

---

## Appendix A: Legal Opinions Provided by the Attorney General or Crown Solicitor

---

I am required by section 52(2) of the *Public Finance and Audit Act 1983* 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. I am also required to publish their responses.

There was only one such legal opinion since my last report contained in Volume Four 2009, released on 29 October 2009. It relates to the application of Corporations Act 2001 to companies reporting under the PF&A Act. I have also included the supplementary advice from the Crown Solicitor regarding the same matter.

**Original PDF - D0929864/D0929865 - Application of the Corporations Act (Cwlth) 2001  
to companies reporting under the PF&A Act - 9 July 2009**

S Fryer  
9275 7218  
A005025

Mr. I Knight  
Crown Solicitor  
GPO Box 25  
Sydney NSW 2001

9 July 2009

Dear Mr. Knight

**Application of the Corporations Act (Cwlth) 2001  
To companies reporting under the PF&A Act**

The *Public Finance and Audit Act 1983* (the PF&A Act) requires certain companies incorporated under the *Corporations Act (Cwlth) 2001* (the Corps Act) to prepare financial reports and have them audited by the Auditor-General. I seek your advice on whether these PF&A Act requirements also create an obligation for all such companies to prepare their accounts and have them audited in accordance with the Corps Act.

Under the Corps Act, a "small" proprietary limited company is not required to prepare accounts and have them audited unless requested to do so by a shareholder direction under s.293, or by an ASIC direction under s.294 of the Corps Act.

In situations where a "small" proprietary Limited company has not received a specific written direction from the shareholders of the company, I am unsure about the application of the Corps Act to the financial report prepared and audited under the PF&A Act. I believe the Auditor-General is not required to conduct the audit in accordance with the Corps Act. Accordingly the Auditor-General is not required to report breaches of the Corps Act to ASIC under s.311 or form an opinion in accordance with s.307 of the Act. I understand that the Auditor-General's reporting obligations only arise from the provisions of the PF&A Act, and the requirements prescribed within the Australian Auditing Standards.

Section 4A of the PF&A Act provides for regulations to be made regarding the relationship with the Corporations Legislation. While such regulations would be relevant to my question, I am not aware that any exist.

We would like the opportunity to discuss this matter before you commence preparing your advice. When convenient, please call Steve Fryer (9275 7218) who is the relevant contact person in my office.

Yours sincerely

A T Whitfield

Deputy Auditor-General

CROWN SOLICITOR'S OFFICE

NEW SOUTH WALES

Facsimile

To: Anthony Whitfield  
Deputy Auditor-General  
Audit Office of NSW

Your ref: Steven Fryer  
Fax: (02) 9275 7179  
Date: 30 September 2009

From: I V Knight Crown Solicitor  
Tel: (02) 9224-5235  
Fax: (02) 9224-5244  
My ref: TB 200902052  
Email: ctownsolagd.nswgov.au

Application of Corporations Act to companies reporting under Public Finance, and Audit Act

Advice follows.

*Confidentiality Notice: This facsimile transmission (including any documents accompanying this facsimile transmission) may contain information which is confidential and/or privileged. Therefore if you are not the intended recipient of this facsimile transmission, any dissemination, copying or action taken in reliance on the contents of this facsimile transmission is strictly prohibited. If you have received this facsimile transmission in error, please notify the sender on the above telephone number.*

CROWN SOLICITOR'S OFFICE ABN 50132 005 54.4 • 60-70 Elizabeth Street Sydney NSW 2000 \* GPO Box 25  
Sydney 2001 • OX 19 Sydney Telephone 02 9224 5000 • Fax 02 9224 5011

CROWN SOLICITOR'S OFFICE

NEW SOUTH WALES

Your Ref:  
My Ref: 200902052  
T8 I V Knight

Tel: (02) 9224-5238  
Fax: (02) 9224-5244  
Email: crownsol@agd.nsw.gov.au

Mr. Anthony Whittleld  
Deputy Auditor General  
Audit Office of NSW  
GPO Box 12  
SYDNEY NSW 2000

By facsimile (02) 9275 7179

Attention: Steven Fryer

Dear Mr. Whitfield

Application of Corporations Act to companies reporting under Public Finance, and Audit Act

I enclose my advice in relation to the above matter.

Should you have any queries in relation to the matter, or if you require any further assistance, please do not hesitate to contact I V Knight on tel: (02) 9224-523and

Yours faithfully

Encl.

TB IV Knight  
Crown Solicitor

CROWN SOLICITOR'S OFFICE ABN 50 137 004 544 SD-70 Elizabeth Street Sydney NSW 2000 • GPO Box 25  
Sydney 2001 • DX 39 Sydney Telephone 02 9224 5000 a Fax 02 9224 501) • Email  
erownso@agd.nsw.ov.aq • www.cso.nsw.gov.au

CROWN SOLICITOR

NEW SOUTH WALES

Advice

Application of Corporations Act to companies reporting under Public Finance and Audit Act

Contents

1. Summary of advice .....	46
2. Background .....	46
3. Advice sought .....	47
4. Advice as to question .....	147
Financial reports of small proprietary companies for the purposes of the PFA Act .....	47
Financial reports of small proprietary companies for the purposes of the Corporations Act .....	48
5. Advice as to question 2 - Reporting to ASIC of contraventions of the Corporations Act .....	48
Conducting audit for purposes of PFA Act .....	48
Conducting audit for purposes of Corporations Act .....	49
Conducting audit where financial report not required for purposes of Corporations Act .....	49
Appendix: Relevant legislation .....	50

Prepared for AUD018 The Audit Office  
Date: 30 September 2009  
Client Ref: Steven Fryer  
CSO Ref: 200902052 18 Ann Fieldhouse

CROWN SOLICITOR'S OFFICE NEW SOUTH WALES

1. Summary of advice

- 1.1 At present no company is required by s.41A of the *Public Finance and Audit Act 1983* (the *PFA Act*, as a result of s.39 (1), to prepare and submit a financial report unless, as seems unlikely, its funds are held in an account in the Special Deposits Account. There may be a question as to whether s.39 (1) is intended to apply to a company and the *PFA Act* would benefit from clarification in this regard.
- 1.2 In my opinion, s.39(1A) does not have the effect of rendering a controlled entity (including a company) of a statutory body a statutory body within the meaning of s.39(1) so as to require it to prepare and submit a financial report pursuant to s.41A. The *PFA Act* would benefit from clarification in regard to the effect of s.39 (1A).
- 1.3 In my opinion, nothing in Division 4A of Part 3 of the *PFA Act* requires a controlled entity (including a company) of a Department to prepare and submit a financial report pursuant to s.45D of the *PFA Act*.
- 1.4 A small proprietary company is required to prepare a financial report for the purposes of the *Corporations Act 2001* (the *Corporations Act*) and have it audited if so requested by shareholders with 5% of the votes or directed by ASIC.
- 1.5 Assuming a small proprietary company is required to prepare and submit a financial report for the purposes of the *PFA Act*, the Auditor-General in conducting an audit in relation to that financial report would not contravene s.311 of the *Corporations Act* if he failed to report circumstances in relation to a contravention of the *Corporations Act*.
- 1.6 If the Auditor-General were to conduct an audit in relation to the financial report of a small proprietary company prepared for the purposes of the *Corporations Act*, the Auditor-General would be subject to the reporting requirements in s.311 of the *Corporations Act*. There must be some doubt as to whether it is within the functions of the Auditor-General to conduct an audit of a small proprietary company for the purposes of the *Corporations Act* and the *PFA Act* would benefit from clarification in this regard.
- 1.7 If the Auditor-General were to conduct an audit in respect of a financial report of a small proprietary company which the company was not required to prepare for the purposes of the *Corporations Act* but chose to prepare, s.311 of the *Corporations Act* would not apply but again there would be some doubt as to whether it was within the functions of the Auditor-General to conduct such an audit.

