protection of the public purse from collusion, fraud and extravagance.[[56]](#footnote-56)

People bring high expectations of the actions of the public service and government. These expectations require greater transparency, even to the point of informing the market when it is less than ideal from a commercial perspective. If officers and agencies are only transparent if and when if they consider it possible in a commercial sense, this provides more discretion than might be acceptable by contemporary standards. Government should be subject to oversight. There is an expectation that probity requires the consistent behaviour of officers, and that matters should only be held in confidence where this is in the public interest.

* + - 1. Adverse reflections (Grievances 11 & 12)

The Complainant took the view that in circulating draft material about him to other persons within the scope of the Audit, the Auditor-General cast adverse reflections on him. He was aggrieved that Audit findings that there was a lack of documentary evidence on negotiations for the sale of Block 30 led to the conclusion that such evidence did not exist. He interpreted this as casting reflections on him.

Regarding the circulation of material to people within the scope of the Audit, there are two reasons why the Auditor-General was obliged to do this. One was that the Auditor-General was obliged to circulate the material to provide persons referred to in draft reports with an opportunity to provide comment under s 18 of the *Auditor-General Act*. The other was to provide such persons with some right of reply if the Complainant’s statements quoted in the Audit report reflected on those people. It appears to be an inescapable obligation on the Auditor-General: to provide a fair opportunity to comment on material included in a draft audit report.

The Complainant raised questions on whether failure to find documentary evidence means that the does not exist. It appears from the Audit report and statements of the Auditor-General and others in hearings that there was a concerted attempt to discover such documentation as existed and that these efforts came up short.[[57]](#footnote-57) Given statements from other sources, it appears that appropriate records of the negotiations were not created and added to the EDD’s official records system. Other material may exist, but the burden of proof as to the existence and location of these other records lies with the Complainant, and the Complainant does not appear to have identified them. In light of this, it is unlikely that Audit findings have unfairly reflected on the Complainant.

* + - 1. Periods of negotiation (Grievance 13)

The Complainant found fault with the Audit report in that it did not, in his view, distinguish sufficiently between the first period of negotiation, for which he was responsible, and the second, which took place after the end of his role in negotiating the terms of the sale.

This issue came more clearly into view for the Committee after it received the Solicitor-General’s Answer to a Question Taken on Notice, considered in Chapter 5 of this report, providing further information of the second period, in which the GSO and lawyers for the Tradies negotiated further over the terms of the sale. In the Committee’s view the Auditor-General’s report was not incorrect or misleading in the way it dealt with the first and second periods of negotiation, but differences between them, including those responsible in each case, could have been indicated more clearly.

For this reason, the Committee’s report on the tender for Block 30 divided the account of negotiations into separate chapters for the first and second periods, and this is considered a sufficient response to the Complainant’s concerns. The Committee did not find evidence that the Audit report attributed changes in terms in the second period of negotiation to the Complainant.

* + - 1. Whether Audits consider recent matters (Grievance 14)

The Complainant stated that it was usual for performance audits to consider recent matters and consequently to restrict their investigation to serving public servants. The Committee did not find any precedent to support this contention and considers no comment necessary.

* + - 1. Car parking spaces (Grievances 15 & 16)

The Audit report noted that at different times and places the ACT government had indicated that the purchaser of Block 30 would be required to provide 154, 139 or 84 replacement car parks, and commented on the implications of the differences between these figures.[[58]](#footnote-58)

The Complainant argued that there were rational explanations for the different figures on car replacement parking spaces the purchaser would be required to provide. The Second Complaint raised a grievance that his comments on this, regarding the first audit report, had not been taken into account by the Auditor-General. He made more specific comments in hearings:

because the planning authority’s Dickson master plan had removed 54 per cent of the available developable space for the block, the question of how that policy would be applied was unclear. There was an assumption within the development community, within the EDD and the LDA, that, of course, as the planning authority was getting rid of 54 per cent of the site, and the pocket park and the road easement, naturally, what it meant by replacing all the parking was to replace that parking which was still extant, which was 84 car spaces. That was a position that we put, as EDD, to the planning authority in their deliberations on this question, through their parking expert.[[59]](#footnote-59)

