



Western Australia

# **Auditor General Amendment Act 2022**

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As at 29 Nov 2022

No. 43 of 2022

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# Auditor General Amendment Act 2022

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Western Australia

# **Auditor General Amendment Act 2022**

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**No. 43 of 2022**

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**An Act to amend the *Auditor General Act 2006*.**

*[Assented to 29 November 2022]*

The Parliament of Western Australia enacts as follows:

**s. 1**

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**1. Short title**

This is the *Auditor General Amendment Act 2022*.

**2. Commencement**

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

**3. Act amended**

This Act amends the *Auditor General Act 2006*.

**4. Section 4 amended**

In section 4(1) insert in alphabetical order:

*Parliament* includes —

- (a) each House of Parliament; and
- (b) the members of each House of Parliament; and
- (c) the committees of each House of Parliament and joint committees of both Houses of Parliament;

**5. Section 4A inserted**

After section 4 insert:

**4A. Parliamentary privilege not affected**

- (1) Nothing in this Act limits or otherwise affects the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891*.

- (2) Except as authorised by Parliament, a power, right or function conferred under this Act must not be exercised if, or to the extent that, the exercise would relate to a matter determinable by Parliament.

**6. Section 7 amended**

Delete section 7(4).

**7. Section 25 amended**

Delete section 25(2)(a) and (b) and insert:

- (a) consult regarding the terms of the report with —
- (i) the Treasurer; and
  - (ii) the agency or audited local subsidiary, as the case may be; and
  - (iii) a person who is taken to have a special interest in the report under section 36B(5); and
  - (iv) any other person who, in the Auditor General's opinion, has a special interest in the report;
- and
- (b) by written notice, invite each person consulted under paragraph (a) to make submissions or comments on the terms of the report before a specified day, being not more than 14 days after the person is consulted.

8. **Part 4 Division 2 replaced**

Delete Part 4 Division 2 and insert:

**Division 2 — Information gathering powers and duties**

**Subdivision 1 — Preliminary**

**32A. Terms used**

(1) In this Division —

*audit request* means —

- (a) a notice under section 33B(2); or
- (b) a direction under section 34(1);

*business day* means a day that is not a Saturday, a Sunday or a public holiday;

*Director General* means the chief executive officer of the department of the Public Service principally assisting the Premier;

*material* means —

- (a) records; and
- (b) information contained or recorded in, or obtained or extracted from, records;

*parliamentary privileged material* means material the disclosure of which would, apart from any immunity of the Crown, infringe the privileges of Parliament;

*protected material* has the meaning given in subsection (2);

*record* has the meaning given in the *State Records Act 2000* section 3(1);

*requested material* means material to which an audit request relates;



*restricted material* has the meaning given in subsection (3);

*specified person* has the meaning given in section 36B(1).

- (2) Whether or not it is restricted material, an item of requested material is *protected material* if —
- (a) it relates to proceedings, deliberations or decisions of Cabinet or of any committee of Cabinet (including proposed or contemplated proceedings, deliberations or decisions); or
  - (b) its disclosure could —
    - (i) damage the security or defence of the Commonwealth or the security of the State; or
    - (ii) divulge any material communicated in confidence by or on behalf of the Commonwealth, a State or a Territory that relates to the security or defence of the Commonwealth or the security of any State or Territory.
- (3) Whether or not it is protected material, an item of requested material is *restricted material* if —
- (a) it is subject to legal professional privilege; or
  - (b) its disclosure could —
    - (i) prejudice the investigation of a contravention or possible contravention of the law; or
    - (ii) prejudice the fair trial of a person; or
    - (iii) damage relations between the Government of the State and a government of the Commonwealth, another State or a Territory; or

- (iv) reasonably be expected to unfairly prejudice the commercial interests of a person or body.

**33. Auditor General may authorise people to perform functions**

The Auditor General may, by written notice, authorise a person (an *authorised person*) to perform functions under this Division.