2. Background

- 2.1 In recent years a general question has arisen in the Auditor-General's Office about the auditing responsibilities of the various State Auditor-Generals in relation to audits of "small proprietary companies" (as defined in the Commonwealth *Corporations Act 2001*) and whether they ought to be audited for the purposes of that Act as well as the applicable State legislation. The various State Auditor-Generals apparently take different views as to their obligations in this regard. The NSW Auditor-General has sought some advice from ASIC, but has been advised by it to seek his own independent legal advice.
- 2.2 If there is a requirement to conduct audits under the *Corporations Act* then the financial report will need to be in a different form, covering different matters, and indicate on its face that the information has been prepared for the purposes of the *Corporations Act* as well as the *Public Finance and Audit Act 1983* (*PFA Act*).
- 2.3 In your letter of instructions you have stated that the *PFA Act* requires certain companies incorporated under the *Corporations Act* to prepare financial reports and have them audited by the Auditor-General. You seek my advice as to whether these *PFA Act* requirements also create an obligation for such companies to prepare their accounts and have them audited in accordance with the *Corporations Act*. You also state that:

"Under the *Corporations Act* a 'small' proprietary limited company is not required to prepare accounts and have them audited unless requested to do so by a shareholder direction under s.293, or by a direction under s.294 of the *Corporations Act*. In situations where a 'small' proprietary company has not received a specific written direction from the shareholders of the company, [you are] unsure about the application of the *Corporations Act* to the financial report prepared and audited under the PF&A Act. Accordingly the Auditor-General is not required to report breaches of the *Corporations Act* to ASIC under s.31 1 or form an opinion in accordance with s.307 of the Act. [You] understand that the Auditor-General's reporting obligations only arise from the provisions of the PF&A Act, and the requirements prescribed within the Australian Auditing Standards. Section 4A of the PF&A Act provides for regulations to be made regarding the relationship with the Corporations legislation. While such regulations would be relevant to my question, I am not aware that any exist."

2.4 As this matter has required some careful analysis, and in the light of further conversations between Ms Feildhouse from this office and Messrs Fry and Ramsay from your office as to the substance of the issues, I have reduced the essence of your inquiry into the two questions set out below.

3. **Advice sought**

3.1 You have asked me to advise in respect of the following issues:

1. Whether all small proprietary companies to which the auditing requirements of the *PM Act* apply are also required to have their financial reports prepared and audited under the *Corporations Act*.
2. If not, whether the Auditor-General who conducts an audit under the *PFA Act* is required to report to ASIC breaches by such companies of the *Corporations Act* under s.31 1 of that Act.
- 3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.

4. **Advice as to question 1**

**FINANCIAL REPORTS OF SMALL PROPRIETARY COMPANIES FOR THE PURPOSES OF THE PFA ACT**

- 4.1 Only if a small proprietary company is a "statutory body" within the meaning of para (a) s.39 (1) of the *PFA Act*? is it required by s.41A to prepare and submit a financial report in accordance with s.41 S which must be audited by the Auditor General pursuant to s.41C. I assume a company is unlikely to be a statutory body as a result of para (b) of s.39 (1), which requires that the funds of the person, group of persons or body be held in an account within the Special Deposits Account.)
- 4.2 So far as para (a) of s.39 (1) is concerned, no company is presently specified in Schedule 2 to the *P64 Act*. It is not clear to me whether that is the result of a policy decision or because it was thought a company was not intended to come within s.39 (1) or because it was thought the inclusion of a company would be inconsistent with the financial reporting provisions of the *Corporations Act*, There may be a question whether a company could be validly specified in Schedule 2 and I think the *P64 Act* would benefit from clarification in this regard.
- 4.3 I have previously advised that s.39 (1A) does not have the effect of rendering a controlled entity a statutory body for the purposes of s.41A: rather, its purpose is to ensure that the financial position and financial performance of the controlling statutory body in its financial report includes that of the controlled entity. If that is correct, a company is not required to prepare and submit a financial report pursuant to s.41A by reason of being a controlled entity of a statutory body. I think the *P64 Act* would benefit from clarification in regard to the effect of s.39 (1A)

- 4.4 I note that s.45 in Division 4 of Part 3 of the P64 Act provides for particular types of audits in relation to a financial report of a "statutory body" within the meaning of s.44 of the PFA Act. Section 44 provides, *inter alia*, that a reference in Division 4 of Part 3 to a "statutory body" is a reference to a person, group of persons or body prescribed for the purposes of that Division. Clause 17(1) of the *Public Finance and Audit Regulation 2005* (the *Regulation*), which is headed "Prescribed statutory bodies under Division 4 of Part 3 of the Act" prescribes a number of entities for the purposes of s.44 (1), including some companies. That might suggest that the draftsman of the regulation thought that a company could be a statutory body for the purposes of s.39 (1), if the definition of statutory body in cl.3 (1) of the *Regulation* which means a statutory body referred to in Division 3 of Part 3 applies in some way to cLI 7 so that entities prescribed for the purposes of s.44 are entities which are statutory bodies for the purposes of Division 3 of Part 3. That might also be the case if the reference to a financial report of a statutory body in s.45 is a reference to the financial report of the statutory body prepared pursuant to s.41A. Previously, a reference to a financial report of a statutory body was a reference to the financial report prepared pursuant to s.41A. However, as a result of amendments, there is now no guidance in the *PM Act* as to whether the reference to a financial report in s.45 is a reference to the financial report prepared pursuant to s.41A or to any financial report, including a financial report for the purposes of the *Corporation Act* Section 39(28) provides a reference to a financial report, in relation to a statutory body, is a reference to the financial report referred to in s.41A but that only applies to such references in Division 3 of Part 3, not Division 4 of Part 3. That might suggest the relevant amendments were intended to have the effect that a financial report in s45 was not intended to be confined to a financial report prepared pursuant to s.41A. The intended effect of these amendments is unclear as the Bill for them was presented as part of the 2008 Budget with no detailed explanation as to their intended effect. It seems to me that the scope of s.44 and the meaning of "a financial report" in s.45 would benefit from clarification as would the relationship between them and the provisions in Division 3 of Part 3.
- 4.5 A company could, presumably be a controlled entity of a Department under the Australian Accounting Standards, However, nothing in Division 4A of Part 3 of the *PF Act* appears to oblige a company which is a controlled entity of a Department to prepare and submit a financial report for the purposes of the *PFA Act*.
- 4.6 I conclude that at present no company, including a company which is a controlled entity of a statutory body or a Department appears to be obliged to prepare and submit a financial report under the *PM Act* (unless s.39(1) is intended to apply to a company and, the company's funds are held in an account within the Special Deposits Account).

#### FINANCIAL REPORTS OF SMALL PROPRIETARY COMPANIES FOR THE PURPOSES OF THE CORPORATIONS ACT

- 4.7 The *Corporations Act* only requires a small proprietary company (as relevantly defined) to prepare an annual financial report and have it audited if the shareholders with at least 5% of the votes of the company direct it to do so or ASIC directs it to do so (see ss.292(2), 293 and 294).
- 4.8 Small proprietary companies may need to prepare a financial report for the purposes of other laws e.g. income tax and I understand some small proprietary companies may choose to prepare a financial report which complies with the *Corporations Act* despite having no obligation to do so under the *Corporations Act*,

#### 5. Advice as to question 2 - Reporting to ASIC of contraventions of the Corporations Act

##### CONDUCTING AUDIT FOR PURPOSES OF PFA ACT

- 5.1 This question assumes that in some circumstances a small proprietary company could be required to prepare and submit a financial report for the purposes of the *PFA Act* and that it would be within the functions of the Auditor-General to audit that financial report.
- 5.2 In my answer to question 1, I have concluded that at present no company, including a company which is a controlled entity of a statutory body or a Department, appears to be obliged to prepare and submit a financial report for the purposes of the *PFA Act* (unless s.39 (1) is intended to apply to a company and the company's funds are held in an account in the Special Deposits Account),
- 5.3 For the purposes of this question I shall assume that there are circumstances in which a small proprietary company does prepare and submit a financial report for the purposes of the *PFA Act* and that it is within the functions of the Auditor-General under the *PM Act* to audit that financial report.