He also stated that EDD did not have the power to set a figure on the number of replacement car parks required, and that this was entirely dependent on decision-making by ACTPLA, that it was ‘never in the gift to the EDD to reduce the number of public car spaces; that was always the prerogative of the ACT planning authority’.[[60]](#footnote-60)

A further argument made by the Complainant was that the Tradies had in the end undertaken to provide 154 replacement car parking spaces in full by converting ‘existing private spaces they possessed into public spaces’.[[61]](#footnote-61) The Complainant’s testimony to this effect was indicated in the Audit report, which stated however that ‘the Audit Office [had] not identified any documentation to support this claim’.[[62]](#footnote-62)

The Complainant’s claims in this instance are undermined by the use of more than one argument to justify terms negotiated with the Tradies. These included arguments that:

* there was a reduction in the requirement for replacement car parking spaces due to changes to Block 30;
* the number of replacement car spaces was determined by ACTPLA; and that
* the Tradies agreed to replace the full requirement of 154 car parking spaces in an undocumented undertaking.

These arguments are not convincing, either separately or in combination.

* + - 1. Meetings (Grievance 17)

The Complainant objected to Auditor-General describing forty contacts in negotiations between EDD and the Tradies as ‘meetings’. He implied that if they were not meetings, then there was no requirement to document them.[[63]](#footnote-63)

It may be confusing to equate phone calls and email exchanges with ‘meetings’, but it is doubtful that this is significant. Officers engaged in such contacts were obliged to record them whether or not they were face-to-face meetings, because they were material to negotiations on a significant sale of land.

* + - 1. Deliberative information (grievance 18)

The Complainant argued that the Auditor-General exercised her discretion to include in the Audit report deliberative information from October 2011, authorising the RFT, but not from September 2012. If she had, the Complainant argued, it would have shown that he had provided advice to Cabinet which suggested that there were elements in the approach to the sale of Block 30 that worked against the Government’s stated objective.

Without access to this material, the Committee is not able to confirm or deny this claim.

* + - 1. Government objectives (Grievance 19)

The Complainant argued that by adopting too narrow a view of the government’s objective for the sale of Block 30, the Auditor-General had, in effect, unfairly placed blame for divergences from the terms of the RFT on his and the shoulders of other officers involved in negotiating the sale.

It appears to the Committee that the Auditor-General was obliged to consider the outcome of the RFT and sale process against the government’s stated objective. While the Complainant appears to have wanted the Auditor-General to broaden the terms of the Audit by considering whether the government ‘really’ meant this to be the objective of the sale, this is contrary to the established approach for performance audits in the ACT which generally takes stated objectives and considers whether performance has been consistent with those objectives.

* + - 1. Conclusion

The two complaints are phrased in a polemical style, and some effort is required to establish the merits or otherwise of the claims. Of the claims that the Committee can evaluate, the only one that can be supported is that the Audit report could have reflected more clearly a distinction between the first and second periods of negotiation on the terms of the sale of Block 30. Other claims are either not supported, or contradictory arguments are used. These are not persuasive.

For some the grievances, the main principle has been to consider whether the things the Complainant asked for could be reasonably be provided while allowing the Audit to proceed in a timely way while protecting its integrity. For many of the Complainant’s requests, this was not the case. Access to documents and other persons within the scope of Audit, for example, could not be provided without compromising the Auditor-General’s capacity to check one account against another: a primary tool for determining the veracity of statements made to her.

This principle applies to other grievances. If the Auditor-General had complied with the Complainant’s position on comments on draft reports it would have resulted in delays in publication and a report dominated by comments, to the detriment of the focus of the report.

If the Auditor-General had taken the Complainant’s statements about replacement car parks at face value, without documentary evidence, it would have resulted in the Audit report adopting a standard of evidence less than expected of Audit reports.