**33A. Delegation**

- (1) A specified person may, by written notice, delegate to a person any power or duty of the specified person under this Division.
- (2) A person to whom a power or duty is delegated in accordance with this section cannot delegate that power or duty.
- (3) A person exercising or performing a power or duty that has been delegated to the person in accordance with this section is taken to do so in accordance with the terms of the delegation unless the contrary is shown.
- (4) Nothing in this section limits the ability of a specified person to perform a function through an officer or agent.

**Subdivision 2 — Information gathering powers**

**33B. Access to information, records, systems, money and property**

- (1) In this section —  
*premises* means any land or place;  
*written authority*, in relation to an authorised person, means a written notice signed by the Auditor General

that states that the person is authorised to exercise powers under this Division.

- (2) For the purpose of an audit the Auditor General or an authorised person may, upon notice to any person, at all reasonable times —
  - (a) access, search, take extracts from and make copies of information, records and systems that are in the possession or control of that person and that the Auditor General considers to be relevant to the audit; or
  - (b) access public money, other money or statutory authority money in the possession or control of that person; or
  - (c) access public property or other property in the possession or control of that person.
- (3) No search or other fee is payable by the Auditor General in respect of the exercise of powers under this section.
- (4) Subject to subsection (6), the Auditor General or an authorised person may, at all reasonable times, enter and remain on any premises in order to exercise powers under this section.
- (5) If an authorised person enters, or proposes to enter, premises under this section, the occupier must not, without reasonable excuse, fail to provide the authorised person with all reasonable facilities for the effective exercise of powers under this section.  
Penalty for this subsection: a fine of \$50 000.
- (6) An authorised person is not entitled to enter or remain on premises if the authorised person fails to produce a written authority on being asked by the occupier to produce proof that the entry is authorised.

- (7) This section has effect subject to Subdivision 3.

**34. Power to obtain information**

- (1) For the purpose of an audit the Auditor General may, by written notice, direct a person to do all or any of the following —
- (a) provide the Auditor General with any information or explanation that the Auditor General requires;
  - (b) attend and give evidence before the Auditor General or an authorised person;
  - (c) produce to the Auditor General any records in the possession or under the control of the person;
  - (d) give access to information, records, systems, money or property so as to facilitate the exercise of powers under section 33B.
- (2) A direction under subsection (1) must specify a reasonable time for compliance, which must be not less than 10 business days after the direction is received.
- (3) The Auditor General may —
- (a) direct that the information, explanation or answers to questions be given either orally or in writing (as the Auditor General requires); and
  - (b) direct that the information, explanation or answers to questions be verified or given on oath or affirmation that the information or evidence the person will give will be true.
- (4) The Auditor General or an authorised person may administer an oath or affirmation for the purposes of this section.

- (5) A person who, without reasonable excuse, fails to comply with a direction under this section commits an offence.

Penalty for this subsection: a fine of \$50 000.

- (6) This section has effect subject to Subdivision 3.

**35. Preparation of s. 24 report**

The powers conferred by sections 33B and 34 may be exercised when preparing a report under section 24(1), but only for the purpose of forming the opinion required by section 24(2)(c) to be included in the report.

**36. Duty to give information overrides other duties and rights**

- (1) A person is not excused from complying with a direction under section 34 on the ground that doing so might tend to incriminate the person.
- (2) A person must comply with a direction under section 34 despite any duty of secrecy or confidentiality imposed by law.
- (3) If a person complies with a direction under section 34, neither the fact that the person complies nor anything obtained as a direct or indirect result of the person complying is admissible in evidence against the person in any civil or criminal proceedings except —
- (a) proceedings for an offence against this Subdivision; or
  - (b) proceedings under *The Criminal Code* Chapter XX.
- (4) Despite subsection (3), the person may, in any civil or criminal proceedings, be asked about an answer under the *Evidence Act 1906* section 21.