- 5.4 Section 311(1) of the *Corporations Act* provides, inter alia, that an individual auditor conducting an audit contravenes s.311(1) if the auditor is aware of circumstances that the auditor has reasonable grounds to suspect amount to a contravention of the *Corporations Act* and the contravention is a significant one or is not significant but will not be adequately dealt with by commenting on it and the auditor does not notify ASIC in writing of these circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of these circumstances. (See also s.311(3) in the case of a lead auditor.)
- 5.5 The issue for determination is whether the reference to “conducting an audit” in s.311(1) (and s.311(3)) is confined to an audit for the purposes of the *Corporations Act* or extends to an audit conducted for the purposes of a State Act such as the *PFA Act*.
- 5.6 The definition of “audit” in the Dictionary in s.9 of the *Corporations Act* provides that, unless the contrary appears, “audit” means an audit conducted for the purposes of the *Corporations Act* and includes a review of a financial report for a half-year conducted for the purposes of the *Corporations Act*. There appears to be no intention manifest that “audit” in s.311 is to apply to audits other than for the purposes of the *Corporations Act*. That being the case, the Auditor-General, in conducting an audit of a small proprietary company for the purposes of the *PFA Act* would not contravene s.311 if he failed to notify ASIC of circumstances specified therein.

#### CONDUCTING AUDIT FOR PURPOSES OF CORPORATIONS ACT

- 5.7 If the Auditor-General were to conduct an audit in relation to the financial report of a small proprietary company prepared for the purposes of the *Corporations Act* the Auditor-General would be subject to the reporting requirements in s.311 of the *Corporations Act*. Section 311 of the *Corporations Act* does not appear to recognize as a justification for not reporting circumstances specified therein the existence of a State provision such as s.38 of the *PM Act*. In any event, s.38 does not appear to purport to prohibit disclosure of circumstances of which the Auditor-General becomes aware when conducting an audit of a financial report prepared for the purposes of the *Corporations Act*. There must be some doubt as to whether it is within the functions of the Auditor-General to conduct an audit of a small proprietary company for the purposes of the *Corporations Act* notwithstanding that the Auditor-General of a State is taken to be registered as an auditor under the *Corporations Act* (see s.1281). The functions of the Auditor-General are determined by the *PFA Act* and are set out in s.27B. Those functions would not appear to include conducting an audit of a small proprietary company for the purposes of the *Corporations Act* at the request of shareholders with 5% of the vote or the direction of ASIC. It might be sought to argue that comes within the incidental function in s.27B(3)(e), on the basis that doing so in relation to such a financial report is incidental to the exercise of his function to audit a financial report of that company for the purposes of the *PFA Act*. While *doing* an audit in relation to a financial report prepared for the purposes of the *Corporations Act* may assist an audit in respect of a financial report prepared for the purposes of the *PFA Act* I do not think it can be said the former is an incident of the latter. The *PM Act* would benefit from clarification in this regard.

#### CONDUCTING AUDIT WHERE FINANCIAL REPORT NOT REQUIRED FOR PURPOSES OF CORPORATIONS ACT

- 5.8 If the Auditor-General were to conduct an audit in respect of a financial report of a small proprietary company which the company was not required to prepare for the purposes of the *Corporations Act* but chose to prepare) then *Corporations Act* would not apply as the Auditor-General would not be conducting an audit for the purposes of the *Corporations Act*. Again, there would be a question as to whether conducting such an audit is a function of the Auditor-General.

Crown Solicitor

CROWN SOLICITOR'S OFFICE NEW SOUTH WALES

Appendix: Relevant legislation

Commonwealth

*Corporations Act 2001 (CM)*

Chapter 1—Introductory

Part 1.2—interpretation

9 Dictionary

Unless the contrary intention appears:

**Audit** means an audit conducted for the purposes of this Act and includes a review of a financial report for a half-year conducted for the purposes of this Act.

**Small proprietary company** has the meaning given by subsection 45A (2).

Division 5A—Types of company

*45A Proprietary companies*

- (1) A proprietary company is a company that is registered as, or converts to<sup>1</sup> a proprietary company under this Act,

*Small proprietary company*

- (2) A proprietary company is a small proprietary company for a financial year if it satisfies at least 2 of the following paragraphs:
  - (a) the consolidated revenue for the financial year of the company and the entities it controls (if any) is less than \$25 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
  - (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than \$12.5 million, or any other amount prescribed by the regulations for the purposes of this paragraph;
  - (c) the company and the entities it controls (if any) have fewer than 50, or any other number prescribed by the regulations for the purposes of this paragraph, employees at the end of the financial year

Note: A small proprietary company generally has reduced financial reporting requirements (see subsection 292(2)).

Part 1.4 - Technical provisions about aids for readers

111J Small business guide

(1) If, because of:

(a) Regulations made Under this Act; or

(b) Instruments issued by ASIC under this Act; the small business guide as set out in Part 1 6 has become out of date, the regulations may set out modifications of the guide that would bring it up to date. The guide then is to be read as if it were so modified.

(2) The small business guide is divided into sections (numbered 1, 2, 3...) and the sections are divided into paragraphs (numbered 1.1, 1.2, 1.3...). For example, a reference in the guide to 3.1 is a reference to paragraph 3.1 of the guide.

## CROWN SOLICITORS OFFICE NEW SOUTH WALES

### Part 1.5—Small business guide

This guide summarizes the main rules in the Corporations Act (the Corporations Act 2001) that apply to proprietary companies limited by shares—the most common type of company used by small business. The guide gives a general overview of the Corporations Act as it applies to those companies and directs readers to the operative provisions in the Corporations Act,

The notes in square brackets at the end of paragraphs in the guide indicate the main provisions of the Corporations Act, the regulations made under the Corporations Act and ASIC Practice Notes that are relevant to the information in the paragraphs.

Other Commonwealth, State and Territory laws also impose obligations on proprietary companies and their operators.

### 10 Annual financial reports and audit

#### 10.1 The small/large distinction

The accounting requirements imposed on a proprietary company under the Corporations Act depend on whether the company is classified as small or large. A company's classification can change from 1 financial year to another as its circumstances change.

A company is classified as small for a financial year if it satisfies at least 2 of the following tests:

- gross operating revenue of less than \$10 million for the year
- gross assets of less than \$5 million at the end of the year
- fewer than 50 employees at the end of the year.

A company that does not satisfy at least 2 of these tests is classified as large. [Section 45A]

As the great majority of proprietary companies are small under these tests<sup>7</sup> the discussion below deals mainly with the accounting requirements for small proprietary companies. [sections 286–301]

#### 10.2 Financial records

Under the Corporations Act, all proprietary companies must keep sufficient financial records to record and explain their transactions and financial position and to allow true and fair financial statements to be prepared and audited. Financial record here means some kind of systematic record of the company's financial transactions not merely a collection of receipts, invoices, bank statements and cheque butts. Financial records may be kept on computer.

[sections 286–289)

#### 10.3 Preparing annual financial reports and director and reports

The Corporations Act requires a small proprietary company to prepare an annual financial report (an annual profit and loss statement, a balance sheet and a statement of cash flows) and a directors' report (about the company's operations, dividends paid or recommended, options issued etc.) if:

- the shareholders with at least 5% of the votes in the company direct it to do so; or
- ASIC directs it to do so.

Unless the shareholders' direction specifies otherwise, the company must prepare the annual financial report in accordance with the applicable accounting standards.

Although the Corporations Act itself may not require a small proprietary company to prepare a financial report except in the circumstances mentioned, the company may need to prepare the annual financial reports for the purposes of other laws (for example, income tax laws). Moreover, good business practice may also make it advisable for the company to prepare the financial reports so that it can monitor and better manage its financial position.

Large proprietary companies must prepare annual financial reports and a directors' report, have the financial report audited and send both reports to shareholders. They must also lodge the annual financial reports with ASIC unless exempted

## Part 2M.3—Financial reporting

### Division 1—Annual financial reports and directors' reports

#### 292 Who has to prepare annual financial reports and directors' reports?

(1) A financial report and a directors' report must be prepared for each financial year by:

- (a) all disclosing entities; and
- (b) all public companies; and
- (c) all large proprietary companies; and
- (d) all registered schemes.

Note: This Chapter only applies to disclosing entities incorporated or formed in Australia (See subsection 265(2)).

(2) A small proprietary company has to prepare the financial report and directors' report only if:

- (a) it is directed to do so under section 293 or 294; or
- (b) it was controlled by a foreign company for all or part of the year and it is not consolidated for that period in financial statements for that year lodged with ASIC by:
  - (i) a registered foreign company; or
  - (ii) a company, registered scheme or disclosing entity,

The rest of this Part does not apply to any other small proprietary company.

#### 293 Small proprietary company—shareholder direction

(1) Shareholders with at least 5% of the votes in a small proprietary company may give the company a direction to:

- (a) prepare a financial report and directors' report for a financial year; and
- (b) send them to all shareholders.

