THIRTY-NINTH PARLIAMENT

REPORT 62

STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

PROVISION OF INFORMATION TO THE PARLIAMENT

Presented by Hon Ken Travers MLC (Chair)

May 2016

STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

Date first appointed:

30 June 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**3. Standing Committee on Estimates and Financial Operations**

3.1 An *Estimates and Financial Operations Committee* is established.

3.2 The Committee consists of 5 Members, 3 of whom shall be non-government Members.

3.3 The functions of the Committee are to –

(a) consider and report on –

(i) the estimates of expenditure laid before the Council each year;

(ii) any matter relating to the financial administration of the State; and

(iii) any bill or other matter relating to the foregoing functions referred by the Council;

and

(b) consult regularly with the Auditor General."

Members as at the time of this inquiry:

Hon Ken Travers MLC (Chair)

Hon Peter Katsambanis MLC (Deputy Chair)

Hon Liz Behjat MLC (18 August 2015 to 10 May 2016)

Hon Alanna Clohesy MLC

Hon Rick Mazza MLC

Hon Martin Aldridge MLC (to 18 August 2015)

Staff as at the time of this inquiry:

Anne Turner (Advisory Officer (Legal))

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Government Response

This Report is subject to Standing Order 191(1):

> *Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.*

The two-month period commences on the date of tabling.

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 The Estimates and Financial Operations Committee (**Committee**) regularly requests information from Ministers and agencies relating to the conduct and operation of an agency as is its absolute right. However, from time to time Ministers decide not to provide the information, predominantly on the basis of (1) cabinet-in-confidence, (2) legal professional privilege and (3) commercial-in-confidence. The Committee has provided a number of case studies in this report documenting its difficulties (and that of other surveyed committees) with obtaining information based on these three reasons. In the Committee's experience, commercial-in-confidence is statistically, the most recurring reason.

2 In the absence of a legal determination to the contrary, the Committee is of the view that the Western Australian Parliament and should not accept any limitation, other than that which is determined by law or self-imposed, upon its capacity to obtain requested information from the Executive.

3 Withholding requested information does not accord with principles of good governance and fundamentally disrespects the institution of the Parliament. However, in circumstances where there are significant concerns about information being made public, the relevant Minister has options under *Standing Orders of the Legislative Council* to request the information be given either a private or *in camera* status. Ultimately, because of the way Standing Orders are constructed, either the Committee or the Legislative Council can order disclosure or publication of the provided information. However, Committee practice is to honour an undertaking given to keep particularly sensitive information confidential.

4 Section 82 of the *Financial Management Act 2006* is unique amongst other Australian jurisdictions in that it requires Ministers to table notices in the Houses when a Minister decides not to provide requested information either during question time or to a committee. The Auditor General forms an opinion of section 82 notices and reports to the Parliament an assessment as to whether a ministerial decision not to provide requested information is reasonable and appropriate. Of 32 finalised opinions since 2008, 18 were assessed as being reasonable and appropriate, 15 not; and for three, the Auditor General was unable to form an opinion.

5 The Committee observed that many Ministers are familiar with section 82 notices but the quality of information in them is variable. Non-compliance with the 14 day timeframe for failing to table a notice is absent any consequences. Three sampled

Ministers revealed an absence of education, training or mentoring on section 82 notices.

6 The Committee is of the view that the profile of section 82 notices needs be raised in parliamentary proceedings and has recommended that the Procedure and Privileges Committee investigate adding *Auditor General Opinions on Ministerial Notifications* in accordance with section 24(2)(c) of the *Auditor General Act 2006,* to the *Consideration of Committee Reports* business item in Standing Order 15(3).

FINDINGS AND RECOMMENDATIONS

7 The Committee made 15 findings and 13 recommendations. Findings and recommendations are grouped as they appear in the text at the page number indicated:

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Finding 1: The Committee finds that the absence of a guarantee of confidentiality by committees of the Parliament compounds Ministerial reluctance to provide requested information.

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Finding 2: The Committee finds that withholding information from any parliamentary committee fundamentally disrespects the institution of Parliament and prevents the Parliament and its committees from carrying out their mandate to oversight the Executive.

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Finding 3: The Committee finds that agencies or Ministers suggesting parliamentary committees or individual Members of Parliament use the *Freedom of Information Act 1992* process to obtain requested documents is unacceptable.

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Finding 4: The Committee finds that the *Parliamentary Privileges Act 1891* gives an absolute right to the Parliament to obtain requested information from the Executive. Both Houses have extended this right to their committees.

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Finding 5: The Committee finds that the views of the Attorney General and the State Solicitor perpetuate an erroneous view of the Parliament's absolute right to requested information.

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Finding 6: The Committee finds that political reality tempers the Parliament's ability to exercise its absolute right to be provided with requested information.

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Finding 7: The Committee finds that there is limited case law on whether parliamentary privilege overrides legal professional privilege. Prior to exercising its right to legal advice, a committee should consider a range of matters including the value of protecting the relationship between legal advisers and their clients in court proceedings.

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Finding 8: The Committee finds that reasonable minds will continue to differ on whether parliamentary privilege overrides a claim of legal professional privilege. In the absence of any binding authority, the Committee will continue to assert that parliamentary privilege prevails over legal professional privilege. However, in exercising its right to legal advice, the Committee acknowledges the responsibility to use the privilege fairly.

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Finding 9: The Committee finds the absence of an Executive Government document defining 'commercial-in-confidence' and 'commercially sensitive' to assist Ministers' decisions to withhold information from the Parliament or its committees, unacceptable. The consequences of absent definitions include: improper claims of commercial-in-confidence, inconsistencies in their application, agencies making erroneous claims and the wasting of parliamentary time over what is or is not commercial-in-confidence.

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Recommendation 1: The Committee recommends that the Attorney General update the State Solicitor's Office 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question*, to provide for definitions of 'commercial-in-confidence' and 'commercially sensitive'. (See also recommendations 6 and 9)

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Recommendation 2: The Committee recommends that the Premier develop a Ministerial Office Memorandum advising Ministers that their claim for commercial-in-confidence or commercial sensitivity as a reason to withhold requested information from the Parliament or its committees should be supported by providing the Parliament or a committee with evidence of why it is not in the public interest to disclose the information, including the following:

- **that disclosure of the information would be likely to result in substantial harmful effects**
- **a list of the harmful effects**
- **why the effects are viewed by the Minister to be substantial**
- **an explanation of the causal relationship between disclosure and such harmful effects.**

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Recommendation 3: The Committee recommends that Ministers include the information in recommendation 2 in a section 82, *Financial Management Act 2006* notice.

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Finding 10: The Committee finds that what appears to be progressive legislation or policy making in other jurisdictions regarding disclosure of commercial-in-confidence information or commercial sensitivity in government contracts is eroded by numerous exceptions.

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Finding 11: The Committee finds that there is currently a lack of clear definition of what constitutes commercial-in-confidence or 'commercially sensitive' information. Agencies can use the lack of a definition to avoid releasing documents for parliamentary scrutiny. When cited as a reason for withholding requested information, it increases tension between parliamentary committees and Executive Government.

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Recommendation 4: The Committee recommends that the Premier develop a Ministerial Office Memorandum containing guiding principles for Ministers when deciding if requested information is 'commercial-in-confidence' or 'commercially sensitive.'

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Recommendation 5: The Committee recommends that the Premier amend the Cabinet handbook to clearly distinguish documents that reveal cabinet deliberations from other documents that do not reveal deliberations.

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Recommendation 6: The Committee recommends that the Attorney General in updating the State Solicitor's Office *2011 Guideline to Ministers withholding information or documents when asked a parliamentary question*, compile a list of documents clearly distinguishing cabinet documents that reveal deliberations from those that do not reveal deliberations for the guidance of Ministers claiming cabinet-in-confidence as a reason for not providing information to the Parliament or its committees. (See also recommendations 1 and 9)

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Recommendation 7: The Committee recommends that the Premier develop a Ministerial Office Memorandum advising Ministers to provide requested core State agreements, bespoke agreements; and government trading enterprise agreements to the Parliament or its committees with a request they be given the appropriate safe custody in each particular circumstance.

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Finding 12: The Committee finds that agency advice to a Minister that an express confidentiality clause prohibits disclosure of its content on commercial-in-confidence grounds, would inhibit that Minister from providing requested information to the Parliament or a committee. Such advice is contrary to section 81 of the *Financial Management Act 2006*.

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Finding 13: The Committee finds that a sample of Legislative Council Ministers did not receive any formal education, training or mentoring on section 82 of the *Financial Management Act 2006*.

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Recommendation 8: The Committee recommends that the Premier, as part of induction, provide new Ministers with formal education, training and mentoring about their responsibilities under sections 81 and 82 of the *Financial Management Act 2006*.

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Recommendation 9: The Committee recommends that when the 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question* is reviewed and updated, the State Solicitor's Office distribute it to all Ministers as well as their heads of departments and agencies. (See also recommendations 1 and 6)

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Finding 14: The Committee finds that it is inappropriate for any Government department, agency or statutory authority to enter into contracts that prevent the disclosure of the existence of the contract, the name of the contract, or with whom the contract is held.

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Recommendation 10: The Committee recommends the Treasurer amend section 24 of the *Auditor General Act 2006* to expressly allow the Auditor General to provide an opinion in all circumstances where the Minister decides not to provide certain information to the Parliament or its committees whether or not a section 82, *Financial Management Act 2006* notice is tabled in the Parliament.

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Recommendation 11: The Committee recommends that the Procedure and Privileges Committee inquire into amending Standing Orders of the Legislative Council to provide for *Auditor General Opinions on Ministerial Notifications* under section 24(2)(c) of the *Auditor General Act 2006* to be considered under Standing Order 15(3).

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Recommendation 12: The Committee recommends the Treasurer propose the making of a regulation pursuant to section 84 of the *Financial Management Act 2006* prescribing that the Auditor General may provide a written reminder to a Minister after the 14 day notice period has lapsed for advising the decision not to provide certain information to the Parliament.

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Recommendation 13: The Committee recommends that the Treasurer amend section 82 of the *Financial Management Act 200*6 so as to provide a new subsection (3) which states:

(3) A notice given to the Auditor General under subsection (1)(b) is to include -

(a) the Minister's reasons for making the decision that is the subject of the notice; and

(b) the information concerning the conduct or operation of an agency that the Minister has not provided to Parliament.

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Finding 15: The Committee finds that section 82 of the *Financial Management Act 2006* and section 24(2)(c) of the *Auditor General Act 2006* are adequate for purpose but require some enhancement. Recommendations, if agreed to by Executive Government, will have the effect of increasing Ministerial and departmental awareness of section 82 for the benefit of the Parliament as well as contributing to the robustness of the section 82 process.

CHAPTER 1
INTRODUCTION

REFERENCE

1.1 On 7 April 2014, the Estimates and Financial Operations Committee (**Committee**) resolved to commence a self-initiated inquiry into the provision of information to the Parliament pursuant to Standing Order 179(1).[1] The motivation for this Inquiry is why and how, on a number of occasions, Ministers of the Western Australian Parliament decide not to provide requested information to the Parliament and its committees.

1.2 Amended Terms of Reference for the Inquiry were tabled on 26 June 2014.[2] They state:

> *The Committee, exercising its Standing function to consider and report on certain matters "relating to the financial administration of the State" will conduct an inquiry in relation to technical compliance with section 82 of the Financial Management Act 2006 and related matters. The Committee will specifically consider the following:*
>
> *(a) the requirements of section 82 of the Financial Management Act 2006, and consequent implications for Ministers and public sector staff;*
>
> *(b) the considerations that are taken into account where a decision is made to not disclose the requested information to the Committee in circumstances that would invoke section 82 of the Financial Management Act 2006;*
>
> *(c) the reasons provided for the non-provision of requested material relating to the financial administration of the State made under section 82 of the Financial Management Act 2006;*

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1 It states: *A Committee may initiate an inquiry of its own motion if the Committee's terms of reference provide that capacity*.

2 Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 48, *Inquiry into the Provision of Information to Parliament–Amended Terms of Reference*, 26 June 2014.

(d) the considerations that give rise to a decision to provide information that is sought by the Committee concerning the financial administration of the State, where a contrary decision may otherwise have been made;

(e) the adequacy and efficacy of the current statutory provisions and administrative practices by which the non-disclosure of requested material relating to the financial administration of the State is assessed;

(f) the manner in which similar considerations are addressed in other jurisdictions; and any other relevant matters.

PROCEDURE

1.3 The Committee advertised its Inquiry in *The West Australian* newspaper calling for submissions. Details of the Inquiry were placed on the Committee website at: www.parliament.wa.gov.au/est

1.4 The Committee sent 86 letters to Ministers, Departments, Agencies and other interested stakeholders, inviting them to make submissions. The Committee received 17 responses. A list of submissions received as evidence is attached at **Appendix 1**.

1.5 Executive Government initially offered a consolidated, 'whole of government' submission, based on earlier terms of reference for the Inquiry but Hon Colin Barnett MLA, Premier, considered that this was unnecessary after Amended Terms of Reference were tabled.[3]

1.6 A Legal Opinion was obtained from Bret Walker SC on the construction of section 82 of the *Financial Management Act 2006* (*FMA*) and its interaction with section 24(2)(c) of the *Auditor General Act 2006*. It is available for viewing on the Committee's website. The Committee then asked the State Solicitor for his views of that Legal Opinion.

1.7 The Committee contacted seven Ministers seeking their personal (and departmental) awareness of current contracts or agreements between Executive Government and the private sector that contain confidentiality disclosure clauses constructed to prevent any discussion or acknowledgment of the existence of the contract or agreement in a public forum.

[3] Hon Colin Barnett MLA, Premier, Letter, 9 July 2014. The Premier said: '*The new terms of reference have a clear focus on the operation of s.82 of the Financial Management Act 2006. As the Auditor General has a central role in the operation of this legislative provision it is more appropriate that he provide information that may assist the Committee*.'

1.8 The Committee held six public hearings in March 2015 and in 2016, an additional three public hearings. Witnesses who appeared at public hearings are listed in **Appendix 2.**

1.9 The Committee extends its appreciation to those who made submissions and appeared at hearings.

CHAPTER 2

BACKGROUND TO THE INQUIRY

OBTAINING INFORMATION FROM MINISTERS AND AGENCIES

2.1 The Committee regularly requests information from Ministers and agencies relating to the conduct and operation of an agency. However, from time to time and for a variety of reasons, Ministers refuse to provide the information under the umbrella of 'public interest immunity.'

2.2 Public interest immunity, formerly crown or executive privilege, refers to claims (not established prerogatives[4]) by Executive Government to be immune from being required to present certain documents or information to the courts or the Houses of Parliament.[5]

2.3 The three most frequently cited reasons for refusal are: cabinet-in-confidence, legal professional privilege and commercial-in-confidence. The Committee has focussed its Report on these three. However, on other occasions, reasons cited include personal privacy, commercial and financial interests of the State, confidentiality agreements, operational sensitivities, adverse impacts on dispute resolution processes, and statutory duty of confidentiality.

2.4 In his role of advising Ministers and their agencies, Paul Evans, the State Solicitor, said it may be reasonable and appropriate not to provide information to the Parliament at least (but not exhaustively) where the information is:

- protected by legal professional privilege
- protected by a public interest immunity
- the subject of a contractual obligation to keep that information commercial in confidence

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4 Harry Evans and Rosemary Laing (editors), *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 597. Available at: <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>. Viewed 6 February 2016, p 596. Prerogative power is a body of customary authority, privilege and immunity, recognized in common law as belonging to the sovereign alone which have not been removed by legislation. The High Court in *Barton v The Commonwealth* (1974) 131 CLR 477 said that executive power includes the prerogative powers of the Crown.

5 Harry Evans and Rosemary Laing, *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 597. Available at: <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>. Viewed 6 February 2016, p 43.

- commercially sensitive with the possibility to cause detriment to the present or future interests of the State even if there is no agreement with a counterparty that it should be kept confidential.[6]

2.5 The Committee does not request information out of mere curiosity. Inadequate or insufficient information is an impediment to its work, frustrating the Committee's general mandate to consider and report on any matter relating to the financial administration of the State. The information is integral to the Committee's work and not necessarily used for '*exposing miscalculation and failure*' but also to '*publicise innovation and achievement*'.[7]

2.6 Ministers and agencies should always provide requested information to committees for transparency and accountability purposes. Withholding such information does not accord with principles of good governance.[8] In circumstances where there are significant concerns about information being made public, the relevant Minister has the following options:

- request the information be given either a private or *in camera* status pursuant to Standing Order 175(1)(b) or (c)[9]

- include a comprehensive explanation as to why the requested information should be given a private or *in camera* status[10]

- if applicable, demonstrate with precision how public release of the requested information is detrimental to the State's interest.[11]

2.7 Committees have reported their frustration at being unable to obtain requested information over many years.[12] On occasion, there is tension between some

6 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015, p 12.

7 WA Inc Royal Commission II, 2.1.7.

8 Commonwealth of Australia, Senate, Legal and Constitutional Affairs References Committee, Report, *A claim of public interest immunity raised over documents*, 6 March 2014, p 25.

9 Standing Order 175 is titled: Status of Committee Evidence and states: (1) Committee evidence shall fall within one of 3 categories – (a) public evidence; (b) private evidence; or (c) *in camera* evidence.

10 In 2014 the Clerk of the Senate said the use of *in camera* hearings was '*probably the most effective response over the years as the inherent flexibility of committees often allows an accommodation to be reached between the competing interests of the Government and the Senate*'. Commonwealth of Australia, Senate, Legal and Constitutional Affairs References Committee, Report, *A claim of public interest immunity raised over documents*, March 2014, p 11.

11 Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 26, *Inquiry into the Confidential Status of the State Development Agreement Oakajee Port and Rail*, 21 April 2010, p 5.

12 For example, Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 30, *Inquiry into the Transport Co-ordination Amendment Bill 1998*, 29 June 2000. Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 26, *Inquiry into the Confidential Status of the State Development Agreement Oakajee Port and Rail*, 21 April 2010. For more recent committees, see paragraphs 2.19 and 2.20.

parliamentary committees and agencies (and their Ministers) during inquiries; as well as Members of Parliament and Ministers in the Houses during question time.

2.8 This tension is particularly evident when legal professional privilege, commercial-in-confidence, or cabinet-in-confidence are given as reasons for refusal. The tension is understandable given that the Parliament (with its committees) and Executive Government have polarised views on these subject matters.

2.9 Ultimately, under Legislative Council Standing Orders either the Committee or the Legislative Council can order the disclosure or publication of the requested information despite any earlier promise of a private or *in camera* status.[13] However, the Committee's practice (and that of other committees) is to honour an undertaking given to keep particularly sensitive information confidential.

2.10 At a hearing the Auditor General raised the lack of uncertainty about the confidentiality of information as an issue for Ministers:

> *We have asked the question of the Clerks. We have looked at the standing orders and asked the question: if information is provided to a committee, does that provide any certainty about the confidentiality of that information?*
>
> *The response we got was that there was no guarantee of confidentiality in those circumstances. Therefore, if the Minister released the information, then the Minister could have no certainty that the information would remain confidential.*[14]

2.11 Further, a request '*requires the Minister to relinquish responsibility*' to a committee '*for the confidentiality of that information.*'[15] This can prove a difficult decision for a Minister who may not want to abrogate that responsibility. This happened to Hon Liza Harvey MLA, then Minister for Tourism, when she decided not to provide to the Committee a copy of Eventscorp's assessment of the potential worth of the India Test in 2014 to Western Australia.

2.12 At first instance the Minister cited commercially sensitive information and later to the Parliament, expressed '*uncertainty as to whether the Committee would keep the*

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13 Standing Order 175(2) states '*Unless otherwise ordered by the Committee or the Council – (1) Committee evidence shall fall within one of 3 categories – (a) public evidence; (b) private evidence; or (c) in camera evidence*.' Standing Order 175(4) states '*Private evidence shall not be disclosed or published by any Committee Member or person, unless otherwise ordered by the Committee or the Council*.' Standing Order 175(5) states '*In camera evidence shall not be disclosed or published by any Committee Member or person unless otherwise ordered by the Council*.'

14 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 9.

15 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 17: September 2014, p 4.

information confidential.'[16] The Minister told the Auditor General she '*was not prepared to take the risk in this instance*.'[17] Bret Walker SC was critical of the Auditor General's deferral to the Minister's '*politically controversial doubting of the ability of the Committee to keep the relevant information appropriately confidential*.'[18]

2.13 Hon Helen Morton MLC, (then) Minister for Mental Health; Disability Services; Child Protection, also expressed concern about the risk of a committee making requested information public. A document containing the selection or criteria used by the combined assessment panel to determine and prioritise resources for people with disability and their families was not risked. The Minister said the '*whole purpose of this thing's operation and its effectiveness in the way that it is operating is because it is not public knowledge about how that is undertaken*.'[19] Given that at no time would the committee guarantee the confidentiality of that information, '*I was not prepared to hand it over*.'[20]

2.14 The Attorney General also expressed the view that information disclosed to a parliamentary committee carries risk:

> *There is no guarantee that it will be kept confidential and there has been one particular case that has caused quite some personal damage to a particular person because the information disclosed in confidence to a parliamentary committee ended up being published in one of its reports and was not, could not, be withdrawn.*
>
> *It did not occur in a commercial context. But there is always that concern on the part of government that something inadvertent like that might occur that can cause damage.*[21]

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16 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 17: September 2014, p 7.

17 Ibid. In reaching an opinion that the Minister's decision was reasonable and appropriate, the Auditor General noted the usefulness of the Western Australian Tourism Commission's Policy for determining when it can release event sponsorship information. The Auditor General said at page 7 '*This policy provided the Commission with an effective basis for the advice it gave to its Minister. Other agencies might wish to consider developing an equivalent policy*.'

18 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 34.

19 Hon Helen Morton MLC, Minister for Mental Health; Disability Services; Child Protection, *Transcript of Evidence*, 21 March 2016, p 8.

20 Ibid.

21 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, pp 6-7. In a letter to the President of the Legislative Council attached to a letter to the Committee, the Attorney General gave an example of how in a Legislative Assembly committee hearing, legal professional privilege was claimed in respect of a document, then provided under protest but privilege was not waived. Notwithstanding that claim, the advice was posted on the committee's website and became publicly available by the following day. Hon Michael Mischin MLC, Letter, 11 June 2014.

2.15 Hon Colin Holt MLC, Minister for Housing; Racing and Gaming advised the Committee that he does not believe committees act irresponsibly with information. Referring to past experiences on committees, the Minister said he observed respect about the information provided, even in-house and *in camera* evidence '*all treated pretty confidentially and with respect*.'[22] The Minister acknowledged that '*while it is easy to answer when you are part of the committee, it is a bit different when you are not. It is still the committee's decision, and their authority to do whatever they like with the information is it not*?' [23]

2.16 The Committee is of the view that issues around the custody and safety of information can be circumvented. As Bret Walker SC advised:

> *Both Houses have long established procedures and precedents for receiving and keeping secret information, for consideration by Members only. It would thus not…be an acceptable reason for a decision to withhold information to assume that all information provided to a House will be published.*[24]

2.17 A tested method for keeping requested information safely within the domain of a committee or the Parliament is retaining documents in the custody of the Clerk of the Parliaments for viewing by all or selected Members of the Parliament.[25] Other methods include committees resolving to give a private or *in camera* status to a document safely secured by Committee staff.

