

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Report 486: Regulatory Activities - Inquiry into Auditor-General's Reports 33, 47, 48 (2019-20) and 5 and 8 (2020-21)

Joint Committee of Public Accounts and Audit

August 2021
CANBERRA

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ISBN 978-1-76092-283-2 (Printed Version)

ISBN 978-1-76092-284-9 (HTML Version)

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Chair's foreword

One of the key functions of regulatory agencies is to establish the rules and guidelines in a defined sector, industry or area. Agencies must ensure compliance whilst also balancing the need not to be overly burdensome on the individuals, organisations and businesses they oversee. Agencies receive their regulatory powers and responsibilities through Acts of the Parliament, and therefore the Parliament needs to be assured that they are exercising those powers and undertaking those responsibilities appropriately.

This report is based on five Australian National Audit Office reports, each of which examines the operations of a particular regulator, into areas as diverse as higher education, environmental protection, the lobbying code of conduct, the national energy market, and electoral funding disclosures.

The Committee highlights that although the field managed by each regulator is unique, there are practices and procedures that every regulator should follow to be effective: regulatory information should be collected and managed properly so that it is accessible to decision makers; risk assessments should be conducted on the basis of sound information and should inform regulatory strategy; compliance and enforcement activities should be risk-based and neither too burdensome nor too permissive; and regulators, like other government entities, should ensure their internal governance and oversight mechanisms are appropriate. The Committee has made recommendations with these aims in mind.

I would like to thank the organisations that participated in this inquiry, and also extend my thanks to my colleagues on the Joint Committee of Public Accounts and Audit who have worked together to deliver this report, and the Secretariat who continue to work tirelessly to assist Committee members.

Mrs Lucy Wicks MP
Member for Robertson

List of Recommendations

Recommendation 1

2.83 The Committee recommends that DAWE provide it with an update on the status of projects planned or commenced in response to the ANAO's findings, including with respect to:

- improvements to its ICT systems and capabilities;
- record keeping practices;
- assessment and treatment of compliance risk;
- performance measurement frameworks;
- quality assurance frameworks; and
- the efficiency of its environmental regulation.

The Committee requests that DAWE provide this update within 6 months of this report.

Recommendation 2

2.86 The Committee recommends that the Auditor-General consider conducting a follow-up audit of DAWE in 2023 to assess the department's progress in implementing the audit report's recommendations. The Committee intends to list this program in its future 'audit priorities of the Parliament' to advocate for a further audit and continued oversight of the department until substantial change is demonstrated.

Recommendation 3

3.37 The Committee recommends that the Attorney-General's Department provide a written update on the implementation of the recommendations from the 2018 and 2020 audit reports. The update should include details on:

- post-transfer IT system issues;
- the Lobbying Code of Conduct's communications and stakeholder engagement strategy;
- the risk management strategy for the Lobbying Code; and
- AGD's progress in developing an evaluation framework for assessing the Lobbying Code's success in meeting its objectives.

The Committee requests that the department provide this update within 6 months of this report.

Recommendation 4

3.38 The Committee recommends that the Australian Public Service Commission update its guidance to government entities on machinery of government changes in light of the Auditor-General's Follow-up Audit into the Management of the Australian Government Lobbying Code of Conduct. This should be done with a view to giving greater clarity on responsibility for the implementation of recommendations made by Parliamentary Committees and the ANAO that are affected by machinery of government changes.

Recommendation 5

6.82 The Committee recommends that TEQSA update the Committee within six months on the progress of its projects to ensure timely re-registration and re-accreditation of low-risk providers. TEQSA should also update the Committee on the outcome of the next stakeholder satisfaction survey, including a detailed analysis and comparison of the responses from private, university and other public providers.

Recommendation 6

- 6.83 The Committee recommends that TEQSA identify cyber security as a specific risk indicator and ensure measures are taken to develop cyber resilience across the sector.

Recommendation 7

- 6.85 The Committee recommends that the Australian Government provide TEQSA with the ability to extend a deadline by mutual consent with a provider to allow providers additional time to submit further evidence in the interests of reducing the necessity of appeals to the Administrative Appeals Tribunal.

1. Introduction

About the inquiry

1.1 This report into the regulatory activities of five Commonwealth agencies is based on five Auditor-General reports:

- Auditor-General Report No.8 2020–21: *Administration of Financial Disclosure Requirements under the Commonwealth Electoral Act*
- Auditor-General Report No.47 2019–20: *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*
- Auditor-General Report No.48 2019–20: *Management of the Australian Government's Lobbying Code of Conduct - Follow-up Audit*
- Auditor-General Report No.5 2020–21: *Regulation of the National Energy Market*
- Auditor-General Report No.33 2019–20: *Tertiary Education Quality and Standards Agency's Regulation of Higher Education*

1.2 This chapter:

- briefly discusses regulatory frameworks;
- highlights common themes found in the audit reports considered by the Committee in its inquiry; and
- outlines the conduct of the inquiry.

1.3 Later chapters will consider each entity's response to the report of their performance audit in more detail.

Regulatory frameworks

- 1.4 The work of regulators is shaped by the frameworks under which they operate. For each regulator there are three primary types of framework:
- the Australian Government's Regulator Performance Framework (the RPF);
 - the *Public Governance, Performance and Accountability Act 2013* (PGPA Act); and
 - the specific laws, regulations or codes that empower the regulator.

The Regulator Performance Framework

- 1.5 The RPF¹ was issued by the Department of the Prime Minister and Cabinet in 2014 and provides guidance to regulators. It defines a regulator as 'a Government body that administers, monitors or enforces regulation'.²
- 1.6 The RPF specifies six principles that regulators should follow:
- regulation should not impede the efficient operation of regulated entities any more than necessary;
 - communication with regulated entities should be clear, targeted and effective;
 - actions undertaken by regulators should be proportionate to the regulatory risk being managed;
 - compliance and monitoring activities should be streamlined and coordinated;
 - regulators should be open and transparent with regulated entities; and
 - regulators should actively contribute to the continuous improvement of regulatory frameworks.³
- 1.7 The RPF also imposes obligations of transparency, self-monitoring and reporting on regulators in the interest of community and business confidence:
- Measuring and publicly reporting performance will give business, the community and individuals confidence that regulators effectively and flexibly manage risk.⁴

¹ Department of Prime Minister and Cabinet, *Regulator Performance Framework*, <https://www.pmc.gov.au/resource-centre/regulation/regulator-performance-framework>, accessed 27 April 2021.

² Regulator Performance Framework, p. 2.

³ Regulator Performance Framework, pp. 16-27.

The PGPA Act

- 1.8 As government entities, regulators are also subject to the PGPA Act.⁵ The PGPA Act establishes a performance framework for Commonwealth entities which aims to ensure that public resources are managed properly, and that Commonwealth entities meet high standards of governance, performance and accountability.⁶
- 1.9 In addition, regulators must comply with a range of rules and delegated legislation associated with the PGPA Act, including the PGPA Rule 2014, the Commonwealth Procurement Rules and the Commonwealth Risk Management Policy.⁷

Enabling legislation of audited entities

- 1.10 Regulators are also empowered by specific frameworks in the form of enabling legislation, regulations, or in the case of non-legislative frameworks, a document such as a Code.

The Australian Electoral Commission

- 1.11 The Australian Electoral Commission (AEC) is authorised to regulate the political donation disclosure scheme by Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act).⁸
- 1.12 The financial disclosure scheme contained in the Electoral Act was introduced in 1983. The scheme requires specific entities that receive funding, provide funding, or incur electoral expenditure to lodge disclosure returns with the AEC. The scheme thereby intends to assist voters to make judgements based on better knowledge of who funds their political representatives and to what extent.⁹

⁴ Regulator Performance Framework, p. 2.

⁵ *Public Governance, Performance and Accountability Act 2013*, <https://www.legislation.gov.au/Series/C2013A00123>, accessed 27 April 2021.

⁶ *Public Governance, Performance and Accountability Act 2013*, Section 5.

⁷ Australian National Audit Office, *Submission 9*, p. 1.

⁸ *Commonwealth Electoral Act 1918*, <https://www.legislation.gov.au/Series/C1918A0002>, accessed 27 April 2021.

⁹ Auditor-General Report No. 8 2020–21, p. 7

The Department of Agriculture, Water and the Environment

- 1.13 The Department of Agriculture, Water and the Environment (DAWE) is empowered to regulate Australia's natural environment by the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).
- 1.14 The EPBC Act is the centrepiece of Australia's environmental legislation. The portion of it audited in the ANAO report considered by this inquiry relates to how 'controlled actions' (actions which might have a significant impact on areas of environmental significance) are referred to DAWE, how DAWE assesses them, and the conditions under which they may be approved.

The Attorney-General's Department

- 1.15 The Lobbying Code of Conduct (the Lobbying Code) managed by the Attorney-General's Department (AGD) differs from the other regulatory schemes considered in this report in that it is not a legislative scheme.
- 1.16 The RPF specifies that regulatory powers should be exercised in proportion to the risk posed by non-compliance. AGD's enforcement powers include deregistration – that is, removing a lobbyist from the Register of Lobbyists. Having been deregistered, Australian Government officials are not permitted to meet with the lobbyist. However, AGD 'has no power to compel Government representatives to meet only with registered lobbyists or to report breaches when they become aware of them'.¹⁰

The Australian Energy Regulator

- 1.17 The regulation of Australia's energy generation and delivery is complex, as is the Australian Energy Regulator's (AER) position and role as a regulator. The AER was created under Part IIIA of the *Competition and Consumer Act 2010* (CCA) and its staff are employed and resourced by the Australian Competition and Consumer Commission (ACCC).
- 1.18 The AER regulates the National Energy Market (NEM) in line with the National Energy Rules (NER). It operates alongside the Australian Energy Market Operator (which manages the day to day operations of the NEM) and the Australian Energy Market Commission (which makes and maintains the NER). The AER regulates the operation of monopoly providers, and

¹⁰ Auditor-General Report No. 48 2019-20, p. 19.

regulates energy markets in Australian jurisdictions that have joined the NEM.

The Tertiary Education Quality and Standards Agency

- 1.19 Following the *Review of Australian Higher Education* (the Bradley Review), the Australian Government established the Tertiary Education Quality and Standards Agency (TEQSA) in 2012. As the national agency for the regulation of higher education, it is responsible for the registration of higher education providers and the accreditation of courses offered by those providers.
- 1.20 Its governing legislation, the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), provides that the agency's 'actions must not burden a provider more than is reasonably necessary'. Instead, its key regulatory decisions 'must be risk-based' and 'proportionate to the provider's actual (or risk of) non-compliance with the relevant standards'.¹¹

Common themes

- 1.21 Each entity included in this report is a regulator in their respective field. To effectively conduct regulatory activities, there are a number of practices and procedures that all entities should adhere to. The five ANAO reports outline a number of these issues, and while later chapters will consider these in greater detail as they relate to each individual entity, it is worthwhile providing a broad overview of the common requirements here.
- 1.22 This includes:
- The importance of accurate, well-managed and accessible regulatory information to a regulator's performance;
 - Risk-assessment and analysis processes;
 - Compliance and enforcement practices; and
 - Internal governance and performance measurement.

Regulatory information

- 1.23 The audit reports highlighted the importance of effective collection, management and use of information to regulators, and also brought to the Committee's attention weaknesses in this area in a number of audited entities.

¹¹ Auditor-General Report No 33 2019-20, p. 17.

1.24 By way of a statement of the principle, the ANAO noted that:

Accurate, integrated and reliable information on regulated entities, activities and individuals supports regulators in assessing the risk of non-compliance and the development of targeted compliance and enforcement strategies. It also forms data which can be used as intelligence in planning future compliance strategies.¹²

1.25 In its audits, however, the ANAO identified problems in the way some regulators captured and managed relevant information.

1.26 In DAWE's case, the ANAO found that the regulatory information it gathers is held in multiple IT systems and DAWE's ability to bring that information together and make use of it 'is limited by a lack of linkages between systems and data management issues'.¹³

1.27 The ANAO went on to observe that '[T]his has resulted in staff checking multiple systems and re-entering information already stored elsewhere' and that '[T]hese limitations increase the risk that the department's view of regulated entities and compliance risks is not complete and accurate'.¹⁴

1.28 TEQSA's use of regulatory information is hampered by issues of timeliness. ANAO noted that much of the data TEQSA relies on to inform its risk assessments is first collected and validated by the Department of Education, Skills and Employment. By the time it is provided to TEQSA it can be as much as two years old, which has obvious and potentially significant impacts on its usefulness and accuracy.¹⁵

1.29 The ANAO also found that the AEC's use of regulatory information could be improved through further analysis and cross-checking of the regulatory information it receives:

The AEC does not undertake detailed analysis of the financial information that is provided, cross check information with other internal data sources such as the amount of election funding provided or external data sources such as the ACNC and ROC registers.¹⁶

¹² Australian National Audit Office, *Submission 9*, p. 3.

¹³ Auditor-General Report No. 47 2019–20, p. 23.

¹⁴ Auditor-General Report No. 47 2019–20, p. 24.

¹⁵ Auditor-General Report No. 33 2019–20, p. 24.

¹⁶ Auditor-General Report No. 8 2020–21, p. 48.

Risk assessment and analysis

- 1.30 Regulatory agencies are required to identify risks facing the entities that they oversee, assess their significance, and take steps to mitigate threats posed. The Regulator Performance Framework outlines the importance of risk:

Comprehensive risk assessment processes are essential to ensuring that resources are targeted to the areas requiring the most attention. A risk-based approach promotes the most efficient use of resources and improves the effectiveness of the regulatory framework through minimising burden on those who are voluntarily compliant and ensuring that enforcement action is proportionate and undertaken only when necessary.¹⁷

- 1.31 Implementing risk-assessment processes informed by reliable regulatory information is of great importance to regulators. The audit reports considered by the Committee showed that while some entities had well-established processes at the time of audit, the processes of others were deficient in ways that required reconsideration by the audited entity.
- 1.32 In its report on AGD's management of the Lobbying Code, the ANAO defined two broad categories of regulatory risk – administrative risk and compliance risk. The first relates to a regulator's ability to manage the regulatory regime, and the second refers to risks that regulated entities might not be able or willing to comply with the regime.¹⁸ Administrative risk is discussed below in the section on internal governance and performance measurement.
- 1.33 In its report on AER's regulation of energy markets, the ANAO said that while AER had well-developed risk assessment processes, they were not demonstrably linked to its compliance and enforcement program:
- The AER did not demonstrate a link between its risk assessments and work program priorities. Without this line of sight it was not clear how the priorities in the annual work programs were selected, or if they were risk-based.¹⁹
- 1.34 The ANAO reached a similar conclusion in relation to DAWE's administration of the EPBC Act:

¹⁷ Regulator Performance Framework, p. 20.

¹⁸ Auditor-General Report No. 48 2019-20, p. 40.

¹⁹ Auditor-General Report No. 5 2020-21, p. 93.

The regulatory approach to referrals, assessments and approvals has not been informed by an assessment of compliance risk. Strategic compliance risk assessments do not inform regulatory plans.²⁰

- 1.35 The key messages relating to risk management emerging from this inquiry were that risk assessments should be informed by good regulatory information, and that risk settings should be aligned with regulatory objectives.

Compliance and enforcement

- 1.36 Just as good regulatory information feeds into risk assessment, the results of good risk assessment processes will ideally inform a regulator's compliance and enforcement activity.
- 1.37 The RPF specifies that compliance and enforcement actions undertaken by regulators should be proportionate to the regulatory risk being managed:
- Where the risk of non-compliance is high or the consequence of non-compliance significant, there is a higher degree of monitoring. Where the risk of non-compliance is low or the consequences of non-compliance minor, regulators take lighter touch approaches.²¹
- 1.38 The ANAO described the Lobbying Code as a 'light touch or principles-based' regulatory regime, in which 'regulated entities are simply trusted to adhere to values and principles in a code of conduct'.²² The risk of non-compliance with the Lobbying Code has been considered by agencies to be low and the impact of non-compliance similarly low. Consequently the Code is not legislated and does not confer any enforcement powers on AGD.
- 1.39 By contrast, the risks to the environment of non-compliance with the EPBC Act can be substantial and the risk of regulated entities failing to comply equally so. DAWE's responsibility to manage those risks is therefore a serious one.
- 1.40 The ANAO assessed DAWE's regulation of referrals, assessments and approvals under the EPBC Act and found each to be lacking. It found that 'referrals and assessments are not administered effectively or efficiently' and

²⁰ Auditor-General Report No. 47 2019-20, p. 9

²¹ Regulator Performance Framework, p. 20.

²² Auditor-General Report No. 48 2019-20, pp. 18-19.

that 'the department is unable to demonstrate that conditions of approval are appropriate'.²³

- 1.41 There was a difference of perspective between the ANAO and the AEC with respect to the AEC's approach to regulation and enforcement. The AEC has consistently adopted an educative approach to non-compliance. Its view is that 'it remains costly and time-consuming to pursue civil penalties in court' and that 'it is also not clear what would be gained by pursuing a civil penalty for minor non-compliance'.²⁴ The ANAO considered that the level of non-compliance and its associated risk justified a more active enforcement program to uphold the intent of the legislation, and that greater use of investigatory powers and penalties should be made.²⁵ The AEC argued that its 'administration of Part XX of the Electoral Act, in line with its interpretation of the intent of that legislation, does not lead to a view that a more heavy-handed approach to enforcement is warranted'.²⁶ These issues are examined in greater detail later in this report.

Internal governance and performance measurement

- 1.42 Issues of information collection and management, risk assessment, compliance and enforcement are more difficult to manage reliably in the absence of sound internal governance and performance measurement arrangements.

- 1.43 As the ANAO noted in its report on the administration of the EPBC Act:

Sound governance arrangements support effective and efficient regulation. This includes the establishment of frameworks to ensure that efforts are targeted to the level of risk, decisions are made consistently and objectively, and regulators are accountable for achieving their objectives.²⁷

- 1.44 Likewise, in relation to performance measurement, the ANAO said in its report on the Lobbying Code:

An integral part of the regulatory process is assessing the effectiveness of the regulatory arrangement in achieving policy objectives. Such assessments help

²³ Auditor-General Report No. 47 2019–20, p. 8.

²⁴ Australian Electoral Commission, *Submission 7*, p. 4.

²⁵ Auditor-General Report No. 8 2020–21, p. 57.

²⁶ Auditor-General Report No. 8 2020–21, p. 62.

²⁷ Auditor-General Report No. 47 2019–20, p. 20.

identify any improvements required to the policy framework, as well as to the administrative performance of the regulator.²⁸

1.45 Particular governance issues arising from the inquiry include:

- The need for sound strategic planning to inform regulatory objectives and activity;
- The need for proper internal oversight and performance monitoring; and
- The need for proper documentation of regulatory activities and programs, which is critical to proper performance assessment as well as meeting a regulator's transparency obligations as laid out in the RPF.

1.46 While the Auditor-General's assessment of the AER's regulatory performance was positive overall, it did find some weaknesses in governance, in particular with respect to its documentation of planning and strategy:

The AER has two distinct arrangements for external reporting on its performance - the Commonwealth performance framework and the statements of expectations from the COAG Energy Council [now the Energy National Cabinet Reform Committee] and Commonwealth Treasurer. These two frameworks were not well linked, and neither adequately captured the AER's purposes or provided a clear read from the purposes to the AER's deliverables.²⁹

1.47 The AER implemented its own corporate planning and governance documents in response to this finding and in addition created a strategic plan to guide its activities as a regulator.³⁰

1.48 The ANAO documented a number of problems with DAWE's internal oversight and management processes, and recommended that the department 'establish and implement a quality assurance framework to assure itself that its procedural guidance is implemented consistently and that the quality of decision-making is appropriate'. The report went on to note that 'the department has no arrangements to measure its efficiency and the implementation of proposed efficiency improvement measures has not been appropriately tracked'.³¹

²⁸ Auditor-General Report No. 48 2019-20, p. 47.