(2) The direction must be:

- (a) signed by the shareholders giving the direction; and
- (b) made no later than 12 months after the end of the financial year concerned.

(3) The direction may specify all or any of the following:

- (a) that the financial report does not have to comply with some or all of the accounting standards;
- (b) that a directors' report or a part of that report need not be prepared;
- (c) that the financial report is to be audited.

#### 294 Small proprietary company—ASIC direction

(1) ASIC may give a small proprietary company, a direction to comply with requirements of this Division and Divisions 3, 4, 5 and 6 for a financial year.

(IA) An offence based on subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the Criminal Code.

(2) The direction may be general or may specify the particular requirements that the company is to comply with.

(3) The direction must specify the date by which the documents have to be prepared, sent or lodged. The date must be a reasonable one in view of the nature of the direction.

(4) The direction must:

- (a) be made in writing; and
- (b) specify the financial year concerned; and
- (c) be made no later than 6 years after the end of that financial year.

#### 295 Contents of annual financial report

##### Basic contents

(1) The financial report for a financial year consists of:

- (a) the financial statements for the year; and
- (b) the notes to the financial statements; and
- (c) the directors' declaration about the statements and notes.

##### Financial statements

(2) The financial statements for the year are:

- (a) the financial statements in relation to the entity reported on that are required by the accounting standards; and
- (b) if required by the accounting standards—the financial statements in relation to the consolidated entity that are required by the accounting standards.

##### Notes to financial statements

(3) The notes to the financial statements are:

- (a) disclosures required by the regulations; and
- (b) notes required by the accounting standards; and
- (c) any other information necessary to give a true and fair view (see section 297)

##### Directors' declaration

(4) The directors declaration is a declaration by the directors:

- (a) whether, in the directors' opinion, there are reasonable grounds to believe that the company, registered scheme or disclosing entity will be able to pay its debts as and when they become due and payable; and

(b) whether, in the directors' opinion, the financial statement and notes are in accordance with this Act, including:

- (i) section 295 (compliance with accounting standards); and
- (ii) section 297 (true and fair view); and

(d) if the company, disclosing entity or registered scheme is listed—that the directors have been given the declarations required by section 295A.

(e) Note: See paragraph 285(3)(c) for the reference to the debts of a registered scheme.

(5) The declaration must:

(a) be made in accordance with a resolution of the directors; and

(b) specify the date on which the declaration is made; and

(a) be signed by a director.

### 296 Compliance with accounting standards and regulations

(1) The financial report for a financial year must comply with the accounting standards. However, a small proprietary company's report does not have to comply with particular accounting standards if:

(a) the report is prepared in response to a shareholder direction under section 293; and

(b) the direction specifies that the report does not have to comply with those accounting standards.

(2) The financial report must comply with any further requirements in the regulations

### 297 True and fair view

The financial statements and notes for a financial year must give a true and fair view of:

(a) the financial position and performance of the company, registered scheme or disclosing entity; and

(b) if consolidated financial statements are required—the financial position and performance of the consolidated entity.

This section does not affect the obligation under section 296 for a financial report to comply with accounting standards.

Note: If the financial statements and notes prepared in compliance with the accounting standards would not give a true and fair view, additional information must be included in the notes to the financial statements under paragraph 295(3)(c),

## Division 3—Audit and auditor's report

### 307 Audit

An auditor who conducts an audit of the financial report for a financial year or half-year must form an opinion about:

(a) whether the financial report is in accordance with this Act, including:

(1) section 296 or 304 (compliance with accounting standards); and

(ii) section 297 or 305 (true and fair view); and (aa) if the financial report includes additional information under paragraph 296(3)(c) or 303(3)(c) (information included to give true and fair view of financial position and performance)— whether the inclusion of that additional information was necessary to give the true and fair view required by section 297 or 305; and

(b) whether the auditor has been given all information, explanation and assistance. necessary for the conduct of the audit; and

(c) whether the company, registered scheme or disclosing entity has kept financial records sufficient to enable a financial report to be prepared and audited; and

(d) whether the company, registered scheme or disclosing entity has kept other records and registers as required by this Act, 311 Reporting to ASIC Contravention by individual auditor

(1) An individual auditor conducting an audit contravenes this subsection if:

(a) the auditor is aware of circumstances that:

- (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
- (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce<sup>1</sup> manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and

(b) if subparagraph (a)(i) applies:

- (i) the contravention is a significant one; or
- (ii) the contravention is not a significant one and the auditor behaves that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

(c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 26 days after the auditor becomes aware of those circumstances. Contravention by audit company

(2) An audit company conducting an audit contravenes this subsection if;

(a) the lead auditor for the audit is aware of circumstances that:

- (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or
- (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
- (iii) amount to an attempt, by any person, to otherwise, interfere with the proper conduct of the audit; and

(b) if subparagraph (AXI) applies:

- (i) the contravention is a significant one; or
- (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

(c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances  
Contravention by lead auditor

(3) A person contravenes this subsection if:

(a) the person is the lead auditor for an audit; and

(b) the person is aware of circumstances that

- (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
- (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (6)); or
- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and

(c) if subparagraph (b)(i) applies:

- (i) the contravention is a significant one; or
- (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

(d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances. Significant contraventions

(4) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:

(a) the level of penalty provided for in relation to the contravention; and

(b) the effect that the contravention has, or may have, on:

- (i) the overall financial position of the company, registered scheme or disclosing entity; or
- (ii) the adequacy of the information available about the overall financial position of the company registered scheme or disclosing entity; and

(c) any other relevant matter.

(5) Without limiting paragraph (4Xa), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3 includes a penalty imposed on a director, because of the operation of section 344, for failing to take reasonable steps to comply with, or to secure compliance with, that provision.

Person involved in an audit

(6) In this section: person involved in the conduct of an audit means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit

## **Division 6—Appointment, removal and fees of auditors for companies**

### **Subdivision A—Appointment of company auditors**

#### **328A Auditors consent to appointment**

(1) A company, the directors of a company or the responsible entity of a registered scheme must not appoint an individual, firm or company as auditor of the company unless that individual, firm or company:

- (a) has consented, before the appointment, to act as auditor; and
- (b) has not withdrawn that consent before the appointment is made. For the purposes of this section, a consent or the withdrawal of a consent, must be given by written notice to the company, the directors or the responsible entity of the scheme.

(2) A notice under subsection (1) given by a firm must be signed by a member of the firm who is a registered company auditor both:

- (a) in the firm name; and
- (b) in his or her own name.

(3) A notice under subsection (1) given by a company must be signed by a director or senior manager of the company both:

- (a) in the company's name; and
- (b) in his or her own name.

(4) If a company, the directors of a company or the responsible entity of a registered scheme appoints an individual, firm or company as auditor of a company in contravention of subsection (1):

- (a) the purported appointment does not have any effect; and
- (b) the company or responsible entity, and any officer of the company or responsible entity who is in default, are each guilty of an offence.

## Part 9.2

### Division 2

#### 1281 Auditor-General taken to be registered as auditor

(1) A person who holds office as, or is for the time being exercising the powers and performing the duties of:

- (a) the Auditor-General; or
- (b) the Auditor-General of a State or Territory in this jurisdiction; is taken despite any other provision of this Part, to be registered as an auditor.

## New South Wales

### Public Finance and Audit Act '1983

#### Part 3 Audit

##### Division I The Auditor-General

#### 278 The Auditor-General

(1) There is to be an Auditor-General for the State.

(2) The Auditor-General has the functions conferred or imposed on the Auditor-General by law.

(3) The Auditor-General's functions include the following:

- (a) to audit the consolidated financial statements the general government sector financial statements and any other financial reports that the Auditor-General is required or authorised to audit by law
- (b) to provide any particular audit or audit-related service to Parliament at the Joint request of both Houses of Parliament
- (c) to provide any particular audit or audit-related service to the Treasurer at the request of the Treasurer or to any other Minister at the request of that other Minister,
- (d) to report to Parliament as required or authorised by law,
- (e) to do anything that is incidental to the exercise of the Auditor-General's functions.

(7) In this section, *by law* means by or under this or any other Act or law.