2.18 The Committee makes the following finding.

Finding 1: The Committee finds that the absence of a guarantee of confidentiality by committees of the Parliament compounds Ministerial reluctance to provide requested information.

WESTERN AUSTRALIAN COMMITTEES' EXPERIENCES WITH OBTAINING REQUESTED INFORMATION

2.19 The Committee contacted all Western Australian parliamentary committees surveying their experiences with non-disclosure of information from Ministers,

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22 Hon Colin Holt MLC, Minister for Housing; Racing and Gaming, *Transcript of Evidence*, 21 March 2016, p 9.

23 Ibid.

24 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 16.

25 As occurred in Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 26, *Inquiry into the Confidential Status of the State Development Agreement Oakajee Port and Rail*, 21 April 2010. The State Development Agreement Oakajee Port and Rail Project was able to be viewed by all Members of the Legislative Council for viewing purposes only. The Clerk later destroyed his copy within a designated time.

agencies, statutory corporations or others. Of six responses from Legislative Council committees, three committees reported that they experienced no difficulties.[26] With the remaining three:

- the Standing Committee on Public Administration experienced difficulty with a department refusing to provide documents. The committee requested that the details be kept confidential.[27] In the previous Parliament three Special Reports were tabled in relation to the non-disclosure of requested information[28]

- the Standing Committee on Legislation when scrutinising the Taxation Legislation Amendment Bill 2014 was refused information by the Office of State Revenue on the basis of State Solicitor Office advice that the confidentiality provisions in section 114 of the *Taxation Administration Act 2003* prevented disclosure.[29] During scrutiny of the Workforce Reform Bill 2013, agencies refused to provide requested documents on two occasions, asserting public interest immunity[30]

- the Standing Committee on Uniform Legislation and Statutes Review reported an assertion of public interest immunity when scrutinising the Directors' Liability Reform Bill 2015. A request for information was made to understand the process by which Western Australian legislation was audited by various agencies. The audit process was used to determine the amendments required by the Council of Australian Government Principles and Guidelines governing personal liability for corporate fault. The Department of the Attorney General asserted public interest immunity by stating '*the context of audit forms part of*

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26 These were (1) the Standing Committee on Environment and Public Affairs; (2) the Joint Standing Committee on Delegated Legislation and (3) the Select Committee into the Operations of the RSPCA. The Joint Standing Committee on Delegated Legislation advised that it enjoyed the benefit of *Premier's Circular 2014/01* which requires agencies to provide requested information within a certain timeframe.

27 Hon Liz Behjat MLC, Chair, Standing Committee on Public Administration, Letter, 23 September 2015.

28 These were (1) Special Report, tabled on 27 June 2012 (OAG refused to answer questions)' (2) Special Report, tabled on 3 May 2012 (the Board of Western Power acknowledged and accepted that aspects of its conduct and those of its duly appointed representatives may have obstructed or impeded the committee; and (3) Report 15, Omnibus Report, Activity During 38th Parliament, tabled on 6 November 2012, in relation to obtaining information from the Ombudsman.

29 In Report 26 Taxation Legislation Amendment Bill 2014 (November 2014), at pages 4 and 5, the committee stated: '*On this legal point, the Committee advised OSR and the Minister for Finance that it did not accept the submission that the requirement of confidentiality contained in section 114 of the Taxation Administration Act 2003 is applicable to persons providing information to either House of Parliament or its duly authorised Committees. The Committee also advised that there is no express or implied abrogation or limitation of parliamentary privilege contained in the Taxation Administration Act 2003 and the Committee asserted that the rights and privileges accruing to the Parliament, its Houses and Committees by common law and statute, are quite settled.*'

30 Hon Robyn McSweeney MLC, Chair, Standing Committee on Legislation, Letter, 9 October 2015.

the deliberative process of Cabinet.'[31] This assertion was the subject of Recommendation 1 of the Committee's report.[32]

2.20 The Committee received two responses from Legislative Assembly committees:

- the Economics and Industry Standing Committee reported two major exceptions to their general experience of helpful agencies. One involved an inquiry into the management of Western Australia's freight rail network. Significant difficulty was experienced when obtaining information from the Department of Transport and the Public Transport Authority[33]

- the Education and Health Standing Committee undertook two inquires relating to the commissioning and operation of Fiona Stanley Hospital. Some information was withheld on the grounds of commercial sensitivity.[34]

2.21 The Committee makes the following finding.

Finding 2: The Committee finds that withholding information from any parliamentary committee fundamentally disrespects the institution of Parliament and prevents the Parliament and its committees from carrying out their mandate to oversight the Executive.

31 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 92, *Directors' Liability Reform Bill 2015*, 21 April 2015, p 12.

32 Ibid, p 14. It recommended: '*during the Second Reading debate, the Attorney General advise the Legislative Council on the basis upon which the content of the audit process of Western Australian legislation against the Council of Australian Government's Principles and Guidelines governing personal liability for corporate fault forms part of the deliberative process of Cabinet to support a claim for public interest immunity from disclosure to the Parliament.*'

33 Mr Ian Blayney MLA, Chairman, Economics and Industry Standing Committee, Letter, 27 October 2015. In April 2014 the Committee, as part of the Agency Annual Report Hearings 2012-2013, conducted inquiries into the grain freight rail network and in particular, performance standards for the rail lines. The Committee requested and eventually received a copy of the *Rail Freight Corridor Land Use Agreement (Narrow Gauge) and Railway Infrastructure Lease* from the Minister for Transport.

34 Dr Graham Gibson Jacobs MLA, Chairman, Education and Health Standing Committee, Letter, 25 November 2015. Dr Jacobs said: '*The Committee's first FSH inquiry was occurring concurrent with the State's negotiations with Serco about the costs associated with delaying the opening of the hospital. The Department wanted to ensure that any information provided to the Committee did not materially impact upon the State's position during those negotiations, and almost all of the documentation was reviewed by the State Solicitor's Office before the Department provided it to the Committee. This slowed the provision of information quite considerably and resulted in the decision to withhold some documentation from the Committee. Where information was withheld, the Department was instructed to provide a list of the documentation that had not been provided and a brief explanation for why. Where documents were withheld it was overwhelmingly on the basis of commercial sensitivity. The Committee was satisfied that the inquiry had not been negatively impacted by the decision to withhold some documentation and did not further pursue the issue*.'

MEMBERS OF PARLIAMENT EXPERIENCES WITH OBTAINING REQUESTED INFORMATION

2.22 The Committee noted that occasionally during question time in the Houses, Members of Parliament are provided with answers to questions on (or without) notice containing the same variety of reasons listed at paragraph 2.3 for not providing the information.

MEMBER OF PARLIAMENT USE OF THE *FREEDOM OF INFORMATION ACT 1992* PROCESS

2.23 It has been erroneously suggested on occasion that a Member of Parliament or a committee may rely on *Freedom of Information Act 1992* (*FOI*) processes set out in that enactment to obtain information.

2.24 In 2010, the Information Commissioner noted the use of the *FOI* process by Members of Parliament to obtain documents.[35] The Commissioner urged Members and Ministers to explore '*more informal and expedient methods of seeking and disclosing information, rather than relying purely on the FOI process*'[36] because the process is a '*last resort information disclosure tool.*'[37] The Commissioner said:

> *Members of Parliament who are seeking information from Ministers may be better served by approaching the Minister in the first instance with an informal request for a briefing or a document, instead of submitting a FOI request.*[38]

2.25 However, by September 2015 the President of the Legislative Council found cause to address the House on the subject of parliamentary questions and the use of the *FOI* process.[39] The President noted that in response to questions asked in the Legislative Council, Ministers had '*often referred members to the Freedom of*

35 Sven Bluemmel, Information Commissioner, *The Administration of Freedom of Information in Western Australia*, 31 August 2010, p 5. Available at: < http://www.foi.wa.gov.au/Materials/FOI%20Review%202010%20-%20Comprehensive%20Report.pdf>. Viewed 20 March 2016.

36 Ibid.

37 Sven Bluemmel, Office of the Information Commissioner, Supplementary Information Letter, 20 March 2015, p 2.

38 Submission 4 from Sven Bluemmel, Information Commissioner, 27 June 2014, p 2.

39 Hon Barry House MLC, President of the Legislative Council, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, Statement, 17 September 2015, p 6583e-6584a.

Information Act 1992 as a method for obtaining the requested documents.' [40] Further, that a Minister had also declined a request to table documents on the ground that the relevant agency was considering an application under the *FOI* for the same documents.

2.26 The President reminded Members the history of the *FOI*. How it had arisen out of a recommendation of the Royal Commission into Commercial Activities of Government and Other Matters. The President referred to Royal Commission reports, the reports of the subsequent Commission on Government and the second reading debates on the bill to demonstrate that the Act was '*always intended to operate in addition to the accountability function provided by the Parliament*.' [41] The President reminded the Legislative Council that:

> *The primary purpose of this House in achieving its accountability objectives would be undermined if the FOI Act came to be seen as a substitute for the accountability functions provided by this chamber. One accountability mechanism used by this House is the seeking of information from Ministers by the asking of questions.*[42]

2.27 Like the Legislative Council, the Committee has also experienced a Minister suggesting an *FOI* application. During the 2013-14 Agency Annual Report Hearings, the Committee requested correspondence or emails from the Minister for Transport's office regarding the engagement of Chronos Advisory or Mr Peter Iancov to undertake any work or contracts in the 2013-14 or 2014-15 financial years. The Minister said: '*due to the time and resources required this information would be best sought using the Freedom of Information process.*'[43]

2.28 The Auditor General's view is that if the reason for deciding not to provide information to the Parliament is simply because it can be accessed via the FOI

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40 Examples are Answers to Questions on Notice 4307, 4491, 4492, 4493, 4495, 4496, 4497, 4498 and 4499 asked in the Legislative Council by Hon Ken Travers MLC and answered by the Minister for Finance representing the Minister for Transport, *Parliamentary Debates (Hansard)*, 5 March 2012. The Minister said that the '*answers to Questions on Notice 4307, 4491, 4492, 4493, 4495, 4496, 4497, 4498 and 4499 suggested that the Member should request the information through a more appropriate method, a Freedom of Information request. The information was not withheld, the Member was simply redirected to a more appropriate process. Should the Member prefer to ask questions of a similar nature through the Parliament, the Minister advises that the same guidelines used in the Freedom of Information process are to be expected*.'

41 Hon Barry House MLC, President of the Legislative Council, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, Statement, 17 September 2015, p 6583e-6584a.

42 Ibid.

43 Question on Notice Additional Questions No. 2, 2013-14 Agency Annual Report Hearings, Department of Transport. On that occasion, the Committee informed the Minister that the response was not acceptable and repeated its request for the information. The second response provided a different reason. The Minister said: '*Much of the information contained within correspondence or emails regarding Chronos Advisory or Mr Peter Iancov form part of a submission to Cabinet and would reveal the deliberations or decisions of an Executive body*.'

process, that is likely to be considered by him to not be a reasonable and appropriate decision under section 24(2)(c) of the *Auditor General Act 2006*. That Act requires the Auditor General to form an opinion of that decision.[44]

2.29 However, the State Solicitor sees a place for the FOI process. He argues that Ministers simply relying on the availability of information through FOI processes '*is not to say that the Minister could not reasonably and appropriately form the view that information was better obtained through those provisions in particular circumstances*.'[45] A benefit of using the FOI process to disclose information is the requirement for third party views to be taken into account as part of an evaluation, to see if there are any objections and a weighing of those objections.[46] That third party '*who is affected gets a say; in the parliamentary process*'[47] and that perspective may be useful to a committee if that perspective is disclosed.

2.30 Awareness of third party views may be beneficial especially when confidentiality disclosure clauses in contracts are raised under the commercial-in-confidence reason for a Minister deciding not to provide information. However, the Committee is of the view that Ministers, not the Committee, should seek those views as part of the process of providing requested information to the Parliament or its committees. A committee should never be required to use the FOI process to undertake its standing functions.

2.31 The Committee makes the following finding.

Finding 3: The Committee finds that agencies or Ministers suggesting parliamentary committees or individual Members of Parliament use the *Freedom of Information Act 1992* process to obtain requested documents is unacceptable.

44 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 19: August 2015, p 16.

45 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015.

46 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, p 10.

47 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 8.

CHAPTER 3

THE PARLIAMENT'S RIGHT TO INFORMATION

THE FOUNDATIONAL BASIS OF PRIVILEGE

3.1 The Parliament is modelled on the Westminster system of government. Its formulation, privileges, immunities and powers derive from the *Constitution Act 1889, Constitution Acts Amendment Act 1899* and the *Parliamentary Privileges Act 1891*.

3.2 Section 36 of the *Constitution Act 1889* demonstrates Parliament's privilege power. It permits the legislature '*by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised*' by each House and their Members. The Western Australia Parliament expressly legislated for its two Houses to have equivalent privileges, immunities and powers to the House of Commons at Westminster in the *Parliamentary Privileges Act 1891*.[48]

3.3 It is evident that the Parliament of Western Australia enjoys a strong statutory base for its privileges. Additionally, case law such as *Egan v Willis & Cahill*[49] and *Egan v Chadwick and Others*[50] (two cases decided in the absence of a privileges enactment because of differing constitutional arrangements) have reinforced the supremacy of parliamentary privilege.

THE POWER OF PARLIAMENT AND ITS COMMITTEES TO OBTAIN REQUESTED INFORMATION

3.4 The right of the Parliament of Western Australia (and by extension its committees) to obtain information is absolute. It finds expression in the 21st edition of *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, (the 'parliamentary bible').[51] Erskine May states:

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48 *Parliamentary Privileges Act 1891* s 1. That section was amended on 3 November 2004 to sever the link between the privileges, immunities and powers of the United Kingdom's Commons House of Parliament as at 1 January 1989. This was recommended by the Legislative Assembly Procedure and Privileges Committee in Report No.5, 2004.

49 *Egan v Willis & Cahill* [1998] HCA 71, 158 ALR 527.

50 *Egan v Chadwick and Others* [1999] NSWCA 176, 10 June 1999.

51 First published in 1844, the treatise is considered to be the most authoritative and influential work on parliamentary procedure and British constitutional convention. The treatise has become part of the uncodified constitution of the United Kingdom and as a result is sometimes called the 'Parliamentary bible', acting as a rule book for parliamentarians. Since its first publication in 1844, the treatise has frequently been updated into the present day. The treatise has been influential outside the United Kingdom, particularly in countries which use the Westminster system.

> *There is no restriction on the power of committees to require the production of papers by private bodies or individuals, provided such papers are relevant to the committee's work, as defined by its order of reference*.[52]
>
> *The degree of formality in the questioning of committees depends on the terms of reference of the committee and the subject matter of the questioning. However committees, being extensions of the House, possess substantial powers to require answers to questions.*[53]

3.5 The Clerk of the Legislative Council advised that in the absence of a legal determination to the contrary, no House should accept that there is any limitation, other than that which is self-imposed, upon its capacity to obtain information from the Executive.[54]

3.6 The Parliament's power and orders to compel attendance of persons and production of documents is found in sections 4, 5 and 6 of the *Parliamentary Privileges Act 1891*.

3.7 Without parliamentary privilege and its beneficial immunity from the general law, Members of Parliament would be unable to '*freely raise and debate any matter in the course of exercising legislative, deliberative and scrutiny functions, without fear of legal liability or other reprisal*.'[55] This explains why parliamentary privilege has been described as having the effect of both sword and shield:

> *It serves as a sword to enable the Houses and their committees to inquire, scrutinise, criticise, debate and legislate, and as a shield from the authority of other arms of government (namely the Executive and the Courts).*[56]

3.8 The Houses further enjoy the sole capability to control their own powers, namely the power to control their own proceedings, conduct inquires, discipline Members and punish for contempt.

PARLIAMENTARY SUPREMACY IN A POLITICAL ENVIRONMENT

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52 CJ Boulton (editor) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Butterworths, London, 1989, p 630.

53 Ibid, p 680.

54 Submission 14 from Nigel Pratt, Clerk of the Legislative Council, 18 June 2014, p 2. See **Appendix 3**.

55 Mr David Blunt. 'Parliamentary Sovereignty and Parliamentary Privilege', to a seminar on 'The Fundamentals of Law: Politics, Parliament and Immunity', Conducted by Legalwise Seminars at UNSW CBD Campus, 16 June 2015, p 2; citing Enid Campbell, *Parliamentary Privilege*, The Federation Press, 2003, p 1. Also see *Egan v Willis & Cahill* [1998] HCA 71, at 42, Gaudron, Gummow, Hayne JJ, p 3.

56 Ibid.

3.9 The Committee noted the advantage of possessing a power of coercion under section 4 of the *Parliamentary Privileges Act 1891* but agrees with the Clerk of the Legislative Council that '*other questions arise when it is exercised against the backdrop of the relationship between a House of Parliament and the Executive*.' [57] Placing the Houses and Executive Government in a position where they have to determine how, and to what extent, ordered documents will be produced strains their working relationship. Bret Walker SC refers to this as '*an explicitly recognised tension*' between the public or governmental interest and the constitutional imperative of Executive Government accountability.[58] This tension found expression in a 2014 Government Response to a Legislative Assembly committee report where the Minister said:

> *While a committee may assert the supremacy of Parliament in justifying its actions the irresponsible behaviour in publishing privileged legal advice and the frankly dangerous behaviour in publishing witness statements...displays little or no regard or possibly comprehension, of long standing conventions and rules of Parliament. Such actions by the committee can only bring Parliament into disrepute.*[59]

3.10 This tension was further demonstrated when the Chair of the Legislative Assembly committee on tabling that particular report stated:

> *The State Solicitor quite rightly claims that it is not his privilege to assert but that of the Commissioner of Police. The police commissioner told the committee on more than one occasion that he had no problem with the opinion being released but it was the State Solicitor who advised that claim of privilege should be pressed. The committee gave the State Solicitor the opportunity to appear and make submissions before the matter was finally determined but this offer was declined. It was also open to the committee to conclude that*

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57 Submission 14 from Nigel Pratt, Clerk of the Legislative Council attaching a copy of a submission to the Department of Treasury from former Clerk of the Legislative Council Malcolm Peacock regarding a review of the *Financial Management Act 2006*, 22 September 2015, paragraph 1.60 of the Attachment.

58 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 6.

59 Hon Liza Harvey MLA, Minister for Police, Government Response to the Legislative Assembly, Community Development and Justice Standing Committee Report Number 5, 14 June 2014, *Review of the police investigation into traffic incidents involving a Member of Parliament*, 14 August 2014, p 3. Margaret Quirk MLA, Chair, Legislative Assembly, Community Development and Justice Standing Committee, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 September 2014, p 6593.

> *the media release by WA Police had effectively waived privilege in any event.*[60]

3.11 *Odgers' Australian Senate Practice Thirteenth Edition,* the leading procedural text on issues surrounding the provision of information to a Parliament by Executive Government, acknowledges that the Executive's claim for confidentiality and the Parliament's right to know (in the Senate and by extrapolation the Legislative Council)[61] must ultimately, be resolved politically.[62] Odgers' states:

> *In practice this means that whether, in any particular case, a government will release information which it would rather keep confidential depends on its political judgment as to whether disclosure of the information will be politically more damaging than not disclosing it.*[63]

3.12 Like the courts, the Committee acknowledges that the power in section 4 of the *Parliamentary Privileges Act 1891* is '*exercised in a context in which conventions and political practices are as important as rules of law*.'[64] Similarly, the Attorney General refers to these themes of unwritten conventions and rules. In recognising the supremacy of Parliament and the broad power in section 4 to compel production of confidential information, the Attorney General said:

> *The breadth of that power does not mean that it is appropriate for Parliament to exercise that power in a way that will prejudice or disregard a recognised public interest*[65] *that gives rise to confidentiality*.[66]

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60 Margaret Quirk MLA, Chair, Legislative Assembly, Community Development and Justice Standing Committee, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 18 September 2014, p 6593.

61 Submission 14 from Nigel Pratt, Clerk of the Legislative Council, 18 June 2014, p 3. See **Appendix 3**. The Clerk advised that in general, Odgers' approach to claims of public interest immunity is '*consistent with that taken by the Legislative Council of Western Australia*.'

62 Odgers' Australian Senate Practice Thirteenth Edition is the authoritative account of the practices and procedures of the Australian Senate and its place in the framework of the Australian Constitution.

63 Harry Evans and Rosemary Laing, *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 597. Available at: <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers13>. Viewed 6 February 2016.

64 *Egan v Willis & Cahill* [1996] NSWCA 583, Judgment, per Gleeson CJ.

65 What constitutes the 'public interest' is difficult to define. Kirby J in *Osland v Secretary to the Department of Justice* [2008] HCA 37, paragraph 110 said: '*I certainly agree… that it is impossible to define the "public interest" precisely, in language that will have universal application.*'

66 Letter to the President of the Legislative Council from Hon Michael Mischin MLC, 11 June 2014 attached to a letter to the Committee from Hon Michael Mischin MLC, 11 June 2014.

3.13 The State Solicitor holds the view that Ministers have a political duty to explain in the Parliament the exercise of their powers and duties; and account to the Parliament for what is done by them in their Ministerial capacity or that of their departments. Ministers do this by answering parliamentary questions and making documents available '*but in doing so, they act voluntarily and not under any legal compulsion*.'[67]

3.14 The Committee makes the following findings.

Finding 4: The Committee finds that the *Parliamentary Privileges Act 1891* gives an absolute right to the Parliament to obtain requested information from the Executive. Both Houses have extended this right to their committees.

Finding 5: The Committee finds that the views of the Attorney General and the State Solicitor perpetuate an erroneous view of the Parliament's absolute right to requested information.

Finding 6: The Committee finds that political reality tempers the Parliament's ability to exercise its absolute right to be provided with requested information.

[67] Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015.

CHAPTER 4

COMMITTEE VIEWS OF THE REASONS WHY MINISTERS WITHHOLD REQUESTED INFORMATION

4.1 In seeking information a committee is not initially constrained by notions of the public interest. Unlike the courts that treat, for example, claims of privilege based on commercial confidentiality by assessing the public interest, the Committee only has to exercise its collective mind that a request for information has a nexus with '*any matter relating to the financial administration of the State*.'[68] Prior to publishing any information a committee would give consideration to the public interest. This strength of a Parliament's position was noted by Priestly JA in *Egan v Chadwick and Others* when speaking of NSW's Legislative Council (a differing constitutional arrangement to that of Western Australia's Council):

> *The Council's power does extend to compel the Executive to produce documents to the Council which, in other circumstances and outside the House the Executive might, after decision by a court, be entitled to withhold on the ground of legal professional privilege or public interest immunity.*[69]

4.2 *Odgers' Australian Senate Practice Thirteenth Edition* refers to how the NSW Court of Appeal found in *Egan v Chadwick and Others* that claims of legal professional privilege and public interest immunity could not protect the NSW executive government against the Legislative Council's power.

THE LEGAL PROFESSIONAL PRIVILEGE REASON FOR REFUSING REQUESTED INFORMATION

4.3 The 'explicitly recognised tension' Bret Walker SC referred to between the Parliament, its committees and Executive Government is heightened when legal professional privilege is the reason for not providing information.

