**LEGISLATIVE COUNCIL, WESTERN AUSTRALIA**
***FINANCIAL MANAGEMENT ACT 2006* (WA) sec 82 &**
***AUDITOR GENERAL ACT 2006* (WA) para 24(2)(c)**

## OPINION

I am asked to advise the Clerk of the Legislative Council and of the Parliaments, on behalf of the Standing Committee on Estimates and Financial Operations, on certain matters arising out of the specific questions addressed below, arising out of the statutory provisions named above.

2 In general terms, the matters in question focus on the rôle of the Auditor General in reporting to the Houses of Parliament on the exercise of executive discretion on the part of Ministers not to provide certain information upon request to do so by a House or one of its committees. The topic happens to be governed by modern legislation. But, in the nature of things, it obviously concerns a fundamental aspect of the accountability of the Executive to the Houses in a representative democracy with responsible government, as in Western Australia.

3 First, I am asked my opinion on the proper construction of sec 82 of the *Financial Management Act*. It is probably impossible to anticipate every argument that could possibly arise in relation to these provisions, that regulate constitutional relations between Ministers and their Houses, accord weighty matters of judgement to an independent statutory officer, and, above all, concern matters of likely political conflict. Nonetheless, in my opinion sec 82 fairly straightforwardly addresses these

potentially delicate matters, and does not pose any particular difficulties of interpretation.

4 Section 82 provides as follows:-

> *(1) If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of any 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 These provisions have a surrounding context that includes the obligations imposed on Ministers and the accountable authorities of agencies, under sec 81, to ensure no action is taken or omitted to be taken and 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*".

6 All these provisions have a broader context in light of their legislative history, both in the relevant committees and in both Houses, especially during debate and passage of the Bills that ultimately enacted, in 2006, the cognate provisions named above. The legislative history is particularly dominated by the explicitly recognized tension between the public or governmental interest in maintaining the confidentiality of certain information (mostly, so-called commercial secrets) and the constitutional

imperative of accountability of executive government to the Houses. The introduction of the Auditor General to provide a kind of institutional and public consequence whenever a Minister decided not to provide information sought by a House or one of its committees is the principal feature of the provisions under discussion.

7 These matters of context cannot be put aside, but it remains the enacted text which is to be construed. It is to be remembered that sec 82 does not purport to stipulate (even if Parliament could) for the political consequences of a House disagreeing with or disapproving of the outcome or manner of a Minister answerable to it, when that Minister has acted as contemplated under sec 82. That is, sec 82 would not prevent a House taking political steps including by majority vote against a Minister in relation to such conduct even if that conduct was in accordance with sec 82. Put another way, sec 82 does not have the meaning or effect that the courts of law, say the Court of Appeal of the Supreme Court of Western Australia or the High Court of Australia on appeal from it, are given the final say on such matters of political accountability.

8 So much for what sec 82 does not do. What it does do is to impose a requirement that a Minister minded to withhold information from a House, being information otherwise properly sought by the House in relation to the conduct or operation of an agency, will not do so unless he or she considers whether withholding the information would be "*reasonable and appropriate*", and decides that it would be.

9 Of course, that requirement is not imposed in terms by sec 82. In my opinion, that is because Parliament has enacted sec 82 on the not unreasonable assumption that no Minister would defy the requirement of a House to which he or she is accountable

to provide information otherwise properly sought, except where that Minister regarded it as "*reasonable and appropriate*". This assumption, while fictitious in a sense, provides a solid basis to construe sec 82. After all, the obligation expressly imposed on a Minister to whom sec 82 applies – to give written notice of the decision to the Houses (or the Clerks) and the Auditor General – is evidently a kind of constitutional and political safeguard. It provides for external, independent or sceptical knowledge of the decision, together with its reasons, and thus sets the stage for public disagreement. It would be wrong to construe sec 82 as if that safeguard protected the public interest when a Minister did consider whether withholding information was the right thing to do, but not when he or she did not bother to do so.

10 In my opinion, the wording of subsec 82(1) that posits a case when a Minister "*decides that it is reasonable and appropriate not to provide to Parliament certain information* ... " is to be read as a sensible albeit polite (or self-regarding) reference to all cases when a Minister decides not to provide such information to Parliament. It follows that the existence of this case, in terms of the "*reasonable and appropriate*" quality, is not justiciable in the courts of law.