#### Division 2 Audit—generally

#### 38 Secrecy

(1) The Auditor-General, an auditor and an authorised person shall preserve and aid in preserving secrecy with respect to 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 authorities 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

### Division 3 General audit of statutory bodies

#### 39 Application and interpretation

(1) A reference in this Division to a statutory body is a reference to:

- (a) a person, group of persons or body specified in Schedule 2, and
- (b) a person, group of persons or body (not being a person<sup>1</sup> group of persons or body specified in Schedule 3) whose funds are held in an account within the Special Deposits Account.

(1A) A reference in this Division to a statutory body also includes a reference to an entity, of which the statutory body has control as defined in Australian Accounting Standards.

(1B) A reference in this Division to a statutory body does not include a reference to a person, group of persons, body or entity who or which is, by a regulation made for the purposes of this subsection, declared not to be a statutory body for the purposes of this Division.

(2B) A reference in this Division to a financial report, in relation to a statutory body, is a reference to the financial report referred to in section 41A,

(3) The provisions of this Division are in addition to any other statutory provisions relating to the financial report, books, records or audit of a statutory body but, in the event of any inconsistency between the provisions of this Division and any other such statutory provisions, the provisions of this Division shall, to the extent of the inconsistency, prevail.

(4) Nothing in this Division limits or derogates from the provisions of Division 2.41 Keeping of books and records

(1) A statutory body shall cause to be kept proper books, and records in relation to all of its operations.

(2) Without limiting the generality of subsection (1), a statutory body, being the Senate or Council of a university, shall cause to be kept proper books and records in relation to the funds of the university.

#### 4Th Preparation of financial report

(1) A statutory body (other Than the Audit Office) shall, within the period of 6 weeks after the end of each financial year of the statutory body, prepare and submit:

- (a) to the Minister and
- (b) to the Auditor-General, a financial report for the financial year then ended.

(2) The Auditor-General is, within the period of 6 weeks after the end of each financial year of the Audit Office, to prepare and submit to the auditor appointed under section 47 the Audit Office's financial report for the financial year then ended.

#### 410 Auditing etc of financial report

(1) The Auditor-General is to audit a statutory body's financial report for a financial year within 10 weeks of its receipt by the Auditor-General.

(1A) The Auditor-General or a person (being the Deputy Auditor-General or an auditor) authorised by the Auditor-General is, within that 10-week period to furnish an opinion;

(a) stating that the Auditor-General has audited the financial report of the statutory body for that financial year, and

(b) indicating whether the financial report complies with section 418, and

(c) setting forth any qualifications subject to which the opinion is given.

(1B) An opinion in relation to the financial report of a statutory body is not to be furnished under subsection

(1A) unless the Auditor-General has received a statement made in accordance with a resolution of the statutory body and:

(a) Stating whether, in the opinion of the person or persons by whom the statement is signed:

(i) the financial report exhibits a true and fair view of the financial position and financial performance of the statutory body, or

(ii) if the statutory body is the Senate, Council or Board of Governors of a university, the financial report exhibits a true and fair view of the financial position and financial performance of the university, and

(b) Including such matters as are prescribed by the regulations for the purposes of this subsection.

(1C) The statement referred to in subsection (1 B) is to be signed:

(a) in the case of a statutory body that has a governing body—by at least 2 members of the governing body, or

(b) in the case of a statutory body that does not have a governing body—by the chief executive officer of the statutory body or the person who exercises the functions of a chief executive officer in relation to the statutory body, or

(c) by a person prescribed by the regulations in respect of the statutory body.

(1D) For the purposes of subsection

(1C), a member of the governing body of a statutory body includes, where the statutory body is the Senate, Council or Board of Governors of a university, a member of the Senate, Council or Board of Governors.

(2) Nothing in this section prevents the alteration of a statutory body's financial report, with the approval of the Auditor-General, after its receipt by the Auditor-General and before its submission to the Minister.

(3) (Repealed)

#### 4.4 Application and interpretation

(1) A reference in this Division to a statutory body is a reference to:

(a) a person, group of persons or body prescribed for the purposes of this Division, or

(b) a person, group of persons or body having the control or management of a fund or account, being a fund or account which is prescribed for the purposes of this Division.

(2) A reference in this Division to a Minister, in relation to a statutory body, is a reference to the Minister having the administration of the Act by or under which the statutory body is appointed, constituted or regulated.

(3) Nothing in this Division limits or derogates from the provisions of Division 2

#### 45 Particular audit

(1) In accordance with the request of the Treasurer, a Minister or a person prescribed for the purposes of this section in relation to a statutory body, the Auditor-General is to inspect and audit:

(a) in the case of a statutory body to which section 44 (1) (a) applies—the financial report of the statutory body and the books and records of financial transactions of or relating to:

(i) the statutory body, and

(ii) assets of or in the custody of the body, and

(b) in the case of a statutory body to which section 44 (1) (b) applies—the financial report of the statutory body and the books and records of financial transactions of or relating to the fund or account under the control or management of the statutory body.

(2) The Auditor-General or a person (being the Deputy Auditor-General or an auditor) authorised by the Auditor-General shall report to the statutory body, the Minister, the Treasurer and any person prescribed for the purposes of this section in relation to the statutory body as to the result of any such inspection and audit and as to such irregularities or other matters as in the judgment of the Auditor-General or authorised person call for special notice,

(2A) The Auditor-General is to include a reference to any audit conducted under this section in the report referred to in section 52 (1).

(3) Towards defraying the costs and expenses of any such inspection and audit, the statutory body shall pay to the Auditor-General such amounts, at such times, as the Treasurer decides.

#### Division 44 General audit of Departments

##### 45A Application and interpretation

(1) A reference 1A this Division to a Department is a reference to a person, group of persons or body specified in Column I of Schedule 3,

(1A) A reference in this Division to a Department also includes a reference to an entity of which the Department (or the Minister responsible for, or an officer of, the Department) has control as defined in Australian Accounting Standards.

(1B) A reference in this Division to a Department does not include a reference to a person, group of persons, body or entity who or which is, by a regulation made for the purposes of this subsection, declared not to be a Department for the purposes of this Division.

(2) A reference in this Division to a Minister, in relation to a Department, is a reference to the Minister responsible for the Department.

(3) A reference in this Division to a Department Head, in relation to a Department, is a reference to the person holding the position specified in Column 2 of Schedule 3 opposite the name or description of the Department.

(3A) A reference in this Division to a financial report, in relation to a Department<sup>1</sup> is a reference to the financial report referred to in section 450.

(4) The provisions of this Division are in addition to any other statutory provisions relating to the financial report, books, records or audit of a Department but, in the event of any inconsistency between the provisions of this Division and any *other* such statutory provisions, the provisions of this Division shall, to the extent of the inconsistency, prevail.

(5) Nothing in this Division limits or derogates from the provisions of Division 2. Public Finance and Audit Regulation 2005

### 3 Definitions

(1) In this Regulation: **statutory** body means a statutory body referred to in Division 3 of Part 3 of the Act  
cl.17(1) Prescribed statutory bodies under Division 4 of Part 3 of the Act

(l) For the purposes of section 44(l) of the Act, the following persons, groups of persons or bodies are prescribed for the purposes of Division 4 of Part 3 of the Act:

- (a) Agricultural Scientific Collections Trust,
- (b) The trustees for the time being of The Art Gallery of New South Wales Foundation,
- (c) The trustees for the time being of each state recreation area reserved under the *National Parks and Wildlife Act 1974*,
- (ci) Dumaresq Barwon Border Rivers Commission,
- (e) C B Alexander Foundation,
- (f) Australia Day Council (New South Wales),
- (g) Area health services within the meaning of the *Health Services Act 1997*,
- (h) Trustees of the Farrer Memorial Research Scholarship Fund,
- (i) Trustee of the Home Purchase Assistance Fund, -
- (j) Minister administering the *Environmental Planning and Assessment Act 1979* (a corporation),
- (k) Minister administering the *Heritage Act 1977* (a corporation).
- (l) P43W Insurance Ministerial Corporation,
- (m) Ambulance Service of New South Wales,
- (n) UNILINC Uimited,
- (o) Office of the Minister for Public Works and Services,
- (p) Uni projects Pty Limited,
- (q) Universities Admissions Centre (NSW and ACT) Pty Limited)
- (r) Cowra Japanese Garden Maintenance Foundation Limited,
- (s) Cowra Japanese Garden Trust,
- (t) Belgenny Farm Agricultural Heritage Centre Trust,
- (u) The trustees for the time being of each superannuation scheme established by a trust deed as referred to in section 127 of the *Superannuation Administration Act 1996*,
- (v) Bligh Park Estate Joint Venture,
- (w) Gosford City Council, being a Water Supply Authority listed in Schedule 3 to the *Water Management Act 2000*,
- (x) Wyong Council, being a Water Supply Authority listed in Schedule 3 to the *Water Management Act 2000*,
- (y) Kings Bay Five Dock Project, being the joint venture for the development of an Urban Design Project at Five Dock,
- (z) (Repealed)