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68 This was acknowledged by the Attorney General in a letter to the President of the Legislative Council from Hon Michael Mischin MLC, 11 June 2014. That letter was attached to a letter to the Committee from Hon Michael Mischin MLC, 11 June 2014.

69 *Egan v Chadwick and Others* [1999] NSWCA 176, 10 June 1999. In *Commonwealth v John Fairfax & Sons* (1980) 147 CLR 39 at 52, Mason J stated '*The court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected*.'

4.4 One example arose out of the Agency Annual Report Hearings 2013-14 when the Committee sought, from the Department of Lands, a summary of legal advice about a government obligation to offer pastoral leases. The Attorney General refused to disclose the advice as he was of the view the disclosure would amount to a waiver of legal professional privilege. In this instance, the Committee, while choosing not to pursue the information at that stage, reserved its right to take action in the future to obtain the information.

4.5 Without doubt, the legal professional privilege reason fails to lend itself to a practical solution (being rarely waived) other than by summons. Fundamentally this is because parliamentary privilege to compel the production of legal advice is a power whereas legal professional privilege is an immunity. As Bret Walker SC said, they cannot exist in the same space and one must yield to the other.[70] In particular, the parliamentary privilege to compel production '*cannot be resisted by reliance on what would elsewhere be legal professional privilege*.' [71]

4.6 The Committee does not routinely request a document from an agency or Minister containing advice to which legal professional privilege is attached. It thoughtfully considers whether:

- the advice is necessary to enable it to perform its standing functions
- the evidence can be obtained some other way or from another source, for example, a summary of legal advice
- harm may arise from its production
- the advice will be publicly released.

4.7 The Parliament's power to compel information the subject of legal professional privilege was noted earlier than an 1828 House of Commons speech by Robert Peel. Later, *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* and the NSW Court of Appeal case of *Egan v Chadwick and Others*[72] confirmed this power.

4.8 In 1828, Robert Peel Home Secretary and Leader of the House of Commons recounted an earlier scenario of an attorney who was examined and refused to divulge his client's secrets but the House had overuled him. The Commons declared that the rules of the law courts do not apply and that for the ends of public

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70 Peter McHugh, Clerk of the Legislative Assembly Western Australia, Presiding Officers and Clerks Conference, *Evidence sought by parliamentary committees and legal professional privilege*, citing Bret Walker SC, Legal Opinion, Legislative Assembly of Western Australia, *Legal professional privilege in parliamentary committees*, 4 November 2014, paragraph 3.

71 Ibid.

72 *Egan v Chadwick and Others* [1999] NSWCA 176, 10 June 1999.

justice it was necessary that he should answer, he being protected from the consequences. Of this speech, Bret Walker SC said it assimilates the case of legal professional privilege with that of the privilege against self-incrimination in two ways:

> *first that they are a good ground to refuse to answer a question in a court of law;*
>
> *second that neither is a good ground to refuse to answer a question in a House or one of its committees.*[73]

4.9 Although an ancient speech, the relevance of it today lies in the following facts:

- in 1828 Mr Peel was speaking about an already established practice
- Mr Peel's words were not novel or surprising to other Members of the Commons during the consideration phase of the debate
- research by Bret Walker SC has not '*produced any qualification of let alone departure from the position plainly stated by Mr Peel in 1828*.'[74]

4.10 Erskine May in its 21st edition regards a witness as:

> *Bound to answer all questions which a committee sees fit to ask and cannot excuse himself because the matter was privileged communication to him, as where a solicitor is called upon to disclose the secrets of his client;…*
>
> *Nor can a witness refuse to produce documents in his possession on the ground that, though in his possession, they are under the control of a client who has given him instructions not to disclose them without his express authority*.[75]

4.11 *Egan v Chadwick and Others* was a case directly on point. It held that the NSW Legislative Council's power to call for documents relating to the ongoing contamination of Sydney's water supply system extended to compel the Executive

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73 Peter McHugh, Clerk of the Legislative Assembly Western Australia, Presiding Officers and Clerks Conference, *Evidence sought by parliamentary committees and legal professional privilege*, citing Bret Walker SC, Legal Opinion, Legislative Assembly of Western Australia, *Legal professional privilege in parliamentary committees*, 4 November 2014, paragraph 16.

74 Ibid, paragraph 19.

75 CJ Boulton (editor) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st edition, Butterworths, London, 1989, p 680.

to produce documents over which a claim of legal professional privilege or public interest immunity had been made.[76]

4.12 In comparison, the State Solicitor's view derives from case law and in particular *Daniels v Australian Competition and Consumer Commission*[77] in 2002 when the High Court confirmed the rights of clients to refuse to hand over to the Australian Competition and Consumer Commission, confidential communications with their lawyers.[78]

4.13 The High Court emphasised the well settled legal rule that statutory provisions should not be construed as overriding common law rights, privileges or immunities in the absence of clear words or a necessary implication to that effect. The Court said that being a rule of substantive law legal professional privilege in the absence of provisions to the contrary, '*may be availed of to resist the giving of information or the production of documents in accordance with investigatory procedures*.'[79] The Court has expressed this rule since 1908 and has strictly applied it since 1987.[80]

4.14 The Committee concurs with the Clerk of the Legislative Council that '*legal principles may be persuasive but are not determinative*' in a parliamentary setting.[81]

4.15 The Committee noted only one Commonwealth statute has abrogated the privilege completely,[82] making waiver the only practical means by which either the Parliament or a committee can access State Solicitor Office legal advice given to agencies. Though the Parliament's absolute right to requested legal advice remains, the Committee acknowledges the responsibility that accompanies the exercise of parliamentary privilege. In the case of legal professional privilege, a committee would (like the Senate) give serious consideration to applying the privilege in

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76 *Egan v Chadwick and Others* [1999] NSWCA 176, 10 June 1999.

77 *Daniels Corporation International Pty Limited v Australian Competition & Consumer Commission* [(2002) CLR 543.

78 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015, p 17.

79 *Daniels Corporation International Pty Limited v Australian Competition & Consumer Commission* (2002) CLR 543 at 552-553.

80 *Potter v Minahan* (1908) CLR 277 in 1908 and *In Re Bolton* (1987) 162 CLR 514.

81 Submission 14 from Nigel Pratt, Clerk of the Legislative Council, 18 June 2014, p 2. See **Appendix 3**.

82 This was the *James Hardie (Investigations and Proceedings) Act 2004 (Cth)* which allowed the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions to obtain and use privileged information for both investigation and prosecution. The Australian Law Reform Commission's Final Report, Report 129, December 2015, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, p 328: states: '*This appears to have been in response to concerns about unwarranted claims of privilege during a special commission of inquiry into the James Hardie companies' handling of asbestos claims. ASIC's proceedings against the James Hardie companies concluded in 2012*.'

proceedings before the courts in order to protect the relationship between legal advisers and their clients.

4.16 The Committee makes the following findings.

Finding 7: The Committee finds that there is limited case law on whether parliamentary privilege overrides legal professional privilege. Prior to exercising its right to legal advice, a committee should consider a range of matters including the value of protecting the relationship between legal advisers and their clients in court proceedings.

Finding 8: The Committee finds that reasonable minds will continue to differ on whether parliamentary privilege overrides a claim of legal professional privilege. In the absence of any binding authority, the Committee will continue to assert that parliamentary privilege prevails over legal professional privilege. However, in exercising its right to legal advice, the Committee acknowledges the responsibility to use the privilege fairly.

THE COMMERCIAL-IN-CONFIDENCE REASON FOR REFUSING REQUESTED INFORMATION

4.17 Commercial-in-confidence is, in the Committee's experience, the most recurring reason Ministers give for not disclosing information. With increased outsourcing of services previously provided by government, information about public spending and provision of services often includes information about the business affairs of third parties.[83] However, the fact that the requested information has a commercial nature or involves a third party is not necessarily sufficient for commercial-in-confidence to be validly claimed. This makes it an especially vexing reason. It is a convenient term used to identify arguments for non-disclosure of information that is potentially sensitive because of its commercial nature.[84]

4.18 Outsourcing of services to the non-government sector creates increased tension when the Committee requests their commercial-in-confidence information in order to scrutinise those services. Hon Colin Holt MLC, Minister for Housing; Racing and Gaming provided a useful set of criteria the Housing Authority uses to assess whether information is commercially confidential. These are:

- The information is commercially valuable and sensitive.

83 Moira Paterson, 'Commercial in Confidence and public accountability: Achieving a new balance in the contract State', *Australian Business Law Review*, 2004, vol. 32, p 322.

84 Ibid.

- Disclosure of the information will result in detriment to the other contracting party because it would lose its commercial value if publicly disclosed.
- The information gives rise to an obligation of confidentiality.
- The information is specifically identifiable as confidential.
- The potential harm to the public interest from not disclosing the information outweighs the benefit of disclosure.[85]

4.19 The State Solicitor's Office 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question,* notes the absence of a 'commercial-in-confidence' definition. The Guideline makes the point to Ministers that mere labelling of a document as commercial-in-confidence '*is not, of itself, sufficient*.'[86] In the Committee's experience this guidance is unknown or known and ignored.

4.20 Commercial-in-confidence is '*potentially dangerous and misleading because it lacks any clearly defined legal meaning and is frequently used on the assumption that information of a business nature is automatically sensitive and should be withheld as a matter of law*.'[87] Hearings with three Legislative Council Ministers revealed an absence of internal generic documentation defining either 'commercial-in-confidence' or 'commercially sensitive' to assist Ministers deciding whether or not to provide requested information.[88] The Committee is of the view that it is necessary (rather than '*desirable*'[89] as the State Solicitor suggested) to develop and insert definitions into the *Guideline to Ministers withholding information or documents when asked a parliamentary question* prepared by the State Solicitor's Office in 2011.

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85 Answer to Question on Notice A1 asked in the Committee by Hon Ken Travers MLC and answered by Hon Colin Holt MLC, Minister for Housing, 7 April 2016, p 1.

86 State Solicitor's Office *Guideline to Ministers withholding information or documents when asked a parliamentary question*, March 2011, p 2.

87 Moira Paterson, 'Commercial in Confidence and public accountability: Achieving a new balance in the contract State', *Australian Business Law Review*, 2004, vol. 32, p 322.

88 For example, Hon Colin Holt MLC, Minister for Housing, Racing and Gaming, *Transcript of Evidence*, 21 March 2016, p 4.

89 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 2.

4.21 The Committee makes the following finding.

Finding 9: The Committee finds the absence of an Executive Government document defining 'commercial-in-confidence' and 'commercially sensitive' to assist Ministers' decisions to withhold information from the Parliament or its committees, unacceptable. The consequences of absent definitions include: improper claims of commercial-in-confidence, inconsistencies in their application, agencies making erroneous claims and the wasting of parliamentary time over what is or is not commercial-in-confidence.

4.22 The Committee therefore makes the following recommendation.

Recommendation 1: The Committee recommends that the Attorney General update the State Solicitor's Office 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question*, to provide for definitions of 'commercial-in-confidence' and 'commercially sensitive'. (See also recommendations 6 and 9)

4.23 The Committee invites the Attorney General to have the State Solicitor's Office consult with the Committee before finalising the updated *Guideline to Ministers withholding information or documents when asked a parliamentary question*.

4.24 Although Western Australia's Public Sector Commissioner Circular 2010-03: *Policy for Public Sector Witnesses Appearing before Parliamentary Committees* does not define commercial-in-confidence, the Circular refers to it in the context of prejudicing the State's position in confidential negotiations or litigation. It states:

> *An organisation or member of the public sector may request that a Committee treat any evidence, document or information as:*
>
> *(a) confidential; or*
>
> *(b) 'Commercial in Confidence', on the basis that release could prejudice the State's position in confidential negotiations or litigation.*[90]

4.25 While information may be commercial in nature, it will only be confidential when disclosure of this information would result in unreasonable detriment to commercial interests. To assess whether information is commercial-in-confidence, the decision maker needs to assess the harm to the public interest in disclosing the

[90] Public Sector Commission, *Policy for public sector witnesses appearing before parliamentary committees*, 29 March 2010. It is due for review on 10 April 2016.

information and balance this against the public interest in the administration of the State.[91]

4.26 The WA Inc Royal Commission noted that there is no simple rule that governs when commercial secrecy can legitimately be claimed. Rather, there are principles which guide the determination.[92] The summarised principles are:

- trade secrets, information which is, in itself, economically valuable. The Royal Commission stated it did not envisage that a significant body of government information would qualify for protection on this ground, as it was normally the product of research, innovation and creativity

- commercial information where its public disclosure would reveal information that has commercial value and disclosure would diminish or destroy that value.[93]

4.27 When claiming commercial-in-confidence, Ministers refer to a commercial relationship. They do not specify the likelihood of the detriment in disclosing the information; why it is unreasonable and what damage may result. It is the Committee's view that it is insufficient to simply assert that the release of information would *likely* prejudice the commercial position of the entity or individual. There has to be a real and substantial risk, a risk which may well eventuate.

4.28 The State Solicitor's 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question*, advises Ministers to properly consider:

- whether the document or information is inherently confidential

- whether disclosure would breach an equitable obligation of confidence[94]

- whether the information is protected by a confidentiality disclosure clause[95]

- whether the information or document is capable of being redacted to preserve confidential aspects

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91 Moira Paterson, 'Commercial in Confidence and public accountability: Achieving a new balance in the contract State', *Australian Business Law Review*, 2004, vol. 32, p 19.

92 WA Inc Report II 2.5.6.

93 Ibid, 2.5.9.

94 This arises when a party communicates information to another on an express or implied understanding that the communication is confidential and only for a particular purpose.

95 The Guideline states: '*It would not be reasonable and appropriate for a Minister to withhold a contract on the sole basis that it contained such a clause if that clause was subject to the requirement that the contractual parties still be allowed to disclose matters as required by law*', p 3.

- whether the information or document is capable of being tabled at a later date after the confidentiality ceases[96]

- whether consideration has been given to whether any party would be seriously aggrieved by disclosure

- the content of legal advice a Minister might seek.[97]

4.29 The Committee is of the view that the 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question*, does not adequately provide guidance on legitimate reasons for claiming confidentiality; and that a redacted version of a document may render its content meaningless.

4.30 The Committee therefore makes the following recommendations.

Recommendation 2: The Committee recommends that the Premier develop a Ministerial Office Memorandum advising Ministers that their claim for commercial-in-confidence or commercial sensitivity as a reason to withhold requested information from the Parliament or its committees should be supported by providing the Parliament or a committee with evidence of why it is not in the public interest to disclose the information, including the following:

- **that disclosure of the information would be likely to result in substantial harmful effects**

- **a list of the harmful effects**

- **why the effects are viewed by the Minister to be substantial**

- **an explanation of the causal relationship between disclosure and such harmful effects.**

Recommendation 3: The Committee recommends that Ministers include the information in recommendation 2 in a section 82, *Financial Management Act 2006* notice.

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96 For example, after related procurement processes have concluded. Hon Colin Holt MLC, Minister for Housing; Racing and Gaming cited an example of how commercial confidentiality was applied during the tender process and formal negotiations with Fleetwood Corporation regarding the Osprey Key Worker Village development, including the mid 2015 negotiations of the final management agreement. The Minister said '*Once the final agreement was signed I was able to provide information in response to parliamentary questions regarding management and development fees.*' Answer to Question on Notice A1, 7 April 2016, p1.

97 Paraphrased from State Solicitor's Office *Guideline to Ministers withholding information or documents when asked a parliamentary question*, March 2011, p 2.

4.31 If the above recommendations are implemented, parliamentary committees will then be in a position to assess:

- whether the information relates to the commercial position of the entity
- the harmful impact on the commercial position of the entity if the information was provided
- the likelihood that a harmful impact will occur
- whether that prejudice is unreasonable.

4.32 The phrase 'commercial-in-confidence information' is not used in the *Auditor General Act 2006* or the *FMA*.[98] The consequent difficulty is that commercial-in-confidence can be made (as the Senate states) in relation to '*any information that is vaguely commercial in nature, rather than in respect of information whose disclosure could harm the commercial interest of a person.*'[99] This is problematic in an environment where, as the Information Commissioner explained, there is a '*growing push nationally and internationally among government towards open data*.'[100] The Information Commissioner said:

> *Open data is the idea that it is good not only for transparency, but also for things like economic activity to have this vast amount of information and data that government holds available publicly so that clever people in businesses out there can exploit it. That is good for the economy, is the idea.*[101]

4.33 The Deputy Auditor General provided research showing that:

- some countries now publish contracts proactively, including the federal governments of Colombia, the United Kingdom, Slovakia and Georgia
- since January 2011, the United Kingdom government has required all new central government contracts be published in full.[102]

98 Paul Evans, State Solicitor, Letter, 9 November 2015, p 13.

99 Brief Guides to Senate Practice, Orders for production of document, August 2015, p 3.

100 Sven Bluemmel, Information Commissioner, Office of the Information Commissioner, *Transcript of Evidence*, 9 March 2015, p 8.

101 Ibid.

102 Glen Clarke, Deputy Auditor General, Letter, 24 March 2015.

4.34 However, at first glance what appears to be progressive legislation and policy in the United Kingdom (contracts valued over £10,000 to be published online on Contracts Finder) is soon watered down by the following categories of information that can be reasonably withheld on the grounds of commercial confidentiality because they would be likely to diminish suppliers' competitive edge.

> *Pricing. This means the way the supplier has arrived at the price they are charging government in a contract, but should not usually be grounds for withholding the price itself.*
>
> *Intellectual property. This means the detail of the solution the contractor is deploying for government. This can include technical or service specifications. It shouldn't be grounds for withholding performance information.*
>
> *Business plans. This can mean the detail of how the contractor expects to yield a financial return from the service. This can include investment plans.*[103]

4.35 Further some Australian jurisdictions have enacted legislation or made policies to make contracts as open as possible. In NSW for example, the *Government Information (Public Access) Act 2009 (NSW)* states at section 6(1) that '*an agency must make the government information that is its "open access information"* (which includes the agency's register of government contracts) *publicly available unless there is an overriding public interest against disclosure of the information.*' However again, what at first glance appears to be progressive legislation is, from a parliamentary perspective, disappointing. For example, section 14 provides a possible exception in relation to business interests of agencies and other persons. It refers to how there is a public interest consideration against disclosure of information if the disclosure could reasonably be expected to have one or more of the following effects:

> *(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,*

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103 United Kingdom Government, *The Transparency of Suppliers and Government to the Public Preamble*, Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416421/Transparency_of_suppliers_and_government_to_the_public.pdf>. Viewed 22 March 2016. Government procurement in the United Kingdom is governed by the *Public Contracts Regulations 2015*, which implements European Union law and also covers United Kingdom policy on promoting access for small and medium enterprise to public sector contracts.

> *(b) reveal commercial-in-confidence provisions of a government contract,*
>
> *(c) diminish the competitive commercial value of any information to any person,*
>
> *(d) prejudice any person's legitimate business, commercial, professional or financial interests,*
>
> *(e) prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).*[104]

4.36 In passing the *Government Information (Public Access) Act 2009 (NSW)* that State has codified and entrenched in legislation what is currently in Western Australia, a *claim* of immunity butting a parliamentary privilege *power*. Further, it turns the NSW government's claim of public interest immunity into a legal question to be resolved by the courts, not in the Parliament.[105]

4.37 In the Australian Capital Territory, section 35 of the *Government Procurement Act 2001 (ACT)* provides a number of grounds for withholding confidential information including that the disclosure of the text would:

> *(i) be an unreasonable disclosure of personal information about a person; or*
>
> *(ii) disclose a trade secret; or*
>
> *(iii) disclose information (other than a trade secret) having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or*
>
> *(iv) be an unreasonable disclosure of information about the business affairs of a person; or*
>
> *(v) disclose information that may put public safety or the security of the Territory at risk; or*
>
> *(vi) disclose information prescribed by regulation for this section…*

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104 *Government Information (Public Access) Act 2009 (NSW)*, section 14, Table, Item 4.

105 Harry Evans, 'The Parliamentary Power of Inquiry: any limitations? *Australasian Parliamentary Review*, 2002, vol. 17, No 2, p 138.

4.38 That Act usefully provides the following examples for paragraph (iv):

1 hourly rates, on-costs and management fees

2 individual components of the total contract price

4.39 However, hourly rates are precisely what financial scrutiny committees are interested to know in order to establish whether the State is receiving value for money but under the Australian Capital Territory's enactment, this is expressly excluded. Of more concern is the capacity of the Australian Capital Territory Executive Government to make, by subsidiary means at any time, a regulation quarantining particular information from disclosure.[106]

4.40 The Committee is of the view that if a jurisdiction enacts procurement legislation its confidentiality disclosure provisions do not apply to the relevant Parliament or its committees unless its provisions expressly abrogate or limit parliamentary privilege. Likewise with legislation providing a statutory duty of confidentiality such as section 114 of Western Australia's *Taxation Administration Act 2003.* In that enactment there is no express abrogation or limitation of parliamentary privilege. Relevantly, *Odgers' Australian Senate Practice Thirteenth Edition* states that '*Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information.*'[107]

4.41 The Committee makes the following finding.

Finding 10: The Committee finds that what appears to be progressive legislation or policy making in other jurisdictions regarding disclosure of commercial-in-confidence information or commercial sensitivity in government contracts is eroded by numerous exceptions.

106 Regulation 14 of the *Government Procurement Regulation 2007 (ACT)* states that the following information is prescribed: '*(a) information that, if disclosed, would have a significant adverse effect on the financial or property interests of the Territory or of a territory entity; (b) information that, if disclosed, would unreasonably constrain the development or consideration of policy alternatives by government.*'

107 Harry Evans and Rosemary Laing (editors), *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 65. However, the Auditor General views section 114 of the *Taxation Administration Act 2003* differently. Of a matter regarding the names of organisations claiming the payroll tax rebate for indigenous employees in 2014-15, the Auditor General said that a decision by the Minister not to provide the requested information was reasonable and appropriate. The Auditor General said: '*Our research shows it is quite common for taxation legislation to include specific confidentiality obligations with limited exceptions. Such an approach reflects the need to protect taxpayer interests while also protecting government information and allowing for efficient administration of taxation legislation*' – Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 21: October 2015.

Jumping at shadows?

4.42 The following exchange with the State Solicitor reveals the Committee's frustration with the phrase 'commercial-in-confidence', given the Attorney General's '*inclination to be conservative rather than to be as open as some might like'*[108] in advising on negotiating contracts. The Attorney General attributes this to an inability to quantify the impact of disclosure and the fact that governments have to act responsibly in representing the State's interest.