- (5) If, in response to an audit request, a person discloses material in good faith to the Auditor General or an authorised person —
  - (a) the person incurs no civil or criminal liability in respect of the disclosure; and
  - (b) the disclosure is not to be regarded as a breach of any duty of secrecy or confidentiality imposed on the person by law.

**Subdivision 3 — Information gathering powers in relation to certain material**

**36A. Audit requests relating to parliamentary privileged material**

A person has a reasonable excuse for the purposes of section 33B(5) or 34(5) for failing to provide facilities or failing to comply with a direction, as the case may be, in relation to requested material if —

- (a) the person believes in good faith that the requested material is parliamentary privileged material; and
- (b) Parliament has not authorised the provision of the requested material to the Auditor General.

**36B. Audit requests relating to protected material and restricted material**

- (1) In this section —

*specified person*, in relation to an item of protected material or restricted material, means —

- (a) a person specified in the regulations in relation to the item for the purposes of this section; or
- (b) if no person is specified in the regulations in relation to the item, a person in possession or control of the item.

- (2) An audit request relating to an item of protected material or restricted material must be addressed to the specified person for that item.
- (3) The regulations may make further provision about audit requests relating to protected material or restricted material, including provision about —
  - (a) the form and content of the audit request; and
  - (b) the rights and obligations of the specified person; and
  - (c) the rights and obligations of a person in possession or control of the material; and
  - (d) processes and procedures to be followed in making, or in responding to, the audit request.
- (4) The specified person is not excused from responding to an audit request on the ground that it relates to protected material or restricted material that —
  - (a) is within the specified person’s possession or control; or
  - (b) is provided to the specified person.
- (5) A specified person who responds to an audit request is taken to have a special interest in the report on the audit for the purposes of section 25(2)(a).
- (6) Subsection (7) applies if —
  - (a) an audit request is addressed to a person who is in possession or control of material; and
  - (b) that person believes in good faith that material to which the audit request relates is protected material or restricted material; and
  - (c) that person is not the specified person for an audit request relating to protected material or restricted material, as the case may be.

- (7) The person has a reasonable excuse for the purposes of section 33B(5) or 34(5) for failing to provide facilities or failing to comply with a direction, as the case may be, in relation to the material believed to be protected material or restricted material.

**36C. Extracts from and copies of protected material and restricted material**

- (1) Despite anything else in this Act, the Auditor General or an authorised person must not take extracts from, or make copies of, an item of protected material or restricted material, except with the written approval of the specified person in relation to that item.
- (2) If the Auditor General takes or receives an extract from or copy of protected material or restricted material for the purposes of an audit, whether under this Division or otherwise, when the audit is completed the Auditor General must —
  - (a) give the extract or copy to the person in possession or control of the material; or
  - (b) destroy the extract or copy and inform the person in possession or control of the material that it has been destroyed.

**Subdivision 4 — Confidentiality of certain material**

**36D. Confidential material must not be disclosed**

- (1) In this section —

*confidential material* means any of the following —

  - (a) parliamentary privileged material;
  - (b) protected material;
  - (c) restricted material;



- (d) material that for any other reason could form the basis for a claim by the State in a judicial proceeding that the material should not be disclosed;
- (e) material the disclosure of which the Auditor General considers would be contrary to the public interest;

**relevant person** means any of the following —

- (a) the Auditor General;
  - (b) a person employed in the OAG;
  - (c) a person appointed to assist the Auditor General in respect of a particular matter;
  - (d) the independent auditor.
- (2) Despite anything else in this Act, a relevant person must not —
- (a) disclose, or disclose the substance of, confidential material to any person; or
  - (b) give any person access to confidential material; or
  - (c) disclose, or disclose the substance of, confidential material in any report or communication to Parliament.
- (3) Subsection (2) does not constrain disclosures made, or access given, by a relevant person to another relevant person for the purposes of this Act.
- (4) Subsection (2) does not affect the duty of the Auditor General —
- (a) to notify as required by the *Corruption, Crime and Misconduct Act 2003* section 28 or 45H; or
  - (b) to comply with a notice issued under the *Corruption, Crime and Misconduct Act 2003* section 94 or 95; or

- (c) to comply with an order to produce issued under the *Criminal Investigation Act 2006* section 53.
- (5) Subsection (2)(c) does not prevent the Auditor General from including in a report to Parliament a statement that confidential material, or information about the substance of confidential material, has been omitted from the report.