(aa) Blacksmiths Project Joint Venture, being the joint venture for the development of an Urban Design Project at Blacksmiths,

- (ab) West Pennant Hills Project Joint Venture,
- (ac) Quakers Hill Project Joint Venture,
- (ad) Oatlands Project Joint Venture,
- (ae) East Fairfield Project Joint Venture,
- (af) Storniwater Trust
- (ag) Jannali Project Joint Venture,
- (ah) Zetland Project Joint Venture,
- (ai) (Repealed)
- (aj) The Australian Institute of Asian Culture and Visual Arts United,
- (ak) State Super Financial Services Ltd<sup>1</sup>
- (al) Valley Commerce Pty Ltd,
- (am) Buroba Pty Ltd,
- (an) Elsun Pty Limited,
- (ao) The Brett Whiteley Foundation,
- (ap) Coffs Harbor Technology Park Ltd,
- (aq) Eif Pty Limited,
- (ar) Little Bay Joint Venture, being the joint venture relating to property development at Little Bay between Landom and Little Bay Developments Pty Ltd,
- (as) NSW Fire Brigades Superannuation Pty Limited,
- (at) NSW Businesslink Pty Limited,
- (au) (Repealed)
- (av) Marine Parks Authority, +
- (aw) United States Studies Centre Limited.
- (ax) Cobbora Coal Unit Trust,
- (ay) CCP Holdings Pty Limited,
- (az) Cobbora Unincorporated Joint Venture.
- (ba) Cobbora Management Company Pty Limited.

Original PDF: D1032478 - CSO Crown Solicitor's Opinion - Supplementary Advice - Application of Corporations Act to companies reporting under Public Finance and Audit Act

CROWN SOLICITOR'S OFFICE  
NEW SOUTH WALES

Your Ref:  
My Ref: 200902052

**Tel:** (02) 8224-5396  
**Fax:** (02) 9224-5244  
**Email:** [crownsolagd.nsw.gov.au](mailto:crownsolagd.nsw.gov.au)

Mr. Steven Fryer  
Director Policy and Research  
Audit Office of NSW  
GPO Box 12  
SYDNEY NSW 2001

By facsimile: (02) 9285-0179

Dear Mr. Fryer

**Application of Corporations Act to companies reporting under Public Finance and Audit Act**

I enclose my supplementary advice in relation to the above matter.

Should you have any queries in relation to the matter, or if you require any further assistance, please do not hesitate to contact me on tel: (02) 9224-5238.

Yours faithfully

I V Knight  
Crown Solicitor

Encl.

CROWN SOLICITOR  
NEW SOUTH WALES

Supplementary Advice

Application of Corporations Act to companies reporting under Public Finance and Audit Act

Contents

1.	Summary of supplementary advice .....	64
2.	Background .....	64
3.	Advice .....	64
	<i>Effect of s.63B PFA Act</i> .....	64
	Appendix: Relevant legislation .....	68

Prepared for: AUD018 The Audit Office  
Date: 23 October 2009  
Client ref: Steven Fryer  
CSO ref: 200902052 T08 Ann Fieldhouse/ I V Knight

© State of New South Wales (Crown Solicitor's Office) 200902052 Advice 2 (IVK) 02009/265268

CROWN SOLICITOR'S OFFICE  
NEW SOUTH WALES

## 1. Summary of supplementary advice

- 1.1 Section 638(3) of the *Public Finance and Audit Act 1983* (the Act) would appear to be intended to oblige a Department or statutory body to ensure that any audit required to be done in respect of a controlled entity, regardless of the source of the requirement for the audit, is done by the Auditor-General, including audits of a controlled entity which is a company under and for the purposes of the *Corporations Act 2001* (C'th) (the *Corporations Act*). Section 638(3) is not itself the source of a requirement that an audit be done.
- 1.2 Section 638(3) is an implied conferral on the Auditor-General of the function of conducting all audits in respect of controlled entities which are required.
- 1.3 If it is considered that the Act is intended to require an audit under and for the purposes of the Act of a financial report of a controlled entity of a Department or statutory body, then Divisions 3 and 4A of Part 3 of the Act should be amended to put that beyond doubt. The application of Division 4 to controlled entities could also be clarified.

## 2. Background

- 2.1 In my earlier advice I expressed doubt as to whether a company which is a controlled entity of a statutory body or a Department was required by ss. 41A and 45D of the Act to prepare a financial report for the purposes of that Act. I considered the Act obliged a statutory body or Department to include in its financial report of its financial position and performance that of its controlled entities. The financial operation and performance of its controlled entities would have to be obtained from them to enable inclusion in the financial report of the statutory body or Department.
- 2.2 My doubt as to whether the Act required controlled entities to prepare a financial report for audit under and for the purposes of the Act caused me to query whether it was a function of the office of Auditor-General under the Act to audit financial reports prepared by controlled entities which are companies. While the Auditor-General is taken to be a registered auditor for the purposes of the *Corporations Act*, and thus able, so far as the *Corporations Act* is concerned, to be an auditor for the purposes of that Act, the functions of the Auditor-General are determined by the Act.
- 2.3 For the purposes of advising on the effect of s. 311 of the *Corporations Act* I assumed in my earlier advice that controlled entities which are companies are required to prepare a financial report for audit under and for the purposes of the Act and may Inc choose to prepare financial reports that comply with the *Corporations Act* while not obliged to do so. I also assumed that it was a function of the Auditor General under the Act to audit such reports.
- 2.4 In a subsequent email on 1 October 2009, I drew attention to s. 638(3) of the Act and indicated I would provide advice as to the effect of this provision on my earlier advice.

## 3. Advice

### **EFFECT OF S.63B PFA ACT**

- 3.1 Section 638(3) of the Public Finance and Audit Act 1983 (PFA Act) provides:

"638(3) A Department or statutory body must take such steps as are appropriate to ensure that an entity referred to in section 45A(1A) or .39(1A) which is controlled by the Department or statutory body is audited by the Auditor-General."

- 3.2 Section 638(3) is not an easy provision to construe. It does not make clear whether its purpose is to require an audit of the entity by the Auditor General (and, if so, the Act under which and for the purposes of which that audit is to be done) or its purpose is to ensure that any audit of a controlled entity which is done (regardless of the source of the requirement for the audit), is done only by the Auditor General.
- 3.3 When originally inserted in 1988, s. 638 provided that a statutory body shall take such steps as are appropriate to ensure that no corporation, association or trust becomes a privately audited subsidiary organisation of the statutory body. A privately audited subsidiary organisation was defined to mean a subsidiary organisation whose auditor (being the auditor appointed in accordance with the law relating to the appointment of auditors for such organizations) is not the Auditor General. The effect of that was to ensure that a subsidiary organisation did not appoint as its auditor in accordance with the law relating to such appointment a person who was not the Auditor General. As originally enacted s. 638(3) seems to have been intended to ensure that the only auditor of subsidiary organisations was to be Auditor General. It did not address what audits were required in relation to a subsidiary organisation and under what law.
- 3.4 In the second reading speech for the *Public Finance and Audit (Amendment) Bill* 1988 which inserted s. 638, the then Premier said in the Legislative Assembly:

“Second, the Auditor-General has brought to attention two issues which affect his audit of subsidiary companies to statutory bodies. The first issue is that there is a conflict between the Public Finance and Audit Act 1983 and the Companies (New South Wales) Code. Section 35(1) of the Public Finance and Audit Act 1983 provides for the appointment of an auditor to carry out an audit on behalf of the Auditor-General. There is a doubt about the application of this provision to subsidiary companies of a statutory body. Though the Auditor-General is the auditor of the subsidiary companies, under the terms of the Public Finance and Audit Act, he is not automatically the auditor of the companies under the provisions of the Companies (New South Wales) Code. With a view to ensuring full public accountability of statutory bodies in connection with subsidiary operations, the amendment of the Act is now necessary. As a result, the bill will insert a new section 63B and an additional subsection 39 (1) (f) in the principal Act.