11 But it is well arguable that the innovation of requiring a reasoned notification of such decisions has imposed a justiciable obligation. The obligation would arise whenever it was beyond sensible argument that Parliament had required, within its broad constitutional powers to do so, such information, and the relevant Minister had refused to provide it to Parliament and had given no opportunity by way of formal notification or supply of reasons for public or political criticism of that refusal. I think, on balance, that an order in the nature of mandamus could be directed to that delinquent Minister, strictly limited to the provision of sec 82 notices, without

presuming to determine the cogency or adequacy of a genuine attempt to have done so.

12 It should be emphasized that the intrusion of the courts of law into what was formerly a matter for parliamentary contest and public political opinion, which is what I contemplate in 11 above, is a fairly striking development. There are powerful underlying constitutional reasons to resist that development, including as a matter of law and statutory interpretation. However, Parliament has enacted sec 82, and the rule of law is not best served by multiplying imperfect obligations (ie promises or duties that cannot be enforced). It may well be that Parliament has effectively invited the judges to assist the Houses by compelling Ministers to explain in this formal and reasoned way their refusals to supply information to the Houses. Put thus, the newfound justiciability of this aspect of the political contest in a parliamentary democracy with responsible government could be seen as not so shocking.

13 Next, in my opinion the negative duties imposed upon Ministers and accountable authorities and agencies by sec 81 provide strong guidance to the content of that which is "*reasonable and appropriate*" as a ground for withholding information as contemplated in sec 82. The provisions of sec 81 are to be taken as complied with, in order for such a decision to be "*reasonable and appropriate*". A Minister could not so regard a decision to withhold information, if he or she were minded to do so because he or she had promised a commercial counterparty to keep certain matters secret including from the representatives of the sovereign people.

14 For these reasons, in my opinion the combination of secs 81 and 82 in fact operates to limit the legitimate scope for keeping commercial secrets away from the

Houses or their committees, much more so than apparently Members speaking in the 2006 debates thought was on the cards. In my opinion, the broad and comprehensive terms of sec 81 disallow governmental entry into contracts or arrangements in such a way as to impose confidentiality even against the Houses. It would be a breach of sec 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.

15 In my opinion, this analysis shrinks greatly the legitimate capacity for a Minister to cite "commercial-in-confidence" as a ground not to provide information to Parliament. A sec 82 notice that included "commercial-in-confidence" as part of the reasons for making a decision to withhold certain information could well amount to a confession by the same Minister that he or she had breached sec 81. An obvious exception to that unacceptable position would be where the 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 upon that secrecy.

16 Consideration of secs 81 and 82 would be incomplete without noting that both Houses have long-established procedures and precedents for receiving and keeping secret information, for consideration by Members only. It would thus not, in my opinion, be an acceptable reason for a decision to withhold information to assume that all information provided to a House will be published. Nor, in my opinion, could a Minister assert, with any constitutional propriety, that he or she is somehow a higher or better repository of the public interest than is one or other of the Houses, acting by majority vote.

17 Second, I am asked my opinion on the proper construction of para 24(2)(c) of the *Auditor General Act*. Once again, I do not pretend that I can imagine in advance all arguments that may possibly be raised about these provisions. But these provisions, as well, do not provide any great puzzles of interpretation.

18 These particular provisions are explicitly cognate with sec 82 of the *Financial Management Act*, as discussed above. That explicit link seen in the legislative history gives rise to the third question I am asked, whether the expression "*reasonable and appropriate*" used in para 24(2)(c) of the *Auditor General Act* poses a test with identical criteria as posited for the decision of a Minister under sec 82 of the *Financial Management Act*. Put shortly, the same expression is used in these cognate provisions for an evident purpose that requires a virtually identical meaning to be given to it in both statutes. I touch on this phrase and my answer to the third question asked in my brief, in discussing my answer to the second question as follows.