The Complainant argued that the Auditor-General should not have been satisfied with the ACT government’s stated objective. Going beyond this, however, would have involved going beyond the ‘performance audit mandate’, which, according to the Auditor-General, ‘stops short of reviewing the merits of government policy decisions’.[[64]](#footnote-64)

In practice, the Auditor-General must balance competing imperatives, including the proper scope and nature of audit reports; standards of evidence and probity; timeliness; and fair treatment of entities within the scope of an audit. The Auditor-General appeared to have gone to great lengths to afford the Complainant fair treatment and largely succeeded in doing so. If she had placed greater emphasis on meeting the expectations of the Complainant it is doubtful that she could have produced a report in good time. It would have created an unhelpful precedent, allowing persons unhappy with their treatment in the course of an audit to determine its timeline and content. Given the key importance of the Auditor-General’s independence, this could never be an acceptable outcome.

Consideration of matters brought to light in a previous chapter also sheds light on the complaints. The Committee’s report *Tender for the sale of Block 30 Dickson* considered the second phase of negotiations on the sale of Block 30 and found, among other things, that the ACTGS was not familiar with the terms negotiated in the first phase and agreed to in December 2013, which were quite different from those stipulated in the RFT. It appears that neither the Complainant, the former Director-General of the EDD, nor his Deputy informed the ACTGS of terms as they were negotiated or agreed to in the first phase of negotiation, contrary to their statements that the ACTGS was involved in much of the process.[[65]](#footnote-65) Such an approach appears quite out of the ordinary and further weakens arguments put by the Complainant.

The Committee has not found any evidence to uphold the complaint.

An issue that became apparent when Mr Ellis made his complaint about the Auditor-General was that no procedure was in place for managing it, obliging those to whom he directed his complaint—including the Committee—to develop a protocol for dealing with the complaints as they arose, in the absence of an established procedure.

This question was considered in the *2020 Strategic Review of the Auditor-General*, which recommended that ‘[only] complaints of a substantial nature which in light of any findings that the Committee may make, could lead to consideration to the removal of the Auditor-General from office should be subject to a formal inquiry’, and that ‘[any] complaints and allegations of an operational nature about the Auditor-General be routinely considered by the Public Accounts Committee in the course of inquiries into the relevant report’.[[66]](#footnote-66)

The Committee recommends that the Legislative Assembly for the ACT develop and implement a protocol for dealing with complaints against the Auditor-General and other officers of the Assembly.