> ***Hon RICK MAZZA****: I am talking more about a commercial nature. It makes me wonder whether we jump at shadows with this commercial-in-confidence. I know with just about every commercial contract everyone always pushes for confidentiality to maybe protect some sort of commercial intelligence, whatever the case may be. I am wondering whether it should be so standard that every contract we have—you say it is bespoke—but, I mean, pretty much every contract you get out of the Solicitor's office wants a commercial-in-confidence type clause in it.*
>
> …
>
> ***Mr Evans****: It is actually one of the hardest things in dealing with confidentiality agreements generally to quantify the impact of the cat-out-of-the-bag, because sometimes they can be very subtle.*[109]

4.43 The State Solicitor gave the following example:

> *Let us say that information in a tender includes a pricing schedule that exposes how a tenderer structures their bid and prices certain unit items in that tender. That then becomes public so that a competitor of that tenderer becomes aware of that pricing schedule. That facilitates that competitor pricing the next bid, which has comparable inputs because they will have an idea about what their competitor is doing in the contracting market. The contractor loses the bid; they do not know why they lost the bid; they do not know whether it is because of that information or a combination of that information and other factors. So one very rarely gets to litigation about the disclosure of confidential information of that type because by the time that information has gone, the competitive damage has been suffered and it is very hard to run a case.*

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108 Hon Michael Mischin MLC, *Transcript of Evidence,* 22 February 2016, p 7.

109 Exchange between Hon Rick Mazza MLC and the State Solicitor, *Transcript of Evidence,* 22 February 2016, p 7.

> *There is a certain conciliatism around this because it is hard to predict or quantify what the risks are. It is simply perceived and rationally explicable that there are risks for the commercial position of one party or another, which will tend to cause them to adopt a conservative approach about the disclosure of that sort of information.*
>
> *In a large and complex tender, there is a vast amount of unit information in granular detail, and also high-level information in relation to negotiating positions which are adopted—things which are important to one contractor and are important to the state but which might not be important to another. For example, if there are two competing contractors, one of whom has a particular sensitivity around one issue which is not a sensitivity for the other, even that identifies it as a commercial weakness which one can exploit in either that or a subsequent negotiation.*[110]

4.44 The Committee acknowledges that it is difficult to know on whom the alleged damage will fall (the State; the private sector contractor; a third party) or the quantum of the damage (money; reputation; intellectual property) should disclosure occur. This is particularly so when the private sector re-bids for a contract in a tight market. However, being informed that a tight market exists is useful information for the Committee to consider. The State Solicitor said:

> *Confidentiality in relation to cost-based information in a tight market is a very reasonable request, because to permit the publication, or to provide any encouragement of the publication, of competition-sensitive information puts, first, the state at some prejudice in being able to attract a sufficient pool of contractors and, second, the counterparty at some prejudice in relation to future bidding.*
>
> *In terms of maintaining a competitive dynamic, actually confidentiality is very often at the heart of maintaining competition through the contracting process.*[111]

4.45 The State Solicitor admitted he was unaware of any empirical evidence supporting the claim that publishing competition-sensitive information places both the State and the counter party at risk.[112] The Committee is of the view that adverse risks would be picked up by a comprehensive tender process on value for money.

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110 Exchange between Hon Rick Mazza MLC and the State Solicitor, *Transcript of Evidence*, 22 February 2016, p 7.

111 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 5.

112 Ibid.

4.46 The Attorney General expressed the view that even if a contract has terminated, there may be some residual interest in ensuring that features of it remain confidential, for example, if a contract has been renewed or a new one is being negotiated or bargaining positions may be revealed.[113] The State Solicitor said:

> *Certainly where there are ongoing, generally, market impacts of information you would not expect that information to be disclosed, certainly where it would undermine the state's bargaining position. Obviously, on an agency level aggregated information that is sometimes relatively granular information may be available through the annual agency reporting process.*[114]

4.47 The Committee is of the view that the public release of terminated contracts reveals an Executive Government focussed on ensuring private sector willingness to engage with the State; and maintaining the State's bargaining position. The Committee does not accept this as a basis for refusing to release a terminated contract.

Case Study – MSS Security Pty Ltd

4.48 Arising out of the 2012-13 Agency Annual Report Hearings, the Committee requested a copy of the MSS Security contract with the Public Transport Authority. At the time of the request, the Committee was asked to keep hourly rates and some special conditions confidential.

4.49 The Committee then sought further information from the Minister about why the information was commercial-in-confidence. The Minister agreed that public officers' rates of pay were publicly available and could be disclosed, but said the private contractor rates should remain confidential. The Minister stated:

> *Disclosure of tendered hourly wage rates would reduce future competition in the market place. By disclosing commercial information of this nature to other potential tenderers it would allow those tenderers to adjust future bids to ensure lower priced rates are submitted than the existing Contractor, which could disadvantage that Contractor. This may in turn impact on the State's ability to secure future competitive tender bids and may lead to increased costs for the State.*[115]

4.50 In terms of the process, MSS General Manager Paul Price confirmed the Public Transport Authority had contacted him and queried whether MSS Security had any

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113 Hon Michael Mischin MLC, *Transcript of Evidence*, 22 February 2016, p 6.

114 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 6.

115 Hon Dean Nalder MLA, Minister for Transport, Letter, 20 May 2014, p 1.

objections to releasing the information. Mr Price had concerns about disclosure because it was an hourly rate contract rather than a lump sum figure. Such a contract is always significant when it comes up for tender in the future. Mr Price explained:

> *The officers are paid under an enterprise agreement which is clearly available to all and sundry on the net, exactly what their hourly rate is. It is very easy for our competitors to look at the EA, look at the hourly rated contract that this is, and clearly work out exactly what our margins are, our profitability.*
>
> *When it comes up for tender again, or where they are competing against us, they have got a pretty good indication of exactly how much we charge and the profitability that we go for on major contracts. It gives a clear indication.*[116]

4.51 The problem with the MSS Security contract lay in the Committee being initially denied information about the hourly rates. This was not idle curiosity; the Committee requested the hourly rates for the purpose of scrutiny, deliberation and potential reporting to the House on the question of whether it was costing the State more to employ contract workers than if the State had employed transit officers. As the Chair explained:

> *By having the request and that information kept confidential, that denies that public debate about is the State getting value for money.*
>
> *It is very much a matter of public policy and what is the best outcome for the State in terms of its financial affairs*.[117]

4.52 The Committee resolved not to pursue this matter further given that subsequent events superseded the need. The Committee maintained confidentiality of the hourly rates.

4.53 The Committee is of the view that its consideration of the MSS Security contract was impeded and open public debate stifled. This runs counter to the Committee's standing function to consider and report on any matter relating to the financial administration of the State.

4.54 The Committee makes the following findings.

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116 Paul Price, General Manager, MSS Security, *Transcript of Evidence*, 30 March 2015, p 2.

117 Hon Ken Travers MLC, Chair of the Committee, *Transcript of Evidence*, 30 March 2015, p 9.

Finding 11: The Committee finds that there is currently a lack of clear definition of what constitutes commercial-in-confidence or 'commercially sensitive' information. Agencies can use the lack of a definition to avoid releasing documents for parliamentary scrutiny. When cited as a reason for withholding requested information, it increases tension between parliamentary committees and Executive Government.

4.55 The Committee makes the following recommendation.

Recommendation 4: The Committee recommends that the Premier develop a Ministerial Office Memorandum containing guiding principles for Ministers when deciding if requested information is 'commercial-in-confidence' or 'commercially sensitive.'

4.56 The Committee invites the Premier to consult with the Committee in respect of recommendation 4.

THE CABINET-IN-CONFIDENCE REASON FOR REFUSING REQUESTED INFORMATION

4.57 The Committee accepts that documents revealing the actual *deliberations* of Cabinet, as distinct from other Cabinet documents have a '*pre-eminent claim to confidentiality*'[118] and convention dictates they not be disclosed. The relevant public interest being protected here is what Commissioner Wayne Gregson called 'candour' in the proper examination and assessment of options in advising decision makers and the ability to undertake them.[119] Cabinet must be able to '*freely debate and be fully informed of matters but remain collectively responsible for decisions.*'[120] The courts also support this reasoning though candour is in decline. In *Commonwealth v Northern Land Council* the High Court made the following observations about candour.

> *When immunity is claimed for Cabinet documents as a class and not in reliance upon the particular contents, it is generally upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest.*

118 *Sankey v Whitlam* (1978) 142 CLR 1 at 618-619.

119 Submission 1 from Wayne Gregson, Commissioner, Department of Fire and Emergency Services, 12 June 2014, p 2.

120 Ibid.

> *The discouragement of candour on the part of public officials has been questioned as a sufficient, or even valid, basis upon which to claim immunity. On the other hand, Lord Wilberforce has expressed the view that, in recent years, this consideration has "received an excessive dose of cold water."*[121]

4.58 The High Court said '*it is not so much a matter of encouraging candour or frankness as of ensuring that decision-making and policy development by Cabinet is uninhibited*.'[122] Ministers must be able to exchange differing views within Cabinet and at the same time maintain the principle of collective responsibility for any decision which is made.

4.59 The Cabinet confidentiality ground is properly claimed only for documents which would reveal the *deliberations* of cabinet. As Odgers' states:

> *The claim is often loosely made that 'cabinet documents' are immune from production in the courts is not supported by recent judgments. Only documents which record or reveal the deliberations of cabinet are immune.*[123]

4.60 The Committee noted a rare case of cabinet deliberations documents that were released for a limited purpose during the Royal Commission into the Home Insulation Program.[124]

4.61 In *Egan v Chadwick and Others* the NSW Court of Appeal held that the Legislative Council did not have the power to require the production of documents which directly or indirectly revealed the deliberations of cabinet. It was stressed that this immunity from production only applies to documents revealing cabinet

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121 *Commonwealth v Northern Land Council* [1993] HCA 24, paragraph 5.

122 *Commonwealth v Northern Land Council* [1993] HCA 24, paragraph 6.

123 Harry Evans and Rosemary Laing (editors), *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 602. The cases cited there are: *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 98 FCR 31; *National Tertiary Education Industry Union v Commonwealth* (Unreported, Federal Court of Australia, 19 April 2001); see also *Secretary, Department of Infrastructure v Asher* [2007] 19 VR 17. In *Asher*, Buchanan JA at paragraph 8 said: '*At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal*.'

124 Ian Hanger AM, QC, Report of the Royal Commission into the Home Insulation Program, 29 August 2014, paragraphs 1.3.11 and 1.3.12. They state: '*It was said that the documents were produced "for the limited purpose of the Commission inspecting them on a private basis (to assess their potential relevance)…without significantly compromising the confidentiality of Cabinet deliberations." The production of the documents was also said not to constitute a waiver of public interest immunity. The Commonwealth reserved to itself the right to argue against the public dissemination of the documents, including during public hearings of the Commission. The Commission respected the basis on which the documents were produced*.'

deliberations. 'Cabinet documents' which are in the nature of reports or submissions prepared for the assistance of cabinet '*may, or may not, depending on their content*' be immune.[125]

4.62 The Western Australian cabinet handbook does not describe immune documents in any detail other than '*cabinet documents, discussions and decisions*'[126] whilst cabinet records are '*all Cabinet agendas, submissions, attachments to submissions, comment sheets and decisions*.'[127] The handbook then states that the following documents comprise a cabinet submission:

- Summary sheet (eg, Appendix A or F of the Cabinet Handbook)[128]
- Minute (eg, Appendix B or G of the Cabinet Handbook) [129]
- Attachments.[130]

4.63 The Committee is of the view that it would be useful if the handbook distinguished those documents constituting deliberations from those that are not deliberations to guide Ministers when parliamentary committees make a request for a particular document that at first glance, is characterised generally as cabinet-in-confidence.

4.64 The Commonwealth's equivalent handbook is more descriptive. It states Commonwealth cabinet documents are any material submitted to and considered by the cabinet. For example submissions including pre-exposure drafts, exposure drafts, drafts for coordination comments and final submissions, drafting comments, including coordination comments and any other documents which are both identical in all relevant respects to those considered by cabinet and precursors of documents submitted to cabinet.[131]

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125 *Egan v Chadwick and Others* [1999] NSWCA 176, paragraph 57.

126 Department of the Premier and Cabinet - Cabinet Handbook 2013, p13, https://www.dpc.wa.gov.au/RoleOfGovernment/Documents/Cabinet_Handbook_2013.pdf viewed on 14 March 2016.

127 Ibid.

128 Appendix A is a Cabinet Summary Sheet. Appendix F is an Appointment Summary Sheet.

129 Appendix B is a Cabinet Minute. Appendix G is an Appointment Minute.

130 Department of the Premier and Cabinet - Cabinet Handbook 2013, p20, https://www.dpc.wa.gov.au/RoleOfGovernment/Documents/Cabinet_Handbook_2013.pdf viewed on 14 March 2016.

131 Australian Government, Department of the Prime Minister and Cabinet, *Cabinet Handbook*, 8th edition, March 2015, p 24.

4.65 The Commonwealth's handbook then usefully states that documents revealing the decision and/or deliberations of cabinet include business lists, cabinet minutes, cabinet notes and notes recorded by cabinet note takers.[132]

4.66 Case law establishes that cabinet documents constituting *deliberations* can include:

- notes recording discussions at meetings of the cabinet[133]
- documents prepared by public servants considered by the cabinet [134]
- papers brought into existence within a governmental organisation for the purpose of preparing a submission to cabinet[135]
- papers brought into existence for the purpose of preparing a submission to cabinet[136]
- documents and communications passing between a Minister and the head of his department relating to Cabinet proceedings and material prepared for cabinet.[137]

Case study – the Forrestfield-Airport Link project

4.67 The Committee has responded to the cabinet-in-confidence reason for withholding information on several occasions. For example, during the 2013-2014 Agency Annual Report hearings, the Committee sought passenger modelling information for the Forrestfield-Airport Link project from the Public Transport Authority. The Director General said:

> *The patronage analysis undertaken for the Forrestfield-Airport Link project formed part of the Cabinet submission recently considered by Government and therefore cannot be released at this time.*[138]

4.68 The Committee wrote to the Minister for Transport acknowledging the convention but sought an explanation as to how outlining rail patronage numbers would reveal the deliberations of cabinet. The Minister replied that:

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132 Ibid.

133 Ian Hanger AM, QC, Report of the Royal Commission into the Home Insulation Program, 29 August 2014, paragraphs 1.3.11 and 1.3.12.

134 Ibid.

135 *Lanyon Pty Ltd v Commonwealth* (1974) 129 CLR 650 at 653, per Menzies J.

136 *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ.

137 Ibid at 99 per Mason J.

138 Answer to Question on Notice A1 asked in the Committee by Hon Ken Travers MLC and answered by Hon Jim Chown MLC, Parliamentary Secretary representing the Minister for Transport, *Parliamentary Debates* (Hansard), 23 January 2015, p 1.

> *The patronage analysis/documentation contained with the Forrestfield-Airport Link Project Definition Plan formed part of Cabinet deliberations which resulted in the Cabinet Submission on this major Government investment being approved by Cabinet. As acknowledged by the Estimates Committee, documents produced for Cabinet deliberation are confidential and cannot be disclosed.*[139]

4.69 The Committee wrote again to the Minister for Transport re-iterating its request for a copy of the patronage analysis or the Minister provide an explanation about how a patronage analysis will reveal or record the deliberations of cabinet. The Committee told the Minister that:

> *It considers the Forrestfield-Airport Link project a significant Government project to which the Western Australian public through the Parliament are entitled to hold the Government to account.*

4.70 Noting that the Minister twice refused to substantively answer how a patronage analysis might reveal or record cabinet deliberations, the Committee settled the matter by reminding the Minister of his obligations under section 82(1) of the *FMA.* That section requires a Minister to table a notice advising of a decision not to provide certain information to the Parliament should a Minister decide it is reasonable and appropriate not to provide the information. (Section 82 is discussed in chapter 5 of this Report.)

4.71 The Committee is of the view that when asserting cabinet-in-confidence the Minister should distinguish between documents that are *deliberations* and those that are not *deliberations*. This will enable the Committee to accurately request from the Minister, those documents that are not cabinet deliberations. The Committee therefore makes the following recommendations.

Recommendation 5: The Committee recommends that the Premier amend the Cabinet handbook to clearly distinguish documents that reveal cabinet deliberations from other documents that do not reveal deliberations.

139 Answer to Question on Notice A1 asked in the Committee by Hon Ken Travers MLC and answered by the Minister for Transport, 18 March 2015, p 1.

Recommendation 6: The Committee recommends that the Attorney General in updating the State Solicitor's Office *2011 Guideline to Ministers withholding information or documents when asked a parliamentary question*, compile a list of documents clearly distinguishing cabinet documents that reveal deliberations from those that do not reveal deliberations for the guidance of Ministers claiming cabinet-in-confidence as a reason for not providing information to the Parliament or its committees. (See also recommendations 1 and 9)

CHAPTER 5

REQUIREMENTS OF SECTION 82 OF THE *FINANCIAL MANAGEMENT ACT 2006*

5.1 If the 'explicitly recognised tension' Bret Walker SC describes between the Executive and the Parliament reaches the point where the requested information is not provided, section 82 of the *FMA* should be triggered. That section requires the Minister to table a notice in the Houses advising of the decision not to provide the information.

SECTION 82 AND RELATED PROVISIONS

5.2 Section 82 cannot be understood in isolation. Its narrative must be read cognately with section 81 which states:

> ***81. Actions etc. inhibiting etc. Minister's parliamentary functions prohibited***
>
> *The Minister and the accountable authority of an agency are to ensure that —*
>
> *(a) no action is taken or omitted to be taken; and*
>
> *(b) no contractual or other arrangement is entered into,*
>
> *by or on behalf of the Minister or agency that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency.*

5.3 Section 82 states:

> ***Ministerial decisions not to give Parliament certain information about agency to be reported to Parliament etc.***
>
> *(1) If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then within 14 days after making the decision the Minister is to cause written notice of the decision —*
>
> *(a) to be laid before each House of Parliament or dealt with under section 83; and*

(b) to be given to the Auditor General.

(2) A notice under subsection (1)(a) is to include the Minister's reasons for making the decision that is the subject of the notice.

5.4 Sections 81 and 82 must also be considered together with section 24(2)(c) of the *Auditor General Act 2006*. That subsection tasks the Auditor General with including in a report to the Parliament, '*an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate*'.

5.5 Section 82 applies to the 'conduct or operation' (not defined) of an 'agency' (defined in section 3 of the *FMA* as a department, a sub-department or a statutory authority[140]). 'Certain' information is not defined though during the previous membership of the Committee's scrutiny of the Financial Management Bill 2006, evidence was submitted that after the (then) Department of Treasury and Finance consultation with the Parliamentary Counsel's Office, the word 'certain', in the context of (then) clause 82, meant 'particular'. For example, information of a 'particular' kind or relating to a 'particular' subject matter.[141] The State Solicitor's Office 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question*, emphasises that '*certain' information ought to relate to information which is within that Minister's portfolio.*'[142]

HISTORY

5.6 Section 82 has its genesis in findings by *the Royal Commission into the Commercial Activities of Government and Other Matters* and recommendations by the subsequent *Commission on Government.*[143] However, the specific requirement for the Auditor General to give an opinion on whether a Minister's decision to withhold information was reasonable and appropriate arose from a review of the Financial Management Bill 2006 by the previous membership of the Estimates and

140 The Committee noted recommendation 31 of the Department of Treasury's *Review of the Financial Management Act (2006)* report, Perth, March 2014, p 24. That recommendation concerns reviewing the definitions of 'department', 'sub-department' and 'deemed department' in the *FMA* and the *Public Sector Management Act 1994* to ensure consistency between the two statutes.

141 Timothy Marney, Under Treasurer, Department of Treasury and Finance, Letter, 13 November 2006, Attachment, p3. Further evidence was submitted that the intent of (then) clause 82 was for Ministers to rely on the clause in order to withhold information that would otherwise appear in an annual report. It was conceded that the clause would apply in any circumstances in which a Minister decides to withhold information about any conduct or operation of an agency from the Parliament. (Michael Barnes, Acting Executive Director, Finance, *Transcript of Evidence*, 8 November 2006, p 13.)

142 State Solicitor's Office *Guideline to Ministers withholding information or documents when asked a parliamentary question*, March 2011, p 2.

143 Commission on Government, *Report No 1*, August 1995, section 5.1.2.5, p 188.

Financial Operations Committee in 2006.[144] That Committee considered an independent assessment of a Minister's decision was necessary to strengthen accountability mechanisms and that the Office of the Auditor General was the most appropriate for providing that assessment.[145]

5.7 The Auditor General commented that when the legislation was passaging through the Parliament it became clear to him that though section 82 started life as a commercial-in-confidence information matter it had morphed into something much broader by the end. The boundaries were unrestricted and any information could be captured. The Auditor General expected a flood of section 82 inconsequential matters but with the passage of time, this never eventuated.[146]

VARIOUS INTERPRETATIONS OF SECTIONS 81 AND 82

5.8 There is an absence of case law on the interpretation of sections 81 and 82. However, there are many and varied interpretations of these provisions on the public record. A range of the views expressed on sections 81 and 82 include:

- s81 imposes a negative duty on Ministers[147]
- s81 is concerned with ensuring that agencies and their Ministers do not enter into arrangements which would limit a Minister's ability to provide information or documents[148]
- s81 ensures that a Minister can report to the Parliament but '*says nothing about whether they must do so*'[149]
- s81 precludes the Minister or an agency from contracting so as to prevent the Minister from providing information to the Parliament[150]
- that ss81 and 82 operate to limit the legitimate scope for keeping commercial secrets away from the Houses and their committees[151]

144 Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 6, Financial Management Bill 2006, Financial Legislation Amendment and Repeal Bill 2006 and Auditor General Bill 2006, 21 November 2006.

145 Submission 3 from Colin Murphy, Auditor General, 23 June 2014, unnumbered page.

146 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 6.

147 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 13.

148 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015, p 9.

149 Ibid.

150 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 3.

151 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 14.

- ss81 and 82 are procedural in nature, forming part of the proceedings in Parliament[152]

- Ministers could rely on s82 in order to withhold information that would otherwise appear in an annual report[153]

- s82 is in part, a duplication of process in Standing Order 108(2)[154] if applied to Questions on Notice (nine sitting days compared with 14 days in s82)[155]

- s82 provides the Minister with a discretion to withhold information from the Parliament[156]

- s82 is a recognition of Ministerial prerogative power[157]

- s82 provides a workable framework under which Parliament obtains assurances that Government is not unreasonably withholding information[158]

- s82 imposes a requirement or obligation on a Minister '*minded to withhold information*', not do so unless the Minister considers whether withholding the information would be reasonable and appropriate - and then decides that it would be[159]

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152 Nigel Pratt, Clerk of the Legislative Council, Letter, 22 September 2015 attaching a copy of a submission to the Department of Treasury from former Clerk of the Legislative Council Malcolm Peacock regarding a review of the *Financial Management Act 2006*, 7 September 2012, paragraph 1.68 of the Attachment.

153 Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 6, Financial Management Bill 2006, Financial Legislation Amendment and Repeal Bill 2006 and Auditor General Bill 2006, 21 November 2006, p 22, paragraph 2.64.

154 It states: '*When a question on notice remains unanswered after 9 sitting days, the Member to whom the question is directed shall advise the Council, at the conclusion of the period for questions without notice on the next sitting day, the date when an answer is expected to be provided*.'

155 Nigel Pratt, Clerk of the Legislative Council, Letter, 22 September 2015 attaching a copy of a submission to the Department of Treasury from former Clerk of the Legislative Council Malcolm Peacock regarding a review of the *Financial Management Act 2006*, 7 September 2012, paragraphs 1.28 and 1.76 of the Attachment.