19 The provisions of para 24(2)(c) impose a mandatory component of what may be called his or her annual report. (It is required at least once every year, but may be more frequent.) The "*opinion*" required by these provisions is therefore one to which the Auditor General is obliged to turn his or her mind, officially. The obligation to include "*an opinion*" in a report implicitly imposes an obligation to consider and form that opinion.

20 It follows that an Auditor General who failed or refused to comment on a sec 82 withholding of information, as notified to the Auditor General, would be in breach of para 24(2)(c). In my opinion, and more clearly than is the case under sec 82 for a Minister, the Auditor General would be susceptible to an order by the Supreme Court

in the nature of mandamus, were he or she to proceed thus. Again, the mandamus would go no further than requiring an opinion to be reported, without presuming to enter upon the merits of any genuine attempt to do so.

21 The whole point of the safeguard constituted by sec 82, as discussed above, is to obtain, in the public political forums constituted by the Houses, the official opinion of the eminent individual holding the independent office of Auditor General, on the ministerial decision to withhold information from Parliament. That safeguard, being in the nature of a known risk of public and political criticism, from the viewpoint of the Minister minded to withhold information from Parliament, would be useless if the Auditor General in any way deferred to a Minister's position so as not to form and report his or her own actual opinion. This point is magnified by the required opinion being as to whether the Minister's decision was "*reasonable and appropriate*". The three key words "*opinion*", "*reasonable*" and "*appropriate*", in the governmental and hence political context in which they are used, are loaded with contestable values, debatable emphases and balances, and directed to matters upon which people may rationally differ in good faith. These are the very qualities which make it sensible for the Auditor General to form an opinion which is not merely to the effect, by way of example, that the Auditor General can understand why a Minister thought withholding information was "*reasonable and appropriate*" – the opinion of the Auditor General is required as to whether that ministerial decision was "*reasonable and appropriate*".

22 Of course, a Minister is quite a different political and constitutional personage from the Auditor General. Matters of partisan politics and electoral appeal are proper for the former but improper to the point of illegal or corrupt for the latter. This contrast is enough to raise the real prospect that what a Minister may consider to have

been "*reasonable and appropriate*" may not strike an Auditor General the same way, even when they both know the facts identically. In particular, the functions of the Auditor General, the ample powers and the explicit independence found throughout the Act all tend to support the nature of the safeguard provided by para 24(2)(c) as the opinion of an impartial professional dedicated to the lawful and efficient husbanding of the State's property and operations.

23 Fourth, I am asked whether the Audit Practice Statement issued by the Office of the Auditor General, insofar as it addresses ministerial decisions subject to sec 82, conforms with the proper construction of para 24(2)(c). In my opinion, there are serious shortcomings in the perfunctory paraphrases of the law contained on pp 16 and 17 of this document.

24 A less important point (on p 16) asserts that no action is required by the Auditor General under para 24(2)(c) until a notice is received under sec 82. Certainly, the intended scheme contemplates, for the reasons discussed above, that there will always be a notice under sec 82 whenever a Minister decides to withhold information from Parliament (that would otherwise have been properly sought in relation to the conduct or operation of an agency). However, para 24(2)(c) does not in terms require a notice, and could practically, at least in some cases, operate without one.

25 But this is, in my opinion, a matter of little moment on the assumption that Ministers and the Auditor General will act in the public interest. The one will give reasoned notice and the other will opine on the first's decision. No doubt that will be better done when the reasons are well expounded. But the duty to do so is not dispensed with by the anterior failure to provide either notice or intelligible reasons.

26 By far a more important deficiency appears in steps 3 and 4, so-called, on p 17 of the document. Step 3 illustrates the danger of departing from an enacted text. The opinion of the Auditor General is required about whether a Minister's decision was "*reasonable and appropriate*" – emphatically not whether it was "*manifestly unreasonable*". As discussed above, it is the opinion of the Auditor General, not deference to the opinion of the Minister, which is the essence of the legislated safeguard in these cognate provisions.

27 Further, the bland ground of "*diversion of resources or a similar reason*" is an indefensible approach, all the worse for being expressed as a general or universal justification. It is an abdication of the case-by-case duty under para 24(2)(c) for the Auditor General to express in advance an opinion that a Minister's decision would "*be deemed reasonable and therefore appropriate*" whenever that ground is cited by a Minister. (That error of approach is not alleviated by providing an exception for the circumstances showing the decision was "*manifestly unreasonable*", as discussed above.)