Vicki Dunne MLA  
Chair

1. Legislative Assembly for the ACT, *Debates*, 13 December 2016, p.40, available at: <http://www.hansard.act.gov.au/hansard/2017/pdfs/20161213a.pdf> [↑](#footnote-ref-1)
2. Legislative Assembly for the ACT, *Minutes of Proceedings* *No. 37*, 26 October 2017, p.489, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1122285/MOP037F.pdf> [↑](#footnote-ref-2)
3. Legislative Assembly for the ACT, Minutes of Proceedings, 22 February 2018, p.709, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/1168583/MoP049F.pdf> [↑](#footnote-ref-3)
4. Legislative Assembly for the ACT, Minutes of Proceedings, 20 March 2018, p.722, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0017/1180034/MoP050F.pdf> [↑](#footnote-ref-4)
5. Auditor-General’s Report No 3 of 2018, *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.23, viewed 1 May 2019, p.ii, available at: <https://www.audit.act.gov.au/__data/assets/pdf_file/0012/1184898/Report-No-3-of-2018-Tender-for-the-sale-of-Block-30-formerly-Block-20-Section-34-Dickson.pdf> [↑](#footnote-ref-5)
6. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.1. [↑](#footnote-ref-6)
7. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.1. The Audit report expressed concern that the EDD had in selling Block 30 contravened the *Planning and Development Act 2007* (ACT), s 240. [↑](#footnote-ref-7)
8. Legislative Assembly for the ACT, Minutes of Proceedings, 20 March 2018, p.722, available at: <https://www.parliament.act.gov.au/__data/assets/pdf_file/0017/1180034/MoP050F.pdf> [↑](#footnote-ref-8)
9. Numbering and grouping of grievances have been added for the sake of clarity. [↑](#footnote-ref-9)
10. First complaint, 15 January 2018, pp.2-3, 4, 8; Second complaint, 23 August 2018, pp.9, 21, 22. [↑](#footnote-ref-10)
11. First complaint, 15 January 2018, p.1; Second complaint, 23 August 2018, pp.17, 18. [↑](#footnote-ref-11)
12. First complaint, 15 January 2018, p.1; Second complaint, 23 August 2018, pp.17, 18, 21. [↑](#footnote-ref-12)
13. *Auditor-General Act 1996* (ACT), s 17(2). [↑](#footnote-ref-13)
14. *Auditor-General Act 1996* (ACT), s 18(2). [↑](#footnote-ref-14)
15. *Auditor-General Act 1996* (ACT), s 18(3). [↑](#footnote-ref-15)
16. *Auditor-General Act 1996* (ACT), s 18(5). [↑](#footnote-ref-16)
17. First complaint, 15 January 2018, p.6; Second complaint, 23 August 2018, pp.11, 15. [↑](#footnote-ref-17)
18. First complaint, 15 January 2018, p.6; Second complaint, 23 August 2018, p.15. [↑](#footnote-ref-18)
19. First complaint, 15 January 2018, p.6; Second complaint, 23 August 2018, e.g. p.41. [↑](#footnote-ref-19)
20. *Auditor-General Act 1996* (ACT), s 35(1) *ff.* [↑](#footnote-ref-20)
21. First complaint, 15 January 2018, pp.2-3, 3-4, 8; Second complaint, 23 August 2018, pp.15-16. [↑](#footnote-ref-21)
22. First complaint, 15 January 2018, p.8; Second complaint, 23 August 2018, e.g. pp.17, 18, 19 *ff*. [↑](#footnote-ref-22)
23. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.9. [↑](#footnote-ref-23)
24. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.68. [↑](#footnote-ref-24)
25. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.10. [↑](#footnote-ref-25)
26. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, pp.10, 29-30. [↑](#footnote-ref-26)
27. First complaint, 15 January 2018, p.2. [↑](#footnote-ref-27)
28. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.9. [↑](#footnote-ref-28)
29. *Auditor-General Act 1996* (ACT), s 18(3). [↑](#footnote-ref-29)
30. See for example Mr Graham Mundy, *Transcript of Evidence*, 6 December 2018, pp.112-116*.* [↑](#footnote-ref-30)
31. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.10. [↑](#footnote-ref-31)
32. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.10. [↑](#footnote-ref-32)
33. Second complaint, 23 August 2018, pp.35, 41. [↑](#footnote-ref-33)
34. Second complaint, 23 August 2018, p.27. [↑](#footnote-ref-34)
35. Second complaint, 23 August 2018, p.20. [↑](#footnote-ref-35)
36. See Mr Greg Ellis, *Transcript of Evidence*, 5 December 2018, p.71; *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.86-87; and Second Complaint pp.20, 40 (*n.30, 31).* Note however a different account provided by Mr Ellis at *Transcript of Evidence*, 12 December 2018, p.156 [↑](#footnote-ref-36)
37. Second complaint, 23 August 2018, p.33. [↑](#footnote-ref-37)
38. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.59; Dr Maxine Cooper, *Transcript of Evidence*, 30 May 2018, p.14. [↑](#footnote-ref-38)
39. Second complaint, 23 August 2018, pp.33-34. [↑](#footnote-ref-39)
40. Second complaint, 23 August 2018, p.12. [↑](#footnote-ref-40)