156 Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 6, Financial Management Bill 2006, Financial Legislation Amendment and Repeal Bill 2006 and Auditor General Bill 2006, 21 November 2006, p 21, paragraph 2.62. Also, *Guideline to Ministers withholding information or documents when asked a parliamentary question*, March 2011, p 1.

157 Michael Jolob, Acting Director, Financial Policy, Department of Treasury and Finance, *Transcript of Evidence*, 29 May 2006, p 12 during the Inquiry into the Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 6, Financial Management Bill 2006, Financial Legislation Amendment and Repeal Bill 2006 and Auditor General Bill 2006, 21 November 2006. Mr Jolob said: '*This piece of legislation in no way would limit the Minister's discretion to exercise his prerogative to say he is not willing to give the Parliament that information*'.

158 Submission 3 from Colin Murphy, Auditor General, 23 June 2014, p 1.

159 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 8.

- s82 is a '*kind of constitutional and political safeguard*'[160]

- s82 is '*fundamentally a section about politics, rather than about the question of defining the political obligations of a Minister in their interaction with Parliament*'[161]

- s82 imposes a justiciable obligation and effectively invites judges to assist the Houses by compelling Ministers to explain their refusals to supply information to the Houses[162]

- s82 does not require a Minister to provide information or documents to Parliament in response to parliamentary questions unless ordered by summons. Rather, 82 operates to impose reporting requirements[163]

- s82 introduces a reporting mechanism in relation to the non-provision of information, and not a requirement to provide information to the Parliament[164]

- s82 allows the Parliament to determine whether it will still require the information in the face of a ministerial decision not to provide information and leaves it to the Parliament to '*determine whether it will hold a Minister in contempt if he or she refuses to comply with such an order*.'[165]

COMMITTEE INTERPRETATION OF SECTIONS 81 AND 82

5.9 Sections 81 and 82 are located in Part 6, Division 3 of the *FMA* respectively titled: 'Miscellaneous' and 'Miscellaneous powers and duties'. Evidenced by the latter heading, the Committee is of the view that section 81 imposes a duty and 82 provides a power.[166]

5.10 Based upon the ordinary meaning of the words used in section 81, the Committee's view is that it prevents or inhibits a Minister or agency from (for example) contracting so as to prevent or inhibit the Minister from providing information about that contract to the Parliament. The Committee agrees with the State Solicitor that section 81 ensures that a Minister can provide information, not that a

160 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 9.

161 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 13.

162 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 12.

163 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015.

164 Ibid.

165 Department of Treasury, *Review of the Financial Management Act (2006)* report, Perth, March 2014, p 22.

166 *Interpretation Act*, s 32(1). It states: '*The headings of the Parts, divisions and subdivisions into which a written law is divided form part of the written law.*'

Minister should or must provide information.[167] If a Minister does not provide the information, the decision not to provide it must be reasonable and appropriate.

5.11 Based upon the ordinary meaning of the words used in section 82, the Committee's view is that it has a wide scope and that where a Minister decides not to provide certain information concerning any conduct or operation of an agency within the *FMA*, notification should be made to the Auditor General and the Houses.

5.12 Section 81 is drafted in negative terms. A *duty* is imposed on both the Minister and an accountable authority to *ensure* certain prescribed events will *not* occur. These events are: actions, omitted actions, contractual and other arrangements. By ensuring these events do not occur, the Minister will be in a position to provide the Parliament information concerning the conduct or operation of the relevant agency because the Minister has not been prevented or inhibited by those prescribed events.

5.13 In contrast, section 82 provides the Minister a *power* to decide *not* to provide the Parliament certain information. In this scenario, procedural consequences of that decision flow.

SCOPE OF SECTION 82

5.14 Some Ministers have declined to explain to the Committee why they have not complied with the notification requirements under section 82, after deciding not to provide information to the Committee. In the Houses, Ministers and Parliamentary Secretaries have been vague, stating that '*advice has confirmed that the Minister did not need to provide notice pursuant to section 82*'[168] and that a question about compliance with section 82 '*shows a fundamental difference of views about what section 82 of the Financial Management Act says and where it should be employed, and that is something we need to look at.*'[169] In the latter example, the Minister did not expand on his view of where section 82 should be employed.

5.15 However, in March 2012 a Parliamentary Secretary was asked why no notification had been given of a decision by the Minister for Corrective Services who declined to table evaluations of the effectiveness of offender programs for specific units within the Department of Corrective Services. The Parliamentary Secretary said:

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167 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 3.

168 Answer to Question on Notice 864 asked in the Legislative Council by Hon Ken Travers MLC and answered by Hon Jim Chown MLC, Parliamentary Secretary representing the Minister for Transport, *Parliamentary Debates (Hansard)*, 5 November 2013, p 6552b.

169 Answer to Question on Notice 134 asked in the Legislative Council by Hon Giz Watson MLC and answered by Hon Simon O'Brien MLC representing the Minister for Corrective Services, *Parliamentary Debates (Hansard)* 27 March 2012, p 1264b.

> *The State Solicitor's Office has advised the Department of Corrective Services that it is its view that the document in question is arguably not sufficiently connected to the management, administration and reporting of the state's public finances to constitute information concerning 'any conduct or operation of an agency' for the purposes of section 82 of the Financial Management Act 2006.*[170]

5.16 The (above) answer runs counter to comments by the WA Inc Royal Commission which stressed the importance of accountability by government to the Parliament, and did not limit this to any categories of information, such as financial information. This similar argument has been raised in the past in relation to Estimates Hearings, when Members have asserted that questions asked during the hearing were not sufficiently related to Estimates and Financial Operations.

5.17 The Committee shares the view of Odgers', which states that questions during Estimates hearings are not limited to financial statements, as any questions going to the operation of an agency are relevant to the estimates of expenditure.[171]

REQUIREMENTS OF SECTION 82

5.18 Section 82 requires Ministers to undertake the following sequential steps:

- determine whether the requested information relates to an '*agency*'[172]
- engage in a decision making process
- assess whether certain information concerning conduct or operation of an agency is of a type that should be withheld from the Parliament
- make a reasonable and appropriate (composite) decision permitting only one decision[173]
- prepare a written notice

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170 Answer to Question on Notice 134 asked in the Legislative Council by Hon Giz Watson MLC and answered by Hon Simon O'Brien MLC representing the Minister for Corrective Services, *Parliamentary Debates (Hansard)* 27 March 2012, p 1264b.

171 Harry Evans and Rosemary Laing (editors), *Odgers' Australian Senate Practice Thirteenth Edition*, 2012, p 472.

172 Not all agencies fit the definition of 'agency' in section 3 of the *FMA*. For example, Hon Terry Redman MLA tabled a section 82 notice but the Deputy Auditor General advised the Hon Member that legal advice had explained that the Western Australian Agriculture Authority to which the requested information related, is not a department, sub department or statutory authority listed under Schedule 1 of the *FMA*.

173 The Committee agrees with the State Solicitor that section 82 does not contemplate an incongruent conclusion ('reasonable but not appropriate' or 'not reasonable but appropriate').

- lay the written notice in the Parliament within 14 days of making the reasonable and appropriate decision

- give the notice to the Auditor General within 14 days.[174]

SECTION 82 IMPLICATIONS FOR MINISTERS AND PUBLIC SECTOR STAFF

5.19 Ministers must make reasonable and appropriate decisions. They rely on public sector staff to provide competent advice to assist their task. With respect to section 82 notices, it concerns the Committee that Department of Transport witnesses said they never advise about the need for a notice. That '*section 82 is purely for Ministers. It has got nothing to do with the public service.*'[175] However, the Westminster system does not contemplate Ministers functioning in a vacuum. Ministers should be appropriately advised by public sector staff about the need or otherwise for a section 82 notice.

5.20 The Auditor General in listing the common reasons for why a section 82 Ministerial decision was not 'reasonable and appropriate', said: '*a feature of many of these decisions was a lack of sufficient consideration of the issues by the agency advising the Minister*.'[176] Of an opinion in 2011 relating to the ministerial decision not to provide information to the Parliament about a theatre production of *The Graduate*, the Auditor General said: '*the advice provided to the Minister by the Department of Culture and the Arts and the Perth Theatre Trust was deficient and its preparation lacked rigorous analysis of the key issues in order to provide sound advice*.'[177]

5.21 In 2014 the Auditor General was still expressing concern about:

> *Inadequate documentation maintained by agencies to support advice given to the Minister, and on occasions, by inadequate explanation given to a Minister as to why information should not be provided.*
>
> *In our view, a Minister should reject any recommendation to refuse information unless it is supported by sufficient cogent argument*.[178]

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174 The Auditor General said that in terms of the timeliness of the notifications, as at 23 June 2014, the timeframe for the last 20 notifications ranged from 6 to 236 days, with an average of 4 to 7 days. Submission 3 from Colin Murphy, Auditor General, 23 June 2014, unnumbered page.

175 Reece Waldock, Director General, Department of Transport *Transcript of Evidence*, 30 March 2015, p 17.

176 The Auditor General said that staff movements can affect the quality of advice.

177 Office of the Auditor General Western Australia, *Annual Report 2010-2011*, 23 March 2011, p 29.

178 Submission 3 from Colin Murphy, Auditor General, 23 June 2014, unnumbered page.

5.22 There is also a self-evident nexus between a Ministerial decision not to table a section 82 notice and poor quality advice given to a Minister prior to that decision. The Committee notes that the *FMA* requires a section 82 notice must always be tabled.

5.23 The Department of Transport during the 2014-15 Annual Agency Reports Hearings provided another example of inadequate agency advice. Referring to commercial-in-confidence disclosure clauses in the Brookfield Rail lease, the Department's absence of evaluation of the clauses was explained as follows:

> *There were a number of very commercial issues going back and forward. So we never put ourselves forward as the arbitrator or the judge of what was commercial and confidential.*
>
> *We always looked at what they said and we put forward that particular interpretation. That was our position and it still is our position. Where we were uncertain we would always go to the SSO.* [179]

5.24 The following extract of evidence provides further insight into that Department's approach to commercial-in-confidence disclosure clauses:

> ***Hon ALANNA CLOHESY****: In terms of that specific example, the letter came to you requesting the information—the copy of the lease and the rest of the information—and you looked at that and you said, "Okay, we've got clause 38 in this lease." Did you identify within the lease the parts that might be problematic or did you leave that to the company?*
>
> ***Mr Browne****: We left that—as Reece said, we should not be the adjudicator. We have a requirement to keep all information within the lease and associated documents confidential. It is not our position to determine what we think should be confidential. Indeed, the lease says that both parties must agree to that being released, so in the absence of them agreeing to it, we can only take back their input and provide that information back to you.* [180]

5.25 The Department said it does not assess the broader public interest because that is within the domain of the Minister. The following extract of evidence again provides insight into that Department's approach.

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179 Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 30 March 2015, p 2.

180 David Browne Executive Director, Safety and Strategic Development, Public Transport Authority *Transcript of Evidence*, 30 March 2015, p 2.

> ***The CHAIR**:* [It] *suggests to me that you are actually going one step further and providing the Minister with advice on what should or should not be made public; and if you are doing that, then it is an obligation for you to tell us how you make the assessment about public interest when providing advice to the Minister.*
>
> ***Mr Waldock**: I think what I am saying is that we just do not go outside—very clear interpretation, assisted by SSO—what is confidential. So we say to the Minister, "This is confidential, Minister, but certainly it should be made available to any committee, as it has always been available, but we would suggest it should be confidential. But it's your decision."*
>
> …
>
> ***The CHAIR**: So, who provides advice to the Minister on the broader public interest questions? You do not do that at all?*
>
> ***Mr Waldock**: No, not at all.*
>
> ***The CHAIR**: So, who does that?*
>
> ***Mr Waldock**: I think the Minister and his office would make those decisions.*[181]

5.26 In contrast, the Attorney General said that if he received a request for information, he would take advice on it from the department about disclosure and that if there was any doubt about the soundness of that advice, refer it to the State Solicitor for further advice.[182] It would be '*a question of how persuaded I am by the advice that I am given*.' [183]

5.27 The State Solicitor said his role is to advise on the legal considerations around a request for information but:

> *Obviously there is a wider gamut of considerations that the Minister, as decision-maker advised by their department, may take into account beyond the purely legal considerations*.[184]

5.28 The Committee is of the view that the duty imposed on an accountable authority in section 81 is not met by an automaton response that a commercial-in-confidence

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181 Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 30 March 2015, p 5.

182 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, p 1.

183 Ibid, p 6.

184 Paul Evans, State Solicitor, *Transcript of Evidence*, 22 February 2016, p 2.

disclosure clause merely exists as is suggested by Department of Transport witnesses. If clauses of this type were to be interpreted in this way, the Committee is of the view that they would inhibit the provision of information to the Parliament and therefore breach section 81 of the *FMA*. The Westminster system is for an accountable authority to advise the Minister why such clauses should not hinder the provision of requested information to the Parliament. In the Committee's view, it is appropriate for the accountable authority to provide advice on the relevant issues. Further, the Committee is of the view that the Attorney General's approach at paragraph 5.26 is more appropriate.

THE DUTY IN SECTION 81

5.29 Bret Walker SC said that the negative duties imposed on Ministers and accountable authorities in section 81 in fact provide strong guidance to the content of that which is reasonable and appropriate.[185] Mr Walker said:

> *The provisions of section 81 are to be taken as complied with, in order for such a decision to be reasonable and appropriate.*[186]

5.30 There is a presumption that if section 81 is followed precisely, then the section 82 decision will always be reasonable and appropriate. For example, a Minister promises a commercial counter party (in what the State Solicitor calls a 'core state agreement' rather than a 'bespoke agreement') that certain matters will be kept secret. A contract is entered into and the Minister, pursuant to section 81, is advised by public sector staff about the Department of Finance's August 2012, *Conditions and General Conditions of Contract*, of which boilerplate provision 25.2 states:

> *The Contractor must keep the Contract Authority's and the Customer's Confidential Information confidential. The Contractor must not use or disclose to any person the Contract Authority's or the Customer's Confidential Information <u>except</u>:*
>
> > *(d) <u>as required by any</u> law, judicial or <u>parliamentary body</u> or governmental agency;…* [187] [Emphasis added]

5.31 If the Minister decides to withhold information about the contract from the Parliament because of the promise made to the commercial counter party, that

185 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 13.

186 Ibid, paragraph 13.

187 Department of Finance, *Conditions and General Conditions of Contract*, p 73. Available at: < https://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Guidelines_and_templates/goods_and_services_request_conditions_and_general_conditions_of_contract.pdf?n=8772>. Viewed 2 February 2016.

decision could never be reasonable and appropriate because compliance with section 81 was never achieved in the first place.

5.32 Bret Walker SC concludes that:

> *The combination of sections 81 and 82 in fact operate to limit the legitimate scope for keeping commercial secrets away from the Houses or their committees…and shrinks greatly the legitimate capacity for a Minister to cite "commercial-in-confidence" as a ground not to provide information to Parliament.*[188]

5.33 The Auditor General said this conclusion is consistent with his current practice, that '*circumstances where information is withheld from Parliament, because it is considered confidential, are extremely rare*.'[189]

5.34 The Committee concurs with the view of Bret Walker SC that the broad and comprehensive terms of section 81 disallow government entry into contracts or arrangements that are either core State agreements, bespoke agreements or government trading enterprise agreements in such a way as to impose confidentiality even against the Houses. At the very least, Ministers should be providing these contracts to the Parliament or its committees with a request that they be kept confidential.

Methods for ensuring safe custody

5.35 As previously stated at paragraph 2.6, in circumstances where there are significant concerns for the safe custody of information, Ministers may request the information be given either a private or *in camera* status or kept in the Clerk's office for access by the Committee or other nominated Members of Parliament depending on the degree of security the Minister requires.

5.36 The Committee therefore makes the following recommendation.

Recommendation 7: The Committee recommends that the Premier develop a Ministerial Office Memorandum advising Ministers to provide requested core State agreements, bespoke agreements; and government trading enterprise agreements to the Parliament or its committees with a request they be given the appropriate safe custody in each particular circumstance.

188 Bret Walker SC, Legal Opinion, 21 January 2015, paragraphs 14 and 15.

189 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 4.

Ministerial review of the *Financial Management Act 2006*

5.37 Section 85 of the *FMA* requires an assessment of its operation and effectiveness after the first five years of operation and every five years thereafter. The first review commenced in 2011 and considered:

- whether there was a need for the *FMA* to continue
- other matters that appeared to be relevant to the operation and effectiveness of the *FMA*.

5.38 The review was tabled in the Parliament on 8 September 2015. In relation to section 82, the review recommended that an amendment be made to '*limit its application to situations where the Minister declines to provide information on the basis of commercial confidentiality*'.[190] However, no reasons were given for this recommendation and in the absence of cogent reasons for limiting section 82, the Committee is of the view that the status quo should remain.

5.39 The Committee noted the Joint Standing Committee on Audit is currently reviewing the Department of Treasury's *Review of the Financial Management Act (2006)* report.

190 Department of Treasury, *Review of the Financial Management Act (2006)* report, Perth, March 2014, recommendation 25, p 22.

CHAPTER 6

MINISTERS' REASONS AND CONSIDERATIONS FOR DECIDING NOT TO PROVIDE CERTAIN INFORMATION UNDER SECTION 82

SNAPSHOT OF SECTION 82 NOTICES

6.1 Section 82(2) of the *FMA* states that a notice under subsection (1)(a) is to include the Minister's reasons for making the decision that is the subject of the notice. In 2015 nine section 82 notices were tabled in the Houses. Eight were tabled by Legislative Assembly Ministers and one by a Legislative Council Minister. Four failed to state that the notices had been given to the Auditor General. All nine contained reasons, some more comprehensive than others, for why the relevant Minister decided it was reasonable and appropriate not to provide certain information to some questions. Of these:

- four were for commercial-in-confidence reasons
- two were for cabinet-in confidence reasons
- two were for the statutory duty of confidentiality
- one was for confidentiality agreements between contractors
- none for legal professional privilege or legal advice reasons (though there was one in 2014 and one to date in 2016).

6.2 Three examples are provided.

The Minister for Tourism

6.3 The request was for advice on the amount of funding granted to Football Federation Australia to host the Socceroos FIFA Cup Qualifier in Perth. The Minister listed the following reasons for not providing the advice.

- compromise of Tourism WA's ability to successfully negotiate with and develop world class events
- the competing jurisdictions factor. Other Australian States/Territories or competing overseas destinations would result in an unfair advantage

- loss of the event to another Australian jurisdiction or competing overseas destination. Funding may be increased substantially should another destination seek to attract the event and offer a larger amount to support the event activity or bid

- impacts on Tourism WA's business, professional, commercial and financial affairs, as well as those of associated third parties, such as event holders

- poaching.[191] The events environment is highly competitive both nationally and internationally

- comprised relationships. Tourism WA's future relationship with Football Federation Australia and its ability to work with the organisation might be compromised. Disclosed financial information could impact on Tourism WA's ability to retain the event on similar financial terms

- financial investment advantage. Competing destinations would gain an understanding of the financial investment required to secure the event

- government policy of growing visitor numbers and hence the State's event business.[192]

6.4 However, the considerations the Minister took into account are particularly revealing. The Minister referred to:

- worldwide standard industry practice not to release financial and contractual information. The Minister said: '*Tourism WA is unaware of any other Australian jurisdiction or competing overseas destination that releases this information*'

- other jurisdictions' approaches. The Minister described how Victoria imposed strict confidentiality conditions with respect to Melbourne's *White Night Festival* event to '*maintain its strategic advantage in a highly competitive environment.*'

6.5 The Auditor General found the Minister's decision to be reasonable and appropriate.[193] Part of the Auditor General's assessment included how the Minister:

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191 The Auditor General has said of poaching that if an event was not likely to be poached by another jurisdiction, if it was an event that had happened some time ago, then there would be no justification whatsoever for withholding that information. But if it was a live event, with a very real threat of another jurisdiction poaching it and it met the criteria, then it could well be information that should be withheld. Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 6.

192 Tabled Paper 2627, Legislative Council, 12 March 2015, p 2. This notice was in relation to Part (1) of Legislative Council Question without Notice 114.

> *Properly sought advice from the Western Australian Tourism Commission and that the information in question was shown to have commercial value in an appropriately documented assessment by Tourism WA against reasonable criteria for determining commercial sensitivity and possible detriment to the State.*[194]

6.6 This contrasts strongly with what the Auditor General said about advice the Minister received from the Department of Culture and the Arts and the Perth Theatre Trust at paragraph 5.20.

6.7 The Committee is of the view that the Minister's reasons and considerations for being unable to provide the answer are comprehensive. The notice clearly explains why the Minister considered the decision to withhold the information was reasonable and appropriate. The Parliament can have confidence in the processing of this particular section 82 notice.

The Minister for Education

6.8 In October 2015, a Legislative Council Question without Notice asked the Minister to table a copy of the Department of Education's Strategic Asset Plan referred to in the 2014-15 Annual Report.[195] The Minister tabled a section 82 notice in November 2015 which stated that the requested Plan is '*part of the annual budget process and on Treasury advice is subject to the conventions associated with information classified within Government as Cabinet-in-Confidence*.'[196] The section 82 notice was absent relevant considerations.

6.9 The Committee also had an interest in the Plan and requested a copy. It identified the Department's demands and asset requirements over a ten year cycle. '*It is also used to provide the framework for budget discussions and Treasury use that as part of their assessment as well.*'[197] Numerous sources of information compile the Plan including a system of policy implications on future infrastructure and demographic projections the Department obtains from various sources, both internal and external.[198]

6.10 Noting that the Plan comprised a variety of documents, the Committee queried whether the Plan had been provided as part of a submission to cabinet or simply

193 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 21: October 2015.

194 Ibid.

195 Legislative Council Parliamentary Question Without Notice 1155 (15 October 2015).

196 Tabled Paper 3637, Legislative Council, 24 November 2015, p 1.

197 John Fischer, Executive Director, Infrastructure, Department of Education, *Transcript of Evidence*, 8 December 2015, p 35.

198 Ibid, p 36.

used to inform cabinet deliberations. The Minister failed to answer the question stating merely that the Plan '*is part of the annual Budget process and is therefore Cabinet-in-Confidence*.'[199] For the Committee, the distinction is important and the failure to respond, disappointing.

6.11 The Committee is of the view that the Minister's reasons and considerations for being unable to provide the Plan lacked detail. Neither the tabled notice nor the supplementary information provided after the hearing particularised the documents that made up the Plan and for which the Committee may have been able to request some documents. In the absence of further information it is the Committee's view that the notice could not be persuasive that the Minister's decision was reasonable and appropriate.

6.12 As at the date of this Report, the Auditor General is yet to form an opinion on the reasonableness and appropriateness of the decision not to provide the Plan. The Auditor General explained that this is the first time he has had to give an opinion on the cabinet-in-confidence reason and has not yet developed specific criteria to test this particular type of notification.[200]

The Minister for Sport and Recreation

6.13 There were three requests for information about the annual payments over 25 years and ongoing life cycle and maintenance payments for the new Perth Stadium. Two originated from the Committee during 2013-14 Agency Annual Reports Hearings and one from the other place.[201] Two requests were similar.