**36E. Reporting to Premier, Treasurer and responsible Minister**

- (1) In this section —  
*responsible Minister*, in relation to a person, means —
  - (a) if the person is a Minister of the State — that Minister; or
  - (b) if the person is an agency or an organisation as those terms are defined in the *Public Sector Management Act 1994* section 3(1) — the Minister responsible for the administration of that agency or organisation; or
  - (c) if the person is a local government or a regional local government — the Minister responsible for the administration of the *Local Government Act 1995*; or
  - (d) in any other case — the Minister responsible for the administration of a written law under which the person is established or continued, or under which functions are conferred on the person.
- (2) If, because of section 36D(2)(c), the Auditor General decides not to make a report to Parliament, or omits confidential material, or reference to confidential

material, from a report to Parliament, the Auditor General may —

- (a) prepare a report under this subsection that includes the material or the reference; and
- (b) subject to and in accordance with the regulations, give a copy of the report to —
  - (i) the Premier; and
  - (ii) the Treasurer; and
  - (iii) a responsible Minister in relation to the person in possession or control of the confidential material; and
  - (iv) the Director General.

**37. Information subject to notice under *Financial Management Act 2006* s. 82(1)**

- (1) If the Minister decides that it would not be in the public interest for material that is the subject of a notice under the *Financial Management Act 2006* section 82(1) to be disclosed and advises the Auditor General of that decision, the Auditor General must not disclose the information in any report or communication to Parliament.
- (2) This section applies in addition to, and does not derogate from the operation of, section 36D.

**37A. Preservation of privileges and immunities**

Providing, or giving access to, material to the Auditor General for the purposes of this Act, or disclosing material to Parliament, to a Minister or to the Director General under this Act, is not a waiver of, and does not otherwise impair, any of the following in relation to that material —

- (a) parliamentary privilege;

- (b) legal professional privilege;
- (c) public interest immunity;
- (d) any confidentiality attaching to protected material or restricted material;
- (e) any other confidentiality, privilege or immunity.

**Subdivision 5 — Transitional provision**

**37B. Transitional provision for *Auditor General Amendment Act 2022***

- (1) In this section —  
*commencement day* means the day on which the *Auditor General Amendment Act 2022* section 8 comes into operation;  
*former Division* means Part 4 Division 2 as in force immediately before commencement day.
- (2) The provisions of this Division as inserted by the *Auditor General Amendment Act 2022* apply in relation to —
  - (a) an audit commenced before, and not completed by, commencement day; and
  - (b) a record created before commencement day; and
  - (c) material to which access is given under section 35, or that is provided under section 34, of the former Division before commencement day; and
  - (d) an exercise of rights under section 35 of the former Division for the purpose of an audit commenced before, and not completed by, commencement day; and

- (e) a direction given under section 34 of the former Division before, and not fully complied with by, commencement day; and
- (f) a report prepared before, but not signed by the Auditor General by, commencement day.

**9. Section 46 amended**

- (1) In section 46(2) in the Penalty delete “Penalty:” and insert:

Penalty for this subsection:

- (2) In section 46(4) —

- (a) delete “a summary of findings” and insert:

a draft of a report or a summary of its findings

- (b) delete “the summary of findings” and insert:

the draft or summary

- (c) in paragraph (b) delete “the summary of findings,” and insert:

the draft or summary,

- (3) In section 46(4) in the Penalty delete “Penalty:” and insert:

Penalty for this subsection:

**s. 9**

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- (4) After section 46(4) insert:
- (5) This section applies in addition to, and does not derogate from the operation of, section 36D.

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