²⁹ Auditor-General Report No. 5 2020-21, p. 11.

³⁰ Australian Energy Regulator, *Submission 2*, p. 2.

³¹ Auditor-General Report No. 47 2019-20, p. 49.

- 1.49 Proper documentation and record-keeping is also a critical element of good governance and permits performance measurement. In its January 2021 ‘audit insights’ publication *Administering Regulation*, the ANAO noted that:

Appropriate recording of regulatory actions and the rationale for regulatory decisions supports transparency and accountability ... A regulator, through its records, should be able to demonstrate that approval decisions align with requirements and that compliance activity and/or actions undertaken were warranted given risk, the evidence available, the compliance framework developed and legislative powers.³²

- 1.50 However, the Committee heard that audited entities have not always met their requirements in terms of record-keeping. In relation to DAWE’s failure to adequately document its administration of environmental approvals, Deputy Auditor-General Rona Mellor said:

... when you’re regulating something as important as this and you’re setting rules within your regulation about what documentation must be kept, it’s because there’s a risk. This is, as many areas of Commonwealth regulation are, a highly contestable space with very strong interests within it. It was very disappointing from an auditor’s perspective to see that rules that were set about good record keeping and documentation around decision-making actually hamstrung us in proceeding down some of the audit routes that we would have done. You come to dead ends when there’s nothing there.³³

- 1.51 Further and more detailed discussion of these issues will be contained in later chapters as it relates to each audited entity.

Conduct of the inquiry

- 1.52 The Joint Committee of Public Accounts and Audit has a statutory responsibility to examine all reports of the Auditor-General presented to the Australian Parliament (as per Section 8(c) of the *Public Accounts and Audit Committee Act 1951*).
- 1.53 On 11 November 2020 the Committee resolved to inquire into five Auditor-General reports examining the performance of regulatory bodies.
- 1.54 On 17 November 2020, the Committee issued a media release announcing the inquiry and inviting submissions from interested parties. The Committee

³² Australian National Audit Office, *Administering Regulation*, January 2021, <https://www.anao.gov.au/work/audit-insights/administering-regulation>, accessed 10 May 2021.

³³ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 41.

also invited submissions from the agencies included in the Auditor-General reports considered.

- 1.55 The inquiry received nine submissions and seven supplementary submissions, which are listed at Appendix A.
- 1.56 A public hearing was held on 4 March 2021. A list of witnesses and organisations that appeared is at Appendix B. A transcript of the public hearing is available in HTML and PDF formats on the [inquiry website](#).

2. Referrals, Assessments and Approvals of Controlled Actions under the EPBC Act

Auditor-General Report No. 47 2019–20

- 2.1 The audited entity was the Department of Agriculture, Water and the Environment (DAWE). The audit objective was to assess the effectiveness of DAWE's administration of referrals, assessments and approvals of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).
- 2.2 This chapter:
- Provides background information on Australia's environmental protection regime and outline the Australian National Audit Office's (ANAO) findings;
 - Discusses DAWE's information management, including its collection and management of regulatory information, and its documentation of regulatory actions;
 - Discusses DAWE's assessment of risk, including both organisational risks and its compliance risk assessments; and
 - Discusses problems with internal governance and performance measurement as they relate to environmental referrals, assessments, and approvals.

Chapter overview

- 2.3 The report by the ANAO found that DAWE's administration of referrals, assessments and approvals of controlled actions under the EPBC Act continues to be ineffective. This is despite the fact that the department has been subject to numerous previous reviews and audits.
- 2.4 The Committee is concerned that the department failed to demonstrate it had acted on the recommendations of previous audits and considers that it would benefit from stronger oversight and accountability to improve in a range of areas.
- 2.5 These include:
- improvements to its ICT systems and capabilities;
 - record keeping practices;
 - assessment and treatment of compliance risk;
 - performance measurement frameworks; quality assurance frameworks; and
 - the efficiency of its environmental regulation.
- 2.6 Recommendations are made to this effect at the end of this chapter.

Background and audit findings

Background

- 2.7 Australia's national environmental protection regime is laid out in the EPBC Act, the first objective of which is 'to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance'.¹
- 2.8 There are nine matters of national environmental significance defined in the EPBC Act. They are:
- world heritage properties;
 - national heritage places (added in 2003);
 - wetlands of international importance (listed under the Ramsar Convention on Wetlands of International Importance);
 - EPBC-listed threatened species and ecological communities;
 - migratory species listed in international agreements;

¹ Environment Protection and Biodiversity Conservation Act, Section 3(1)(a)
<https://www.legislation.gov.au/Series/C2004A00485>, accessed 4 June 2021.

- protection of the environment from nuclear actions (such as uranium mines);
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park (added in 2009); and
- protection of water resources from coal seam gas development and large coal mining development (added in 2013).²

2.9 Where an activity (a project, development, or undertaking, or a series thereof) is likely to have an impact on a matter of national environmental significance, it becomes a ‘controlled action’, which must then be subject to an environmental assessment process. It is the responsibility of regulated entities to determine if their activity might have sufficient environmental impact to become a controlled action.

2.10 The assessment process that then begins is comprised of three stages:

- referral - in which the Minister (or their delegate) decides whether the action is a ‘controlled action’, that is, one that may have a significant environmental impact;
- assessment - which determines the method of assessing the potential impacts of controlled actions, and in which the assessment is carried out; and
- approval - which decides whether to approve the controlled action and decides on any conditions to attach to the approval.³

2.11 The Federal Government has reached agreements with the states and territories which allow them to conduct assessment processes under the EPBC Act. They may then report to the Minister, who determines whether to approve the action. DAWE remains responsible for enforcing compliance with any conditions attached to approvals.⁴

Audit findings

2.12 The ANAO’s report found that:

Despite being subject to multiple reviews, audits and parliamentary inquiries since the commencement of the Act, the Department of Agriculture, Water and the Environment’s administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective.

² Auditor-General Report No. 47 2019–20, p. 14.

³ Auditor-General Report No. 47 2019–20, p. 15

⁴ Auditor-General Report No. 47 2019–20, p. 15.

Governance arrangements to support the administration of referrals, assessments and approvals of controlled actions are not sound. The department has not established a risk-based approach to its regulation, implemented effective oversight arrangements, or established appropriate performance measures.

Referrals and assessments are not administered effectively or efficiently. Regulation is not supported by appropriate systems and processes, including an appropriate quality assurance framework. The department has not implemented arrangements to measure or improve its efficiency.

The department is unable to demonstrate that conditions of approval are appropriate. The implementation of conditions is not assessed with rigour. The absence of effective monitoring, reporting and evaluation arrangements limit the department's ability to measure its contribution to the objectives of the EPBC Act.⁵

2.13 On the basis of these findings, the audit report made eight recommendations:

- Recommendation 1 related to the collection and management of compliance intelligence;
- Recommendations 2 and 3 related to risk assessment and management, particularly compliance risk and probity risk;
- Recommendations 4 to 8 related to the department's internal governance of environmental approval processes, particularly performance measurement, quality assurance, the measurement of efficiency, and quality controls with respect to the department's management of referrals, assessments, and approvals.

Past reviews

2.14 The issues identified in this audit are not novel. The audit report listed numerous previous reviews of DAWE's administration of the EPBC Act, the majority of which contained adverse findings. These included ANAO performance audits in 2002-03, 2006-07, 2013-14, 2015-16 and 2016-17, a number of inquiries by parliamentary committees, as well as the two statutory reviews of the operation of the EPBC Act, the 2009 Hawke review and the 2020 Samuel review.⁶

⁵ Auditor-General Report No. 47 2019–20, p. 8.

⁶ *The Australian Environment Act* (the Hawke Report), October 2009, <http://environment.gov.au/epbc/about/review/epbc-review-2008>, accessed 24 May 2021;

2.15 Previous performance audits have found several weaknesses in the department's performance as a regulator, including:

- a low likelihood of receiving referrals on all actions that may significantly impact matters of national environmental significance;
- delays in meeting statutory timeframes under the EPBC Act; and
- deficiencies in compliance monitoring and enforcement arrangements, relating to procedural guidance, risk-based compliance monitoring strategies, IT support systems and compliance intelligence capabilities.⁷

Entity response

2.16 DAWE agreed to each of the audit report's eight recommendations. The department's submission outlined a range of initiatives it is undertaking which aim to assist in its implementation of the ANAO's recommendations. Taken together the department argues these will constitute an 'uplift' of environmental compliance regulation. Among them are:

- improved IT systems for better and more comprehensive assessment information and better measurement of conservation outcomes;
- greater investment in intelligence to assist in oversight of illegal environmental activity;
- a new Environmental Approvals Division Board to improve oversight of regulatory activity and the improved conflict of interest register; and
- accurate records of public comments, a triage framework for assessments, and a better way to manage environmental offsets.⁸

2.17 The department also pointed to improvements in the timeliness of environmental approvals as a result of increased funding.⁹

Record keeping and information management

2.18 The audit report revealed a number of problems with the way DAWE handled information relevant to its administration of the EPBC Act. First, the ANAO found that DAWE did not have adequate systems in place to collect regulatory information – specifically compliance intelligence. Second, it

Independent Review of the EPBC Act - Final Report (the Samuel report), October 2020, <https://epbcactreview.environment.gov.au/resources/final-report>, accessed 24 May 2021.

⁷ Auditor-General Report No. 47 2019–20, pp. 17-18.

⁸ Department of Agriculture, Water and the Environment, *Submission 8*, pp. 4-7.

⁹ Department of Agriculture, Water and the Environment, *Submission 8*, p. 4.

found that DAWE did not manage information effectively even when it had been collected. And third, the department's record keeping practices were poor enough that the ANAO could not reach an informed conclusion on some issues.

- 2.19 The collection of timely and relevant information is a central element of effective regulation, as it informs a regulator's assessment of risk and its compliance and enforcement activities. This is especially true for Australia's lead environmental regulator:

Collecting regulatory information from a range of reliable sources assists regulators to ensure their information is complete and accurate. As the department operates within a network of environmental regulators, it should have arrangements to collect information from those sources as well as its own activities.¹⁰

- 2.20 DAWE's information-sharing relationships with its co-regulators are underdeveloped. In 2016, a review commissioned by the department of its maturity, capability and capacity as a regulator recommended that it formalise information sharing arrangements with its co-regulators in the states and territories. However:

...the audit report found no evidence that the recommendation was implemented. DAWE has only one agreement which provides for regular compliance information sharing - with NSW.¹¹

- 2.21 As the audit report notes, failure to cooperate effectively with the states and territories has impaired the quality of the regulatory information the department receives and has thereby reduced its effectiveness as a regulator:

In the absence of agreed and structured information sharing arrangements, information received from co-regulators will be reactive, issue-based and dependent on personal relationships. As a consequence, compliance information may be incomplete and limited in value for strategic planning.¹²

- 2.22 Second, the report noted that the department's management of regulatory information is also imperfect:

Once regulatory information is obtained, it should be managed in a way that enables it to efficiently inform compliance intelligence. The department stores regulatory information in multiple systems maintained by different business

¹⁰ Auditor-General Report No. 47 2019–20, p. 20.

¹¹ Auditor-General Report No. 47 2019–20, p. 22.

¹² Auditor-General Report No. 47 2019–20, p. 22.

areas ... However, the department has not established a procedure to extract all relevant compliance information from each of these different systems. There is no system to store and risk assess open source information, develop custom risk profiles for regulated entities, or undertake projects to gather intelligence.¹³

- 2.23 The ANAO noted that ‘the department’s ability to utilise information from internal business systems and develop a comprehensive view of the regulatory landscape is limited’. Further, ‘key internal systems do not provide for a consistent, accurate and holistic view of regulated entities. This has resulted in staff checking multiple systems and re-entering information already stored elsewhere’.¹⁴
- 2.24 The audit report listed five IT projects commenced since 2015 to improve the management of regulatory information stored by the department. It also noted that none of these had been completed.¹⁵
- 2.25 With this in mind the ANAO recommended that the department make improvements to its collection and use of compliance intelligence.
- 2.26 In response to this recommendation, DAWE told the Committee that it has begun another IT project to do so:

The department has commenced discovery activities which will inform an overarching Information Strategy to create a framework and strengthen processes for the collection and use of regulatory information, including compliance intelligence.¹⁶

- 2.27 DAWE elaborated on what this strategy will entail:

We are, however, in the process of procuring an information technology system for compliance case management, which will enhance our ability to share our information in a more systematic way. That information technology system includes an online portal, which will include the ability for external stakeholders to report any concerns or allegations about non-compliance directly to the department. It will also comprise an end-to-end case management system. That IT system is on track to be delivered this year.¹⁷

¹³ Auditor-General Report No. 47 2019–20, p. 22

¹⁴ Auditor-General Report No. 47 2019–20, p. 24.

¹⁵ Auditor-General Report No. 47 2019–20, p. 24.

¹⁶ Department of Agriculture, Water and the Environment, *Submission 8*, p. 5.

¹⁷ Ms Monica Collins, Assistant Secretary, Environmental Compliance Branch, Department of Agriculture, Water and the Environment, *Committee Hansard*, 4 March 2021, pp. 37–38.

- 2.28 DAWE's supplementary submission said that it expects the project to be completed by 2023 at the latest:

In response to the audit recommendation, the department is ... in the process of procuring Information Technology for an assessments system and a compliance case management system. The integration of the two systems in the future will allow for a complete information workflow. The department is on track to have the systems implemented within the next two years.¹⁸

- 2.29 Finally, and in addition to issues with the DAWE's collection and use of regulatory information, the audit identified problems with the department's record keeping practices. These were in some instances so poor as to prevent the ANAO from reaching conclusions due to a lack of evidence.

- 2.30 The audit office examined the records of a random sample of referral, assessment and approval decisions. While available documentation indicated that decisions taken 'were largely in accordance with procedural guidance and aligned with the supporting evidence', a number of records were not present:

Key documents relating to decisions were not available in the department's record management system ... This issue was noted in an internal audit in 2018 that found 'inconsistent practices occurring for the storage of key decision-making evidence' ... Failure to create and maintain accurate records of regulation impacts the department's accountability and transparency, and exposes it to further risks of legal overturn.¹⁹

- 2.31 There were also gaps in the department's records relating to pre-commencement conditions of approval. When a controlled action is approved, conditions may be attached to it to mitigate or offset any environmental impacts it is likely to have. Monitoring these conditions is an important way to avoid damage to the environment:

For pre-commencement conditions of approval to effectively prevent unacceptable impacts on matters of national environmental significance, the department must ensure they are fully implemented before project activities commence. This requires appropriate monitoring of both commencement of actions and implementation of pre-commencement conditions.²⁰

¹⁸ Department of Agriculture, Water and the Environment, *Submission 8.1*, p. 1.

¹⁹ Auditor-General Report No. 47 2019–20, p. 46.

²⁰ Auditor-General Report No. 47 2019–20, p. 67.

2.32 The department's procedures require it to record when projects commence so that it can monitor the project effectively. However, it has not always met this requirement:

The department's records of project commencement are subject to completeness and integrity issues. The department has recorded 151 projects as commencing between 1 July 2015 and 28 August 2019. There were a number of discrepancies with these records, including:

- Ninety eight commencements were only found in either the spreadsheet or EIAS, and six of the 53 projects recorded in both sources had different commencement dates.
- Thirty nine projects were recorded as 'commenced' or 'completed' but had no recorded date of commencement.
- Fifty five projects that had reported on their post-commencement activities in annual compliance reports to the department since 1 June 2018 were not recorded as having commenced.²¹

2.33 These issues with the completeness and accuracy of its records 'limit the department's ability to determine when projects have commenced and therefore its ability to monitor whether pre- commencement conditions of approval have been implemented'.²²

2.34 Documentation of the conditions attached to environmental approvals was so poor that in some cases that the ANAO could not even reach a view on how appropriate the department's decision making was. According to the ANAO:

... it means that the department is poorly positioned to demonstrate the extent to which the setting of conditions is actually appropriate to the level of environmental risk ... there's insufficient information there to talk about the appropriateness of the conditions that have been set with respect to the level of risk to the environment in particular referrals.²³

2.35 The Deputy Auditor-General, Ms Rona Mellor, said that Committee questions on whether the department was an effective regulator in relation to this issue were:

²¹ Auditor-General Report No. 47 2019–20, p. 68.

²² Auditor-General Report No. 47 2019–20, p. 68.

²³ Mr Mark Rodrigues, Senior Director, Performance Audit Services Group, ANAO, *Committee Hansard*, 4 March 2021, p. 41.

... hard for us to answer in the absence of documentation that needed to be there ... This is, as many areas of Commonwealth regulation are, a highly contestable space with very strong interests within it. It was very disappointing from an auditor's perspective to see that rules that were set about good record keeping and documentation around decision-making actually hamstrung us in proceeding down some of the audit routes that we would have done.²⁴

- 2.36 Although the department did not address this issue directly, it is presumed that the improved IT systems described above will have a positive impact on its record keeping practices.

Risk management

- 2.37 The audit made two recommendations that primarily relate to the assessment of risk. First, that the department improve the way it assesses and treats probity or conflict of interest risks. Second, that the department conduct an up-to-date assessment of compliance risk.

Management of conflicts of interest

- 2.38 Given the importance of environmental regulation and the high value of the development proposals the department assesses, proper treatment of conflict of interest risks is important:

As regulators of environmentally sensitive, high-value and often contentious development proposals, appropriate arrangements to manage conflicts of interest are particularly important for building public confidence in the department as a trusted regulator.²⁵

- 2.39 The ANAO noted that the department had an appropriate conflict of interest policy for its employees:

The department has established a conflict of interest policy that complies with Commonwealth legislation. It requires employees to regularly assess and review their personal interests, take reasonable steps to avoid conflicts, complete a declaration where conflicts are identified, take measures to manage any identified conflicts and record declarations on the department's record management system.²⁶

²⁴ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 41.

²⁵ Auditor-General Report No. 47 2019–20, pp. 32.

²⁶ Auditor-General Report No. 47 2019–20, p. 32

2.40 However, the report identified problems with the policy's implementation. The department's conflict of interest policy required internal oversight committees to have a standing agenda item on potential or actual conflicts of interest but this was frequently not observed. Further, where treatments for probity risks were required, the department did not implement them, or was unable to provide evidence for doing so.²⁷

2.41 Finally the report noted that an ongoing fraud risk plan had not been implemented:

The division has not established a fraud risk plan for 2019–20 onwards. Without an active fraud plan to identify and treat potential conflicts of interests, there is an elevated risk of the regulation of referrals, assessments and approvals being influenced by conflicts of interest.²⁸

2.42 The report therefore recommended that DAWE improve the oversight of referrals, assessments and approvals and properly identify and treat conflict of interest risks.

2.43 DAWE agreed with the recommendation and said that it has improved its management of conflict of interest risks:

A conflict of interest register for environmental approvals is now [in] place and a mandatory declaration process has been established for all staff in the Environment Approvals Division. This register is regularly reviewed by [a] senior executive. All declared conflicts of interest, where applicable, must have an agreed management plan in place to manage any risks posed by the conflict.²⁹

2.44 DAWE told the Committee that the department has made substantial changes to its internal conflict of interest processes to address this recommendation:

The former department had a conflict of interest process, and that required staff who identified a conflict of interest in relation to what they were doing to declare that conflict. But, following the ANAO audit, we revamped that completely, and we now have instituted a mandatory conflict of interest process with an ongoing register that is maintained within the division. That register and the process for rolling it out for - for requiring staff to update

²⁷ Auditor-General Report No. 47 2019–20, p. 33

²⁸ Auditor-General Report No. 47 2019–20, p. 33.