6.14 The Committee's second request was for an unredacted copy of the State's agreement with the Westadium consortium. The Minister advised that a redacted version was available on Treasury's website and a copy could be provided if required. The contract was redacted in accordance with the Government's policy on public private partnerships.

6.15 The Minister said the information is of a commercially confidential nature and should not be revealed for the following reasons.

- the information is specifically identified in the contract as commercial in confidence carrying an expectation that the information would remain confidential

199 Department of Education, Supplementary Information A13, 6 January 2016.

200 Colin Murphy, Auditor General, Letter, 8 March 2016.

201 Tabled Paper 2633, Legislative Council, 17 March 2015, p 1 and Tabled Paper 2806, Legislative Council, 23 April 2015, p 1.

- the information would disadvantage the State and mislead bidders in future negotiations of this kind as it would highlight the terms and conditions accepted by the State for this transaction, whereas those terms and conditions may not be appropriate to future contracts for different projects

- the information could jeopardise future negotiations as prospective tenderers may be apprehensive about entering into State contracts if their information becomes public, particularly as this information has been specifically identified in the agreement as being confidential.[202]

6.16 The Committee is of the view that when information is specifically identified in a contract as inherently commercial-in-confidence and carries an expectation the information will remain confidential, agency advice to that effect inhibits a Minister from providing requested information to the Parliament or its committees, contrary to section 81 of the *FMA*.

6.17 Consistent with his previous comments about the standard of agency advice to Ministers at paragraphs 5.20 and 6.6, the Auditor General said the Department of Sport and Recreation's '*approach to advising the Minister on the first request from Parliament was generally not comprehensive or fully documented*.'[203] However, in relation to the two later requests, the Auditor General said the process had improved under the hand of the Minister.[204] The Committee finds this encouraging.

6.18 Significantly absent from the section 82 notice is any reference to the information being protected by legal professional privilege. The department said the State Solicitor's Office had advised that '*LPP documents can be waived by the Attorney General in conjunction with the Premier and respective Minister*.[205] However, in this case there did not seem to be a need for the advice to be waived and it was not ultimately waived. The Auditor General asked to see the legal advice but was told the State Solicitor's Office had advised the department '*the advice was protected by legal professional privilege and that the release of the information to the Auditor General would result in the information losing its protected status.*'[206] The

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202 The Auditor General was able to satisfy himself that three of the four standard commercial-in-confidence criteria had met his Audit Practice Statement criteria.

203 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 19: August 2015, p 11.

204 Ibid, p 9. The Auditor General said: '*In relation to the information requested on 3 February and 16 March 2015, the Department said it provided full briefing notes at Minister Davies' request. We considered this a significant improvement in the process for providing advice*.'

205 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 19: August 2015, p 8.

206 Ibid.

Auditor General saw access to this legal advice as crucial to forming an opinion and ultimately, on that basis he was unable to reach an opinion.[207]

6.19 The Committee is of the view that legal professional privilege is a significant element and its absence in the notice means the notice is incomplete for transparency purposes to the Parliament. It is persuasive that the Minister's decision was not reasonable and appropriate. The Committee is not surprised that the Auditor General was unable to form an opinion as to whether the Minister's decision was reasonable and appropriate.

CONCLUSION

6.20 The reasons Ministers give for deciding not to provide requested information to the Committee are predominantly cabinet-in-confidence, commercial-in-confidence or legal professional privilege. Section 82 notices about these reasons are generally insubstantial though some, as has been demonstrated in this chapter, include a list of useful considerations. The Committee is disappointed that other section 82 notices tabled in the Parliament in 2015 lacked detail.

6.21 The Committee makes the following Finding.

Finding 12: The Committee finds that agency advice to a Minister that an express confidentiality clause prohibits disclosure of its content on commercial-in-confidence grounds, would inhibit that Minister from providing requested information to the Parliament or a committee. Such advice is contrary to section 81 of the *Financial Management Act 2006*.

[207] Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 19: August 2015, p 7.

CHAPTER 7

HOW MINISTERS DECIDE NOT TO PROVIDE CERTAIN INFORMATION UNDER SECTION 82

7.1 In 2014, Hon Liza Harvey MLA (then) Minister for Tourism disclosed to the Committee that she had no knowledge of the nexus between section 82 of the *FMA* and a question on notice from the 2013-14 Budget Estimates Hearings. The Minister said:

> *My obligations under section 82 in respect to question A3*[208] *were not brought to my attention at the time. However, having now been made aware of them I have taken the necessary steps to advise the Office of the Auditor General and both Houses of Parliament.*[209]

LEGISLATIVE COUNCIL MINISTERS' EXPERIENCES WITH SECTION 82 NOTICES

7.2 The Committee sought to understand the process by which Legislative Council Ministers make a decision not to provide requested information to the Parliament or a committee. For this purpose, three Ministers were invited to share their experiences with the process.

The Attorney General

7.3 The Attorney General attended a hearing with the State Solicitor.

7.4 The Attorney General disclosed an absence of formal training, education or mentoring as a new Minister about the issues Ministers should consider when making a decision to make information public or to withhold it.[210]

7.5 In his capacity as both Attorney General and Minister for Commerce, the Attorney General explained that under his two portfolios he has not yet been required to make a decision not to provide requested information to the Parliament or a committee. However, should this scenario arise he would obtain advice from the relevant department and seek advice from the State Solicitor if he felt the departmental advice was unsound or he could not see the argument himself or was concerned that some aspects had not been covered.

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208 Question No. A3 dated 25 September 2013 concerned a request for a copy of Eventscorp's assessment of the potential worth of the India Test in 2014 to Western Australia.

209 Hon Liza Harvey MLA, (then) Minister for Tourism, Letter, 15 May 2014.

210 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, p 6.

7.6 In his representative capacity the Attorney General confers with the relevant Minister and will assume that Minister's position as long as the rationale is well based.[211]

7.7 The Attorney General said there are occasions when he is asked via questions without notice (or with notice) about pending investigations, investigations underway, matters before a court, matters where there may be a disclosure of advice that has been given that is privileged, or matters involving public interest immunity for cabinet, for which he '*instinctively know*[s] *whether that is a sound objection to take*.'[212] The Committee is of the view that what is instinctive for the Attorney General may not be instinctive for every Minister or their departmental advisers.

7.8 In the case of commercial information requested by committees, the State Solicitor initially acknowledged an absence of internal documentation to assist a Minister's decision making process. However, after conducting further research, the State Solicitor corrected this information and gave the Committee a copy of a document titled: *Guideline to Ministers withholding information or documents when asked a parliamentary question* prepared by the State Solicitor's Office in March 2011. Though absent 'commercial-in-confidence', 'commercially sensitive' or 'the public interest' definitions, it does exhort a Minister to consider whether a document or the information is inherently confidential and then provides some examples (see paragraph 4.28).The State Solicitor said '*to what extent and to how those guidelines have been used by those Departments to advise their Ministers we are not aware*.'[213] This is because the Guideline was not given to individual Ministers but to Directors General for them to either distribute to Ministers or raise the issues covered by it with their Ministers.[214]

7.9 According to the State Solicitor, there is '*a thought process which you go through in looking at a particular problem, principally from a legal perspective*.'[215] This 'thought' process the State Solicitor described is not particularly rigorous unless the Ministers and their advisers can, in the case of the 'commercial-in-confidence' reason for not disclosing information, evaluate the commercial legal implications of disclosure as follows:

- what is the contract arrangement?

211 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, p 1.

212 Ibid, p 3.

213 Paul Evans, State Solicitor's Office, Letter, 21 March 2016.

214 Paul Evans, State Solicitor's Office, Letter, 22 April 2016.

215 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 3.

- is there a confidentiality obligation arising out of the commercial dealings of the parties?

- is there an express obligation? That is, does a contract between the parties contain a confidentiality clause? Between the State and a third party, as between private parties, it is not uncommon for the third party or possibly the State to seek confidentiality over the whole or part of the relationship. That will be subject to section 81 of the *FMA*

- is there an understanding that some or all of the information in or generated as a result of a contract will be confidential?

- what is the impact of confidentiality on (1) the relations between the parties, (2) the ability of the State to enjoy the benefits of the contract, (3) the ability of the State to participate in market-related activities, (4) the inhibitory effect of disclosure upon the State's ability to obtain the benefits of the contract or of some other contract or dealing

- whether partial disclosure, redacted disclosure, may or may not be satisfactory

- policy and other considerations.[216]

7.10 The Committee re-iterates the advice given by Bret Walker SC at paragraph 5.32 that it is the intent of sections 81 and 82 of the *FMA* that requested information should be released. That '*it would be a breach of section 81 not to spell out that all and any aspects of the governmental procurement or business in question could potentially be subject to disclosure to one or both of the Houses of Parliament.*'[217]

The Minister for Housing; Racing and Gaming

7.11 Hon Colin Holt MLC, Minister for Housing; Racing and Gaming described a thorough process of receiving advice on section 82 notices in which he regularly reviews the advice and either accepts it or sends it back for more information. The Minister's resources are his chief of staff and portfolio policy advisers. Similar to the Attorney General, the Minister disclosed no specific knowledge regarding the definitions of 'commercial-in-confidence', 'commercially sensitive' or 'the public interest' and no generic guiding principles. The Minister has developed his own guiding principle that he calls '*right timing.*'[218] Thus, any contract which is either

216 Paul Evans, State Solicitor, *Transcript of Evidence*, 22 February 2016, pp 3-4.

217 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 14.

218 Hon Colin Holt MLC, Minister for Housing; Racing and Gaming, *Transcript of Evidence*, 21 March 2016, p 5.

in the middle of negotiations or changing from an interim to a final agreement is confidential and would not, on principle, be provided to a committee.[219]

7.12 The Minister is also very clear that it is not his role to direct the Housing Authority on contract outcomes (such as '*You'd better write this in a way that can be disclosed down the track*'[220] to the Parliament if requested). His role is about policy settings and outcomes he wants the Housing Authority to deliver on those settings.[221] Given the Minister's position, the Committee is of the view that this makes the Minister appropriately reliant on Housing Authority compliance with section 81(b) of the *FMA.*[222] It is the Housing Authority's obligation not to place the Minister in jeopardy.

The Minister for Mental Health; Disability Services; Child Protection

7.13 Hon Helen Morton MLC, (then) Minister for Mental Health; Disability Services; Child Protection also described a thorough process of receiving and considering advice from agency and ministerial staff (and sometimes from the State Solicitor's Office) about providing information. The Minister said her '*chief of staff would be involved in the majority, if not all, of the questions, but I can assure you that there is a lot of delegation.*'[223] Like Minister Holt, the Minister said she has many times, requested more information when found it was shortcoming.

7.14 In terms of guidance, Hon Helen Morton MLC was the only Minister who had some awareness of how the State Solicitor's Office had '*prepared a document in March 2011 to give Ministers and staff some support.*'[224] However, the Minister said her (personal) guiding principles around disclosure are:

- the exclusion of individual and family identity as well as their personal details[225]
- and if there is no good reason not to provide that information, then it should be provided.[226]

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219 Hon Colin Holt MLC, Minister for Housing; Racing and Gaming, *Transcript of Evidence*, 21 March 2016, p 3.

220 Ibid, p 6.

221 Ibid.

222 Paraphrased as: The accountable authority is to ensure that no contractual arrangement is entered into, by or on behalf of the Minister that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency.

223 Hon Helen Morton, Minister for Mental Health; Disability Services; Child Protection, *Transcript of Evidence*, 21 March 2016, p 2.

224 Ibid, p 4.

225 Ibid.

7.15 Like Minister Holt, the Minister has had experience on the other side of the committee table and '*also experienced some of the difficulty in getting good information that is not irrelevant to the work of the committee*.' [227] The Minister deals with this dilemma by providing as much good information as possible on a case by case basis.

7.16 The Minister could not recall being offered any specific education, training or mentoring around section 82 notices or how to be a Minister.[228]

CONCLUSIONS

7.17 The question: *do Ministers comply with section 82*? is dependent on their personal knowledge of the section; the guidance and advice they receive from both the relevant agency and their ministerial office staff. The small sample of Ministers the Committee examined revealed varying degrees of exposure to both section 81 and 82 as well as experience in the information that should be in the notice. Their examinations reveal a significant gap in ministerial knowledge despite the recently discovered 2011 '*Guideline to Ministers withholding information or documents when asked a parliamentary question*' prepared by the State Solicitor's Office.[229]

7.18 The Committee makes the following findings.

Finding 13: The Committee finds that a sample of Legislative Council Ministers did not receive any formal education, training or mentoring on section 82 of the *Financial Management Act 2006*.

7.19 The Committee therefore makes the following recommendation.

Recommendation 8: The Committee recommends that the Premier, as part of induction, provide new Ministers with formal education, training and mentoring about their responsibilities under sections 81 and 82 of the *Financial Management Act 2006*.

226 Hon Helen Morton, Minister for Mental Health; Disability Services; Child Protection, *Transcript of Evidence*, 21 March 2016, p 6.

227 Ibid, p 4.

228 Ibid, pp 9-10.

229 Paul Evans, State Solicitor, Letter, 21 March 2016.

Recommendation 9: The Committee recommends that when the 2011 *Guideline to Ministers withholding information or documents when asked a parliamentary question* is reviewed and updated, the State Solicitor's Office distribute it to all Ministers as well as their heads of departments and agencies. (See also recommendations 1 and 6)

STATUTORY SECRECY IN CONTRACTS

7.20 The Auditor General is of the view that Ministers are very familiar with section 81 of the *FMA* and have a very good understanding of how it '*does not allow public sector entities to enter into contracts with commercial parties which require keeping information away from the Parliament.*'[230] The Auditor General said:

> *I regard that as almost a threshold issue. I have an expectation that that will be the approach in our commercial dealings and in almost every case we have seen that Ministers understand that. There have been exceptions. Where there are exceptions in looking at matters under section 24, if a Minister is under some sort of misunderstanding that a contractual provision can prevent information going to Parliament, we do not take that into consideration at all. We would not allow that as a valid reason for withholding information from Parliament* [231]

7.21 In 2015, the Committee learned the existence of a secret contract entered into by the Pilbara Ports Authority approximately one year after sections 81 and 82 of the *FMA* became operational on 1 July 2007. Section 90(2) of the *Ports Authority Act 1999*, states that the Pilbara Ports Authority is subject to sections 81 and 82 of the *FMA.*[232] The Port Authority's General Counsel in explaining its secrecy said '*public disclosure of the Agreement would adversely affect the commercial interests of the Pilbara Ports Authority and other persons.*'[233]

7.22 The Committee contacted seven Ministers about their personal (and departmental) awareness of current, secret contracts or agreements within their portfolios. Five Ministers responded with only one, the Minister for Transport, confirming the (above) Pilbara Ports Authority contract. The Minister told the Committee that the contract '*does not prevent disclosure of the existence of the contract, but does*

230 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 4.

231 Ibid.

232 Section 90(2) states: '*The Minister and the board of a port authority must comply with sections 81 and 82 of the Financial Management Act 2006 as if — (a) the port authority were a statutory authority; and (b) the board were its accountable authority, within the meaning of that Act.*'

233 Richard Donaldson, General Counsel, Letter, Pilbara Ports Authority, 26 March 2015, p 2.

preclude disclosure of the name of the contract or with whom the contract is held.'[234] Further:

> *All Port Authorities have contracts with third parties where there are confidentiality obligations, reflecting standard commercial practice to maintain the confidentiality of either party's confidential information, but which do not prevent the acknowledgement of the existence of the contract.*[235]

7.23 Bret Walker SC acknowledges that some commercial matters '*need to be kept secret in the public interest – usually, so as to preserve real competition for the public benefit in government procurement - without the commercial counterparty itself having any right to insist on that secrecy*.'[236]

7.24 The Committee is of the view that secrecy should not extend to the existence of a contract, its name or the names of the contracting parties especially if one of the parties is a statutory authority.

7.25 The Committee makes the following Finding.

Finding 14: The Committee finds that it is inappropriate for any Government department, agency or statutory authority to enter into contracts that prevent the disclosure of the existence of the contract, the name of the contract, or with whom the contract is held.

234 Hon Dean Nalder MLA, Minister for Transport, Electronic Mail, 29 March 2016.

235 Ibid.

236 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 15.

CHAPTER 8

ADEQUACY OF CURRENT STATUTORY PROVISIONS

8.1 This chapter focuses on the adequacy of section 82(1) of the *FMA* and section 24(2)(c) of the *Auditor General Act 2006* when the Auditor General assesses if a Minister's decision is reasonable and appropriate. In other words, are these sections and their supporting administrative practices sufficient to assist the Auditor General's task?

8.2 The Committee notes this chapter is contemporaneous with the Joint Audit Committee's two inquiries into the review of the *Auditor General Act 2006* and the Department of Treasury's review of the *FMA.*

AUDITOR GENERAL OPINIONS

8.3 Pursuant to section 24(1) of the *Auditor General Act 2006*, the Auditor General is required to report to the Parliament at least once a year on matters arising out of the performance of the Auditor General's functions. Section 24(2)(c) states:

> *Without limiting subsection (1), in a report under that subsection the Auditor General —*
>
> > *(c) is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.*

8.4 Section 24 (2)(c) leaves no room for discretion. On receiving the notice, the Auditor General '*must investigate it and must report*.[237] The role involves reviewing a Minister's decision making process, arguably, not the substance of the decision itself. However, Bret Walker SC said section 24(2)(c) means the Auditor General '*should not in any way defer to a Minister's position so as to not form and report his own actual opinion.*' [238] By engaging in this process, the Auditor General moves beyond why a Minister '*thought withholding information was reasonable and appropriate*' to whether, in the process that decision '*actually was reasonable and appropriate*.'[239]

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237 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 6.

238 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 21.

239 Ibid.

8.5 The Committee interprets the phrase 'reasonable and appropriate' in subsection 24(2)(c) of the *Auditor General Act 2006* identically with section 82 of the *FMA 2006*. The obligation to include an opinion in a report implicitly imposes an obligation on the Auditor General to consider and form that opinion.[240] However, the Committee acknowledges that what a Minister considers to be reasonable and appropriate may not strike the Auditor General the same way '*even when they both know the same facts identically*.'[241]

8.6 Reports pursuant to section 24(2)(c) have had the beneficial effect of educating Ministers. The Auditor General referred to '*examples in our earlier opinions*' where a Minister has said: '*Under contract, I am required to keep this confidential, and we have said, Not only is that not a valid reason, but if that is the case, you could well be in breach of section 81*.'[242] Another benefit has been an improvement in public sector practice.[243] The Auditor General said:

> *With this being in operation for some period now we have seen improvement as people get used to the idea. Initially they did not have good answers to our questions when we asked them what process they went through to get advice and how they documented things, but we have been back now to agencies and found that they have improved. Much of what we put into those reports is our endeavour to try to improve practice within the sector as distinct from the analysis that was used to determine whether the minister's decision was reasonable or not.* [244]

8.7 The Auditor General said his opinions:

- identify the process a Minister has gone through to get advice
- identify what policies were referred to
- assess whether the agency involved gave good advice
- assess whether the agency obtained legal advice and how they responded to that advice.[245]

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240 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 19.

241 Ibid, paragraph 22.

242 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 4.

243 Ibid, p 6.

244 Ibid.

245 Ibid.

8.8 The State Solicitor observed a limitation on the Auditor General under section 24. This being an inability to form an opinion about what may be a Ministerial political decision not to provide information to the Parliament. The Auditor General is not there '*as some kind of backup government to make political decisions as to the rightness or wrongness of particular actions*.'[246] For example, the Auditor General would have to assess that a request for information was '*genuinely an inquiry for the purposes of the Financial Management Act into the affairs of an agency, rather than for a political purpose.*'[247]

8.9 The Committee is of the view that the *FMA* does not provide for Ministers to make political decisions, rather Ministers should make decisions that are reasonable and appropriate.

STATISTICS

8.10 Between 1 February 2007 and 4 February 2016, the Auditor General provided the following table of 'received and assessed as reasonable' section 82 notices since the *FMA* became operational on 1 February 2007.

Year Received/ Notices	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016 To date	Total To date
No. Received	55	1	4	2	2	1	4	11	11	2	93
No. Assessed as Reasonable	55	1	0	0	2	1	2	9	3		73

8.11 The Auditor General found that of 93 notifications received to January 2016, 73 have been assessed as reasonable. However, 55 of the 73 'reasonable' assessments related to 2007 decisions not to provide information to the Parliament because the cost was prohibitive.

8.12 Since the beginning of 2008 the Auditor General has received 38 notifications. Six have not yet been finalized. The 32 finalised have resulted in:

- 18 'reasonable' opinions
- 15 'not reasonable' opinions
- three occasions when the Auditor General was unable to form an opinion.

8.13 Some notifications have resulted in more than one opinion. Hence, the number of opinions issued is greater than the number of notifications received.[248] Of the

246 Hon Michael Mischin MLC, Attorney General, *Transcript of Evidence*, 22 February 2016, p 15.

247 Paul Evans, State Solicitor, State Solicitor's Office, *Transcript of Evidence*, 22 February 2016, p 13.

248 Sandra Labuschagne, Assistant Auditor General, Information Systems and Performance Audit, Office of the Auditor General, Electronic Mail, 9 February 2016.

statistics, the Committee is of the view that 'reasonable' opinions are fairly evenly balanced with the 'not reasonable' category.

AUDITOR GENERAL ASSISTANCE TOOLS

8.14 An absence of statutory guidance in either the *FMA* or section 24(2)(c) of the *Auditor General Act 2006* prompted the Auditor General to develop his own audit methodology so the Parliament could have confidence in the independence and reliability of his opinions. The Auditor General relies on:

- a guidance note from the Australian National Audit Office (to assist with the commercial-in-confidence reason for withholding information)
- a self-developed Audit Practice Statement (discussed at paragraph 8.37).[249]

STATE SOLICITOR VIEW OF SECTION 24

8.15 The State Solicitor understands the role of the Auditor General based on what section 24 of the *Auditor General Act 2006* does *not* say. The State Solicitor argues that section 24 does *not* specify whether the Auditor General is required to provide an opinion about a Ministerial decision not to give information *only* when notified or in *all* circumstances where the Minister declines to give information to the Parliament.[250] The State Solicitor argues the correct interpretation is *only* when notified. The Committee agrees with Bret Walker SC that section 24 (2)(c) '*does not in terms require a notice, and could practically, at least in some cases, operate without one.*'[251] Auditor General advice to date suggests he is at liberty to look at issues without a notice and has had representations put to him that matters should be subject to review even though a notice had not been given to him.[252]

8.16 The Committee is of the view the Auditor General already has the capacity to examine and report a failure to provide information to the Parliament even if a section 82 notice is not tabled. However, to provide clarity the Committee makes the following recommendation.

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249 Part of this is an Audit Practice Statement which outlines the approach used to assess a section 82 notice. First introduced in 2007 the Statement was amended in 2011 and again in 2014.

250 Paul Evans, State Solicitor, State Solicitor's Office, Letter, 9 November 2015.

251 Bret Walker SC, Legal Opinion, 21 January 2015, paragraph 24.

252 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 2.