28 This homogenised approach in step 3 admits of no degree or balance in assessing "*diversion of resources*", let alone what is concretely envisaged to be "*a similar reason*". I fear that the Auditor General is here upholding in advance and in blank ministerial justifications for withholding information from Parliament to the effect that it is too much trouble for the Minister or the Department to do so. To put it mildly, this is an anti-purposive reading of para 24(2)(c) by the Auditor General. It is egregiously wrong.

29 The approach proclaimed in step 4 is also misconceived, although less seriously so. It is evidently addressed to grounds to the effect that the withheld information was "*commercially confidential or significant in nature*", which I read as embracing both cases where a commercial counterparty is entitled to enforce secrecy as well as other cases where, that not being so, nonetheless it is in the public interest for certain matters not to be published. With respect, the discussion of commercial confidentiality and significance on pp 17 and 18 of the document from the Office of the Auditor General is adequate. Furthermore, again with respect, it is good that on p 18 some of the implications of sec 81 are spelled out.

30 Unfortunately, the articulation of step 4 itself, and the following explanation in the document, draws short of the considerable implications of sec 81 for any such confidential or secret material being kept from Parliament (ie the Houses and their committees). Neither is there any reference to the obvious possibility that the Houses and their committees can receive and keep secrets. The articulation of step 4 is therefore an inadequate blueprint for the Auditor General to proceed under para 24(2)(c).

31 Fifth, I am asked whether Report No 17 of 2014 by the Auditor General, entitled *Opinions on Ministerial Notifications* dated 25th September 2014 conforms to a proper construction of para 24(2)(c) in relation to information withheld on the Feasibility for International Cricket (Cricket Test Matches). I am afraid that, in my opinion, this opinion by the Auditor General (found on pp 6 and 7 of his Report) is poorly expressed and legally suspect.

32 Starting at the end, it is wrong for the Auditor General expressly to note that his opinion (unfortunately phrased in the royal plural) "*is not meant to imply that we consider that the Minister's judgement was correct*". Simply, it is difficult or smacks of excessive pedantry to contemplate the Auditor General regarding a Minister's decision as "*appropriate*" while doubting (or not believing) that it was "*correct*". There seems to be no sensible content, certainly for the purpose of the safeguard in question, for the Auditor General delphically to label a decision "appropriate if incorrect", "appropriate whether correct or not" or "appropriate without even considering whether it is correct", etc. The permutations serve no useful purpose under para 24(2)(c).

33 The next error is the failure to consider the implications of sec 81 in referring to the policy and guidelines of Tourism WA in relation to the provision of information to Parliament. Neither the Minister nor Tourism WA is permitted to have acted (or failed to act), including in reaching agreements with others, in such a way as to inhibit provision of information to Parliament. There is no consideration of this by the Auditor General. Endorsement of Tourism WA's assessment (as "*correct*") therefore wrongly suggests that an agency's policy made in breach of sec 81 could nonetheless provide a ground for a decision to withhold information as contemplated by sec 82.

34 Finally, for the reasons discussed above, the Auditor General appears, with great respect, to have more or less deferred to the Minister in her politically controversial doubting of the ability of the Standing Committee on Estimates and Financial Operations to keep the relevant information appropriately confidential. This seems to be the aspect of the matter that elicited the express non-implication a view

that the Minister's decision was correct, and the express possibility that the decision could indeed be argued to have been "*very cautious*".

35 It is a little surprising that the Minister's stated unwillingness to abide by the Committee's discretion as to confidentiality was not examined by the Auditor General. The Houses and their committees proceed by majority vote, including in acting constitutionally to hold Ministers accountable – the essence of responsible government. It is simply not explained, or even apparently considered, how the Minister's decision could be justified by some presumption that she was a higher or better judge of the public interest than the Committee. Coupled with the complete absence of consideration of compliance with sec 81, these considerations suggest that the Auditor General has misdirected himself concerning the nature of the opinion required of him by para 24(2)(c).

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