²⁹ Department of Agriculture, Water and the Environment, *Submission 8*, p. 5.

changing circumstances, et cetera - is made very clear to staff. For every new starter, the first thing they do, on day one, is complete their form.³⁰

- 2.45 The Deputy Auditor-General noted that ongoing and active management of identified probity risks is a key part of every regulator's work:

... it's a matter of active management. You've seen other audits of ours where conflict of interest policies have been in place and declarations have been made and management hasn't occurred. What's the outcome of a declaration being made? How's it being managed? Are people turning their mind to it? It's about positive steps by the department in moving forward on a more holistic conflict of interest regime for this part of its business.³¹

Compliance risk

- 2.46 Compliance risk refers to the risk of regulated entities failing to comply with the EPBC Act or the department's decisions as a regulator. Proper assessment of compliance risk is an important part of a regulator's role:

Regulators that assess the risk of non-compliance are better positioned to target regulatory activities towards areas of greatest impact. Strategic risk assessments can inform the design of regulatory approaches, including the allocation of resources between regulatory activities (such as promoting voluntary compliance, individual assessments and approvals, and compliance monitoring functions). Operational and tactical risk assessments may be used to inform decision-making on individual actions.³²

- 2.47 The audit found that 'no assessment of compliance risk across all of the department's environmental regulatory responsibilities has been completed'. As such:

Without an overarching assessment of compliance risk across its regulatory responsibilities or a process to prioritise its assessments, the department is not well positioned to develop a complete view of compliance risk. This weakens the basis of its strategic risk assessments and limits its ability to align regulatory functions and resources to the risk of non-compliance.³³

³⁰ Ms Mary Colreavy, Department of Agriculture, Water and the Environment, *Committee Hansard*, 4 March 2021, p. 39.

³¹ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 40.

³² Auditor-General Report No. 47 2019–20, p. 25.

³³ Auditor-General Report No. 47 2019–20, p. 26.

- 2.48 On that basis the ANAO recommended that the department conduct an up-to-date risk assessment of non-compliance.
- 2.49 The audit also noted that the department's conduct of individual referrals, assessments and approvals is not risk based. It argued that 'the administration of referrals, assessments and approvals under the EPBC Act inherently involves a consideration of the environmental risk of each proposed action'. However, there is no framework to target the department's actions according to risk:

While risk is discussed generally in the department's procedural guidance, prompting officers to consider environmental, legal, reputational and compliance risks, it does not indicate how risk assessments should be conducted or establish how the assessment should inform the level of regulatory effort applied.³⁴

- 2.50 In response to these issues, the department informed the Committee that it has engaged an external expert to develop a compliance risk assessment regime:

The department has ... engaged an external expert to carry out an independent Environmental Compliance Regulatory Risk Review which will provide systematic assessment and prioritisation of risk across the Department's regulatory regimes.

Noting that the recently released Independent review of the EPBC Act makes a range of recommendations about compliance under the Act, the final report for this project could further inform government decisions and directions for compliance.³⁵

- 2.51 The regulatory risk review began in February 2021 and the department said it was expected to be completed before the end of June 2021:

The scope for the project is to identify the non-compliance risks with each environmental regulatory regime administered by the Department of Agriculture, Water and the Environment, to identify the compliance activities already undertaken by the department to manage those risks, to identify benchmarks and mechanisms used in other environmental regulatory jurisdictions for allocating resourcing levels across compliance regulatory functions, and to identify other regulatory tools that the department should consider using.

³⁴ Auditor-General Report No. 47 2019–20, p. 29.

³⁵ Department of Agriculture, Water and the Environment, *Submission 8*, p. 5.

This work is expected to be completed this financial year.³⁶

Governance and performance measurement

- 2.52 The ANAO report made a number of recommendations that go to the department's internal governance and performance measurement arrangements.

Performance measurement

- 2.53 Performance measures are particularly important because they permit the department itself, as well as its stakeholders, to assess its effectiveness as a regulator and determine whether it is achieving its intended results.³⁷
- 2.54 While the audit report found that the department's performance measures were 'largely relevant and partially reliable', it also found that 'results and analysis in the performance statements contained inaccuracies, were not supported by suitable records, or both'. Further, 'for 2019–20, no performance measures specifically relating to the administration of referrals, assessments and approvals were included in the corporate plan'.³⁸
- 2.55 The audit highlighted that although DAWE had indicators to measure some outputs, these did not measure its performance:

The department has not established internal performance measures for the quality, impacts and long-term outcomes of its administration of referrals, assessments and approvals. It has established a number of output-level indicators, such as the number of statutory decisions made and the proportion of these decisions made within statutory timeframes. However, these do not provide any information on the effectiveness of the department's regulation.³⁹

- 2.56 The ANAO therefore recommended that the department develop internal and external performance measures on the effectiveness and efficiency of its regulation of referrals, assessments and approvals.
- 2.57 DAWE agreed to this recommendation and said that it is developing a performance framework to assist it to meet its reporting obligations:

³⁶ Department of Agriculture, Water and the Environment, *Submission 8.1*, p. 2.

³⁷ Auditor-General Report No. 47 2019–20, p. 34.

³⁸ Auditor-General Report No. 47 2019–20, p. 35.

³⁹ Auditor-General Report No. 47 2019–20, p. 37.

A performance measure for environmental approvals was reinstated in 2021 Corporate Plan: 'Statutory timeframes are met 100% of the time for EPBC Act referral, assessment and approval decisions and the backlog of decisions is cleared' ...

The department is now engaging external expertise to assist with the preparation of a Performance Framework for the Environmental Approvals Division, in line with the Commonwealth Regulator Performance Framework and best practice approaches to performance reporting.⁴⁰

Quality assurance

2.58 The audit noted that procedural guidance available to departmental staff to assist them in making complex referral, assessment and approval decisions was incomplete and not well maintained.⁴¹

2.59 As such, good quality assurance processes assume greater importance. However:

The department has not established a quality assurance framework despite agreeing to do so in an internal audit recommendation in 2018. The department informed its audit committee in March 2020 that the item was 'not being progressed' as it had been 'overtaken by a shift in focus to improve [its] performance against statutory timeframes in line with the Australian Government's congestion busting agenda'.⁴²

2.60 This left the department 'without appropriate assurance over its regulation of referrals, assessments and approvals, including: compliance with the EPBC Act, quality and consistency of decision-making, and accuracy of externally-provided information'.⁴³

2.61 On that basis the ANAO recommended that the department implement a quality assurance framework to assure itself that its procedural guidance is implemented consistently and that the quality of decision-making is appropriate.

2.62 DAWE agreed to this recommendation and told the Committee that it has begun work to implement such a framework:

⁴⁰ Department of Agriculture, Water and the Environment, *Submission 8*, p. 6.

⁴¹ Auditor-General Report No. 47 2019–20, p. 38.

⁴² Auditor-General Report No. 47 2019–20, p. 47.

⁴³ Auditor-General Report No. 47 2019–20, p. 47.

Work to prepare a Quality Assurance Framework for referrals, assessments and approvals under the EPBC Act is well progressed. The framework will provide ongoing assurance that procedural guidance is implemented consistently and that the quality of decision-making is appropriate.

The framework has been developed by external quality assurance experts to ensure it reflects best practice international quality assurance standards, is fit-for-purpose and provides a roadmap for implementation and uplift in quality assurance maturity over time. Implementation of the framework will consist of an ongoing program of continuous improvement of quality outcomes over time and is expected to commence mid-2021.⁴⁴

Efficiency

- 2.63 The audit report also considered whether DAWE's environmental regulation was conducted efficiently. Efficient administration is an important part of effective regulation:

Efficient use of public resources enables regulators to maximise outcomes for government and the community, reduce demands on the Australian Government budget and promote financial sustainability. The efficiency of the regulation of referrals, assessments and approvals also impacts on the timeliness of decisions, which impacts regulated entities.⁴⁵

- 2.64 DAWE had not made arrangements to measure how efficiently it administers the EPBC Act. The department's primary business IT system, the Environmental Impact Assessment System (EIAS) had the capability to measure departmental efficiency but it was not used to do so.⁴⁶

- 2.65 The ANAO noted that the department planned to make efficiency improvements using government funds which had been allocated with the primary purpose of reducing the backlog of environmental decisions:

It is particularly important for the department to establish efficiency indicators and implement efficiency initiatives if it is to deliver increased outputs in the future, including after the funding to reduce the backlog of assessments expires.⁴⁷

⁴⁴ Department of Agriculture, Water and the Environment, *Submission 8*, p. 6.

⁴⁵ Auditor-General Report No. 47 2019–20, p. 49.

⁴⁶ Auditor-General Report No. 47 2019–20, p. 53.

⁴⁷ Auditor-General Report No. 47 2019–20, p. 56.

2.66 Accordingly, the report recommended that the department establish efficiency indicators to assist in meeting legislative timeframes for referrals, assessments and approvals.

2.67 In response, DAWE said that it has developed a triage system which will allow it to allocate its resources more efficiently:

A triage framework has been prepared and piloted and is expected to be finalised and implemented by the end of this financial year.

The framework will help guide the allocation of resources and processes undertaken in assessments to drive more efficient and effective delivery of assessments and approvals in a strategic risk-based manner.⁴⁸

Monitoring of conditions of approval

2.68 Conditions of approval are of central importance to good environmental outcomes under the EPBC Act. They are 'the main mechanism to avoid, mitigate or offset any unacceptable impacts to matters of national environmental significance that may be caused by the action'.⁴⁹

2.69 However, for conditions to be an effective mechanism they must be monitored to ensure regulated entities are complying with them:

For conditions of approval to be effective at reducing impacts on matters of national environmental significance, they must be fully implemented in line with the original approval. It is therefore important that appropriate arrangements are in place to monitor the implementation of conditions of approval.⁵⁰

2.70 This audit is not the first time the ANAO has assessed the department's performance in relation to conditions of approval:

The ANAO previously examined the department's arrangements to monitor the implementation of EPBC Act conditions of approval in 2013-14 and 2016-17. The 2013-14 audit found that the department had limited assurance over compliance with conditions of approval, making five recommendations. The 2016-17 audit found that while the department had implemented three of these recommendations and partially implemented the remaining two, limited

⁴⁸ Department of Agriculture, Water and the Environment, *Submission 8*, p. 7.

⁴⁹ Auditor-General Report No. 47 2019–20, p. 57.

⁵⁰ Auditor-General Report No. 47 2019–20, p. 62.

progress had been made in implementing broader initiatives to strengthen the department's regulatory performance.⁵¹

- 2.71 In turn, this audit found that the department's performance in regulating the implementation of conditions of approval is poor:

The department has not established appropriate arrangements to monitor the implementation of pre-commencement conditions of approval. The department's systems for monitoring commencement of actions are inaccurate. The absence of procedural guidance for reviewing documents submitted as part of pre-commencement conditions leaves the department poorly positioned to prevent adverse environmental outcomes.⁵²

- 2.72 The ANAO thus recommended that the department develop guidance and quality controls to assure itself that pre-commencement conditions of approval are implemented and assessed consistently to protect matters of national environmental significance.

- 2.73 DAWE agreed to this recommendation, stating:

The department has accepted responsibility for the findings of the audit report and has commenced work to strengthen quality controls for approval conditions. In the short term, we are strengthening the current quality control processes by updating guidance material for condition writing. In the medium term we are engaging external expertise to provide the department with options for a new process for quality control that is in line with best regulatory practice.⁵³

- 2.74 More broadly, DAWE noted significant internal reforms at the department which it argued will have a long-term positive impact on its performance as a regulator:

The department has put in place a range of measures - a tiering, if you like - of governance architecture to manage our response to the ANAO report ... First of all, we have a steering committee that is chaired by a deputy secretary ... [which] meets monthly and is charged with responsibility for overseeing the implementation of our work plan and keeping the department's senior executive informed of our progress ...

We also have established a board within the environment approvals division. That comprises all of the executive. That's now committed to a formal

⁵¹ Auditor-General Report No. 47 2019–20, p. 62.

⁵² Auditor-General Report No. 47 2019–20, p. 62.

⁵³ Department of Agriculture, Water and the Environment, *Submission 8*, p. 6.

structure where the board meets either fortnightly or monthly with a program of work again targeting very closely the implementation of the work coming out of the ANAO report ...

We also have within the department an internal audit committee and an external audit committee. We have provided the full suite of our implementation plans to that audit committee and we will report to them quarterly on our progress against our work plan so we're held accountable through that structure as well.⁵⁴

2.75 DAWE noted that the reforms have been undertaken with the support of substantially increased funding from the government:

We've committed to what we believe is a fairly ambitious program of business transformation that will see significant improvements in our administration of the act. The audit findings provide a useful road map for the department to improve that administration and build on our existing policies and practices, but present a number of key improvements to our administration, and that's being supported by the government's investment of \$25 million through congestion-busting for environment approvals.⁵⁵

2.76 DAWE noted that while the implementation of some parts of the program will take 1-2 years, it is likely that other improvements to departmental operations will be ongoing:

We certainly won't have an end date on the EAD [Environment Approvals Division] board, the internal board, because that will be the business of the senior executive to continue to monitor. Unless something radically changes, I imagine that would be an ongoing function. The steering committee does not have an end date at this time, but, if and when they're satisfied that we've completed all eight recommendations, and we have reported back through the ANAO, then we may agree that it's no longer required. That hasn't yet been discussed. Our estimate within the division is that it would probably take 18 months to two years to complete this program of work.⁵⁶

2.77 However, as the Deputy Auditor-General noted at the Committee's public hearing, positive outcomes in this space will require sustained effort:

⁵⁴ Ms Mary Colreavy, Department of Agriculture, Water and the Environment, *Committee Hansard*, 4 March 2021, p. 38.

⁵⁵ Mr Dean Knudson, Deputy Secretary, Department of Agriculture, Water and the Environment, *Committee Hansard*, 4 March 2021, p. 36.

⁵⁶ Ms Mary Colreavy, Department of Agriculture, Water and the Environment, *Committee Hansard*, 4 March 2021, p. 38.

... generally in regulation we find that, where there are problems, it's because people aren't putting the effort in, managing actively and keeping an eye on a very important part of their organisation ... In the case of this part of the regulation of activities of the Commonwealth, there have been a large number of reviews. When people accept that they need to change things, they need to do it. We're hearing some positive sounds from the deputy secretary about moving forward. We hope the momentum on that continues.⁵⁷

Committee comment

- 2.78 It is important that Australia's environmental laws are administered by DAWE in a competent and consistent manner. Regulatory information should be collected, managed, used and published according to best practice, particularly when responsibility for regulation is shared between states, territories and the Commonwealth. An understanding of risk drawn from this information should inform compliance and enforcement settings.
- 2.79 Similarly, the department's internal governance and performance measurement should be sound. This requires proper arrangements for identifying and treating conflict of interest risk, appropriate performance measurement practices, and good quality assurance to ensure decision making is sound and consistent.
- 2.80 It is unacceptable to the Committee that the audit found deficiencies in each and every one of these areas. There have been deficiencies in the department's administration of the Act for many years, as evidenced by numerous previous reports.
- 2.81 It is also very concerning that the ANAO was unable to form a view on some issues because of a lack of records. As mentioned earlier in this report, accurate record keeping is vital to the effectiveness of regulatory agencies. Without this, the department is exposed to numerous threats including risks relating to probity and conflicts of interest, compliance risk and the inability to adequately substantiate decisions.
- 2.82 Although the Committee acknowledges that DAWE accepted all of the report's recommendations, this inquiry's evidence highlighted the scope and scale of the work the department must undertake to ensure it functions adequately in its role regulating the EPBC Act.

⁵⁷ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 37.

Recommendation 1

2.83 The Committee recommends that DAWE provide it with an update on the status of projects planned or commenced in response to the ANAO's findings, including with respect to:

- **improvements to its ICT systems and capabilities;**
- **record keeping practices;**
- **assessment and treatment of compliance risk;**
- **performance measurement frameworks;**
- **quality assurance frameworks; and**
- **the efficiency of its environmental regulation.**

The Committee requests that DAWE provide this update within 6 months of this report.

2.84 The audit report lists a number of past projects which aimed to improve DAWE's performance as a regulator but which remained incomplete or ineffective.

2.85 It is too soon to tell whether the actions taken in response to this audit will be effective, and as such the Committee recommends that the Auditor-General consider a follow-up audit to assess the success of the department's implementation of the ANAO's recommendations.

Recommendation 2

2.86 The Committee recommends that the Auditor-General consider conducting a follow-up audit of DAWE in 2023 to assess the department's progress in implementing the audit report's recommendations. The Committee intends to list this program in its future 'audit priorities of the Parliament' to advocate for a further audit and continued oversight of the department until substantial change is demonstrated.

3. Management of the Australian Government's Lobbying Code of Conduct - Follow-up Audit

Auditor-General Report No. 48 2019–20

Introduction

- 3.1 This chapter considers Report No. 48 (2019-20), *Management of the Australian Government's Lobbying Code of Conduct – Follow-up Audit* (the 2020 report). The 2020 report was a follow-up audit which assessed the implementation of a previous audit report - Report No. 27 (2017-18) *Management of the Australian Government's Register of Lobbyists* (the 2018 report).
- 3.2 Both audits examined the administration of the Lobbying Code of Conduct (the Lobbying Code) and the Register of Lobbyists (the Register). At the time of the 2018 report, the Lobbying Code and the Register were administered by the Department of the Prime Minister and Cabinet (PM&C). The follow-up audit followed a machinery of government (MoG) change which transferred responsibility for the Register and the Lobbying Code to the Attorney-General's Department (AGD).
- 3.3 This chapter:
- provides a brief summary of the findings of the 2018 and 2020 reports;
 - discusses issues with interagency communication and planning with respect to the MoG change;

- discusses AGD's management of the implementation of the 2018 report's recommendation; and
- discusses ways in which future MoG changes might be improved.

Chapter overview

- 3.4 The Committee's inquiry into this report found that throughout the MoG transfer of the Register and the Lobbying Code, there were a number of key areas for improvement. This included issues with the transfer of the Register's IT system, a lack in interagency communication and planning, and improvements needed to internal governance and oversight. Recommendations are made on these issues at the end of this chapter.
- 3.5 The Committee also recommends a broader change to ensure that guidance given to government entities on MoG changes is improved and that responsibilities are more clearly defined and understood.

Background and audit findings

- 3.6 In its submission, AGD noted that:

The Lobbying Code's purpose is to promote trust in the integrity of government processes and ensure that contact between lobbyists and Australian Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty ... Any lobbyist who acts on behalf of third-party clients for the purposes of lobbying Australian Government representatives must register their details and comply with the requirements of the Lobbying Code.¹

The 2018 report

- 3.7 The 2018 report examined PM&C's management of the Lobbying Code. It made one recommendation, which was that PM&C review the appropriateness of current arrangements in supporting the achievement of the Lobbying Code's objectives, by:
- implementing a strategy to raise awareness of the scheme among lobbyists and Government staff;
 - assessing risks to compliance with the scheme and providing advice to Government on the sufficiency of the Lobbying Code's management framework; and

¹ Attorney-General's Department, *Submission 6*, p. 3.

- developing a set of performance measures to better inform stakeholders with respect to the Lobbying Code's policy objectives.²

3.8 Although formal responsibility for managing the Lobbying Code passed from PM&C to AGD in May 2018, final transfer of management of the Register was delayed for a year so that PM&C could complete improvements to the IT system used to manage the Register.

The 2020 report

3.9 The 2020 report examined the transfer of the Lobbying Code and in particular looked at how well AGD had implemented the ANAO's 2018 report recommendation.

3.10 The 2020 report found that AGD had not effectively implemented the recommendation from the 2018 report. In particular, it found that:

- AGD 'did not develop a communications or stakeholder engagement strategy for the Code' and that consequently 'AGD's effectiveness in communicating regulatory requirements to lobbyists cannot be assessed';
- AGD 'did not systematically consider or manage risks that impact the ability or willingness of regulated entities and individuals to comply with the Code'; and
- AGD 'did not develop an evaluation framework for assessing the regime's success in meeting objectives and did not develop performance measures'.³

3.11 The 2020 report therefore contained two recommendations:

- that AGD establish processes for the implementation of the 2018 report's recommendation; and
- that it 'evaluate the sufficiency of the current regulatory regime for lobbying and provide advice to Government about whether the regime is able to achieve the regulatory objective of promoting public trust in the integrity of government processes'.⁴

3.12 AGD agreed with both of the 2020 report's recommendations.

3.13 In the wake of the 2018 report the Government considered whether it was appropriate to legislate the scheme in a manner similar to the Foreign

² Attorney-General's Department, *Submission 6*, p. 2.