41. *Auditor-General Act 1996*, s 20(1). [↑](#footnote-ref-41)
42. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.16. [↑](#footnote-ref-42)
43. Second complaint, 23 August 2018, p.16, *n.*7. [↑](#footnote-ref-43)
44. Second complaint, 23 August 2018, pp.38-39, 43-44. [↑](#footnote-ref-44)
45. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.2. [↑](#footnote-ref-45)
46. Second complaint, 23 August 2018, p.16, p.16, *n.*8, p.19 et cetera. [↑](#footnote-ref-46)
47. Second complaint, 23 August 2018, pp.39, 43-45. [↑](#footnote-ref-47)
48. Second complaint, 23 August 2018, p.16, p.16, *n.*8, p.19 et cetera. [↑](#footnote-ref-48)
49. *Auditor-General Act 1996*, s 17(20), with reference to s 18, ‘Comments on proposed reports’. [↑](#footnote-ref-49)
50. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.28-29. [↑](#footnote-ref-50)
51. *Auditor-General Act 1996*, s 18(5) & 18(6). [↑](#footnote-ref-51)
52. See for example Mr Dan Stewart, *Transcript of Evidence*, 22 March 2019, pp.196, 198, 199, 200, 203, *et cetera*, and Mr Ian Wood-Bradley, *Transcript of Evidence*, 6 December 2018, pp.106-107. [↑](#footnote-ref-52)
53. On the question of whether it was reasonable for the Auditor-General to issue a notice under S 35 of the *Auditor-General Act 1996*, it is useful to note that Australian jurisdictions take different approaches to the confidentiality of information provided to auditors-general. Sections 35 and 36 of the *Auditor-General Act 1996* (ACT) provide a mechanism under which the Auditor-General may at his or her discretion issue a direction requiring a witness to keep testimony in confidence, and penalties for not complying with the direction. The *Auditor-General Act 1997* (Cth), at Section 36(2B), creates a non-discretionary requirement that a person must not ‘use or disclose’ information provided to the person in the course of an audit if the person is not performing an Auditor-General function, for which the penalty is imprisonment for 2 years. Neither the Audit Act 1994 (Vic) or the *Public Finance and Audit Act 1983* (NSW) make any specific provision to allow the Auditor-General to issue a direction that the person must hold information in confidence, as in the ACT, or to prevent the person from using or disclosing information, as in the Commonwealth. [↑](#footnote-ref-53)
54. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.68, 69. [↑](#footnote-ref-54)
55. First complaint, 15 January 2018, p.7; Second complaint, 23 August 2018, p.10. [↑](#footnote-ref-55)
56. Nicholas Seddon, *Government Contracts: Federal, State and Local*, (6th ed.), Federation Press, Leichhardt, NSW, 2018, p.344. [↑](#footnote-ref-56)
57. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.3-4, 10, 25, 39, 43, 47, 59; Dr Maxine Cooper, *Transcript of Evidence*, 30 May 2018, pp.4, 10, 14, 16; Mr Brett Stanton, *Transcript of Evidence*, 30 May 2018, p. 12-13, 14, 16; Mr Graeme Mundy, *Transcript of Evidence*, 6 December 2018, pp.111-116, 119-122; Mr Ben Ponton, *Transcript of Evidence*, 12 December 2018, pp.162-167. [↑](#footnote-ref-57)
58. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.6-8, 80-81. [↑](#footnote-ref-58)
59. Mr Greg Ellis, *Transcript of Evidence*, 12 December 2018, p.156. [↑](#footnote-ref-59)
60. Mr Greg Ellis, *Transcript of Evidence*, 12 December 2018, p.156, and *Transcript of Evidence*, 5 December 2018, pp.71, 84-85. [↑](#footnote-ref-60)
61. Mr Greg Ellis, *Transcript of Evidence*, 5 December 2018, p.83, and Mr Ellis quoted in *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, pp.85, 86-87. [↑](#footnote-ref-61)
62. *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p.7. [↑](#footnote-ref-62)
63. Second complaint, 23 August 2018, p.33. See *Tender for the sale of Block 30 (formerly Block 20) Section 34 Dickson*, p. 59, and Dr Maxine Cooper, *Transcript of Evidence*, 30 May 2018, p.17. [↑](#footnote-ref-63)
64. ACT Audit Office, ‘General Principles for Conducting a Performance Audit’, viewed 15 August 2019, available at: <https://www.audit.act.gov.au/__data/assets/pdf_file/0008/1176605/General-Principles-for-performance-audits.pdf> [↑](#footnote-ref-64)
65. Standing Committee on Public Accounts, *Tender for the sale of Block 30 Dickson,* Chapter 4, pp.45-58,and seeMr David Dawes, *Transcript of Evidence*, 5 December 2018, pp.49, 56, and Mr Richard Drummond, *Transcript of Evidence*, 22 March 2019, p.178. [↑](#footnote-ref-65)
66. Recommendation 9 of the *Strategic Review of the Auditor-General 2020,* p.50, viewed 30 April 2020, available at: <https://www.audit.act.gov.au/__data/assets/pdf_file/0010/1484272/2020-Strategic-Review-of-Auditor-General.pdf> [↑](#footnote-ref-66)