In the Legislative Council, the then Minister for Police and Emergency Services repeated this statement but inserted after “Code”:

“This leads to confusion, and sometimes to appointment of two auditors,”

- 3.5 It is clear from his statement that the Premier was under the impression that the Auditor-General was the auditor of subsidiary companies of a statutory body “under the terms of” the Act (but did not say in what sense he was the auditor of subsidiary companies) and that s. 63B would ensure he was also the auditor under the provisions of the then *Companies (New South Wales) Code* of subsidiary companies. The *Companies (New South Wales) Code* was an Act of this State.
- 3.6 Section 63B was substituted in its present form in 1992 by the *Public Finance and Audit (Amendment) Act 1992*.

In the Second Reading speech Mr Moore, the then Minister for Environment, stated in the Legislative Assembly:

“Occasionally subsidiary companies and other unincorporated controlled entities such as partnerships, trusts and joint ventures, are set up by departments and statutory bodies as vehicles to assist in pursuing their commercial objectives. Both the Auditor General and the Public Accounts Committee have pointed out that the problem with this trend is that public sector activities may become removed from the normal parliamentary scrutiny and the parliamentary process. Under the existing Public Finance and Audit Act all subsidiary companies and certain types of unincorporated bodies under the control of a statutory body are subject to audit by the Auditor General although a private sector auditor may be appointed, if the Treasurer so approves. However, although the form and content of the annual financial statements of these controlled entities are governed by the Act, the statements are not required to be presented to Parliament. Worse still, controlled entities formed by departments are not caught by the Act at all.

To address these problems the Treasurer in January 1991 issued a memorandum to all Ministers setting out detailed guidelines which deal with the formation, audit and reporting of controlled entities. The auditing and reporting guidelines were issued as an interim measure pending the necessary amendments to the Public Finance and Audit Act and the annual reports legislation. The amendments in the bills are principally directed at giving legislative backing to the Treasurer's guidelines. I will outline the key features of the amendments. First, all controlled entities established by departments and statutory bodies are to be defined with reference to the Corporations Law for the purpose of the Public Finance and Audit Act. Secondly, the form and content of the financial statements of all entities under the control of a department are to be in accordance with the Public Finance and Audit Act. Thirdly, the financial statements of individually controlled entities are to be included in the annual report of the parent entity. Fourthly, all controlled entities are to be subject to audit by the Auditor-General or his agent. Lastly, departments and statutory bodies are to report the creation of all entities which they control to the Auditor-General and the Treasurer." "

- 3.7 Again, Mr Moore seems to have been under the impression that "Under the existing *Public Finance and Audit Act*" all subsidiary companies and certain types of unincorporated bodies under the control of a statutory body are subject to audit by the Auditor General but did not explain in what sense they were subject to audit by the Auditor General,

- 3.8 The Explanatory Note in relation to the 1992 amendments stated:

"Controlled entities

Schedule 1(1)) amends section 39, and Schedule 1(16) substitutes section 638, to change the concept of a "subsidiary organisation" of a statutory body to bring it into line with the "controlled entity" concept in the new Corporations Law.

Schedule 1(16) also extends the new section 638 to Departments. In future, both Departments and statutory bodies will be required to report the creation of entities which they control to the Auditor-General and the Treasurer, and to take immediate steps to ensure those entities are audited by the Auditor-General. (Section 638, as substituted, does not repeat the present provisions for a 3 year period in which those steps may be taken by a statutory body.)

Schedule 1(13) amends section 45A so that Division 4A of Part 3 of the Act will require the accounts - records, financial statements and audit of any Department to cover also the entities which the Department controls. A similarly extended requirement (in Division 3 of Part 3 of the Act) presently applies only to statutory bodies."

The Corporations Law referred to in the Note and by Mr Moore was the Corporations Law of the ACT applied as law of New South Wales by the *Corporations (New South Wales) Act 1990*.

- 3.9 In relation to the intended effect of the new s. 638, the Explanatory Note is unhelpful. Schedule 1(13) was said to require the accounts, records and financial statements and audit of any Department "to cover" also the entities which the Department controls and noted that "a similar extended requirement" presently applies only to statutory bodies. The Explanatory Memorandum did not state that controlled entities of statutory bodies were presently required by the Act to be audited under and for the purposes of the Act by the Auditor-General. Nor did it state that controlled entities of Departments and statutory bodies would be required to be audited under and for the purposes of the Act; rather, accounts etc. and audits "of any Department" would "cover" controlled entities and presumably the same would apply in the case of statutory bodies to which a "similar extended requirement" applied.
- 3.10 On balance, I think that s. 638(3) is intended to require statutory bodies and Departments to ensure that all audits required in relation to a controlled entity, regardless of the source of the requirement for the audit, are done by the Auditor General, with the result an audit under and for the purposes of the *Corporations Act* of a controlled entity which is a company is to be done by the Auditor General. On that view, s. 638(3) is not itself the source of a requirement for an audit.
- 3.11 If it is correct that, as a matter of construction, s. 63B(3) requires a statutory body or Department to ensure that all audits required in relation to controlled entities, including audits of companies under and for the purposes of the *Corporations Act*, are done by the Auditor-General, that would not seem to be inconsistent with the provisions of the *Corporations Act* which provide for the appointment of auditors to conduct such audits. In so providing, s. 638(3) would seem to be an implied conferral on the Auditor-General of the function of doing all such audits including audits required by the *Corporations Act*. That overcomes any uncertainty as to whether other provisions of the Act make it a function of the Auditor General to do audits under and for the purposes of the *Corporations Act*.

- 3.12 If it is asserted that the Act is intended to require the auditing by the Auditor-General of financial reports of controlled entities of statutory bodies and Departments, and in particular a company which is not itself a statutory body within s. 39(1) of the Act, under and for the purposes of the Act, then I consider that it is desirable that the Act be amended to make that clear. In particular, s. 39(1A) in Division 3 of Part 3 should be omitted and its content placed in s. 39(1) and provision should be made for references to "Department Head" in Division 4A of Part 3 in relation to controlled entities to enable the application of that Division in respect of controlled entities. Other amendments may need to be made to those Divisions to make clear their application to controlled entities but that is a matter for the Parliamentary Counsel. The application of Division 4 to controlled entities could also be clarified. I should say that my concerns in relation to the application of Divisions 3 and 4A to controlled entities remain notwithstanding that s. 7(1)(a)(ia) of the *Annual Reports (Statutory Bodies) Act* contemplates a financial report of a controlled entity of a statutory body being prepared in accordance with Division 3 of Part 3 of the Act and the regulations; that under the regulations payments to directors of statutory bodies must be included in their financial reports; and that some companies are prescribed as statutory bodies for the purposes of Division 4.
- 3.13 It would not appear to be inconsistent with the *Corporations Act* for a State Act to provide for ensuring that a controlled entity which is a company be audited under and for the purposes of that State Act, but that is a matter the Parliamentary Counsel would consider in drafting amendments to make clear the application of Divisions 3 and 4A of Part 3 of the Act to controlled entities of Departments and statutory bodies.

Signed

I V Knight  
Crown Solicitor

**APPENDIX: RELEVANT LEGISLATION**

*Public Finance and Audit Act 1983*

Part 3

Division 3 General audit of statutory bodies

**39 Application and interpretation**

- (1) A reference in this Division to a statutory body is a reference to:
- a) a person, group of persons or body specified in Schedule 2, and
  - b) a person, group of persons or body (not being a person, group of persons or body specified in Schedule (3) whose funds are held in an account within the Special Deposits Account.
- (1A) A reference in this Division to a statutory body also includes a reference to an entity of which the statutory body has control as defined in Australian Accounting Standards.
- (1B) A reference in this Division to a statutory body does not include a reference to a person, group of persons, body or entity who or which is, by a regulation made for the purposes of this subsection, declared not to be a statutory body for the purposes of this Division.
- (2) A reference in this Division to a Minister, in relation to a statutory body, is a reference to the Minister having the administration of the Act by or under which the statutory body is appointed, constituted or regulated.
- (2A) A reference in this Division to the Auditor-General shall, where, in relation to a statutory body, not being the Audit Office or an entity referred to in subsection (1A), an Act authorizes or enables the appointment by the statutory body of an auditor other than the Auditor-General to be the sole auditor in respect of the statutory body, be read and construed as a reference to that auditor.
- (2B) A reference in this Division to a financial report, in relation to a statutory body, is a reference to the financial report referred to in section 41A.
- (3) The provisions of this Division are in addition to any other statutory provisions relating to the financial report, books, records or audit of a statutory body but, in the event of any inconsistency between the provisions of this Division and any other such statutory provisions, the provisions of this Division shall, to the extent of the inconsistency, prevail.
- (4) Nothing in this Division limits or derogates from the provisions of Division 2.