³ Auditor-General Report No. 48 2019-20, pp. 9-10.

⁴ Auditor-General Report No. 48 2019-20, p. 10.

Influence Transparency Scheme. The Government ultimately decided against such a move.⁵ Consideration was again given to this option after the 2020 report. However, AGD advised that its 'primary focus ... will be about administrative and operational enhancements to the existing code'.⁶

Issues with the transfer of the Register's IT system

- 3.14 The AGD submission noted that upon PM&C's completion of the upgrades to the IT system which managed the Register, and as the final element of the MoG change, management of the IT the system was transferred to AGD. AGD immediately experienced technical issues with the new system:

The department experienced a number of technical issues after the new IT system was deployed. The most significant of these issues were bugs in the automated workflows which resulted in an inability to publish accurate information on the public Lobbyist Register. Lobbyists were also unable to update their details on the Lobbyist Register, as the Lobbying Code requires on a bi-annual basis.⁷

- 3.15 Consequently, according to AGD, its focus turned to remediating the IT system – initially via an interim solution involving manual processing of some Register management data:

The department's focus after the transfer of the Lobbyist Register was to address continued technical issues while managing the mandatory update periods required under the Lobbying Code as effectively as possible. In doing so, the department prioritised the development and implementation of a replacement, interim IT solution.⁸

- 3.16 At the same time the department began the development of a long-term solution, 'the development of a long-term fit-for-purpose IT system that would assist in implementing the recommendation from the 2018 report'.⁹

⁵ Auditor-General Report No. 48 2019-20, p. 46.

⁶ Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard*, 4 March 2021, p. 14.

⁷ Attorney-General's Department, *Submission 6*, p. 4.

⁸ Attorney-General's Department, *Submission 6*, p. 4.

⁹ Attorney-General's Department, *Submission 6*, p. 4.

Weaknesses in interagency communication and planning

3.17 The audit found that throughout the MoG transfer of the Register and the Lobbying Code there have been weaknesses in communication between the two departments, and insufficient planning for the transfer.

3.18 AGD highlighted the 12-month delay between the transfer of responsibility for the Lobbying Code to AGD and the transfer of administrative responsibility for it:

PM&C administered the Lobbying Code from 2008 until a revised Administrative Arrangements Order in May 2018 made the Attorney-General responsible for whole-of-government integrity policies and activities, including the Code. However, PM&C retained responsibility for the day-to-day operation of the Lobbyist Register until 10 May 2019, to allow it to develop a new supporting IT system. Upon completion of the new IT system, responsibility transferred to the department.¹⁰

3.19 The ANAO noted that conflicting statements had been made on responsibility for the code by PM&C and AGD during the 12-month delay:

[I]t seems to have come out in some Senate estimates as well, where neither seemed to be taking responsibility during that period for the code or the register.¹¹

3.20 The 2020 report went into greater detail about this apparent lack of clarity with respect to oversight of the Lobbying Code :

The extended period of one year involved in transferring the Register IT system from PM&C to AGD led to differing views about which department held accountability for the Code and the ANAO recommendation, during the period May 2018 to May 2019.

- On 22 October 2018, a PM&C officer responded to a question about the Code before the Senate Finance and Public Administration Legislation Committee by stating, 'That would be a question now that should go to the Attorney-General's Department as a policy issue.'
- On 23 October 2018, an AGD officer responded to a question about the Code before the Senate Legal and Constitutional Affairs Legislation Committee by stating 'as we haven't taken that function over yet, we're just not aware of it.'

¹⁰ Attorney-General's Department, *Submission 6*, p. 4.

¹¹ Ms Lisa Rauter PSM, Group Executive Director, ANAO, *Committee Hansard*, 4 March 2021, p. 10.

It's PM&C at the moment. You go through them ... It's an operational question in relation to how the code and the register operate, and, at this point, we are not operationally responsible for the register.'

- When answering a question in the House of Representatives on 9 September 2019, the Attorney-General advised Parliament that 'Responsibility for the Australian Government Lobbying Code of Conduct and the Register transferred from the Department of Prime Minister and Cabinet to the Attorney-General's Department on 10 May 2019.'¹²

3.21 In addition to the apparent confusion over responsibility for implementing the 2018 report's recommendation, the MoG transfer was hampered by a lack of formal planning. According to the 2020 report:

AGD did not conduct a due diligence exercise within the first five to ten days for the elements of the MoG relating to the Code, develop an implementation plan with milestones or specify a completion date for administrative arrangements. PM&C and AGD have advised that they did not consider the MoG to be complex or contested.¹³

3.22 AGD advised that it had no formal plan in place for the transfer of the Register:

We didn't have a written plan. Some of it was because there was a lack of clarity about when PM&C would have finished its changes to its systems to transfer across, but we should have had - and I think in future, having learned the lesson, we will have - more of a written agreement about what was happening ... it was an evolving situation. I think it was something where the issues that inhibited the transfer became more apparent over time. We would, with hindsight, have had a plan in writing, but we did not. We had regular conversations with PM&C but didn't set out a written understanding with them.¹⁴

Internal governance and oversight

3.23 The inquiry highlighted weaknesses in AGD's internal governance with respect to the transfer of responsibility for the Lobbying Code and with it the recommendation from the 2018 report.

3.24 The 2020 report noted weaknesses in AGD's oversight of the implementation of the 2018 report's recommendation, noting that the

¹² Auditor-General Report No. 48 2019-20, p. 29.

¹³ Auditor-General Report No. 48 2019-20, p. 30.

¹⁴ Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard*, 4 March 2021, p. 8.

department focused only on the IT problems associated with the transfer to the exclusion of the audit report:

Divisional responsibility for the Code within AGD was clearly established. The Executive Board (Board) and Senior Management Committee (SMC) had visibility of the Code, however this was focused on technological issues associated with the transfer of the Register rather than the implementation of the ANAO recommendation. Progress against the recommendation was reported to the [Audit and Risk Management Committee], but the commencement of this process was delayed.¹⁵

- 3.25 In its submission AGD noted that it has only recently begun to consider the recommendation:

The department has begun establishing governance processes to ensure it implements the recommendation of the 2018 report. In particular, the department is finalising an implementation plan [that] sets out the milestones and deliverables that will assist in meeting this recommendation.¹⁶

- 3.26 Deputy Auditor-General Ms Rona Mellor emphasised that regulators need to pay attention to internal governance issues to ensure that they are effective as regulators:

... internal regulation requires the same thought process about whether or not compliance is achieved or else how do you know that your internal regulation is successful? ... Our expectation is that, whatever the source of the regulation—whether it's legislation, whether it's a rules set of some kind—the owner of it understands whether it's successfully being implemented.¹⁷

- 3.27 AGD advised that although its work on this issue is still in progress, it expects to complete it within the year:

The ANAO recommended an evaluation framework and performance measures. We have given some thought to that already and have a preliminary draft. We've started to make some changes to the register system already for collection of metrics about numbers and time frames, for example, but we're working on those performance measures, including the time it takes us to respond to inquiries, deal with breaches and set performance measures around that. But that is a work in progress.¹⁸

¹⁵ Auditor-General Report No 48 2019-20, p. 9.

¹⁶ Attorney-General's Department, *Submission 6*, p. 6.

¹⁷ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 10.

¹⁸ Ms Sara Chidgey, *Committee Hansard*, 4 March 2021, p. 13.

Need for clarity in transfer guidance

3.28 It also emerged in the course of the public hearing that there is a gap in the MoG guidelines maintained by the Australian Public Service Commission (APSC) with respect to the handling of Parliamentary Committee and ANAO recommendations in the course of a MoG transfer.

3.29 According to the ANAO:

The June 2016 *Machinery of Government Changes: A Guide for Agencies* does not address the need for agencies to consider in their planning and implementation of machinery of government changes the transfer of responsibility for actioning 'in-progress' or not yet completed recommendations from ANAO audits or Parliamentary inquiries. This is a gap in the guidance that is developed by the Department of Finance and Australian Public Service Commission.¹⁹

3.30 The ANAO said that in the course of providing detailed information on the functions being transferred the guide does mention audits:

The guide does address, in paragraph 9, the responsibility of the losing agency to provide the gaining agency information following a detailed examination of all aspects of the functioning being transferred, including unfinished audits.²⁰

3.31 However, the results of this audit indicate that there may be a need for clearer advice from the APSC on the handling of Committee and ANAO recommendations in the course of MoG changes.

Committee comment

3.32 This audit report and AGD's response to it highlighted the importance of interagency communication and good internal governance arrangements during transfers of responsibility between departments.

3.33 As a result of the focus on developing a long-term IT solution which can implement the 2018 report's recommendation, the recommendation is yet to be finalised. However the 2020 report highlighted that more attention could and should have been paid to the original ANAO recommendation in AGD's internal governance committees.

¹⁹ Australian National Audit Office, *Submission 9.1*, p. 1.

²⁰ Australian National Audit Office, *Submission 9.1*, p. 1

- 3.34 The Committee acknowledges AGD's commitment that it will implement the recommendation and encourages it to do so as soon as possible.
- 3.35 The inquiry also revealed a gap in the APSC's guidance on how Parliamentary Committee and ANAO recommendations are treated in the process of machinery of government changes. The Committee considers that this guidance should be updated to provide greater clarity to agencies as to how to implement recommendations made to other departments prior to transfers of responsibility.
- 3.36 While acknowledging the priority accorded to ensuring the IT system and Register were working, the Committee is concerned by the slow progress in developing a communications and engagement strategy to raise awareness of the Code. AGD acknowledged that this is key to improving compliance by encouraging registration.

Recommendation 3

- 3.37 **The Committee recommends that the Attorney-General's Department provide a written update on the implementation of the recommendations from the 2018 and 2020 audit reports. The update should include details on:**
- **post-transfer IT system issues;**
 - **the Lobbying Code of Conduct's communications and stakeholder engagement strategy;**
 - **the risk management strategy for the Lobbying Code; and**
 - **AGD's progress in developing an evaluation framework for assessing the Lobbying Code's success in meeting its objectives.**

The Committee requests that the department provide this update within 6 months of this report.

Recommendation 4

- 3.38 **The Committee recommends that the Australian Public Service Commission update its guidance to government entities on machinery of government changes in light of the Auditor-General's Follow-up Audit into the Management of the Australian Government Lobbying Code of Conduct. This should be done with a view to giving greater clarity on**

responsibility for the implementation of recommendations made by Parliamentary Committees and the ANAO that are affected by machinery of government changes.

4. Administration of Financial Disclosure Requirements under the Commonwealth Electoral Act

Auditor-General Report No. 8 2020–21

Introduction

- 4.1 The Commonwealth entity included in the audit was the Australian Electoral Commission (AEC). The objective of the audit was to examine the effectiveness of the AEC's management of the financial disclosure requirements under Part XX of the *Commonwealth Electoral Act 1918* (the Electoral Act).¹
- 4.2 This chapter:
- Provides background information on the financial disclosure scheme, the audit report's findings and the AEC's response;
 - Discusses issues of disclosure accuracy, completeness and timeliness;
 - Discusses the AEC's approach to risk assessment and compliance; and
 - Considers the disagreement between the AEC and ANAO with respect to enforcement action.

¹ Commonwealth Electoral Act 1918, <https://www.legislation.gov.au/Details/C2021C00140>, accessed 23 April 2021.

Chapter overview

- 4.3 The Committee's inquiry into this report highlighted a disconnect between the views of the ANAO and the audited entity, the AEC, on a number of core issues. This included disagreements in relation to the AEC's role in enforcing breaches of the Electoral Act, the ANAO's use of data and the impact of recent legislative changes on the accuracy of this information, and the adequacy of risk assessment practices.
- 4.4 This chapter will outline that the Committee believes the ANAO could look to improve consultation with audited entities and pay greater attention to their interpretation of their role and functions, particularly for entities involved in niche areas of regulation.

Background

- 4.5 The financial disclosure scheme was introduced in 1983 with the aim of increasing the transparency of elections and informing the public about the financial dealings of political parties, candidates and other groups involved in the electoral process.
- 4.6 The scheme requires entities (parties, candidates, donors, and others) that receive funding, provide funding, or incur electoral expenditure to lodge disclosure returns with the AEC. The intention of the scheme is that such disclosures will permit voters to make more informed judgements by providing a clearer picture of which entities fund political groups and how much money they give.²
- 4.7 The Electoral Act gives the AEC enforcement powers over the financial disclosure scheme, including the power to undertake compliance reviews and investigations to ensure entities are meeting their legislated requirements. Following amendments made to the Electoral Act in 2018, the Act provides for both civil and criminal penalties for non-compliance with the scheme's requirements.

Audit findings

- 4.8 The audit report found that the AEC's management of financial disclosures required by the Electoral Act is 'partially effective' and that its

² Auditor-General Report No. 8 2020-21, p. 7.

administration of the financial disclosure scheme is 'limited in its effectiveness'.³ The report said that:

- while the AEC receives almost all the financial disclosure returns it seeks, more than 20 per cent of annual returns and 17 per cent of election returns are lodged late;
- the AEC does not make effective use of data sources to cross-check return information and to identify entities that failed to lodge a return at all (that is, mistaken nil-returns);
- there is insufficient evidence that returns that are provided are accurate and complete analysis of returns that are made is 'limited'; and
- risk management is not carried out in accordance with the AEC's risk management framework.⁴

4.9 The ANAO also identified issues with the AEC's compliance monitoring and enforcement, and found that 'the AEC is not well placed to provide assurance that disclosure returns are accurate and complete'.⁵

4.10 The ANAO pointed to four reasons for this conclusion:

- the AEC has not implemented the recommendations of past reviews, or absorbed information from other regulatory bodies with applicable expertise;⁶
- the AEC's risk-based compliance framework is limited and compliance is under-resourced;⁷
- the AEC's compliance activities are not timely or effective, and are sometimes incomplete;⁸ and
- the AEC 'does not appropriately act on identified non-compliance'.⁹

Entity response and audit conduct

4.11 The AEC agreed to two ANAO recommendations, agreed with qualification to four recommendations, and disagreed with one. The AEC did not agree to Recommendation 7 of the audit report, which argued that it should

³ Auditor-General Report No. 8 2020–21, p. 7.

⁴ Auditor-General Report No. 8 2020–21, p. 22.

⁵ Auditor-General Report No. 8 2020–21, p. 37.

⁶ Auditor-General Report No. 8 2020–21, p. 37.

⁷ Auditor-General Report No. 8 2020–21, p. 40.

⁸ Auditor-General Report No. 8 2020–21, p. 48.

⁹ Auditor-General Report No. 8 2020–21, p. 57.

implement 'a graduated approach to addressing non-compliance, including by making better use of its investigatory powers', and by 'seeking to have prosecutions undertaken ... or civil penalties applied by the courts where serious or repeat noncompliance has been identified'.¹⁰

- 4.12 Though the AEC's primary disagreement was with the ANAO's recommendation on enforcement, its submission also expressed its reservations with the ANAO's findings more generally:

The audit concluded that the AEC's management of the financial disclosure scheme was partially effective. While the AEC welcomes all forms of scrutiny in this highly complex area, it does not agree with the conclusion and considers that the report demonstrates a misunderstanding by the ANAO of the Electoral Act which the AEC administers.¹¹

- 4.13 The AEC argued that the legislative intent of the scheme is to encourage 'transparency through disclosure', and that 'the AEC has consistently maintained this approach since [the scheme's creation in 1983], and the AEC's application of the intent has not been corrected by Parliament and has been largely uncontested by stakeholders'.¹²

- 4.14 In the AEC's view:

... the purpose of the penalties in Part XX is to encourage transparency by deterring non-compliance and, where necessary, penalising intentional non-compliance ... it is also not clear what would be gained by pursuing a civil penalty for minor non-compliance, for example against a person or entity who lodged a return late, or who made an amendment to correct their return on realising (or being informed by the AEC) that there was an error in the original return.¹³

- 4.15 The Electoral Commissioner, Mr Tom Rogers, elaborated for the Committee:

The conclusion drawn in the ANAO report into the administration of the scheme runs counter to the extent of disclosure achieved by the AEC ... the AEC has not detected any systemic issues of intentional or large-scale non-compliance with the existing legislation. The AEC's enforcement and prosecution regime continues to reflect the legislative intent of Part XX of the Commonwealth Electoral Act: transparency through disclosure. We have

¹⁰ Auditor-General Report No. 8 2020–21, p. 11.

¹¹ Australian Electoral Commission, *Submission 7*, p. 1.

¹² Australian Electoral Commission, *Submission 7*, p. 3.

¹³ Australian Electoral Commission, *Submission 7*, pp. 3-4.

consistently upheld the purpose to encourage transparency and deter noncompliance by adopting an educative approach.¹⁴

- 4.16 Further, Mr Rogers argued that the ANAO's 'misunderstanding' of the Electoral Act was at least in part a consequence of the ANAO's failure to consult effectively with AEC officials during the audit process:

If they're doing an audit, I would have thought that they would have approached the key people. I'm responsible for administering that scheme ... Not once was I interviewed in a formal interview as part of this process. The deputy commissioner of the AEC, who is the chair of the compliance review committee, was not interviewed at all.¹⁵

- 4.17 The ANAO noted:

At the start of an audit, the first thing we do is to communicate with the entity formally and offer an entry interview. At this audit, the AEC was represented up to a certain level in the organisation. In previous audits of the AEC, the commissioner himself has participated in the entry interview and exit interviews. We don't dictate to the entity who should represent the entity at those opportunities; we offer the opportunity. The designation advice to the AEC that we're auditing goes to the commissioner. The proposed report, including the offer for further discussion, goes to the commissioner... we leave it to the entity to decide who it wishes to have represent it in those discussions with us on what we're finding and what we're doing.¹⁶

- 4.18 Mr Rogers also argued that the data underlying the audit report may be misleading, first because of recent legislative changes, and second because the audit was conducted at the wrong stage in the 'compliance cycle':

.. the legislation changed in 2018 and introduced new categories, such as political campaigner. Our feeling was that this audit would have been far more useful had it come at the end of what we call the compliance cycle and electoral cycle rather than upfront, because some of the statistics that are quoted in the report were therefore misleading because we were still seeking various returns at that point.¹⁷

- 4.19 The ANAO noted that the audit was focused on the framework rather than the actual returns received:

¹⁴ Mr Tom Rogers, Electoral Commissioner, *Committee Hansard*, 4 March 2021, p. 17.

¹⁵ Mr Tom Rogers, *Committee Hansard*, 4 March 2021, p. 20.

¹⁶ Mr Brian Boyd, ANAO, *Committee Hansard*, 4 March 2021, p. 20.

¹⁷ Mr Tom Rogers, *Committee Hansard*, 4 March 2021, p. 19.

