



THIRTY-EIGHTH PARLIAMENT

REPORT 26

**STANDING COMMITTEE ON ESTIMATES AND
FINANCIAL OPERATIONS**

**THE CONFIDENTIAL STATUS OF THE STATE
DEVELOPMENT AGREEMENT OAKAJEE PORT
AND RAIL**

Presented by Hon Giz Watson MLC (Chair)

April 2010

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:

“2. Standing Committee on Estimates and Financial Operations

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

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

2.3 The functions of the Committee are to consider and report on -

- (a) the estimates of expenditure laid before the Council each year;
- (b) any matter relating to the financial administration of the State;
- (c) any bill or other matter relating to the foregoing functions referred by the House;
- (d) to consult regularly with the Auditor General and any person holding an office of a like character.”

Members as at the time of this inquiry:

Hon Giz Watson MLC (Chair)

Hon Ljiljanna Ravlich MLC

Hon Philip Gardiner MLC (Deputy Chair)

Hon Ken Travers MLC

Hon Liz Behjat MLC

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REPORT OF THE STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

THE CONFIDENTIAL STATUS OF THE STATE DEVELOPMENT AGREEMENT OAKAJEE PORT AND RAIL

1 INTRODUCTION

1.1 On 20 March 2009 the Western Australian Government signed the State Development Agreement Oakajee Port and Rail Project (**SDA**) with Oakajee Port and Rail (**OPR**), Murchison Metals, Crosslands Resources and Mitsubishi Development. “*The Development Agreement appoints OPR on an exclusive basis as the infrastructure provider for a new port at Oakajee and provides for an open-access rail line servicing northern mid-west iron ore mines.*”¹

1.2 During the Estimates and Financial Operations Committee (**Committee**) budget estimates 2009/10 hearing² with the Department of State Development on 7 September 2009 questions relating to the Oakajee Port and Rail Project were asked and a copy of the SDA requested.³

1.3 The Committee notes that s81 of the *Financial Management Act 2006* provides that:

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.

1.4 A copy of the SDA was provided to the Committee by Hon Colin Barnett MLA, Premier; Minister for State Development with a request that the SDA remain confidential until the State resolves its discussions with the new management of OPR in regard to aspects of the SDA.⁴

¹ Department of State Development, *Oakajee Industrial Estate and Port Project*, www.dsd.wa.gov.au/6616.aspx (viewed on 5 November 2009).

² The Committee’s term of reference provides for it to consider the estimates of expenditure laid before the Council each year. The Committee’s procedure for examining the 2009/10 budget estimates is hearings held throughout the year (**budget estimates 2009/10 ongoing hearings**).

³ Department of State Development, *Transcript of Evidence*, 7 September 2009, pp1-4.

⁴ Letter from Colin Barnett MLA, Premier; Minister for State Development, 9 October 2009.

2 COMMITTEE CONSIDERATION OF THE REQUEST FOR CONFIDENTIALITY

- 2.1 The Committee generally makes all the evidence it receives public, unless the Committee is satisfied that the nature of the evidence requires it to be made private.⁵
- 2.2 Initially, the Committee did not consider that it was provided an adequate explanation as to why the SDA should remain confidential to the Committee. The Committee noted that the SDA had been signed by all parties.
- 2.3 The Committee sought further information to assist it in making its determination from the Premier and OPR. The Committee also sought the opinion of the Auditor General as to whether the request for confidentiality was reasonable and appropriate.
- 2.4 On 16 November 2009 the Committee held a private hearing with Hon Norman Moore MLC, Leader of the House representing the Premier, to discuss the matter fully. Hon Norman Moore MLC provided the Committee with the following explanation for the need for confidentiality:

Among other things the SDA required the development of an implementation agreement. The state expects to conclude that agreement with OPR by the end of March 2010. The final agreements between the state and OPR that will precede financial close of the transaction are expected to be agreed by the end of calendar year 2010. There remain a number of outstanding issues regarding Oakajee Port and Rail project that are the subject of negotiation between the parties as part of the implementation agreement phase. These include, but are not limited to, final details regarding the funding arrangements between OPR and the state and commonwealth governments, and the ultimate design of the project infrastructure pending further engineering and feasibility work to be completed by OPR. The SDA contains a number of sensitive commercial provisions relating to the obligations of the parties to the agreement and other matters. It also contains a confidentiality clause, which is clause 17, which is binding on the parties.

As members will appreciate, this is a large and complex project, requiring the alignment of the commercial interests of a significant number of parties. While respecting the need for openness and transparency, the state government remains mindful of the commercially sensitive nature of the SDA.⁶

⁵ Standing Order 323.

⁶ Hon Norman Moore MLC, Leader of the House representing the Premier, *Transcript of Evidence*, 16 November 2009, p2. (This is a private transcript.)