**41A Preparation of financial report**

- (1) A statutory body (other than the Audit Office) shall, Within the period of 6 weeks after the end of each financial year of the statutory body, prepare and submit
- (a) to the Minister, and
  - (b) to the Auditor-General, a financial report for the financial year then ended.
- (2) The Auditor-General is, within the period of 6 weeks after the end of each financial year of the Audit Office, to prepare and submit to the auditor appointed under section 47 the Audit Office's financial report for the financial year then ended.

#### Division 4 Particular audit of statutory bodies, funds and accounts

##### 44 Application and interpretation

- (1) A reference in this Division to a statutory body is a reference to:
  - (a) a person, group of persons or body prescribed for the purposes of this Division, or
  - (b) a person, group of persons or body having the control or management of a fund or account, being a fund or account which is prescribed for the purposes of this Division.
- (2) A reference in this Division to a Minister, in relation to a statutory body, is a reference to the Minister having the administration of the Act by or under which the statutory body is appointed, constituted or regulated.
- (3) Nothing in this Division limits or derogates from the provisions of Division 2,

##### 45 Particular audit

- (1) In accordance with the request of the Treasurer, a Minister or a person prescribed for the purposes of this section in relation to a statutory body, the Auditor-General is to inspect and audit:
  - (a) in the case of a statutory body to which section 44 (1) (a) applies--the financial report of the statutory body and the books and records of financial transactions of or relating to:
    - i. the statutory body, and
    - ii. assets of or in the custody of the body, and
  - (b) In the case of a statutory body to which section 44 (1) (b) applies--the financial report of the statutory body and the books and records of financial transactions of or relating to the fund or account under the control or management of the statutory body.

#### Division 4A General audit of Departments

##### 45A Application and interpretation

- (1) A reference in this Division to a Department is a reference to a person, group of persons or body specified in Column 1 of Schedule 3.
- (1A) A reference in this Division to a Department also includes a reference to an entity of which the Department (or the Minister responsible for, or an officer of, the Department) has control as defined in Australian Accounting Standards.
- (2)
- (3) A reference in this Division to a Department Head, in relation to a Department, is a reference to the person holding the position specified in Column 2 of Schedule 3 opposite the name or description of the Department.
- (3A) A reference in this Division to a financial report, in relation to a Department, is a reference to the financial report referred to in section 45D.
- (4) The provisions of this Division are in addition to any other statutory provisions relating to the financial report, books, records or audit of a Department but, in the event of any inconsistency between the provisions of this Division and any other such statutory provisions, the provisions of this Division shall, to the extent of the inconsistency, prevail.
- (5) Nothing in this Division limits or derogates from the provisions of Division 2.

#### 45D Preparation of financial reports

- (1) A Department Head shall, within the period of 6 weeks after the end of each financial year of the Department, prepare and submit:
  - (a) to the Minister, and
  - (b) to the Auditor-General,a financial report for the financial year then ended.

#### Part 5 Miscellaneous

##### 63B Notification of controlled entities

- (1) Within 1 month after an entity becomes an entity referred to in section 45A (1A), the appropriate Department Head must notify the Auditor-General and the Treasurer in writing of that fact.
- (2) Within 1 month after an entity becomes an entity referred to in section 39 (IA), the appropriate statutory body must notify the Auditor-General and the Treasurer in writing of that fact.
- (3) A Department or statutory body must take such steps as are appropriate to ensure that an entity referred to in section 45A (IA) or 39 (IA) which is controlled by the Department or statutory body is audited by the Auditor-General.

#### Public Finance and Audit Regulation 2005

##### Part I Preliminary

##### 3 Definitions

- (1) In this Regulation:

*Department* means a person, group of persons or body specified in Column 1 of Schedule 3 to the Act.

*Statutory body* means a statutory body referred to in Division 3 of Part 3 of the Act.

##### Part 4 Miscellaneous

##### 17 Prescribed statutory bodies under Division 4 of Part 3 of the Act .

- (1) For the purposes of section 44 (1) of the Act, the following persons, groups of persons or bodies are prescribed for the purposes of Division 4 of Part 3 of the Act:
  - (n) UNILINC Limited,
  - (p) Uniprojects Pty Limited,
  - (q) Universities Admissions Centre (NSW and ACT) Pty Limited,
  - (r) Cowra Japanese Garden Maintenance Foundation Limited,
  - (aj) The Australian Institute of Asian Culture and Visual Arts Limited,
  - (ak) State Super Financial Services Ltd,
  - (al) Valley Commerce Pty Ltd,
  - (am) Buroba Pty Ltd,
  - (an) Elsun Pty Limited,
  - (ao) The Brett Whiteley Foundation
  - (ap) Coffs Harbour Technology Park Ltd,
  - (aq) Eif Pty Limited,
  - (ar) Little Bay Joint Venture, being the joint venture relating to property development at Little Bay between Landcom and Little Bay Developments Pty Ltd,
  - (as) NSW Fire Brigades Superannuation Pty Limited,
  - (at) NSW Businesslink Pty Limited,
  - (ay) CCP Holdings Pty Limited,
  - (ba) Cobbora Management Company Pty Limited.

## Schedule I Information to be included in financial reports of statutory bodies

(Clauses 7 and 8)

### Part I Income and expenditure information

1. The amount of emoluments or other benefits paid or due and payable, directly or indirectly, to members or directors (however described) of the body, but not including amounts paid by way of salary to full-time members or directors of the body.
2. The total amounts paid or becoming payable to consultants engaged by the statutory body (other than the Public Trustee or the Senate or Council of a university) during the financial year.

### Part 2 Balance sheet information

3. The description and amount of loans, advances or money otherwise due to the body by members or directors (however described) of the body, or officers or employees of the body holding executive decision-making positions, or relatives of those members, directors, officers or employees, but not including loans, advances or money otherwise due for the purpose of carrying out official duties, such as travelling advances and the like.
4. The description and amount of loans, advances or money otherwise due to the body by a corporation, a director of which is a member or director (however described) of the body, or an officer or employee of the body holding an executive decision-making position.

## *Annual Reports (Statutory Bodies) Act 1984 No 87*

### Part 1 Preliminary

#### 3 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires: *statutory body* means:
  - (a) a person, group of persons or body to which Division 3 of Part 3 of the *Public Finance and Audit Act 1983* applies, not being an entity referred to in section 39 CIA) of that Act, or
  - (b) a person, group of persons or body who or which is prescribed to be a statutory body for the purposes of this Act.

#### 4 Auditor

- (1) For the purposes of this Act and the regulations, the auditor of a statutory body is:
  - (a) except as provided by paragraphs (b) and (c)—the Auditor-General, or
  - (b) where, in relation to the statutory body (other than the Audit Office), an Act authorises or enables the appointment by the statutory body of an auditor other than the Auditor-General to be the sole auditor in respect of the statutory body—the auditor so appointed, or
  - (c) in relation to the Audit Office—the auditor appointed for the time being under section 47 of the *Public Finance and Audit Act 1983*.

### Part 2 Annual reports

#### 7 Annual reports

- (1) The annual report of a statutory body shall comprise:
  - (a) in the case of a statutory body to which paragraph (a) of the definition of *statutory body* in section 3 (1) applies:
    - i. the statutory body's financial report prepared in accordance with Division 3 of Part 3 of the *Public Finance and Audit Act 1983* and the regulations under that Act,
    - ia. the financial report so prepared of each entity referred to in section 39 (IA) of the *Public Finance and Audit Act 1983* which is controlled by the statutory body,
    - ii. the opinion of the auditor given in accordance with Division 3 of Part 3 of that Act as to any financial report referred to in subparagraph (i) or (ia),