...we're auditing a framework, and that happens at a point in time. So that is what the report shows. This might apply, for example, where we're saying returns weren't lodged on time, and as the audit proceeded, as further returns were obtained by the AEC, we would update our data to reflect those further returns. But that would simply reflect that now more returns have come in ... Yes, as the audit proceeded, the AEC would then obtain more returns, but that didn't turn those returns into being on time; it simply meant there were now fewer returns outstanding but more late returns. So that's what our statistics reflect.¹⁸

Accuracy and reliability of regulatory information

- 4.20 The AEC's approach to regulating the financial disclosure scheme prioritises educating stakeholders and therefore relies on them to comply by providing accurate and timely returns. The audit report noted that the AEC must have access to accurate, timely and complete disclosure information to successfully regulate the scheme:

To achieve the purpose of the disclosure scheme, it is important that reports be obtained from all those with a reporting obligation and that the reports obtained be timely, accurate and complete.¹⁹

- 4.21 However, the ANAO found that the AEC's initial analysis of disclosure returns is not sufficiently rigorous:

There is insufficient evidence that annual and election returns are accurate and complete. While the AEC checks that all fields have been completed and looks for some obvious errors it does not compare the figures disclosed with other data available from internal or external sources, instead relying on its annual compliance review program to provide sufficient evidence that the annual and election returns are accurate and complete.²⁰

- 4.22 Although the scheme relies on accurate information being provided to the AEC, the ANAO found that when reviewed in detail only one in five disclosure returns was found to be accurate and complete:

Over the five-year period we looked at, 78 per cent of compliance reviews required a return to be corrected in some way. That never dropped below

¹⁸ Mr Brian Boyd, ANAO, *Committee Hansard*, 4 March 2021, pp. 19-20.

¹⁹ Auditor-General Report No. 8 2020-21, p. 12.

²⁰ Auditor-General Report No. 8 2020-21, p. 8.

about 67 per cent in any year, so you're consistently finding errors that need correction through the compliance review process.²¹

4.23 The ANAO recommended that the AEC use data analytics and matching 'to provide greater assurance over whether data included in returns can be relied upon'.²²

4.24 The AEC noted that:

... there are inherent difficulties and risks in using other public sources of financial information due to the different requirements of reporting to the AEC and bodies such as the Registered Organisations Commission and the Australian Charities and Not-for-profits Commission.²³

Risk and compliance

4.25 Generally, risk assessments should inform the direction and extent of compliance and enforcement activity. The Regulator Performance Framework states that 'comprehensive risk assessment processes are essential to ensuring that resources are targeted to the areas requiring the most attention'.²⁴ As such, for risk-based compliance and enforcement activity to be effective, an entity's risk assessments should be properly targeted and linked to regulatory outcomes.

4.26 The audit report found that the AEC identified only one operational risk and that identified risks were not being managed according to the AEC's own risk-management guidance.²⁵

4.27 The AEC agreed to the ANAO's resulting recommendation that it identify and develop treatment plans for risk to the financial disclosure scheme:

The AEC agreed with this recommendation and has identified the risks of non-compliance by other persons or entities with disclosure obligations. Additional controls have also been recognised and treatment plans developed.²⁶

²¹ Mr Brian Boyd, ANAO, *Committee Hansard*, 4 March 2021, p. 27.

²² Auditor-General Report No. 8 2020–21, p. 34.

²³ Australian Electoral Commission, *Submission 7*, p. 2.

²⁴ Regulator Performance Framework, p. 20.

²⁵ Auditor-General Report No. 8 2020–21, pp. 34–5.

²⁶ Australian Electoral Commission, *Submission 7*, p. 2.

4.28 In relation to compliance risk, the audit report noted that the AEC had commissioned a review of its risk matrix but had not implemented the changes it recommended, and it found that 'the AEC does not apply an appropriate risk based approach to planning and conducting compliance activities'.²⁷

4.29 The AEC argued that its compliance program is a balanced one in light of the fact that there is no evidence of widespread non-compliance:

The AEC's risk based approach to its compliance review program balances the preservation of transparency of financial dealings with natural justice and the prudent use of Commonwealth resources. I'd point out that the AEC has not detected any systemic issues of intentional or large-scale noncompliance with the existing legislation.²⁸

4.30 Regardless, the AEC agreed with the audit report's recommendation that it establish performance measures for its compliance program:

The AEC agreed with this recommendation and updated its performance measures for 2020-21 in accordance with the recent changes to the Public Governance, Performance and Accountability Act 2013 (PGPA Act). The measures are currently being reviewed for 2021-22 to ensure that they continue to meet PGPA Act requirements and are relevant, reliable and complete.²⁹

Enforcement

4.31 Enforcement was a key area of disagreement between the AEC and the ANAO. The audit report concluded that the AEC was not making appropriate use of its enforcement powers:

The AEC does not appropriately act upon identified non-compliance. It is not making effective use of its enforcement powers and as such has not implemented a graduated approach to managing and acting on identified non-compliance.³⁰

²⁷ Auditor-General Report No. 8 2020–21, pp. 40–44.

²⁸ Mr Tom Rogers, *Committee Hansard*, 4 March 2021, p. 17.

²⁹ Australian Electoral Commission, *Submission 7*, p. 3.

³⁰ Auditor-General Report No. 8 2020–21, p. 57.

- 4.32 The ANAO recommended that the AEC adopt a graduated approach to enforcement in line with established regulatory practice. It said the AEC should:

...implement a graduated approach to addressing non-compliance, including by making greater use of its investigatory powers and seeking to have prosecutions undertaken by the Commonwealth Director of Public Prosecutions or civil penalties applied by the courts where serious or repeat non-compliance has been identified.³¹

- 4.33 The AEC disagreed with this recommendation, noting that it considers its approach to non-compliance to be appropriate:

The AEC did not agree to this recommendation as it has a graduated approach to addressing non-compliance, makes appropriate use of its investigatory powers and undertakes enforcement action where necessary. The AEC is of the view that a more heavy-handed approach to enforcement is not warranted.³²

- 4.34 In the AEC's view, its approach to enforcement is proper and consistent with many years of practice:

The AEC welcomes all forms of scrutiny in this important area of electoral administration. The AEC has administered the funding and disclosure scheme effectively and in line with the legislative intent - transparency through disclosure - for many years.³³

- 4.35 Mr Rogers went on to emphasise that the AEC's focus is to prevent non-compliance through education, and argued that this approach is more in line with the Electoral Act's intent:

...the AEC's enforcement and prosecution regime continues to reflect the legislative intent of Part XX of the Commonwealth Electoral Act ... We have consistently upheld the purpose to encourage transparency and deter noncompliance by adopting an educative approach.³⁴

- 4.36 However, the AEC also said that there may be a place for less costly enforcement mechanisms, such as administrative penalties – that is the power to issue fines for non-compliance:

³¹ Auditor-General Report No. 8 2020–21, p. 62.

³² Australian Electoral Commission, *Submission 7*, p. 3.

³³ Mr Tom Rogers, *Committee Hansard*, 4 March 2021, p. 17.

³⁴ Mr Tom Rogers, *Committee Hansard*, 4 March 2021, p. 17.

While administering the disclosure scheme the AEC has found that inaccuracies are generally administrative errors or misunderstanding of the legislation. The AEC considers there may be merit in administrative penalty powers as an additional tool in the suite of enforcement options available, particularly for straightforward matters such as late lodgement of a return.³⁵

- 4.37 The AEC noted, however, that this would require legislative change and additional resourcing:

Any changes to legislation would likely necessitate changes to AEC's administrative process and systems which would have financial implications for the AEC. Additionally, as noted above, any change to the legislation is a matter for Parliament to decide.³⁶

Committee comment

- 4.38 The Committee acknowledges the differences in understanding between the ANAO and the AEC in relation to the frameworks applying to the financial disclosure scheme.
- 4.39 The Committee acknowledges the AEC's explanation of its longstanding approach to achieve transparency through disclosure. The Committee also acknowledges the AEC's explanation of its educative approach and its evidence that this is appropriate in many instances, including for major political parties, candidates and donors, given the serious reputational risks of non-compliance.
- 4.40 The AEC's response to the ANAO report acknowledges that there is room for continuous improvement in the AEC's approach to compliance and the Committee considers that this should occur in the context of the Regulator Performance Framework.
- 4.41 The Committee agrees with the ANAO's recommendations with respect to information management, data matching and analytics, risk management and performance measurement, and considers that the administration of the scheme would be improved by their implementation.

³⁵ Australian Electoral Commission, *Submission 7.1*, p. 3.

³⁶ Australian Electoral Commission, *Submission 7.1*, p. 3.

5. Regulation of the National Energy Market

Auditor-General Report No. 5 2020–21

- 5.1 The Commonwealth entity included in the audit was the Australian Energy Regulator (AER). The objective of the audit was to assess the effectiveness of the AER's regulation of energy markets.
- 5.2 This chapter:
- provides background information on the National Energy Market (NEM), the AER, and the audit report's findings;
 - outlines the AER's governance and performance measurement practices;
 - discusses the AER's handling and use of regulatory information;
 - discusses the AER's risk management processes; and
 - briefly considers other evidence to the inquiry.

Chapter overview

- 5.3 The Committee's inquiry into this report found that the AER's regulation of energy markets in Australia was largely effective, with ANAO recommendations suggesting improvements to generally sound regulatory processes. All recommendations were accepted, and the AER engaged constructively throughout the inquiry.

Background and audit findings

National energy governance

- 5.4 The governance of energy generation and sale in Australia is complex. The NEM commenced operation in 1998. In 2004, the Council of Australian Governments (COAG, now the National Cabinet) established a governance framework to oversee the NEM. The framework is set out in the Australian Energy Market Agreement, under which Australian jurisdictions may develop and implement Australian Energy Market Legislation, most of which relates to electricity and gas.¹
- 5.5 In addition, the framework set up three market institutions that were accountable to the then-COAG Energy Council (now the Energy National Cabinet Reform Committee).²
- 5.6 The AER is one of the three market institutions so established, along with the Australian Energy Market Commission (AEMC) and the Australian Energy Market Operator (AEMO). Each has its own functions:
- AEMC creates and revises National Energy Rules under the National Energy Laws and provides advice to participating governments;
 - AEMO is responsible for operating Australia's electricity and gas markets and systems, through day-to-day management of wholesale and retail energy market operations; and
 - AER is responsible for regulating the NEM in jurisdictions that have adopted Australian Energy Market legislation.³
- 5.7 In 2017 an additional body, the Energy Security Board (ESB), was established by the then-COAG Energy Council to coordinate the implementation of energy reform and provide oversight of energy security and reliability. The ESB has an independent chair and deputy, as well as the leaders of the AER, AEMO and AEMC as members.⁴

¹ Key energy market legislation includes the National Electricity Law, the National Gas Law, and the National Energy Retail Law. The laws, and their accompanying rules and regulations, are set out in model legislation passed in South Australia with identical implementations in participating jurisdictions. See *Energy Industry Regulation*, <https://www.aer.gov.au/industry-information/energy-industry-regulation>, accessed 19 May 2021.

² Auditor-General Report No. 5 2020–21, p. 9.

³ Auditor-General Report No. 5 2020–21, p. 20.

⁴ Auditor-General Report No. 5 2020–21, p. 20.

The AER

5.8 Under the national legislation, the AER's key functions to are to:

- regulate wholesale electricity and natural gas through price-setting of monopoly networks and through regulation where competition exists; and
- regulate retail electricity and gas markets where the National Energy Retail Law applies – South Australia, New South Wales, Queensland, the Australian Capital Territory, and Tasmania (electricity only).⁵

5.9 In 2018-19 the AER was responsible for regulating:

- 110 generation businesses with annual turnover of nearly \$20 billion;
- 84 retail businesses providing energy services to approximately 9.5 million residential and commercial customers; and
- 30 transmission and distribution networks with assets worth \$107 billion.⁶

5.10 The AER is established under Section 44AE of the *Competition and Consumer Act 2010*.⁷ The Act provides for the creation of the AER Board, which is comprised of two Commonwealth members and three state or territory members. The powers of the AER Board are set out in the Act and may be drawn from the Act itself, other Commonwealth laws, or from state and territory energy laws.⁸

5.11 The Chair of the Australian Competition and Consumer Commission (ACCC) provides staff to assist the AER Board in carrying out its functions. This AER division is led by an ACCC employee known as the AER Chief Executive Officer. For clarity and following the audit report, in most instances the term AER will refer to the Board and the division jointly. If necessary they will be distinguished.

Audit findings

5.12 In general, the report made positive findings and its recommendations are mostly aimed at the improvement of existing practices and represent

⁵ AER, Strategic Plan 2020-2025, <https://www.aer.gov.au/publications/corporate-documents/aer-strategic-plan-2020-2025>, p. 5, accessed 21 May 2021.

⁶ Auditor-General Report No. 5 2020–21, pp. 20-21.

⁷ Competition and Consumer Act 2010, <https://www.legislation.gov.au/Series/C2004A00109>, accessed 21 May 2021.

⁸ Auditor-General Report No. 5 2020–21, p. 21.

comparatively modest changes. Recommendation 2 related to governance, and suggested that the AER would benefit from an AER-specific corporate plan and strategy. Recommendations 3 and 4 related to information management, and argued for improvements in the documentation and communication of review and assessment processes, as well as for better collection, management and use of compliance information. Finally, recommendations 1, 5 and 6 suggested refinements to the way the AER manages organisational and compliance risks, and to how those risks might better inform its decision-making.

5.13 The AER agreed with all six recommendations.

Governance and performance measurement

5.14 The ANAO's assessment of the AER's internal performance measurement and governance while regulating the NEM was, overall, a positive one:

The AER has established largely effective governance and oversight arrangements for its National Energy Market regulatory activities ... Between April 2019 and April 2020, the AER was progressing the implementation of recommendations from a number of reviews to improve governance and operational management arrangements, including to increase the strategic focus of the AER Board.⁹

5.15 However the report identified a number of areas in which the AER could improve its internal governance. Partly these arose from the complexity of the AER's external reporting and accountability arrangements:

The AER has two distinct arrangements for external reporting on its performance - the Commonwealth performance framework and the statements of expectations from the COAG Energy Council and Commonwealth Treasurer. These two frameworks were not well linked, and neither adequately captured the AER's purposes or provided a clear read from the purposes to the AER's deliverables.¹⁰

5.16 Dr Liz Develin, Chief Executive Officer of the AER, provided updated information on these arrangements:

The energy minister's forum provides a statement of expectations to the Australian Energy Regulator. The last one of those statements covered the period 2014 to 2017. In response to that, the Energy Regulator prepares a

⁹ Auditor-General Report No. 5 2020–21, p. 30.

¹⁰ Auditor-General Report No. 5 2020–21, p. 11.

statement of intent, which was the last one covering that period ... Separately, with the new governance arrangements with energy ministers, we provide an annual plan of our priorities over the year and we have been reporting to energy ministers on a six-monthly basis on our priorities, our budget, our governance arrangements ... In terms of the framework of the energy ministers, they are very much setting priorities in accordance with the Strategic Energy Plan. Our statement of intent is, really, to respond to those, in terms of what we will do. Separately, we have the same accountability as other government agencies through parliamentary budget statements, annual reports and those things, which are far more through the Commonwealth government processes.¹¹

5.17 The audit report noted the central role in facilitating good governance outcomes played by corporate planning documents:

The corporate plan is intended to be the entity's primary planning document. It is required to set out the purposes and activities that the entity will pursue and the results it expects to achieve, including explaining the environment and context in which the entity operates, its planned performance measures, risk profile and capabilities over a minimum of four reporting periods.¹²

5.18 The report went on to argue that the AER should have its own separate planning and strategy documents:

The AER's planning, performance and evaluation arrangements are not outlined in a framework document. They are not included under any performance measurement and evaluation framework developed by the ACCC. To ensure that the AER is well positioned to demonstrate that its purpose is met, the AER should develop a performance measurement framework that details the AER's purpose, strategies and activities to achieve the purpose, measures for assessing performance in the short to long term, and arrangements for evaluating the AER's success in achieving its purpose.¹³

5.19 The report also noted that the AER's existing planning documents do not have a sufficiently clear relationship between the organisation's purpose and its outcomes:

The purpose does not provide a 'clear read' to the AER's deliverables as it is not clear which deliverables contribute to efficient investment, operation and

¹¹ Dr Liz Develin, Chief Executive Officer, AER, *Committee Hansard*, 4 March 2021, p. 29.

¹² Auditor-General Report No. 5 2020–21, p. 40.

¹³ Auditor-General Report No. 5 2020–21, p. 40.

use of energy services for the long term interests of consumers with respect to price, quality, safety, reliability and security.¹⁴

5.20 As the ANAO explained:

In terms of their deliverables, activities and performance measures, when you follow them through ... what you can see is that matters, such as security, reliability, price and quality, are infrequently and sometimes never mentioned. Therefore, it's not clear how their planned performance arrangements are seeking to address that purpose.¹⁵

5.21 Consequently the ANAO recommended that the AER develop a performance measurement and evaluation framework with a corporate plan at its centre, which 'supports the AER to report on its effectiveness with respect to its purpose and primary activities and strategies'.¹⁶

5.22 The AER agreed to the recommendation and noted that it has addressed the recommendation by producing its own corporate plan, which previously was not separate from that of the ACCC:

The AER does not publish its own separate corporate plan. But to assist us in implementing this recommendation, with the agreement of the ACCC, we produced an AER-specific plan as part of the broader agency 2020-21 Corporate Plan. This was published at the end of August.¹⁷

5.23 The AER also advised the Committee that it has worked to improve its strategic planning:

In 2020, the AER undertook a significant strategic planning exercise, resulting in the development of our new Strategic Plan that outlines our vision, outcomes, objectives, priorities and enablers across our people, stakeholders and systems.¹⁸

5.24 The AER said that this effort will assist it in dealing with planning, report and performance management work in future:

The AER Strategic Plan forms the centrepiece of the AER's new planning and reporting arrangements. It is also enabling us to consider refinements to our

¹⁴ Auditor-General Report No. 5 2020–21, p. 44.

¹⁵ Ms Tracey Martin, Senior Director, ANAO, *Committee Hansard*, 4 March 2021, p. 31.

¹⁶ Auditor-General Report No. 5 2020–21, p. 49.

¹⁷ Australian Energy Regulator, *Submission 2*, p. 2.

¹⁸ Australian Energy Regulator, *Submission 2*, p. 2.

key performance indicators so that we move towards a clearer program logic incorporating a suite of output, outcome and impact measures.¹⁹

- 5.25 Dr Develin explained that the strategic plan has not only informed the corporate plan but also the AER's reporting to government:

I think one of the key things we've done since the audit is the release of a strategic plan for the Australian Energy Regulator, which then aligns with a corporate plan, so we now have a series of planning framework documents, if you like, which will assist the Commonwealth government requirements. Separately the strategic plan for the Australian Energy Regulator is also what we use in our annual reporting to ministers, so that has informed our report to ministers of what we plan to do this year and it will also inform our six-monthly reports on how we're going.²⁰

- 5.26 The AER noted that although its planning work remains an ongoing project, it was already beginning to deliver more favourable governance outcomes:

We took initial steps in this year's Corporate Plan to reduce our reliance on what the ANAO has characterised as more managerial output measures, with a greater emphasis now on outcomes and impact, but this is a work in progress. We are currently working with the AER Board on developing measures that allow us to account for our impact across our diverse areas of work, with a view to putting in place substantially improved measures for 2021-22.²¹

Information management and communication

- 5.27 Strong information management practices are vital to all effective regulators. The collection, management and use of regulatory information are essential to ensure decisions can be substantiated and legislative and other obligations can be satisfied. Open and frequent communication with stakeholders is also important.
- 5.28 The ANAO made two recommendations in this area – recommendation 3, which recommended better and more consistent documentation and communication of reviews and assessments, and recommendation 4, which dealt with the collection and use of compliance intelligence.

¹⁹ Australian Energy Regulator, *Submission 2*, p. 2.

²⁰ Dr Liz Develin, AER, *Committee Hansard*, 4 March 2021, p. 29.

²¹ Australian Energy Regulator, *Submission 2*, p. 3.