Recommendation 10: The Committee recommends the Treasurer amend section 24 of the *Auditor General Act 2006* to expressly allow the Auditor General to provide an opinion in all circumstances where the Minister decides not to provide certain information to the Parliament or its committees whether or not a section 82, *Financial Management Act 2006* notice is tabled in the Parliament.

SECTION 82 NOTICES

8.17 Statistically, the tabled papers register in 2015 revealed that section 82 notices are rare compared with the volume of answers to questions with (or without) notice in the Houses and their committees. However, this can be misleading because Ministers or their advisers may be unaware of their procedural duty under section 82 or are aware but decide not to table a notice. Section 82 is both absent penalties and '*silent on what action is to be taken if there is no notice*.'[253]

8.18 The Committee has developed its own internal practice. As the Chair explained:

> *We now as a matter of course remind Ministers, when they tell us we cannot have something, of section 82 certificates in the correspondence when we write back to them and say that we do not find it acceptable that they have asked us to FOI that document, or we do not find it acceptable that the Minister has said he is just not going to provide it to us, even with a request that it be kept confidential.*[254]

8.19 On occasion a Minister will advise of an intention to table the requisite notice and the Committee encourages this practice. The Committee's experience is that some Ministers are comfortable with preparing notices and regularly table them (for example the Minister for Tourism) whilst others do so infrequently.

8.20 The Committee is of the view that its internal practice has contributed to raising ministerial consciousness of section 82. However, a limitation is that committees cannot compel compliance with it. Being unable to compel or penalise means the effectiveness of section 82 is reduced. Only the Parliament has the capacity to insist that Ministers comply with the procedural obligation and whether that occurs is essentially a political decision of Executive Government.

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253 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 4.

254 Hon Ken Travers MLC, Chair of the Committee, *Transcript of Evidence*, 16 March 2015, p 3.

8.21 Other than tabling a notice, section 82 does not garner attention in parliamentary proceedings[255] and Legislative Council Standing Orders are absent any opportunity for debate after tabling.

8.22 The Committee is of the view that the profile of section 82 notices should be elevated in the Legislative Council. Permitting debate on them after tabling would elevate their importance in parliamentary proceedings but notes this is not the nature and content of formal business in the Legislative Council under Standing Order 14.[256] An alternative is for *Auditor General Opinions on Ministerial Notifications* in accordance with section 24(2)(c) of the *Auditor General Act 2006,* to be added to the *Consideration of Committee Reports* business item in Standing Order 15(3). The Committee is of the view that Standing Order 15(3) could be amended as underlined below.

> *The following business shall be taken each sitting week*
>
> > *(3) Consideration of Committee Reports*
> >
> > *After the conclusion of motions on notice under (2) each Wednesday, consideration of Committee reports and Auditor General Opinions on Ministerial Notifications in accordance with section 24(2)(c) of the Auditor General Act 2006 shall be taken for a period of 60 minutes.*

8.23 The decision of a Minister not to provide certain information to the Parliament is significant for transparency and accountability of Executive Government. Further, there can be considerable delays between each step in the section 82 process which diminishes the currency of the requested information. Therefore the Committee makes the following recommendation.

Recommendation 11: The Committee recommends that the Procedure and Privileges Committee inquire into amending Standing Orders of the Legislative Council to provide for *Auditor General Opinions on Ministerial Notifications* under section 24(2)(c) of the *Auditor General Act 2006* to be considered under Standing Order 15(3).

AUDIT OF COMPLIANCE WITH SECTION 82 NOTICES BY THE AUDITOR GENERAL

8.24 The Auditor General does not routinely audit compliance with section 82 notices as the following exchange reveals.

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255 In 2015, only one occasion of debate in the Legislative Assembly. This was the *Barnett Government Financial Oversight, Matter of Public Interest*, WA, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 March 2015, pp 1452d-1463a regarding the sale of FESA house and the value of the FESA hotel incentive being treated as commercial-in-confidence as per State Solicitor advice.

256 Formal business in Standing Order 14 comprises 11 items.

> ***Hon PETER KATSAMBANIS****: I would not mind asking a question, just for completeness and to have it on the record. In your normal auditing function, do you routinely audit compliance with section 82, or do you simply treat that as a ministerial obligation that you cannot audit in the usual course of either a financial audit, or a performance audit for that matter?*
>
> ***Mr Murphy****: Look, probably the latter; it is not something that we routinely monitor. Certainly, compliance with legislation is well within my mandate. It is very open for me to monitor compliance of an agency or a minister with any legislation but, given how much there is and how many areas there are, I really have to devote my resources to areas of priority.*
>
> *As we have discussed, given the requirement for a Minister to provide a notice, and given the Parliament's capacity to insist that Ministers actually are complying with the legislation, it is not something I have devoted a lot of attention to. I would hasten to add that, on the understanding of the legal advice, I have no obligation to actually do that.*[257]

8.25 However, the Auditor General's updated Audit Practice Statement of August 2015 demonstrates a significant shift in the Auditor General's approach. Included in a new paragraph titled: *How soon must the Minister send a notice?* the Audit Practice Statement provides for the Auditor General '*to take action*'[258] after the 14 day notice period has lapsed. Action '*could include for instance contacting the Minister to advise them of the legislative requirement*.'[259] The Committee is of the view that this significant new feature of the Audit Practice Statement enhances the administrative practices around section 24(2)(c) of the *Auditor General Act 2006*.

8.26 The Committee is confident that Auditor General reminders to Ministers about section 82 notices will increase compliance. However, to support the Auditor's initiative in his Audit Practice Statement, the Governor's 'necessary and convenient' regulation making power in section 84 of the *FMA* may authorise the making of a regulation to allow the Auditor General to take prescribed action after the 14 day period in section 82(1) has lapsed. This would formalise and strengthen the statutory regime around section 82 notices. The Committee therefore makes the following recommendation.

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257 Hon Peter Katsambanis MLC, Member of the Committee, *Transcript of Evidence*, 16 March 2015, p 3.

258 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 19: August 2015, p 16.

259 Ibid.

Recommendation 12: The Committee recommends the Treasurer propose the making of a regulation pursuant to section 84 of the *Financial Management Act 2006* prescribing that the Auditor General may provide a written reminder to a Minister after the 14 day notice period has lapsed for advising the decision not to provide certain information to the Parliament.

8.27 The Committee will continue its own internal practice of reminding Ministers about section 82 notices and will introduce a new practice of advising the Auditor General when certain, requested information has not been provided. The Committee is of the view that all committees of the Parliament could, by resolution, adopt such a practice. The Committee particularly encourages those surveyed committees identified at paragraphs 2.19 and 2.20 that experienced difficulties with obtaining requested information, to consider such a resolution.

REASONS WHY MINISTERS DENY INFORMATION TO THE AUDITOR GENERAL

8.28 In a submission, the Auditor General listed the following main reasons Ministers advise him of their decision not to provide information to the Parliament or its committees:

- the information was provided to government by a third party and is commercial-in-confidence to them
- the release of government information could compromise agency operations
- the cost of gathering the information is prohibitive
- ongoing negotiations.[260]

8.29 Other less frequent reasons were:

- disclosure of the information will make suppliers more cautious in future about tendering for government business
- the information was already being sought under the *Freedom of Information Act 1992*
- the information could not be given at that time but could be given later.

8.30 Like the Committee, the Auditor General struggles with the cabinet-in-confidence and legal professional privilege reasons Ministers give for withholding information

[260] Glen Clarke, Deputy Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 7.

from him during the process of forming an opinion. In his 2014-15 Annual Report the Auditor General said:

> *The Auditor General Act 2006 is still relatively contemporary audit legislation but it does have some deficiencies that are impacting the efficiency and effectiveness of our audits.*
>
> *In particular, access constraints to documents protected by Cabinet-in-confidence or legal professional privilege have impacted recent audits. The ability to gather sufficient and appropriate evidence is a fundamental audit requirement and in worst case scenarios can prevent an auditor from issuing an audit opinion.*[261]

8.31 The Attorney General responded by ruling out any changes to the *Auditor General Act 2006* and that the Auditor General '*has been able to do his job in the past without access to material that is legally protected*.'[262] The Committee noted that the Explanatory Memorandum to the Auditor General Bill 2006 reveals that the Auditor General's power to obtain information is extensive. It can direct a person to provide any information or explanation and produce any documents in the custody or control of a person to the Auditor General.[263]

8.32 The Committee noted that the Department of the Premier and Cabinet, cabinet handbook allows the Auditor General to obtain '*cabinet records*.'[264] The process involves the following steps:

- The Auditor General writes to the Director General of the department specifying those Cabinet records he requires and outlines the reasons for the request.
- The Director General contacts the Minister responsible for the required records outlining the Auditor General's request and informing the Minister that she or he must obtain a Cabinet decision on whether Cabinet agrees to waive privilege and make the records available.
- The Minister must then prepare a one page item for discussion at Cabinet, outlining the Auditor General's request and providing a recommendation on whether Cabinet should allow the Auditor General to view the records. If

261 Office of the Auditor General WA, *Annual Report 2014-2015*, p 20.

262 Nicolas Perpitch, *Attorney General Michael Mischin rules out greater powers for WA auditor, Media Statement*, ABC news online, Perth, 9 September 2015.

263 Auditor General Bill 2006, *Explanatory Memorandum*, Legislative Council, p 8.

264 Defined as *all Cabinet agendas, submissions, attachments to submissions, comment sheets and decisions*.'

Cabinet waives privilege and makes the records available, the Auditor General and his staff may make notes but not take any copies.[265]

8.33 The Committee noted the subsequent use the Auditor General can make of that information is not covered in the handbook. Of the handbook, the Auditor General said he has used the facility on several occasions. That:

- requesting access to cabinet information is a step only taken if the view is it will provide important and necessary evidence for an audit
- staff notes of the information become audit evidence and can be used without any limits to reach a financial audit opinion or a performance audit conclusion. That evidence can form part of an opinion
- to date, cabinet information has not been disclosed in an Audit Report. If this were to occur, its disclosure would need to be assessed as being in the public interest and would only occur after appropriate consultation.[266]

AUDITOR GENERAL REASONS FOR DISAGREEING WITH A MINISTERIAL DECISION

8.34 The Auditor General listed the most common reasons for why his Office disagreed with a decision not to provide information to the Parliament. These were:

- the claimed commercial-in-confidence information was not specifically identified
- an obligation of confidence existed but not to the extent that it should prevent disclosure of all the requested information. The confidential components could have been redacted
- no clear obligation of confidence existed
- a lack of any substantiation from the third party to demonstrate that the information was significant; that is, it did not demonstrate that it was inherently confidential.

8.35 Of the commercial-in-confidence reason, the Auditor General commented that if disclosing profit margins can be demonstrated, then there would be an argument for not giving that information to the Parliament because:

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265 Department of the Premier and Cabinet, *Cabinet Handbook*, 2013, p 14-15. Available at: <https://www.dpc.wa.gov.au/RoleOfGovernment/Documents/Cabinet_Handbook_2013.pdf>. Viewed 14 March 2016.

266 Seisha Fogarty-Pryor, Principal Policy Officer, Office of the Auditor General for Western Australia, Electronic Mail, 24 March 2016.

> *If you disclose too much of the intellectual property of proponents, people may be reluctant to do business with government, but, by and large, prices, values and rates, should be disclosed.*
>
> *I think it has become increasingly the trend in public sector procurement over the years. Less secrecy is seen in most jurisdictions as the way to go.*[267]

8.36 Notably absent from section 82 is a mandatory requirement that the Minister give reasons to the Auditor General for deciding not to provide information to the Parliament as well as the withheld information. Section 82 only mandates that reasons be given to the Parliament. The Auditor General is given the same notice. The Committee therefore makes the following recommendation.

Recommendation 13: The Committee recommends that the Treasurer amend section 82 of the *Financial Management Act 200*6 so as to provide a new subsection (3) which states:

(3) A notice given to the Auditor General under subsection (1)(b) is to include -

(a) the Minister's reasons for making the decision that is the subject of the notice; and

(b) the information concerning the conduct or operation of an agency that the Minister has not provided to Parliament.

ADMINISTRATIVE PRACTICES AND COMMERCIAL-IN-CONFIDENCE

8.37 The Committee noted that after Bret Walker SC commented on some elements of the Auditor General's Audit Practice Statement, it was updated (the Auditor General conceding it needed revision).[268]

8.38 Historically, there have been a number of iterations of the Audit Practice Statement since 2007 but the update provides '*some further guidance and clarification for agencies on criteria they can use to assess the commercial confidentiality of information.*'[269] The criteria are replicated in **Appendix 4**. Of them, the State Solicitor said:

> *The 'reasonable and appropriate' criterion is a flexible one, and could apply to a multitude of circumstances. Some of these may be largely political, and all must be assessed in context.*

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267 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 9.

268 Ibid, p 3.

269 Western Australian Auditor General's Report, *Opinions on Ministerial Notifications*, Report 19: August 2015, p 16.

> *Other circumstances upon which one might speculate include the burden of answering a question compared to its (objective) importance or relevance, whether the question or a like question has been asked and answered by some or other means etc.*[270]

8.39 The Committee makes the following finding.

Finding 15: The Committee finds that section 82 of the *Financial Management Act 2006* and section 24(2)(c) of the *Auditor General Act 2006* are adequate for purpose but require some enhancement. Recommendations, if agreed to by Executive Government, will have the effect of increasing Ministerial and departmental awareness of section 82 for the benefit of the Parliament as well as contributing to the robustness of the section 82 process.

[270] Paul Evans, State Solicitor's Office, Letter, 9 November 2015.

CHAPTER 9

OTHER JURISDICTIONS

9.1 How some other jurisdictions deal with Ministers deciding not to provide information to their Parliaments is covered in this chapter of the Report as well as the respective roles of some of their Auditors General.

THE UNIQUENESS OF WESTERN AUSTRALIAN LEGISLATION

9.2 Referred to as first generation legislation with no parallels elsewhere,[271] the unique nature of sections 81 and 82 is due to the context in which they were enacted – the Commission on Government.

9.3 Western Australia is the only jurisdiction that requires the Auditor General to issue an opinion on a Minister's decision not to provide information to the Parliament.[272] A few other jurisdictions in the Table below have similar provisions in their audit and public finance legislation to section 82(1)(b) and section 24(2)(c) of the *Auditor General Act 2006.*[273]

Jurisdiction	Enactment	Relevant section(s)
Australian Commonwealth	*Auditor-General Act 1997*	37(2)
Australian Capital Territory	*Auditor-General Act 1996*	19 and 20
Queensland	*Auditor-General Act 2009*	66
New Zealand	*Public Audit Act 2001*	30

9.4 Those jurisdictions' provisions are useful to the Western Australian Auditor General because they provide examples of what is considered sensitive information in other jurisdictions.[274] The nearest parallels are requirements on the Commonwealth and Australian Capital Territory Auditor Generals under which they are able to disclose confidential and sensitive information in particular

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271 Colin Murphy, Auditor General, Office of the Auditor General, *Transcript of Evidence*, 16 March 2015, p 3.

272 Dr Gordon Robinson, *Independence of Auditors General; A 2013 update of a survey of Australian and New Zealand legislation*, http://www.acag.org.au/Independence-of-Auditors-General-in-ANZ-2013.pdf , 4 September 2015, p 39.

273 Western Australian Auditor General's Report, Opinions on Ministerial Notifications, Report 11: November 2007, p 60.

274 Sandra Labuschagne, Assistant Auditor General, Information Systems and Performance Audit, Office of the Auditor General for Western Australia, Electronic Mail, 11 March 2016.

circumstances absent criteria of reasonableness and appropriateness. Guidance on sensitive information is provided by audit legislation in Queensland and New Zealand.[275]

The Commonwealth

Auditor General

9.5 Section 37(1) of the *Auditor-General Act 1997 (Cth)* provides that the Auditor General must not include particular information in a public report[276] if disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2). The Attorney General also has to issue a certificate to the Auditor General stating that, in the Attorney General's opinion, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection 2. The reasons are:

- it would prejudice the security, defence or international relations of the Commonwealth
- it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet
- it would prejudice relations between the Commonwealth and a State
- it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth
- it would unfairly prejudice the commercial interests of any body or person
- that any other reason could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

9.6 Pursuant to section 37(3) the Auditor General is not allowed (and cannot be required) to disclose to the Houses, Members of the Parliament or a committee that prohibited information. In the scenario of where the Auditor General omits particular information from a public report because of the Attorney General's issued certificate, the Auditor General must report the fact of that omission and the reasons in the certificate.

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275 Sandra Labuschagne, Assistant Auditor General, Information Systems and Performance Audit, Office of the Auditor General for Western Australia, Electronic Mail, 11 March 2016.

276 '*Public report*' means a report that is to be tabled in either House of the Commonwealth Parliament.

9.7 Under section 37(5) if the Auditor General decides not to prepare a public report; or omits particular information from a public report; the Auditor General '*may prepare a report…that includes the information concerned*' and '*must give a copy of each report…to the Prime Minister, the Finance Minister and any responsible Minister*.'

Senate Chamber

9.8 In the Senate, Standing Order 164(3) provides a procedure for any Senator to seek an explanation from the relevant Minister for non-compliance with an order for the production of documents once 30 days have elapsed after the deadline set by the order. It does not limit any other remedy or sanction that a Senator may choose to initiate under the procedures of the Senate. It is of no application to the person to whom the order is directed and, in particular, does not provide an implicit extension of time for a Minister to respond to the order.

9.9 The requirement for a Minister to provide an explanation for non-compliance and the right of a Senator to move a motion without notice in relation to the explanation or failure to provide it are generally preferred even though harsher penalties exist. As the commentary states:

> *When lacking a majority in the Senate, a government faces disruption to its legislative program if it is not forthcoming with information, thus providing a strong incentive to comply.*[277]

The Australian Capital Territory

Auditor General

9.10 The *Auditor-General Act 1996(ACT)* allows for the auditor-general not to include information in a report for the Legislative Assembly if the auditor-general considers that the disclosure of the information would, on balance, be contrary to the public interest. Examples are given in section 19(2) of what may be contrary to the public interest. These are if the disclosure would be reasonably likely to—

> *(a) infringe an individual's right to privacy, or any other right under the Human Rights Act 2004; or*
>
> *(b) disclose a trade secret, or the business affairs or research of an entity; or*
>
> *(c) prejudice the investigation of a contravention of a law; or*

[277] *Annotated Standing Orders of the Australian Senate.*. Available at: <http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/aso/so164>. Viewed 8 March 2016.

> *(d) prejudice relations between the ACT government and another government; or*
>
> *(e) disclose information mentioned in the Legal Aid Act 1977, section 92(2)(a) or contained in a document mentioned in that Act, section 92(2)(b).*[278]

9.11 Interestingly, section 19(4) provides that if the auditor-general omits information mentioned in subsection (2)(a) to (d) from a report for the Legislative Assembly, the auditor-general '*may prepare a special report for the public accounts committee that includes the information*.' However, this is not mandatory. If a special report is prepared, the auditor-general must give it to the presiding member of the committee and once given is under section 19(7) '*taken for all purposes to have been referred to the committee by the Legislative Assembly for inquiry and any report that the committee considers appropriate*.'

Assembly Chamber

9.12 In the Assembly, Standing Order 213A(5) provides for the Chief Minister to consider if a document should be privileged. A claim of privilege must be given to the Clerk within 14 calendar days and any Member may dispute the claim with the Clerk who then advises the Chief Minister's Department. Within seven days that department must provide the Clerk copies of the disputed document. The Clerk is authorised to release the disputed document to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

9.13 The independent legal arbiter is appointed by the Speaker and must be a retired Supreme Court, Federal Court or High Court Judge. The independent legal arbiter's report is lodged with the Clerk and under Standing Order 213(8):

> *(a) made available only to Members of the Assembly; and*
>
> *(b) not published or copied without an order of the Assembly.*

9.14 If the independent legal arbiter upholds the claim of privilege the Clerk must return the document to the Chief Minister's department and if not, the Clerk tables the document. If out of session, the Clerk is authorised to release the document to any Member and maintain a register showing the name of any person examining the document.

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[278] Section 92(2)(a) states: '*A person to whom this section applies shall not, either directly or indirectly, except for this Act, the Auditor-General Act 1996 or an inquiry— (a) make a record of, or divulge or communicate to any person, any information concerning the affairs of another person acquired by him or her by reason of his or her office or employment under or for this Act or in the exercise of a function under this Act or in the course of an inquiry; or (b) produce to any person a document relating to the affairs of another person furnished for this Act or in the course of an inquiry*.'

Queensland

Auditor General

9.15 Section 66 of the *Auditor-General Act 2009 (Qld)* provides that the Auditor General can consider a report to be against the public interest to disclose it to the Legislative Assembly. The information has to:

- have a serious adverse effect on the commercial interests of an entity
- reveal trade secrets of an entity
- prejudice the investigation of a contravention or possible contravention of the law
- prejudice the fair trial of a person
- cause damage to the relations between the Government of the State and another Government.

9.16 In these scenarios, the Auditor General must not disclose the information in the report but must instead include it in a report prepared and given to the parliamentary committee.[279] However, the Act is silent about whether the parliamentary committee can then release the information.[280]

Assembly Chamber

9.17 Standing Order 27 states that the House may order documents to be tabled or produced to the House with the Clerk advising the responsible Minister to table them or transmit them to the Clerk for tabling in the House. Standing Order 29 provides that every Wednesday when the House is sitting, the Clerk must read out the titles of all orders and addresses for documents agreed to by the House that have not been tabled.

9.18 Generally, the powers, privileges and immunities of the House of Commons apply to the Legislative Assembly and its members and committees by virtue of section 9 of the *Constitution of Queensland 2001*. Section 25 of that Act provides that an

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279 '*parliamentary committee*' is defined in the schedule as meaning *(a) if the Legislative Assembly resolves that a particular committee of the Assembly is to be the parliamentary committee under this Act—that committee; or (b) if paragraph (a) does not apply and the standing rules and orders state that the portfolio area of a portfolio committee includes the auditor-general—that committee; or (c) otherwise—the portfolio committee whose portfolio area includes the department, or the part of a department, in which this Act is administered.*

280 Dr Gordon Robinson, *Independence of Auditors General; A 2013 update of a survey of Australian and New Zealand legislation,* http://www.acag.org.au/Independence-of-Auditors-General-in-ANZ-2013.pdf 4 September 2015, p 39.

authorised committee may order a person, other than a member, to produce to the committee any document or other thing in the person's possession.

9.19 Schedule 8 of the Standing Orders titled: *Code of practice for public service employees assisting or appearing before parliamentary committees* recognises grounds for objection to producing material as including:

- That the material sought is commercially sensitive information relating to a Government Owned Corporation and should only be given in private session (this is consistent with sections 100-101 of the *Parliament of Queensland Act 2001*).

- The material sought or question asked relates to briefing, opinion or advice given to Ministers, unless the Minister has agreed to its release, as this may infringe the privileges of the Minister as a Member of the Legislative Assembly (this is consistent with sections 8 and 9 of the *Parliament of Queensland Act 2001*).

- The information sought is subject to statutory confidentiality or some other legally recognised privilege, such as legal professional privilege, and it is not in the public interest to disclose the matter, particularly in public session.