2.5 OPR submitted to the Committee that they wished the document to remain confidential on the grounds of commercial confidentiality. OPR further submitted to the Committee that the SDA was subject to a confidentiality clause contained within the Agreement.⁷

2.6 The Committee asked the Premier how the State or other parties may be harmed if the details of the SDA were disclosed prior to the discussions and negotiations being concluded. In response, the Committee was advised that:

*The SDA contains a number of sensitive, commercial provisions relating to the obligations of the parties to the agreement and other matters. As the proponent, OPR is understood to currently be in negotiations with various potential contractors located both within Australia and overseas as well as discussions with potential customers of the port and rail infrastructure. OPR has advised Government that disclosure of the SDA is likely to adversely affect those negotiations.*⁸

2.7 The Committee noted that certain aspects of the SDA were already in the public domain:

*... notwithstanding the state government, along with OPR and one of the joint venture partners, have previously issued media statements that publicly disclose relevant aspects to the agreement. These include but are not limited to, OPR's exclusive right to construct the northern railway line for the transport of iron ore, the milestone dates regarding completion of the bankable feasibility study and implementation agreement, and the iron ore export cap at Geraldton port following establishment of the Oakajee port.*⁹

Commercial Confidentiality versus Parliamentary and Public Scrutiny

2.8 Parliamentary committees are often confronted with the issue of finding the right balance between Parliamentary and public scrutiny of government on the one hand with that of commercial confidentiality on the other.

2.9 The former Standing Committee on Estimates and Financial Operations in its 30th Report was disapproving of the use of commercial confidentiality clauses in contracts

⁷ Letter from Alwyn Vorster, Acting Chief Executive Officer, Oakajee Port and Rail Pty Ltd, 23 November 2009.

⁸ Tabled Paper, *Suggested Responses to Questions Posed by the Standing Committee on Estimates and Financial Operation*, tabled during hearing with Hon Norman Moore MLC, 16 November 2009, p2. (This is a private document.)

⁹ Hon Norman Moore MLC, Leader of the House representing the Premier, *Transcript of Evidence*, 16 November 2009, p2. (This is a private transcript.)

between the Government and the private sector and was of the view that they were ineffective to prevent scrutiny by the Parliament:

*Whilst there may be a legitimate basis for commercial confidentiality, in terms of exposing the Government to unnecessary financial risk during the negotiation stage of contracts between the Government and the private sector, it is the Committee's view that it would only be in exceptionally rare circumstances that commercial confidentiality could be sustained as a valid reason for non-disclosure of contract documentation after the negotiations have been finalised and the contract has been formally entered into.*¹⁰

- 2.10 The Committee notes that in the past when documents of a confidential nature which contained commercial in confidence information have been requested by the Parliament, there have been occasions when they have been provided to the Parliament on a confidential basis. This was discussed by the former Legislative Council Standing Committee on Government Agencies in its 32nd Report:

*The committee accepts that a public corporation's commercial interests are as valid and deserving of the same consideration that ought to be given to a private company. There are numerous instances in our own Hansard of ministers declining to answer questions on the ground of commercial confidentiality. With few, and notable, exceptions, the Legislative Council has not insisted on disclosure in the face of the minister's averment. Indeed, the House has sought to accommodate the confidentiality aspect by ordering that the documents be delivered to the Clerk and be made available to members for perusal on a "no-publication, no-copy" basis.*¹¹

3 COMMITTEE DECISION

- 3.1 In relation to the SDA the Committee notes that at the time the decision was made on the status of the document the negotiations for the project were still underway and that the implementation agreement for the project had yet to be finalised.
- 3.2 The Committee noted that in providing a copy of the SDA to the Committee, the Government recognised that it was appropriate for the Committee to access such documents in the interests of transparency. The Committee in discussion with the

¹⁰ Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 30, *Transport Co-ordination Amendment Bill 1998*, 28 June 2000, p23.

¹¹ Western Australia, Legislative Council, Standing Committee on Government Agencies, Report 32, *The Establishment, Role and Scrutiny of Government Agencies - Interim Report No. 3 - The Identification and Parliamentary Oversight of Government Agencies*, October 1992., p10.

Leader of the House agreed that, in keeping with the past practice of the Parliament, Members be provided with qualified access to the SDA.¹²

- 3.3 Recognising both the desire for Government to preserve the confidentiality of the SDA and the Parliament's right to scrutinise the actions of Government, the Committee resolved to provide a copy of the SDA to the Clerk of the Legislative Council to be made available to all Members of the Legislative Council for viewing purposes only (not to be copied or disclosed), for a limited time period. The Clerk destroyed his copy of the SDA at the expiry of the designated time.¹³

4 COMMITTEE COMMENT

- 4.1 The Committee draws to the attention of Ministers and departments that when requesting that a document remain private to the Committee, they must provide a **substantive and detailed reason** as to why the Committee should not publish the evidence.
- 4.2 A claim of commercial confidentiality in relation to a document may not be sufficient to warrant the Committee keeping a document private. For example, it is not sufficient to simply state that a document is commercial in confidence, the reasons why it is commercial in confidence must be provided and how they believe its release will be detrimental to the State's interest. The Committee will assess each request on a case by case basis.
- 4.3 The Committee reiterates that, as provided by the standing orders, in dealing with the evidence it receives, it will make the evidence public unless it is satisfied that the nature of the evidence requires it to be kept private.
- 4.4 At the completion of the current negotiations for the project the Committee expects the Government to make the final agreement public.



Hon Giz Watson MLC
Chair

Date: 1 April 2010

¹² Hon Norman Moore MLC, Leader of the House representing the Premier, *Transcript of Evidence*, 16 November 2009, pp3-4. (This is a private transcript.)

¹³ Letter from Mr Malcolm Peacock, Clerk of the Legislative Council, 4 January 2010.