Documentation and communication of reviews and assessments

- 5.29 The Regulator Performance Framework – applicable to key government regulatory bodies – references both of these key principles and encourages regulators to act with transparency wherever possible:

Effective communication is vital for the efficient delivery of regulatory services and the achievement of positive regulatory outcomes. Clear advice and guidance can reduce the compliance burden on regulated entities and reduce non-compliant activity ... Where possible, better practice regulators clearly communicate the evidence base and approach used in the regulatory decision making process to regulated entities.²²

- 5.30 A number of other frameworks impose obligations on the AER regarding information management, including the National Energy Laws which detail a range of duties with respect to stakeholder communication. The audit report lists the following:

- providing information to support energy businesses to comply with the legislation and rules;
- operating an energy price comparator website;
- publishing performance and compliance reports on energy markets;
- implementing arrangements to ensure the contestability, reliability and security of the energy market;
- managing review and assessment processes in electricity and gas markets; and
- establishing and maintaining public registers, including for retailer authorisations and retail and network businesses exemptions.²³

- 5.31 The ANAO made generally positive findings on these duties. It found that:

- the AER's 'development and communication of procedures and guidelines has been largely effective' and that for the most part they met content and timeliness requirements;
- the 'Energy Made Easy' website was 'largely appropriate', but said that the AER 'cannot demonstrate that the website is effective or value for money' because it 'has not developed adequate performance measures and targets to measure the effectiveness of the website';
- the AER's stakeholder communication and publications were done on time and to standards; and

²² Regulator Performance Framework, pp. 18, 24.

²³ Auditor-General Report No. 5 2020–21, p. 51.

- the AER had maintained public registers of energy assets and businesses adequately.²⁴

5.32 The report found some issues with the AER's management of reviews and assessments. These are:

... processes [which] can involve the AER making decisions about energy business revenues, market entry, exemptions, disputes, and other matters covered by the law. For these assessment and review processes the laws establish criteria or conditions to be satisfied and may set timeframes within which applications, submissions and assessments need to be made. The AER must make an assessment of whether the criteria or conditions have been satisfied.²⁵

5.33 While the ANAO found that reviews of hardship policies were timely and well documented, in the case of many other policies they were not:

... with the exception of the Hardship Policy Review update completed in 2019, between 25 and 94 per cent of the AER's reviews and assessments examined were not timely ... retail reviews and assessments always documented the AER's assessments, whereas networks tariff reviews did not document assessments in 80 per cent of cases, and advice to the AER Board addressed the overall assessment of components of revenue proposals, while not addressing each legislative requirement, and supporting documentation was incomplete.²⁶

5.34 As a result the ANAO recommended that the AER develop tools to improve documentation and management of reviews and assessments, and to assist in the provision of reliable information on them for performance reporting purposes.

5.35 The AER agreed to the recommendation. In response, it said:

Three recent initiatives are assisting in addressing this recommendation:

- A new project management framework has been developed and is now in use following staff training last year. This training was attended by 95 per cent of executive level staff and included the development of a toolkit of core templates for project plans, scheduling and status reporting. This will assist in managing projects in a more consistent, structured way across the AER.

²⁴ Auditor-General Report No. 5 2020–21, pp. 52–54, p. 55, p. 68.

²⁵ Auditor-General Report No. 5 2020–21, p. 74.

²⁶ Auditor-General Report No. 5 2020–21, p. 75.

- Although we continue to draw on ACCC corporate resources, we are currently implementing an organisational redesign which includes enhancing AER-specific corporate functions. The dedicated new AER Corporate team will amongst other things lead on portfolio management reporting, as well as improvements to other processes and how we document work.
- We have already developed a number of materials and guides to promote agency wide consistency, including enhanced Board and committee paper templates. We have also developed a compliance and enforcement toolbox that includes guides and templates. These act as a useful resource for staff but also aid consistency in the management and delivery of our compliance work program.²⁷

Compliance intelligence

- 5.36 In addition to the above, the ANAO also identified issues with the AER's information management capabilities:

The AER did not fully establish and consistently apply robust systems and processes for gathering, storing, retrieving and analysing compliance intelligence from all sources. While the AER collected significant amounts of information, it was often captured or stored in ways that did not allow for efficient retrieval or analysis to inform the AER's compliance and enforcement activities.²⁸

- 5.37 The report noted that the AER makes some effort to provide templates and guidance to assist in the collection of structured data for easier use and analysis. However this is not consistently done:

Some of the AER's information collection processes are supported by templates and guidance, while others are not. In the absence of guidance or templates for providing intelligence, the AER receives unstructured data that may not contain important information for assessing compliance risk or identifying potential compliance breaches.²⁹

- 5.38 According to the ANAO, this had a direct impact on the AER's ability to use the information in its possession:

The AER's approach to storing information directly impacted its ability to quickly and easily retrieve all relevant intelligence from where it was stored.

²⁷ Australian Energy Regulator, *Submission 2*, p. 3.

²⁸ Auditor-General Report No. 5 2020–21, pp. 12-13.

²⁹ Auditor-General Report No. 5 2020–21, p. 82.

Where intelligence was stored consistently in a structured system (such as a database) it was straightforward to extract information.³⁰

- 5.39 Consequently the ANAO recommended that the AER improve its information management framework or arrangements for compliance intelligence to promote useful, specific data collection methods, and to ensure the AER was able to better make use of its data.
- 5.40 The AER agreed with this recommendation and said it would work towards its implementation:

A centralised repository of compliance intelligence will be developed that includes key details such as the type and location of the information stored. This will allow easier and more efficient retrieval, analysis and application in risk based decision making.³¹

- 5.41 The AER told the Committee that it expects to have its new information management system fully completed and operational in June 2021:

In December 2020 the functionality to support the information management framework was completed. This involved modifying the existing enterprise data asset register to manage, store and retrieve compliance assets. Since then we have been populating compliance data assets into this enhanced register.³²

- 5.42 On this issue, the Deputy Auditor-General said that information management was an issue for many regulators, and that the AER's response to the audit report was promising:

People involved in compliance activities collect a lot of information. One of the observations we made in this report was that it wasn't collected in a way that was useful and accessible to the people who might need it. They might need it in the individual activities they undertake but it's also really useful to a regulator to step back and have a look at that data and say, 'How is this market operating? Are new risks emerging?' et cetera. So it's positive to hear that the regulator has taken some steps to improve the quality of the collection [and] the structure.³³

³⁰ Auditor-General Report No. 5 2020–21, p. 84.

³¹ Australian Energy Regulator, *Submission 2*, p. 4.

³² Australian Energy Regulator, *Submission 2.1*, p. 1.

³³ Ms Rona Mellor PSM, Deputy Auditor-General, *Committee Hansard*, 4 March 2021, p. 33.

Risk management

- 5.43 The ANAO made two recommendations with respect to risk management. The first related to organisational risk – that is, risks that could impact the ability of the AER to perform its functions. The second related to management of compliance risk – the risk that regulated entities might fail to comply with the National Energy Market's laws, rules and regulations.

Organisational risk

- 5.44 The audit report observed that the AER's unique structure – sharing staff and governance arrangements with the ACCC while owing performance obligations to a wide range of stakeholders – can give rise to special challenges, especially with respect to risk.

- 5.45 The report pointed out that the AER is covered by, or included in, the ACCC's risk plan:

The ACCC has developed a risk management framework that is endorsed by the accountable authority and an enterprise risk register (that identifies risk at an enterprise and division level within the ACCC, and includes AER division risks).³⁴

- 5.46 However it noted that the ACCC risk plan 'did not address identification and management of shared risk in a consistent and systematic way under the plan'.³⁵ This posed a particular problem for the AER given that the organisational risks it faces may diverge from those of the ACCC. In particular:

AER Board and division shares many risks with other stakeholders including energy market institutions, the COAG Energy Council and energy market participants. For example, the AER division has identified a risk that substantial new functions are assigned to the AER Board without appropriate funding increases, sufficient notice, or in an area where the AER division does not have relevant expertise.³⁶

- 5.47 Consequently the ANAO recommended that the AER develop better mechanisms for reporting and treating its organisational risk.

³⁴ Auditor-General Report No. 5 2020–21, p. 37.

³⁵ Auditor-General Report No. 5 2020–21, p. 37.

³⁶ Auditor-General Report No. 5 2020–21, p. 38.

- 5.48 The AER agreed with the recommendation and said it has done significant work toward implementing it:

While the AER has an independent Board, the AER must also comply with the ACCC's risk management framework. Within this framework a number of ACCC committees also provide oversight of the AER's systems of risk and control. Since mid-2019, the AER has made a number of improvements to risk management that strengthen the organisation's capability through training and enhanced processes and procedures.³⁷

- 5.49 Dr Develin informed the Committee that the AER has worked hard to create better risk management practices internally:

... we have trained all our executive level staff in risk management and in project management, because a lot of the recommendations would assist with those sorts of activities. We have revised our risk table, very much taking up that recommendation around shared risks. We are very conscious now of our shared risks, particularly with the other market bodies that operate in the energy system and with our relationship with our portfolio agencies, such as Treasury and Energy.³⁸

- 5.50 In relation to shared risk Dr Develin stressed the importance of good communication with other stakeholders:

With regard to the shared risks in particular, it really is about keeping a good dialogue with our partners who share the risks with us. This is particularly the case with the Australian Energy Market Commission, who are the rule makers. We have routine, shared board meetings where risk issues can be talked about. Similarly in our reporting to energy ministers, one of the requirements of that six monthly reporting is any risks. This provides another opportunity to demonstrate how the market bodies are working together.³⁹

- 5.51 Finally, the AER submission highlighted a number of specific measures it has undertaken to address recommendation 1:

- all executive level staff have completed training on risk identification, management and reporting, as well as project management training. Both initiatives are designed to support the building of risk capability within the AER.
- we have revised the AER's organisational-level risk table as part of the ACCC's annual business planning process. This allows for the identification

³⁷ Australian Energy Regulator, *Submission 2*, p. 2.

³⁸ Dr Liz Develin, AER, *Committee Hansard*, 4 March 2021, p. 30.

³⁹ Dr Liz Develin, AER, *Committee Hansard*, 4 March 2021, p. 30.

of a number of shared risks between the AER and ACCC in a consistent and systematic way, and to work with the ACCC on action plans for risks rated as 'high' or above.

- we have revised the AER's organisational-level risk table as part of the ACCC's annual business planning process. This allows for the identification of a number of shared risks between the AER and ACCC in a consistent and systematic way, and to work with the ACCC on action plans for risks rated as 'high' or above.
- we are working on a new enhanced format for our centralised risk register. This register is designed to present AER risks clearly, to quickly identify emerging areas of risk and agree on mitigations.
- we have implemented monthly CEO updates on strategic and operational risks, and dedicated quarterly updates on the centralised register, to the AER Board's Policy and Governance Committee.⁴⁰

Compliance risk

5.52 Recommendations 5 and 6 of the audit report focused on risks of non-compliance and enforcement and were aimed at:

- establishing better linkages between the AER's regulatory objectives, its evaluation frameworks, and the risks of non-compliance; and
- developing risk-based triage processes to support decision-making in relation to non-compliance and enforcement.

5.53 The audit report found that the AER's framework for assessing, prioritising and managing risks of non-compliance in the NEM was 'partially effective':

The framework requires risk assessments of each obligation contained in the National Energy Laws. However, many obligations have not been assessed and the framework does not sufficiently distinguish risk levels to support prioritisation and allocation of resources. The AER does not monitor and adjust risk assessments and related strategies and priorities.⁴¹

5.54 The report found that the AER conducted compliance risk assessments only when resourcing permitted, meaning that many of them were not kept up to date:

The AER advised that risk assessments are undertaken when resourcing has permitted, leaving a backlog of provisions waiting to be assessed following

⁴⁰ Australian Energy Regulator, *Submission 2*, p. 2.

⁴¹ Auditor-General Report No. 5 2020–21, p. 86.

law and rule changes. The backlog means that AER do not have a complete understanding of compliance risk.⁴²

- 5.55 The report also found that the AER's compliance risk matrix was not sufficiently granular, which limited its ability to prioritise its work program:

This matrix does not sufficiently support the AER to distinguish between compliance risks, such as those with catastrophic versus major consequences or those that are possible or likely to occur. The risk assessment process and work instruction do not provide for further prioritisation of risks. This limits the AER's ability to prioritise obligations with more significant consequences and/or that are more likely to occur, which is important given the AER's lack of capacity to address many 'red zone' cases.⁴³

- 5.56 In responding to this issue, the AER noted the complexity of managing compliance with the national energy laws:

The energy framework, in terms of compliance enforcement, is quite challenging. It is obligation dense. It's a changing framework. It is unique in the sense that we have customer facing obligations as well as market obligations to ensure the market works to the benefit of the consumers. This in itself makes it a uniquely challenging framework to administer, enforce and ensure compliance with.⁴⁴

- 5.57 However, the AER told the Committee that the ANAO's recommendations in relation to compliance risk were similar to those made in a 2019 internal review, and that as such work to implement them is well underway:

The review made a number of recommendations to strengthen and improve our capabilities and they are being implemented by our Compliance and Enforcement Branch. As such, implementation is well advanced and in 2019 for the first time, we released Compliance and Enforcement Priorities to guide and focus our work.⁴⁵

- 5.58 The AER went on to say:

Recommendation 5 requires the AER to develop a decision making framework that demonstrates the link between regulatory obligations and non-compliance risks in the National Energy Market and the AER's annual

⁴² Auditor-General Report No. 5 2020–21, p. 87.

⁴³ Auditor-General Report No. 5 2020–21, p. 88.

⁴⁴ Ms Jacqueline Thorpe, General Manager, Compliance and Enforcement, AER, *Committee Hansard*, 4 March 2021, p. 34.

⁴⁵ Australian Energy Regulator, *Submission 2*, p. 3.

compliance and enforcement priorities. Our new Compliance Decision Making Framework is designed to measure and assess this risk and apply it to our work including annual compliance and enforcement priority setting. This Framework will be considered by the AER Board in the first quarter of 2021 and used in the setting of our 21/22 compliance and enforcement priorities. We are also developing performance measures to evaluate the setting of these priorities.⁴⁶

- 5.59 The AER's response to recommendation 6 also pointed to the work of its Compliance Decision Making Framework. In addition, however, it noted that:

We have also aligned our management and governance processes to the new compliance assessment process, for example through the creation of a centralised assessment team and the new Enforcement and Compliance Committee, comprised of AER Board members. These are proving valuable for triaging matters and decision-making.⁴⁷

- 5.60 The AER outlined some of the specific measures it has taken to improve its compliance risk management:

Historically, compliance and enforcement activities were dispersed across the organisation. We do now have a specialised compliance and enforcement branch. Within that, there is an assessment team whose role is to triage and look at risks of noncompliance. We have also enhanced our risk-assessment process. Within the energy laws there are 12,000 obligations on people. We have gone through every single one of those to triage them, in terms of a high or a low impact on consumers or a risk of harm or difficulty of compliance. That also helps us think about our assessments.⁴⁸

- 5.61 The AER also argued that implementing a proper response to recommendations such as these is difficult but that it is making good progress:

It is a long process to build capability in compliance and enforcement. Since the creation of our standalone compliance and enforcement branch two years ago, you have seen an evolution of increased enforcement in compliance activity, including taking on litigation to resolve serious conduct or concerns for the AER.⁴⁹

⁴⁶ Australian Energy Regulator, *Submission 2*, p. 4.

⁴⁷ Australian Energy Regulator, *Submission 2*, p. 4.

⁴⁸ Dr Liz Develin, AER, *Committee Hansard*, 4 March 2021, p. 33.

⁴⁹ Ms Jacqueline Thorpe, AER, *Committee Hansard*, 4 March 2021, p. 34.

Comment on additional public submissions

- 5.62 The Committee received three submissions from Australian energy companies or representative bodies, all of which argued for broader reconsideration of Australia's energy market regulation.
- 5.63 AGL Energy said there is a need for clarity in regulatory functions to 'reduce duplication and inefficiencies':

The original intent of the Australian Energy Market Agreement (AEMA), is the separation of responsibilities, in which the Australian Energy Market Commission (AEMC) is the rule-maker and the AER is the rule-enforcer, no longer holds true. Through the increasing use of guidelines, the role of rules making is falling to the AER creating an inconsistent and confused regulatory regime.⁵⁰

- 5.64 AGL argued that the AER should be mindful of the impacts its guidelines might have on investment, markets or competition:

At present, the obligations on the AER for creating guidelines are significantly high level and only focus on consultation process, they do not relate to tests that the AER must apply or what outcome the AER should seek in making and amending guidelines. There is no obligation for broader economic considerations, impacts to investment, competition, or the market or how these balance with any proposed benefits to be delivered to consumers. There is no requirement to ensure the effectiveness of the guidelines or to undertake any review.⁵¹

- 5.65 Reposit Power argued that what was initially a clear delineation between the roles of the three energy market bodies had eroded over time:

Market body roles were clear and well respected creating a consistent, predictable and transparent regulatory environment. This served to lower the barriers to entry for competition to enter the market with new technology and new business models ... Since 2016, however, the NEM's regulatory environment has been eroded by inefficient regulation of the Australian Energy Market Operator (AEMO). This has forced Reposit Power and other Market Participants to invest heavily in alternative means by which to gain some regulatory certainty and to attempt to improve market operator efficiency.⁵²

⁵⁰ AGL Energy, *Submission 1*, p. 3.

⁵¹ AGL Energy, *Submission 1*, p. 4.

⁵² Reposit Power, *Submission 3*, p. 1.

- 5.66 The Australian Energy Council, an industry body representing 21 electricity and natural gas businesses operating in competitive markets, argued in its submission that 'there should be broader consideration of the energy sector's governance'.⁵³

The Energy Council suggests that it is not just the AER which needs clarity of role; it is important for the other market bodies, the AEMC and the AEMO to have their responsibilities and obligations made clear by the Government.⁵⁴

- 5.67 The Committee thanks submitters for their contribution to its work; however these broader questions of energy policy, the efficient operation of power markets, and the role of the other market bodies are outside the scope of this inquiry.

Committee comment

- 5.68 The Australian energy market is complex, and the legislation, regulations and rules governing it is equally complex. The AER therefore has a challenging task to ensure that generation and delivery of energy and the operation of energy markets remain as efficient as possible and deliver the best prices and outcomes possible for consumers.
- 5.69 The ANAO's audit of the AER's regulation of energy markets was largely positive. It found many areas in which the AER was effective and, while it made six recommendations, these appear to be predominantly focused on the improvement of generally sound regulatory processes.
- 5.70 The Committee notes that the AER accepted all six recommendations and provided details of its plans for their implementation. It commends the AER for its conduct throughout the audit, for its comprehensive responses to the ANAO's recommendations, and for its open and receptive approach to this inquiry.
- 5.71 The Committee has no recommendations directed to the AER.

⁵³ Australian Energy Council, *Submission 5*, p. 1.

⁵⁴ Australian Energy Council, *Submission 5*, p. 5.

6. TEQSA's Regulation of Higher Education

Auditor-General Report No. 33 2019-20

Introduction

- 6.1 The audited entity was the Tertiary Education Quality and Standards Agency (TEQSA). The objective of the audit was to assess the effectiveness of TEQSA's regulation of Australia's higher education sector.
- 6.2 This chapter:
- provides an overview of the audit findings and TEQSA's approach to regulating the higher education sector;
 - outlines its risk assessment process;
 - examines its compliance and enforcement frameworks; and
 - discusses matters related to regulatory approvals.

Chapter overview

- 6.3 The Committee's inquiry into this report found that TEQSA's regulation of the higher education sector was effective in some areas and was in need of improvement in others. Two problematic areas included the need to ensure timely re-registration and re-accreditation of low-risk providers, and the need to identify cyber security as a specific risk indicator and ensure measures are taken to develop cyber resilience. Recommendations are made to this effect at the end of this chapter.

Background and audit findings

- 6.4 TEQSA was established in 2012 under the *Tertiary Education Quality and Standards Agency Act 2011* (the TEQSA Act). As a regulatory agency, TEQSA is responsible for the registration of higher education providers and the approval of courses offered by those providers.
- 6.5 The sector that TEQSA regulates consists of providers varying in size, received revenue and courses offered. In 2018, 1.56 million students were enrolled in courses that counted towards an Australian higher education award. Of this total, 90 per cent of students were enrolled at public universities.¹
- 6.6 The audit concluded that the effectiveness of TEQSA's regulation of higher education was 'mixed' and made the following five recommendations addressing compliance and enforcement that TEQSA:
- Establish and implement a comprehensive compliance monitoring framework, supported by appropriate operational processes;
 - Ensure that it adequately documents its analysis and the outcomes of each stage of its compliance assessments in a timely manner;
 - Ensure material submitted by providers as part of formal conditions is assessed in a timely manner;
 - Establish and implement a transparent process for managing material change notifications, including documenting the assessment of all notifications; and
 - Ensure that its annual performance reporting includes information on the number of provider compliance activities undertaken and the outcomes of compliance activity.