New South Wales

9.20 Unlike Western Australia, NSW is absent an equivalent privilege, immunities and powers enactment and has chosen not to align itself with the United Kingdom House of Commons.[281] Notwithstanding the absence of a statutory basis for these privileges, in the High Court in *Egan v Willis* & *Cahill* held by a 5 to 1 majority that the New South Wales Legislative Council has the implied power to require one of its members, who is a Minister, to produce State papers[282] to the House, together with the power to counter obstruction where it occurs. The majority said the relevant test is that an implied power must be reasonably necessary for the exercise of the Council's functions: these include its primary legislative function, as well as its role in scrutinising the Executive.

9.21 The High Court considered that the parliamentary powers were a reasonable necessity, despite the lack of a statutory basis for its rights, powers and immunities. The Court found that NSW does have and operates in a system of responsible government with a power to summons documents, otherwise subjected to client

281 *Egan v Willis* & *Cahill* [1998] HCA 71 at 29.

282 These were defined by Gleeson CJ as '*papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of the State of New South Wales*'. *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 654.

legal privilege (legal professional privilege). In 2004, this implied power was settled in Standing Orders, especially Order 52(5) which states:

> *(5) Where a document is considered to be privileged:*
>
> *(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,*
>
> *(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:*
>
> *(i) made available only to members of the Legislative Council,*
>
> *(ii) not published or copied without an order of the House.*

9.22 Further any Member can dispute the validity of the privilege claim by writing to the Clerk. On receipt, the Clerk must release the disputed document to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

9.23 Similar to the ACT, the independent legal arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge. The independent legal arbiter's report is lodged with the Clerk and made available only to members of the House. It cannot be published or copied without an order of the House.

9.24 The Committee noted a report by the Senate's Legal and Constitutional Affairs References Committee that sees merit in the independent arbitration model used by the NSW Legislative Council as an option for reform. The report '*acknowledges the high regard in which* [the independent arbitration] *process is held.* The committee said '*such a process, or some version of it, may well be adapted to the Senate.*'[283]

[283] Commonwealth of Australia, Senate, Legal and Constitutional Affairs References Committee, Report, *A claim of public interest immunity raised over documents*, 6 March 2014, p 11.

Victoria

Audit Act 1994

9.25 In Victoria, decisions about public interest are left to the Auditor-General.[284] Section 12(1) of the *Audit Act 1994 (Vic)* provides that:

> *no obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons employed in the public service or by an authority, where imposed by an enactment or rule of law or Cabinet confidentiality, applies to the disclosure of information required by the Auditor-General…for the purposes of anything done under this Act.*

Council chamber

9.26 Standing Order 11.03 states that where documents claim Executive privilege, reasons for it must be provided and delivered to the Clerk and

> *(i) made available only to the mover of the motion for the order; and*
>
> *(ii) must not be published or copied without an order of the Council.*

9.27 The mover of the motion for the order may notify the Clerk, in writing, disputing the validity of the claim of Executive privilege and on receipt, the Clerk is authorised to release the disputed document to (like NSW and the ACT) an independent legal arbiter, for evaluation and report within seven calendar days. The independent legal arbiter is appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

9.28 Again like NSW and the ACT, the Clerk is required to maintain a register showing the name of any person examining the document.

CONCLUSION

9.29 In 2002, Harry Evans, (then) Clerk of the Senate wrote about how the coercion of governments is much more difficult than coercion of private citizens. He said:

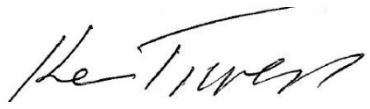
> *The law of parliamentary power, like other legal powers, in practice works very well against the ordinary citizens, where it is not needed,*

[284] Section 12(3) states that the Auditor-General may include in a report any information which has come to his or her knowledge in the course of performing functions under this or any other Act if the Auditor-General considers that the inclusion of the information in the report is in the public interest.

> *but is less effective against the great and the powerful, where it is needed, and governments are the greatest and most powerful.*[285]

9.30 Mr Evans posed the question: *What are parliamentary committees and their houses to do when governments flatly refuse to produce documents*? For Mr Evans, other than imposing procedural penalties on recalcitrant (Senators) the remedies are '*purely political*' ranging from '*heaping obloquy on the government to refusing to consider government legislation.'*[286]

9.31 The Committee is of the view that little has changed since 2002 with the *battle of privileges'*[287]as one Member of Parliament recently expressed it, showing no resolution. However, compared to other jurisdictions, the Western Australia Parliament has a unique approach for responding to Ministers who decide not to provide certain information to the Parliament or its committees. The Auditor General's statutory requirement to give an opinion as to a Minister's decision is a proven accountability mechanism that enhances transparency of Executive Government to the general public.



Hon Ken Travers MLC
Chair

19 May 2016

285 Harry Evans, 'The Parliamentary Power of Inquiry: any limitations? *Australasian Parliamentary Review*, 2002, vol. 17, No 2, p 138.

286 Ibid, p 139.

287 Dr Antonio Buti MLA, 'Information and Parliamentary Democracy: The Battle of Privileges', *Australasian Parliamentary Review*, 2015, vol. 30, No.2, p 76. Here Dr Buti is referring to the battle between the power of a parliamentary committee to compel the production of documents and the legal capacity to resist the production of legal advice.

APPENDIX 1

STAKEHOLDERS WHO PROVIDED A SUBMISSION

Stakeholders who provided a submission

1. Department of Fire and Emergency Services
2. Water Corporation
3. Office of the Auditor General
4. Office of the Information Commissioner
5. Standing Committee on Public Administration
6. Standing Committee on Environment and Public Affairs
7. Joint Standing Committee on Delegated Legislation
8. Select Committee into the Operations of the Royal Society for the Prevention of Cruelty to Animals Western Australia (Inc)
9. Standing Committee on Legislation
10. Economics and Industry Standing Committee
11. Public Accounts Committee
12. Education and Health Standing Committee
13. Standing Committee on Uniform Legislation and Statutes Review
14. The Clerk of the Legislative Council

APPENDIX 2

PUBLIC HEARINGS

Public hearings

1. Mr Sven Blummel, Information Commissioner, Office of the Information Commissioner

2. Office of the Auditor General
   Mr Colin Murphy, Auditor General
   Mr Glen Clarke, Deputy Auditor General

3. Mr Paul Evans, State Solicitor, State Solicitor's Office

4. Brookfield Rail
   Mr Paul Larsen, Chief Executive Officer
   Ms Megan McCracken, Head of Human Resources
   Mr Brian Pereira, Chief Finance Officer

5. Mr Reece Waldock, Director General, Department of Transport

6. Public Transport Authority
   Mr Graeme Doyle, Acting Managing Director
   Mr David Brown, Executive Director, Safety and Strategic Development

7. Mr Paul Price, MSS Security

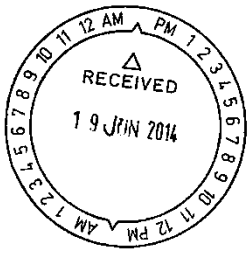
8. Hon Michael Mischin MLC, Attorney General and Minister for Commerce

9. Hon Helen Morton MLC, Minister for Mental Health; Disability Services; Child Protection

10. Hon Colin Holt MLC, Minister for Housing; Racing and Gaming

APPENDIX 3

CLERK OF THE LEGISLATIVE COUNCIL SUBMISSION



18 June 2014

Hon Ken Travers MLC
Chair
Estimates and Financial Operations Committee
Parliament House
PERTH WA 6000

Dear Chair

Thank you for your letter dated 12 May 2014.

The issues surrounding the provision of information by the Executive and agencies of government to committees are common to all Australian jurisdictions and is dealt with extensively in the leading procedural texts.[1]

The provision of information from government to your committee as a subordinate body of the Legislative Council is necessary to enable it to fulfil the functions set out in the committee's terms of reference provided in Schedule 1 of the Standing Orders. I take it that the terms of reference of this self-initiated inquiry are to be read subject to this Schedule, specifically in relation to your committee's functions under item 3.3. Matters relating to the financial administration of the State encompass the operation of the State's financial legislation. These include the *Financial Management Act 2006* (FMA) and the *Auditor General Act 2006* (AGA).

I note that in the two most recent reports of the Auditor General made pursuant to section 82 of the FMA the Executive's refusals to provide information to Parliament were based on claims of commercial in confidence[2] and legal professional privilege.[3] An investigation of the types of claims that have or could be made and how they are assessed by the Auditor General under section 82 of the FMA and reported under section 24 of the AGA are directly relevant to your committee's terms of reference.

1 See Odgers' Australian Senate Practice, 13th Edition, 2012, pp595-626.
2 Report No. 3; March 2014 relating to questions asked in December 2013 and February 2014 about The Margaret River Gourmet Escape.
3 Report No. 16, November 2013 relating to a question asked in April 2013 about the Margaret River bushfires.

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Information from government is a necessary part of the transparency required to enable governments to be accountable to the Parliament and through the Parliament to the people. It may be useful to your committee to consider the following definition of public accountability:

1. Public accountability means the obligation of authorities to explain publicly, fully and fairly, before and after the fact how they are carrying out responsibilities that affect the public in important ways.

2. Holding to account means obtaining from authorities the public explanations we need at the time we need them, validating the reporting for its fairness and completeness and doing something sensible and fair with explanations given in good faith.[4]

Transparency is a necessary precondition to proper accountability by providing free and open access to information regarding these government actions and decisions. Accountability does not necessarily equate to full disclosure by government. It is acknowledged in the case law on public interest immunity that government at a high level cannot function without some degree of secrecy.[5] Of course the legal cases under which this body of common law developed do not deal with disputes between Houses of Parliament and the Executive relating to the provision of information. As these disputes almost invariably take place during proceedings in Parliament they are not usually the subject of judicial determination.[6]

In the absence of a legal determination to the contrary it is my view that no House of Parliament should accept that there is any limitation, other than that which is self-imposed, upon its capacity to obtain information from the Executive. In this sense the question of whether the public interest is served by the disclosure of particular information is not a legal question for a court but one for the Legislature. Legal principles may be persuasive but not determinative.

Accordingly, the available remedies for a refusal by the Executive to provide information to a Legislature on the grounds of public interest immunity in its various formulations are therefore more often political rather than legal or procedural questions. This view is reflected in *Odgers* when discussing claims made by the Executive of public interest immunity:

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4 See 'Executive Accountability to Parliament — Reality or Rhetoric?' by Peter Loney, Australasian Parliamentary Review, Spring 2008, Vol. 23, No.2.

5 *Sankey v Whitlam* (1978) 142 CLR 1, per Gibbs A.C.J. at p.40.

6 But see *Egan v Willis and Cahill* (1996) NSWSC 583 (29 November 1996); *Egan v Willis* (1998) 195 CLR 424; and *Egan v Chadwick and Others* (1999) 46 NSWLR 563.

> *There appears to be a consensus that the struggle between the two principles involved, the executive's claim for confidentiality and the Parliament's right to know, must be resolved politically. In practice this means that, whether in a particular case, a government will release information which it would rather keep confidential depends upon its political judgment as to whether disclosure of the information will be politically more damaging than not disclosing it...*[7]

I attach for the information of your committee a copy of an advice from the then Clerk of the Australian Senate, Mr Harry Evans, which outlines the Australian Senate's approach to claims of public interest immunity. In general this approach is consistent with that taken by the Legislative Council of Western Australia.

I trust that the above will assist the committee in its deliberations.

Yours sincerely

Nigel Pratt
Clerk of the Legislative Council
Att:
A452243

7 *Op. Cit*, Odgers, p.597.

hc/pap/14613
19 May 2005

THE SENATE

GROUNDS FOR PUBLIC INTEREST IMMUNITY CLAIMS

This is a list of potentially acceptable and unacceptable grounds for claims of public interest immunity, that is, claims that information should not be provided to the Senate or in the course of an inquiry in a Senate committee.

The list is based on precedents of the Senate arising from cases in the Senate and actions and attitudes adopted by the Senate in those cases. The major cases are set out in *Odgers' Australian Senate Practice,* 11th ed, 2004, pp 464-484.

The most significant principle drawn from Senate precedents is that the Senate has insisted that a claim that information should not be produced remains merely a claim unless and until determined by the Senate. Any agreement by a committee to accept a claim is subject to a determination by the Senate, which may be initiated by any senator.

Particular claims must be assessed in their particular circumstances. It is in the nature of the process that, short of the Senate compelling the production of the information concerned, there can never be complete assurance that a particular claim is justified. The scope and basis of a claim may be clarified, however, by appropriate questions. The following list suggests the issues which have to be clarified and the questions which should be asked in relation to particular grounds for claims.

The terminology "public interest immunity" is significant. The Senate has made it clear that a claim that particular information should not be produced must be based on a particular ground that disclosure of the information would be harmful to the public interest in a particular way. A statement that the holder of information does not wish to produce it, or that the information is confidential, is not a proper claim for public interest immunity.

It is open to the Senate to determine that any risk of harm to the public interest by disclosure of information is outweighed by the benefit to the public interest in the provision of the information.

The Senate has also made it clear that claims in relation to information held by government must be made by ministers. The government's guidelines for public servants appearing before parliamentary committees also emphasise this principle.

Any claim by an officer that information should not be produced should, if contested by any senator, be referred to a minister for a decision on whether to maintain the claim. Where a claim is made by a statutory body which has independence from the government, the decision to raise a claim should be made by the governing authority of that statutory body as a deliberate and properly communicated decision.

Accepted grounds

The following grounds for public interest immunity claims have achieved some measure of acceptance by the Senate in the past.

(1) ***Prejudice to legal proceedings***

This could arise in two forms. There may be a reasonable apprehension that disclosure of some information could prejudice a trial which is in the offing by influencing magistrates, jurors or witnesses in their evidence or decision-making. A case involving only questions of law before superior court judges is not likely to be influenced and therefore is unlikely to provide a basis for this ground. Secondly, production of information to a committee could create material which, by reason that it is unexaminable in court proceedings because of parliamentary privilege, could create difficulties in pending court proceedings. To invoke this ground, there should be set out the nature of the pending proceedings and the relationship of the information sought to those proceedings.

(2) ***Prejudice to law enforcement investigations***

For this ground to be invoked it should be established that there are investigations in progress by a law enforcement agency, such as the police, and the provision of the information sought could interfere with those investigations. As this is a matter for the law enforcement agency concerned to assess, this ground should normally be raised directly by the law enforcement agency, not by some other official who can merely speculate about the relationship of the information to the investigation.

(3) ***Damage to commercial interests***

The provision of some information could damage the commercial interests of commercial traders in the market place, including the Commonwealth. This is the well-known "commercial confidentiality" ground. The most obvious form of this is the disclosure of tenders for a contract before the call for tenders is closed. The Senate has made it clear in its resolution of 30 October 2003 that a claim on this ground must be based on specified potential harm to commercial interests, and in relation to

information held by government must be raised by a minister. Statements that information is commercial and therefore confidential are clearly not acceptable.

(4) ***Unreasonable invasion of privacy***

The disclosure of some information may unreasonably infringe the privacy of individuals who have provided the information. It is in the public interest that private information about individuals not be unreasonably disclosed. It is usually self-evident whether there is a reasonable apprehension of this form of harm. It is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates.

On some occasions it has been claimed that fees paid to lawyers or consultants should not be disclosed, usually on the privacy ground but sometimes on the commercial confidentiality ground. The claim has not been consistently raised, and information on such fees has been readily provided in some cases. The Senate has since 1980 asserted its right to inquire into such fees.

It is sometimes claimed that information has been collected on the condition that it would be treated as confidential, and therefore the information cannot be disclosed. This is not in itself a ground for a public interest immunity claim. It must still be established that some particular harm may be apprehended by the disclosure of the information. Those who provided the information may not be concerned about its disclosure, and their approval for the disclosure may be sought.

(5) ***Disclosure of Executive Council or cabinet deliberations***

It is accepted that deliberations of the Executive Council and of the cabinet should be able to be conducted in secrecy so as to preserve the freedom of deliberation of those bodies. This ground, however, relates only to *disclosure of deliberations*. There has been a tendency for governments to claim that anything with a connection to cabinet is confidential. According to a famous story about a state government, trolley loads of documents were wheeled through the cabinet room so that it could be claimed that they were all "cabinet-in-confidence", a story which serves to illustrate the abuse of this ground. A claim that a document is a cabinet document should not be accepted; it has to be established that disclosure of the document would reveal cabinet deliberations. The claim cannot be made simply because a document has the word "cabinet" in or on it.

Neither legislatures nor courts have conceded that internal deliberations of government departments and agencies are entitled to the same protection.

(6) ***Prejudice to national security or defence***

This claim should be raised in the form of a deliberate statement by a minister that disclosure of particular information would be prejudicial to the security or defence of the Commonwealth. It is usually self-evident whether the claim can legitimately be raised. It has not actually been used extensively before Senate committees.

The ground may be extended to internal security matters. For example, disclosure of information about security precautions to be taken at some forthcoming public event could well be resisted on this ground.

(7) ***Prejudice to Australia's international relations***

There are two bases for a claim on this ground. Disclosure of particular information could sour Australia's relations with other countries. The raising of a claim on this basis would seem to cause the harm which it is apprehended disclosure of the information would cause; foreign governments can thereby conclude that something has been said or written that they would not like. Perhaps that is why it is seldom raised. Disclosure of some information could also weaken Australia's bargaining position in international negotiations, and this would seem to be a stronger basis for a claim on this ground. It would have to be established that there are negotiations in prospect for it to be raised.

(8) ***Prejudice to relations between the Commonwealth and the states***

Again, raising this ground, on one basis, would seem to do the apprehended harm. This ground, however, has appeared frequently in recent times in the following form: the information concerned belongs to the states as well as to the Commonwealth, and therefore cannot be disclosed without the approval of the states. The obvious response to this is that the agreement of the states to disclose the information should be sought and they should be invited to give reasons for any objection.

There are also some lesser grounds of very limited scope for legitimate claims. Undermining public revenue or the economy may be apprehended in disclosure of some information. For example, proposed tariff increases cannot be disclosed in advance of their legislative implementation, usually in the annual budget. Some information about interest rates and action to support the dollar also falls into this category. It should be self-evident whether claims on these kinds of grounds are legitimately raised.

Unacceptable grounds

The following grounds have not been accepted by the Senate in the past.

(1) ***A freedom of information request has been or could be refused***

The Senate comprehensively dealt with this suggestion in 1992, and it was formally established, and conceded by the then government, that the fact that a freedom of information request for the same information has been or could be refused under the Freedom of Information Act is not a legitimate basis for a claim of public interest immunity in a parliamentary forum. Some ground acceptable in such a forum must be independently raised and sustained.

Similarly, the fact that an exemption under the Freedom of Information Act applies to some information is not a legitimate basis for a claim in a parliamentary forum.

(2) ***Legal professional privilege***

It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides a ground for a refusal of information in a parliamentary forum. The first question in response to any such claim is: to whom does the legal advice belong, to the Commonwealth or some other party? Usually it belongs to the Commonwealth. Legal advice to the federal government, however, is often disclosed by the government itself. Therefore, the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought.

(3) ***Advice to government***

As with legal advice, the mere fact that information consists of advice to government is not a ground for refusing to disclose it. Again, some harm to the public interest must be established, such as prejudice to legal proceedings, disclosure of cabinet deliberations or prejudice to the Commonwealth's position in negotiations. Any general claim that advice should not be disclosed is defeated by the frequency with which governments disclose advice when they choose to do so.

(4) ***Secrecy provisions in statutes***

It is now well established that a secrecy provision in a statute prohibiting the disclosure of particular information does not prevent the provision of that information

in a parliamentary forum. Government legal advisers have accepted this position, and most departments and agencies now realise that they cannot raise a claim merely on this basis. Some other ground must be raised for not disclosing the information. That ground may be reflected in the statutory secrecy provision, but must be independently raised.

(5) ***Working documents***

The fact that a document is a "working document" says nothing about its content or status. The great majority of documents in the possession of government could be made out to be working documents. As always, the question is: what is the particular harm to the public interest to be apprehended by its disclosure? The fact that the document may contain something embarrassing to government or its departments or agencies is not a basis for a public interest immunity claim.

(6) ***"Confusing the public debate" and "prejudicing policy consideration"***

The Senate formally resolved in 1999 that this is not an acceptable ground for not producing documents in response to a Senate order for documents.

A coherent formulation of this ground would seem to be as follows: the Senate and the public should not find out about matters which are under consideration by the government because they would then debate those matters to the detriment of the government. This is closely related to the "working document" claim, and indeed appears to be the real basis of that claim in many instances.

Often in committee hearings general indications of reluctance or refusal to provide particular information are given. In response to these sorts of statements the question should be asked: is a minister raising a public interest immunity claim, and, if so, on what particular, known ground?

Only when that question is answered can the basis of a claim be explored and considered. A statement by a minister, for example, that "I am not going to provide that information" is not a claim of public interest immunity.

The grounds for public interest immunity claims which have gained some acceptability in the Senate and comparable legislatures are also those to which the courts have given weight in determining claims for public interest immunity in legal proceedings. Conversely, a claim which would not be entertained in a court should not carry much weight in the legislature.

In relation to all claims it must also be established whether the claim is made against *production* of the information or *publication* of the information. Production of information to

a Senate committee, except in estimates hearings, does not automatically involve publication of the information. It is open to a committee, except in estimates hearings, to avoid any apprehended harm to the public interest by receiving information on an in camera basis. Estimates hearings are required by the rules of the Senate to receive all information in public, but in those hearings the possibility of a committee receiving information other than in estimates hearings can be explored.

Other compromises may be made to allow information to be provided while avoiding the apprehended harm. Reference has been made to the deletion of identifying details where privacy is the issue. Other processes for "sanitising" information have been used.

Harry Evans
Clerk of the Senate

APPENDIX 4

AUDITOR GENERAL CRITERIA FOR COMMERCIAL-IN-CONFIDENCE

1. If the information is commercial-in-confidence to a commercial counterparty, it must be specifically identified.
2. The information must be 'commercially sensitive'. This means that the information should not generally be known or ascertainable.
3. Disclosure would cause unreasonable detriment to the owner of the information or another party.
4. The information was provided under an understanding that it would remain confidential.

Criterion one is critical when assessing information provided to government by a third party. If criterion one is not met, the other criteria are not assessed. This approach supports a culture of openness and accountability for the expenditure of public money, efficient and effective management of government departments, and the most appropriate and beneficial use of public funds.

We also are mindful of the requirements of section 81 of the FM Act, which limits the capacity of a Minister to cite commercial-in-confidence as a ground to not provide information to Parliament. Section 81 states:

> *'The Minister and the accountable authority of an agency are to ensure that –*
>
> *a. no action is taken or omitted to be taken; and*
>
> *b. no contractual or other arrangement is entered into, by or on behalf of the Minister or agency that would prevent or inhibit the provision by the Minister to Parliament of information concerning any conduct or operation of the agency'.*

Government contracts typically reflect this requirement in a standard clause that allows the disclosure of confidential information if it is 'required by any law, judicial or parliamentary body or governmental agency'.

Exemption from the section 81 requirement would require non-disclosure to be in the 'public interest'. That is, disclosure would likely cause underlying harm to the public interest and the extent of the probable harm is sufficient to outweigh reasons for disclosure. For instance, disclosure could:

- damage current government negotiations
- have a negative effect on future government procurement.