TEQSA's approach to regulation

- 6.7 The Australian Government established TEQSA as the national agency responsible for the regulation and quality assurance of higher education after the 2008 *Review of Australian Higher Education* (the Bradley Review).
- 6.8 Accompanying the TEQSA Bill 2011, the second reading speech outlined the purpose of the regulator, stating that:

¹ Auditor-General Report No. 33 2019-20, p. 14.

TEQSA will focus its activities on encouraging and supporting both new entrants to the system and higher risk providers, while ensuring that existing, higher quality, lower risk providers will not be unnecessarily burdened.²

- 6.9 Citing this second reading speech, TEQSA explained that its governing legislation was designed with a focus on 'meta-regulation', which places an emphasis on reviewing the regulatory systems of institutions rather than directly assessing whether particular aspects of an entity's operation are of appropriate academic standards.³
- 6.10 TEQSA outlined that its approach to regulation is to encourage as many regulated entities to be 'leaders and move beyond compliance ... to embark on a process of continuous improvement'. TEQSA indicated that if this approach is not taken, its role as a regulator may become 'prescriptive and oppressive'. Such an approach would hinder TEQSA's ability to achieve some of the objectives of the TEQSA Act, including supporting diversity and innovation in Australian higher education.⁴
- 6.11 According to TEQSA's performance statement:
- ... fifty-nine per cent of responding providers rated it as good or excellent in assuring and regulating the sector without unnecessarily impeding the efficient operation of higher education providers. TEQSA's good or excellent rating by for-profit providers was considerably lower at 43 per cent.⁵
- 6.12 TEQSA argued that its aim is to foster and support 'a culture of effective self-assurance' among providers to ensure that they meet the standards, thereby reducing the need for enforcement action. TEQSA's aim is demonstrated through its design of the registration process, which requires higher education providers to achieve and maintain compliance with relevant standards, including through self-monitoring compliance and taking appropriate action if lapses occur.⁶

² TEQSA, *Submission 4*, p. 5.

³ TEQSA, *Submission 4*, p. 5.

⁴ TEQSA, *Submission 4*, p. 5.

⁵ Auditor-General Report No. 33 2019-20, p. 40.

⁶ TEQSA, *Submission 4*, p. 5.

Risk assessments

- 6.13 Managing risk is an integral part of a regulator's role. It can be used to inform the development of management systems and frameworks that support regulatory activity and ensure that available resources are efficiently allocated.
- 6.14 Like all non-corporate Commonwealth entities, TEQSA must comply with all nine elements of Commonwealth Risk Management Policy to establish appropriate systems of risk oversight and management.

TEQSA's method for assessing risk

- 6.15 TEQSA's annual risk assessment cycle involves assigning risk ratings to higher education providers by assessing each provider against a set of risk indicators. In its submission, TEQSA stated that it 'considers regulatory history and standing as an indicator for arriving at its overall risk assessment for individual providers'. TEQSA also considers academic staff profile and financial viability and sustainability.⁷
- 6.16 Risk indicators used in TEQSA's risk assessment process are informed by the *Higher Education Standards Framework (Threshold Standards) 2015* (the Threshold Standards), which define the minimum standards of operation in the higher education sector. TEQSA's role is to 'assess, monitor and regulate the sector' against these Threshold Standards.⁸
- 6.17 TEQSA explained that if potential risks are identified through risk assessments, 'the provider is invited to submit further evidence regarding its risk profile and management'. The regulator further elaborated that if the provider is responding to their initial risk assessment, they are:
- ... asked to demonstrate actions or initiatives undertaken to mitigate any identified risks to students and the financial position of the provider, including ratings of likelihood and consequence, and accompanying treatments and controls. On the basis of the response, TEQSA then arrives at a residual risk rating, considering the provider's inherent risk, risk mitigation and regulatory history.⁹

⁷ TEQSA, *Submission 4.1*, p. 2.

⁸ Mr Alistair Maclean, Chief Executive Officer, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 3.

⁹ TEQSA, *Submission 4.2*, p. 1.

Source data

- 6.18 As discussed in Chapter 1, sound regulatory activity depends on the good collection and management of compliance data. This data is analysed during the risk assessment process and is then used to inform the design of a regulator's compliance programs. Due to TEQSA's use of source data that is usually two years old, the audit noted that the accuracy of TEQSA's risk assessment is reduced.¹⁰
- 6.19 The ANAO explained that TEQSA relies on data that comes from a number of systems used by the Department of Education, Skills and Employment (DESE), such as the Quality Indicators for Learning and Teaching data and the Higher Education Information Management System. Once this data, often from the previous school year, is provided to TEQSA, it is two years old.¹¹
- 6.20 TEQSA noted that through DESE's *Transforming the Collection of Student Information* project, which aims to improve data availability, it will be able to access more recent student data for its risk assessment.¹² The audit stated that this project may improve the timeliness of data by up to six months.¹³

Sector-wide risks

- 6.21 One of TEQSA's four strategic objectives is to 'support providers to deliver high quality education, protect student interests and enhance the reputation and competitiveness of Australia's higher education sector'.¹⁴ The regulator indicated in its 2019-23 corporate plan that to achieve this objective it will 'consult with stakeholders and identify issues and deliver strategies where guidance is required'.¹⁵
- 6.22 The audit concluded that 'TEQSA provided appropriate support to the sector to address the majority of key sector-wide risks'.¹⁶

¹⁰ Auditor-General Report No. 33 2019-20, p. 21.

¹¹ Ms Deborah Jackson, Executive Director, Performance Audit Services Group, ANAO, *Committee Hansard*, Canberra, 4 March 2021, p. 4.

¹² TEQSA, *Submission 4.1*, p. 1.

¹³ Auditor-General Report No. 33 2019-20, p. 24.

¹⁴ TEQSA Corporate Plan 2019-23, p. 6.

¹⁵ TEQSA Corporate Plan 2019-23, p. 14.

¹⁶ Auditor-General Report No. 33 2019-20, p. 55.

- 6.23 During the inquiry, the Committee received evidence related to TEQSA's responses to sector-wide risks such as cyber security, sexual assault and harassment, and COVID-19.

Cyber security

- 6.24 The audit observed that 'TEQSA has not yet taken any specific actions to respond to cyber security risk'¹⁷ and that its 'process to assign risk ratings to providers also does not include specific consideration of cyber security issues'.¹⁸
- 6.25 TEQSA stated that in response to cyber security risks it:
- ... has directly engaged with universities who experienced significant cyber security failings and collected evidence that appropriate rectification was being conducted. TEQSA is working with the lead agency, the Australian Cyber Security Centre, in relation to this risk.¹⁹
- 6.26 TEQSA advised that its Higher Education Integrity Unit, established in June 2020, 'is leveraging the expertise of both the Australian Cyber Security Centre and the Trusted Cyber Security Forum supported by the Department of Home Affairs to develop a cyber security resource that will support non-university providers enhance the protection of their cyber assets'.²⁰
- 6.27 On the consideration of cyber security in risk ratings, TEQSA explained that it is working to further strengthen the risk assessment process 'by including more evidence based on sector trends and provider data held by other agencies'. TEQSA also acknowledged that its annual risk assessments do not include a specific indicator for cyber security, but added that the risk is considered in compliance and registration renewal assessments, where there is an identified risk.²¹

¹⁷ Auditor-General Report No. 33 2019-20, p. 57.

¹⁸ Auditor-General Report No. 33 2019-20, p. 58.

¹⁹ TEQSA, *Submission 4.1*, p. 13.

²⁰ TEQSA, *Submission 4.1*, p. 12.

²¹ TEQSA, *Submission 4.1*, p. 13.

Sexual assault and harassment

- 6.28 In 2017, the Australian Human Rights Commission released *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*. In response to this report, 'the Minister requested that TEQSA assess providers and universities, in particular, on their policies, systems, controls for handling complaints or allegations of sexual assault and sexual harassment on campus'.²² The regulator then sought advice from an expert advisory group on the standards used to assess providers. This process, which commenced in 2019, remains ongoing as of the time of this inquiry.²³
- 6.29 Although not a regulatory requirement, TEQSA issued the sector with guidance that providers may consider when handling complaints or allegations of sexual assault and sexual harassment.²⁴ TEQSA stated that it also directly engaged with higher education providers on their policies and procedures around responding to sexual harassment incidents, during the re-registration process between February 2019 and June 2020.²⁵ The regulator additionally noted that, since that time, it has sought to adopt a revised approach to addressing sexual assault and sexual harassment—proposing to 'work with peak bodies, rather than individual providers'.²⁶
- 6.30 TEQSA reported that its compliance assessments in relation to sexual assault and harassment have found no evidence of sector noncompliance, where the majority of the compliance assessments related to universities. Instead, when 'TEQSA has identified areas of improvement, providers have engaged and responded appropriately and promptly'. From its assessments of providers in this area, TEQSA observed that 'providers have a good understanding of their student safety and wellbeing obligations'.²⁷ TEQSA explained further that 'for the most part universities have well-established procedures, systems et cetera' and that independent providers have sought advice or guidance from TEQSA on related policies and procedures that they may establish.²⁸

²² Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 1.

²³ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 1.

²⁴ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 1.

²⁵ TEQSA, *Submission 4.1*, p. 9.

²⁶ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 1.

²⁷ TEQSA, *Submission 4.1*, p. 10.

²⁸ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 2.

- 6.31 The sector's feedback on TEQSA's work in this area 'indicated a good level of satisfaction'. TEQSA's 2020 stakeholder feedback report discussed this further, noting that guidance, other materials and resources 'were largely appreciated by the sector, particularly when they addressed systemic issues (e.g. sexual harassment issues)'.²⁹
- 6.32 To date, TEQSA has considered 23 matters related to alleged sexual assault and sexual harassment, which have been received as complaints or through other means, such as media reports.³⁰

COVID-19

- 6.33 TEQSA outlined the process it used to evaluate the financial positions of providers, in light of the effect of COVID-19 on the sector. In 2020, the regulator asked all providers to supply information of their accounts from 30 June that year, which has been used 'as a basis for assessing the ongoing financial viability' of providers. TEQSA informed the Committee that it had completed its annual risk assessment cycle for providers and was in the process of sending these assessments to providers for comment. Once these responses have been received, TEQSA stated that the annual risk assessment will be finalised.³¹
- 6.34 TEQSA observed that the sector is 'under pressure at present'. In particular, and of the smaller private providers, the regulator stated that English-language-teaching-only providers were experiencing a 'significant collapse in the marketplace'. TEQSA advised that for other private providers risk categories around financial viability have been refreshed or revised.³²
- 6.35 TEQSA expressed the view that 'at present, the imminent collapse of providers' is not apparent. TEQSA acknowledged that 'providers have held up reasonably well in the face of the pressures of the last year', however cautioned that 'some lag impacts from COVID during the course of 2021 and 2022' is expected.³³

²⁹ TEQSA, *Submission 4.1*, p. 9.

³⁰ TEQSA, *Submission 4.1*, p. 8.

³¹ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 4.

³² Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 4.

³³ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 4.

Online learning

- 6.36 As part of the response to COVID-19, many providers shifted to online learning modules, which became an area of focus for the regulator in 2020. TEQSA said that it held a series of webinars to support providers with their transition to online learning.³⁴
- 6.37 TEQSA indicated that its annual survey had included questions targeting the implementation of online learning and more specifically, concerns from students.³⁵ While some of those responders reported positively on how quickly providers were able to transition to online learning for modules previously taught in-person, TEQSA observed that there were some IT concerns. In addition to capacity and technical issues with the delivery of online services, these concerns also included the quality and depth of materials offered online.³⁶
- 6.38 TEQSA recognised that isolation felt by students as a result of the transition to online learning was an issue and informed the Committee that this will be the subject of further surveys this year. The regulator also noted that the Quality Indicators for Learning and Teaching survey results indicate how student experience has shifted in the context of online learning over the previous year.³⁷

Compliance and enforcement

- 6.39 Compliance and enforcement activities form an important part of a regulator's role, as they have the responsibility of assuring Parliament and the public that regulated entities are compliant with their statutory obligations and that appropriate enforcement actions are taken when regulated entities do not meet such obligations.
- 6.40 This section details the actions that TEQSA has taken to address the audit's five recommendations around compliance and enforcement processes.

³⁴ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 6.

³⁵ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 6.

³⁶ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 6.

³⁷ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 6.

Compliance planning and monitoring

- 6.41 The audit observed that TEQSA had 'not undertaken any periodic compliance planning' and was in the 'early stages of developing priorities to guide future compliance activity'. Instead, compliance activity had 'mainly been informed by media and self-reporting'.³⁸ Accordingly, the audit recommended that TEQSA establish and implement a comprehensive compliance monitoring framework, supported by appropriate operational processes.³⁹
- 6.42 Addressing this recommendation, TEQSA confirmed it has now established a Compliance Monitoring Framework that ensures 'compliance monitoring is coordinated and prioritised, through transparent and established processes'.⁴⁰ To guide TEQSA's investigative work an Investigation Manual is being prepared⁴¹ and procedures for handling complaints and concerns have been revised, with staff receiving relevant training.⁴²
- 6.43 TEQSA elaborated on the steps taken to ensure the Compliance Monitoring Framework is effective, including:
- A Compliance and Enforcement Policy, documenting principles and standards for compliance and enforcement activities under Part 7 of the Tertiary Education Quality and Standards Agency Act 2011 and Part 6 and Part 7 of the Education Services for Overseas Students Act 2000, is currently being finalised.
 - A prioritisation model has been implemented. The model incorporates a triage process for prioritising complaints and concerns, based on risk and meaningful categorisation of concerns.
 - An annual compliance program has been established. The program ensures TEQSA targets current, systemic and emerging risks, using a range of compliance monitoring tools, such as out-of-cycle compliance audits and provider site visits.

³⁸ Auditor-General Report No. 33 2019-20, p. 44.

³⁹ Auditor-General Report No. 33 2019-20, p. 46.

⁴⁰ TEQSA, *Submission 4.1*, p. 3.

⁴¹ TEQSA, *Submission 4.1*, p. 4.

⁴² TEQSA, *Submission 4*, p. 3.

- TEQSA now has documented processes, procedures and other resources for its compliance monitoring activities, in support of operational planning and business processes.⁴³

- 6.44 TEQSA noted that the framework will be reviewed annually or when there are substantial changes affecting students, the reputation or financial viability of the sector.⁴⁴
- 6.45 TEQSA assured the Committee that during the process of implementing audit recommendations part of its focus has been to link its compliance activities to risks and 'not just be reactive ... to media concerns or specific complaints made to the agency'.⁴⁵

Documentation of compliance assessments

- 6.46 Given that provider compliance history is one of the elements that TEQSA considers when assessing risk, the quality of recordkeeping around its compliance activities has an impact on the quality of its risk assessments.
- 6.47 The ANAO explained in its submission that adequate documentation of regulatory actions as well as the rationale for regulatory decisions facilitates 'transparency and accountability'. This is particularly important, as a regulator's approval decisions may be subject to external scrutiny, wherein it may be required to demonstrate how its actions and decisions were warranted.⁴⁶
- 6.48 Based on its analysis of TEQSA's completed compliance assessments, the ANAO recommended that the regulator adequately document its compliance assessments, inclusive of recording its analysis and the outcomes at each stage of the process in a timely manner.⁴⁷
- 6.49 TEQSA advised that it has implemented a new reporting framework to demonstrate the status of its compliance assessments and that the naming standards of records have been revised. To further improve the compliance assessments process, the mapping of business requirements commenced in 2020-21.⁴⁸

⁴³ TEQSA, *Submission 4.1*, p. 3.

⁴⁴ TEQSA, *Submission 4.1*, p. 3.

⁴⁵ Mr Alistair Maclean, TEQSA, *Committee Hansard*, Canberra, 4 March 2021, p. 2.

⁴⁶ ANAO, *Submission 9*, p. 3.

⁴⁷ Auditor-General Report No. 33 2019-20, p. 49.

⁴⁸ TEQSA, *Submission 4*, p. 3.

Management of conditions

- 6.50 To address concerns or areas of risk related to a provider's higher education activities, TEQSA may impose statutory conditions on the registration and course accreditation of providers. As part of the process to evaluate compliance with conditions, TEQSA is required to assess materials submitted by providers and advise them of the assessment outcomes through periodic reports. Non-compliance with imposed conditions is considered a breach of the TEQSA Act.⁴⁹
- 6.51 Based on audit findings, the ANAO recommended that TEQSA ensure materials submitted by providers, as part of formal conditions, is assessed in a timely manner.⁵⁰
- 6.52 TEQSA noted that 'newly-developed resources and tools' have been made available to support the management of conditions.⁵¹ TEQSA is also undertaking a Conditions Project, from which recommendations were expected to be implemented between May and December 2021. The project is focused on:
- evaluating the effectiveness of conditions to date;
 - developing more specific, better targeted conditions to reduce the administrative burden on providers while still addressing risks; and
 - improving the management and timeliness of condition assessments.⁵²
- 6.53 To support the timely assessment of submitted materials, TEQSA has made business improvements, including:
- enhanced monitoring and reporting, so that assessments are allocated and tracked more efficiently; and
 - improved assessment capabilities, through resources and tools to support staff assessing provider compliance with conditions.⁵³

Administrative Appeals Tribunal

- 6.54 If TEQSA does not approve an application or imposes conditions, providers may appeal the decision through the Administrative Appeals Tribunal

⁴⁹ Auditor-General Report No. 33 2019-20, p. 49.

⁵⁰ Auditor-General Report No. 33 2019-20, pp 49-50.

⁵¹ TEQSA, *Submission 4*, p. 4.

⁵² TEQSA, *Submission 4.1*, p. 5.

⁵³ TEQSA, *Submission 4.1*, p. 5.

(AAT). Through this process, appellants are able to provide new or updated evidence that was not available to TEQSA at the time the decision was made.

- 6.55 During the inquiry, TEQSA was asked whether it should consider changing its approach to give providers the opportunity to supply additional information prior to entering into an AAT appeals process. In response, the regulator noted that applicants are provided with opportunities to supply information before its decisions are formalised, adding that the volume of its involvement in external review matters is low, with approximately five per year since 2012. TEQSA further explained that it is not possible to provide an applicant with an extension to submit additional evidence beyond its legislative deadlines, as the regulator is required to meet these timeframes.⁵⁴
- 6.56 When asked about potential issues with its regulatory functions, the regulator maintained that it continually reviews its approach to regulation, including in the context of external review proceedings. TEQSA stated that it will continue to consider the outcomes of such matters when reviewing its approach to regulation.⁵⁵

Material change notifications

- 6.57 The TEQSA Act also requires registered providers to notify the regulator within 14 days of becoming aware of events that will either affect the provider's ability to meet threshold standards or require an update to the National Register of Higher Education Providers. Such events that may require providers to alert TEQSA through a 'material change notification' include changes that may impact the financial viability and the good standing of any given provider.⁵⁶
- 6.58 In relation to TEQSA's management of material change notifications, the audit observed that the regulator 'did not adequately document its assessment of notifications and whether further action was required'. Accordingly the ANAO recommended that TEQSA implement a transparent process for managing material change notifications, including the documentation of all associated assessments.⁵⁷

⁵⁴ TEQSA, *Submission 4.2*, p. 6.

⁵⁵ TEQSA, *Submission 4.2*, p. 6.

⁵⁶ Auditor-General Report No. 33 2019-20, p. 50.

⁵⁷ Auditor-General Report No. 33 2019-20, p. 51.

- 6.59 On this matter, TEQSA advised that it has centralised the reporting and recording of material change notifications. All reported material changes and related assessments are recorded in the regulator's case management system, with a monthly report of assessment outcomes issued to TEQSA's Commissioners.⁵⁸ TEQSA additionally noted that a communication plan, detailing the reporting requirements for providers, has been implemented.⁵⁹

Performance reporting

- 6.60 Under the PGPA Act, Commonwealth entities are required to report on their activities against the performance measures published in their corporate plans through an annual performance statement.
- 6.61 The ANAO highlighted that:
- To promote transparency and accountability, regulators should publicly report on the number and outcomes of core compliance activities such as compliance assessments. Regulators should also report on the extent to which regulated entities and individuals comply, and fail to comply, with obligations under the legislation. This provides the parliament with transparency about whether regulatory objectives are being met.⁶⁰
- 6.62 From its examination of TEQSA's 2018-19 performance statement, the ANAO identified that the regulator 'did not report on the number of compliance activities commenced or completed or the outcomes of completed assessments'.⁶¹ The audit recommended that TEQSA include this information in its annual performance reporting.
- 6.63 In March 2021, the TEQSA Compliance Report 2020 was published. This report provided a snapshot of the regulator's compliance activities between January and December 2020, including the number of compliance assessments initiated and finalised and the resulting outcomes of finalised assessments.⁶²

⁵⁸ TEQSA, *Submission 4.1*, p. 6.

⁵⁹ TEQSA, *Submission 4*, p. 4.

⁶⁰ ANAO, *Submission 9*, p. 4.

⁶¹ Auditor-General Report No. 33 2019-20, p. 53.

⁶² TEQSA, *TEQSA Compliance Report 2020*, p. 6.

Regulatory approvals

- 6.64 Sub-standard providers or courses have the potential to threaten Australia's reputation of providing quality higher education. Protecting this reputation forms a key part of TEQSA's role as a regulator.
- 6.65 As such, TEQSA's registration approvals and course accreditation processes are an important part of its regulatory functions. The registration approvals process allows the regulator to ensure that only providers meeting the relevant higher education standards are operating in the sector. In the same way, the course accreditation process allows TEQSA to regulate the courses offered by registered providers.

Required documentation

- 6.66 All registration and course accreditation applications require providers to submit evidence demonstrating the ability to meet relevant higher education standards. The evidence needed is to be 'based on the provider's regulatory and compliance history, TEQSA's annual risk assessment [of the provider] and any other intelligence held by TEQSA about ... the provider's risk context'.⁶³
- 6.67 When asked about concerns around the volume of evidence that providers are required to submit, TEQSA claimed that its assessment is limited to a core set of standards (Core Plus Model) focused on the 'provider's internal and external reviews and reporting', thereby reducing the volume of evidence needed. The regulator added that the scope of assessments, and therefore the breadth of evidence required, may change where concerns around potential non-compliance arise.⁶⁴
- 6.68 TEQSA stated that while providers are encouraged to submit evidence relevant to the assessed standards, 'it is ultimately up to a provider to determine the volume of facts and evidence' needed to support their applications.⁶⁵

⁶³ TEQSA, *Submission 4.2*, p. 3

⁶⁴ TEQSA, *Submission 4.2*, p. 3

⁶⁵ TEQSA, *Submission 4.2*, p. 3

- 6.69 The regulator advised that to reduce the administrative burden associated with low-risk assessments, it has 'recently reviewed and refined its approach to Core Plus assessments'.⁶⁶

Timeliness of regulatory decisions

- 6.70 The audit found that the timeliness of regulatory approvals was 'mixed'.⁶⁷ While it was observed that TEQSA met its statutory timeframes for initial registration and accreditation approvals in all but one instance, it 'did not meet its targets for re-registration and re-accreditation approvals for low risk providers'.⁶⁸
- 6.71 To improve the timeliness of its regulatory decisions, particularly for low-risk providers, TEQSA advised that it is undertaking 'a number of projects', including a review of the specialisation business process model and the development of risk priorities.⁶⁹ The regulator explained that the business improvement projects have focused on ensuring:
- Processes are streamlined and opportunities for continual improvement are identified, including by working with a LEAN consultant and end-to-end process reviews.
 - Processes support targeted risk-based assessments and decision making. The scoping of assessments has been improved to ensure they are informed by intelligence and data, focused on key risk areas, and proportionate to the risk-rating of the provider.
 - Enhanced provider-self-assurance. Where TEQSA has confidence in a provider's own quality review and improvement processes, TEQSA no longer engages its own subject matter experts to review courses, significantly reducing processing times.
 - A refined "core plus" approach to assessments that reduces the administrative burden of regulation for providers. TEQSA's re-accreditation and re-registration assessments focus on the provider's compliance with a limited set of core Standards, relating principally to governance, internal quality assurance, student performance and student experience.⁷⁰

⁶⁶ TEQSA, *Submission 4.2*, p. 3

⁶⁷ Auditor-General Report No. 33 2019-20, p. 41.

⁶⁸ Auditor-General Report No. 33 2019-20, p. 31.

⁶⁹ TEQSA, *Submission 4*, p. 4.

⁷⁰ TEQSA, *Submission 4.1*, p. 15.

- 6.72 As part of its efforts to further improve the timeliness of regulatory approvals, TEQSA is streamlining work practices through 'a major IT transformation', which would enable certain repetitive tasks to be automated and improve data capture.⁷¹

Assessments under the ESOS Act

- 6.73 Under the National Code of Practice for Providers of Education and Training to Overseas Students under the *Education Services for Overseas Students Act 2000* (the ESOS Act), providers teaching international students are required to comply with another 11 standards (international student standards), in addition to the Threshold Standards. Initial registration and periodic reregistration of providers on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) are the key types of approvals under the ESOS Act.
- 6.74 The audit found that ESOS assessments 'did not involve input from experts' and that 'site visits were generally not undertaken'.⁷²
- 6.75 TEQSA advised that, in the three years before this inquiry, it commissioned 39 reports from external experts to inform the ESOS assessments for over 20 different providers, ranging from small private higher education providers to large public universities. The 39 reports represented less than five per cent of assessments under the ESOS Act within the same three year period.⁷³
- 6.76 TEQSA stated that it had undertaken seven physical site visits in the last three years as part of its assessment of providers seeking to renew their CRICOS registration, representing less than 10 per cent of total renewal applications for CRICOS registration.⁷⁴

Committee comment

- 6.77 Although the audit found the effectiveness of TEQSA's regulation of the higher education sector to be 'mixed', the regulator has made progress on implementing the five recommendations directed to improve its compliance and enforcement processes. The Committee notes that TEQSA has now

⁷¹ TEQSA, *Submission 4.1*, p. 15.

⁷² Auditor-General Report No. 33 2019-20, p. 37.

⁷³ TEQSA, *Submission 4.2*, p. 2.

⁷⁴ TEQSA, *Submission 4.2*, p. 2.

directed resources and new tools towards establishing new processes and frameworks to improve its compliance and enforcement activity.

- 6.78 The Committee also notes the disparity in the stakeholder survey results between for-profit and not-for-profit providers. While this was not a major theme of the inquiry, the Committee highlights the importance of TEQSA building positive relationships with all types of providers. The Committee is interested in seeing TEQSA's steps to improve relationships with private providers.
- 6.79 In relation to risk assessments, there were concerns around the use of two-year-old source data and the subsequent reduction in the accuracy of TEQSA's risk assessments. However, the Committee is aware that this may be improved through TEQSA's access to more recent student data through the DESE's Transforming the Collection of Student Information.
- 6.80 TEQSA has generally demonstrated the ability to take appropriate action to support the higher education sector in relation to sector-wide risks, such as COVID-19 and sexual assault and harassment. In relation to cyber security risks, the Committee notes the adverse audit finding that the regulator did not specifically consider cyber security in its process to assign risk ratings. The Committee believes that TEQSA should consider cyber security as a specific risk indicator and take steps to develop cyber resilience.
- 6.81 While the Committee understands that TEQSA's approach to regulation involves not burdening low-risk providers unnecessarily, it was noted that TEQSA 'did not meet its targets for re-registration and re-accreditation approvals for low-risk providers'.⁷⁵ The Committee heard that TEQSA is undertaking a number of projects to address this finding. Given that regulatory approvals form an important part of TEQSA's responsibilities, as regulator of the higher education sector, the Committee is interested in the progress and outcomes of these projects.

Recommendation 5

- 6.82 The Committee recommends that TEQSA update the Committee within six months on the progress of its projects to ensure timely re-registration and re-accreditation of low-risk providers. TEQSA should also update the Committee on the outcome of the next stakeholder satisfaction survey, including a detailed analysis and comparison of the responses from private, university and other public providers.**

⁷⁵ Auditor-General Report No. 33 2019-20, p. 31.

Recommendation 6

- 6.83 The Committee recommends that TEQSA identify cyber security as a specific risk indicator and ensure measures are taken to develop cyber resilience across the sector.**
- 6.84 In terms of a provider's ability to appeal decisions to the AAT, the Committee acknowledges TEQSA's advice that it is required to meet legislative timeframes and is therefore unable to provide additional time for providers to submit further evidence. The Committee considers there would be merit in TEQSA having the power to provide an extension of time where mutually agreed with a provider, which may reduce the necessity of AAT appeals. A recommendation is made to this effect due to the high percentage of matters that are either resolved after an appeal is lodged or successfully appealed to the AAT.

Recommendation 7

- 6.85 The Committee recommends that the Australian Government provide TEQSA with the ability to extend a deadline by mutual consent with a provider to allow providers additional time to submit further evidence in the interests of reducing the necessity of appeals to the Administrative Appeals Tribunal.**

Lucy Wicks MP
Chair

11 August 2021

Additional comments

Labor Members of the Committee endorse the report and support its recommendations, continuing the strong bipartisan tradition of the Joint Committee of Public Accounts & Audit.

In particular we note and welcome the Committee's strong condemnation of the administration of the EBPC Act.

These additional comments relate to the Lobbying Code of Conduct as Labor Members consider the recommendations do not go far enough and that legislation is warranted to provide a stronger, statutory underpinning for the Code.

LEGISLATION IS REQUIRED FOR THE LOBBYING CODE OF CONDUCT

The Australian National Audit Office has examined and made two separate sets of recommendations for improvements to the administration of the Australian Government Register of Lobbyists ('the Register') and its associated Lobbying Code of Conduct ('the Code').

The first investigation and recommendations were detailed in Auditor-General Report No.27 of 2017–18, *Management of the Australian Government's Register of Lobbyists*, the recommendations to Government being:

The Department of the Prime Minister and Cabinet review the appropriateness of the current arrangements and Code requirements in supporting the achievement of the objectives established for the Code. To better support the ongoing regulation of lobbyists, PM&C should:

- implement a strategy to raise lobbyists' and Government representatives' awareness of the Code and their responsibilities;

- assess risks to compliance with the Code and provide advice on the ongoing sufficiency of the current compliance management framework; and
- develop a set of performance measures and establish an evaluation framework to inform stakeholders about the extent to which outcomes and broader policy objectives are being achieved.

However, in a Follow-up Audit published in June 2020, the ANAO determined that the Government had not implemented those earlier recommendations.

When questioned about this failure in hearings of the Public Accounts and Audit Committee on 4 March 2021, the evidence of the Attorney-General's Department ("AGD") was that in May 2019, responsibility for the Register was shifted from the Department of Prime Minister and Cabinet (PM&C) to AGD, following a Machinery of Government Change initiated by the Prime Minister's office. Following this change of administrative arrangements, AGD's focus was on dealing with problems with functioning of the Register website that were identified with the transfer of this responsibility.

Evidence to the Committee about the reasons for these problems and the subsequent difficulties with fixing them included that:

- There was no written plan for transfer of accountability between the two departments; and
- There was a lack of clarity about when PM&C would complete its changes to the system to deal with 'some problematic functionality'.

AGD's evidence was that it has now prepared an implementation plan that covers both the 2018 and 2020 recommendations of the ANAO. However, a primary concern raised by the ANAO reports and the evidence received in a public hearing about the operation of the Register and the Code did not relate to the technical problems with the Register website.

The central problem identified by the ANAO centered on the fact the Government has been operating an essentially passive regime. There was no strategy to raise awareness of the Register and Code, no systematic assessment of risk, no proactive assessment of compliance with the requirements of the Register or the Code, and no evaluation framework of the scheme overall.

When pressed on what AGD was doing to actively identify lobbyists who had not registered, and to ensure compliance with the Code, the Department assured the Committee that steps were being taken to engage with the lobbying sector and to improve the Government's communication strategy to raise awareness of the Register and Code.

However, it is clear that little is being done to address the primary concern about the way in which the Register and Code are currently administered, which is marked by a primarily a passive rather than proactive approach to the regulation of lobbying by this Government. This is revealed in the fact AGD does not appear to operate or intend to introduce a performance framework or a risk management framework to ensure the Register and Code are fulfilling the important functions for which they were established.

Labor members believe this is a serious and fundamental weakness underpinning the Code that no amount of technical improvement to the web interface for the Register can address.

Rather, significant changes should be made to shift the entire regulatory regime to a more active orientation that includes performance targets and the development and implementation of a risk management framework to identify individuals who do not register and to ensure that those lobbyists who have registered comply with the requirements of the Code.

The need to shift the Register and Code to a statutory footing

The ANAO revealed that on 6 May 2018, the Prime Minister wrote to the Attorney-General, requesting advice to be provided by late July 2018, *"following your review of arrangements in relation to the Lobbying Code, as recommended by the ANAO, including whether the Lobbying Code should be placed on a statutory footing in a manner consistent with the FITS Bill."*

But the ANAO found that *"The Attorney-General wrote to the Prime Minister on 12 September 2018 responding to the initial request, and confirming it was withdrawn by agreement."*

AGD also confirmed that it had not provided advice to the Attorney-General regarding shifting the Register and Code to a statutory footing prior to the apparent withdrawal of the May 2018 request. However, under questioning AGD confirmed that having now fixed most of the technical problems with the website, it would be providing further advice to the Attorney-General 'by the middle of the year' on options to improve administration and operation, and that these options could include shifting the regime to a statutory footing.

The Government claims to recognize the importance of the Register and Code, which it describes as being *"to ensure that contact between lobbyists and Australian Government representatives is conducted in accordance with public expectations of*

transparency, integrity and honesty." Yet there is precious little action that conveys any sense of urgency or import.

Problems with 'transparency, honesty and integrity' in the Australian Government have been frequently and prominently aired in the media over recent years. A great deal more needs to be done to remedy these problems and to restore the Australian public's faith in the integrity of their national government.

It is certainly a step forward that the Australian Government website that operates the Register is now functioning. However, it is the strong view of the Labor Members of this Committee that the administration of the Register and the Code should be strengthened to ensure that both the Register and Code are more proactively administered and enforced.

In putting in place the significant reforms required to move the scheme to a proactive footing, it is also the view of Labor members that the entire scheme be shifted to a statutory footing. This would provide for:

- Greater opportunities for public consultation on and transparency in the design of the statutory scheme;
- Greater confidence in the independence of the scheme from the government of the day, with its operation provided for by statute rather than executive order; and
- Opportunities to strengthen the scheme through statutory enforcement mechanisms, including civil penalties for breach of certain provisions.

Lobbying is a legitimate activity however it must be undertaken transparently, to enhance integrity and prevent corruption.

The Morrison Government has failed to introduce a proper National Anti-Corruption Commission, allowing their rorts, waste and corruption to go unchecked.

This government has also repeatedly shown it cannot be trusted to govern with respect for long established conventions and standards, hence a legislative response is warranted.

Labor members consider that an all-out effort is urgently required to improve integrity in national public administration and arrest the decline in public trust in democracy and institutions. Legislating a strong Lobbyist Code would complement Labor's commitment to introduce a National Anti-Corruption Commission.

Julian Hill MP
Deputy Chair

Pat Conroy MP

Senator Kimberley
Kitching

Alicia Payne MP

Senator Jess Walsh

Tim Watts MP

A. Submissions

- 1 AGL Energy
- 2 Australian Energy Regulator
 - 2.1 Supplementary to submission 2
- 3 Reposit Power
- 4 Tertiary Education Quality and Standards Agency
 - 4.1 Supplementary to submission 4
 - 4.2 Supplementary to submission 4
- 5 Australian Energy Council
- 6 Attorney-General's Department
 - 6.1 Supplementary to submission 6
- 7 Australian Electoral Commission
 - 7.1 Supplementary to submission 7
- 8 Department of Agriculture, Water and the Environment
 - 8.1 Supplementary to submission 8
 - 8.2 Supplementary to submission 8
- 9 Australian National Audit Office
 - 9.1 Supplementary to submission 9

B. Public hearings

Thursday, 4 March 2021

Committee Room 2R1 (via video and teleconference)

Parliament House, Canberra

Australian National Audit Office & Tertiary Education Quality and Standards Agency

MELLOR, Ms Rona, PSM, Deputy Auditor-General, Australian National Audit Office

JACKSON, Ms Deborah, Executive Director, Performance Audit Services Group, Australian National Audit Office

RAUTER, Ms Lisa, PSM, Group Executive Director, Performance Audit Services Group, Australian National Audit Office

MACLEAN, Mr Alistair, Chief Executive Officer, Tertiary Education Quality & Standards Agency [by video link]

Australian National Audit Office & Attorney-General's Department

MELLOR, Ms Rona, PSM, Deputy Auditor-General, Australian National Audit Office

CHALMERS, Ms Christine, Senior Director, Performance Audit Services Group, Australian National Audit Office

RAUTER, Ms Lisa, PSM, Group Executive Director, Performance Audit Services Group, Australian National Audit Office

CHIDGEY, Ms Sarah, Deputy Secretary, Attorney-General's Department

*WITCOMBE, Ms Jaan-Clare, Acting Director, Transparency Frameworks Branch,
Attorney-General's Department*

Australian National Audit Office & Australian Electoral Commission

MELLOR, Ms Rona, PSM, Deputy Auditor-General, Australian National Audit Office

*BOYD, Mr Brian, Executive Director, Performance Audit Services Group, Australian
National Audit Office*

*RAUTER, Ms Lisa, PSM, Group Executive Director, Performance Audit Services Group,
Australian National Audit Office*

ROGERS, Mr Tom, Electoral Commissioner, Australian Electoral Commission

*REID, Ms Joanne, Assistant Commissioner, Disclosure, Assurance and Engagement
Branch, Australian Electoral Commission*

Australian National Audit Office & Australian Energy Regulator

MELLOR, Ms Rona, PSM, Deputy Auditor-General, Australian National Audit Office

*MARTIN, Ms Tracey, Senior Director, Performance Audit Services Group, Australian
National Audit Office*

*MARTYN, Ms Peta, Executive Director, Performance Audit Services Group, Australian
National Audit Office*

*RAUTER, Ms Lisa, PSM, Group Executive Director, Performance Audit Services Group,
Australian National Audit Office*

DEVELIN, Dr Liz, Chief Executive Officer, Australian Energy Regulator

*THORPE, Ms Jacqueline, General Manager, Compliance and Enforcement, Australian
Energy Regulator [by video link]*

***Australian National Audit Office & Department of Agriculture, Water and the
Environment***

MELLOR, Ms Rona, PSM, Deputy Auditor-General, Australian National Audit Office

RODRIGUES, Mr Mark, Senior Director, Performance Audit Services Group, Australian National Audit Office

WHITE, Mr Michael, Executive Director, Performance Audit Services Group, Australian National Audit Office

KNUDSON, Mr Dean, Deputy Secretary, Department of Agriculture, Water and the Environment

COLLINS, Ms Monica, Assistant Secretary, Environment Compliance Branch, Department of Agriculture, Water and the Environment

COLREAVY, Ms Mary, Assistant Secretary, Governance and Reform Branch, Environment Approvals Division, Department of Agriculture, Water and the Environment