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PARLIAMENT OF WESTERN AUSTRALIA
LEGISLATIVE COUNCIL

TWENTY SIXTH REPORT
OF THE
STANDING COMMITTEE ON
GOVERNMENT AGENCIES

THE FINANCIAL MANAGEMENT
AND ACCOUNTABILITY OF THE
STATE GOVERNMENT
INSURANCE COMMISSION AND
CORPORATION: FINAL REPORT

Presented by the Hon. N F Moore (Chairman)

26

July 1990

The Standing Committee was appointed, pursuant to Legislative Council Standing Order 38 on 7 April 1982 with the following terms of reference:

- (i) To make such examination as it deems necessary and to inquire into the purpose, finance, accountability, extent, nature, administrative control and methods of State Government agencies, including statutory corporations, primary produce boards, regulatory and quasi-judicial bodies, trustees of government agencies, advisory committees and local and regional bodies (excluding municipal authorities) that are the subject of legislation of the Western Australian Parliament, with the exception of those agencies listed in the Schedule to these Orders.
- (ii) To report to the House upon any matter concerning the government authorities referred to in paragraph (i) or any recommendations for abolition or amalgamation of them, or any findings particularly in regard to the productivity, efficiency, economy, effectiveness, organisation and circumstances connected with them to which the Committee thinks the attention of the House should be directed.
- (iii) To inquire into and report to the House upon any question in connection with government agencies which is referred to the Committee by resolution of the House.
- (iv) To inquire into and where necessary, report to the House when, in the view of the Committee, any agency duplicates all or part of the work of another.
- (v) To recommend as it deems necessary the application of the "Sunset" principle to any government agency.

The "Sunset" principle is defined as a process whereby a government agency's existence is automatically terminated after a certain period unless specific re-authorising legislation is enacted.

Members of the Committee:

Hon Norman Moore (Chairman)
Hon Tom Stephens (Deputy Chairman)
Hon John Halden
Hon Barry House
Hon Murray Montgomery
Hon Doug Wenn

Staff of the Committee:

Miss June McKinnon (Secretary)
Ms Jan Paniperis (Secretary/Stenographer)

Address: Parliament House, Perth, WA 6000 Telephone 222 7322

**FINAL REPORT OF THE STANDING COMMITTEE ON GOVERNMENT AGENCIES
INTO THE FINANCIAL MANAGEMENT AND ACCOUNTABILITY OF THE STATE
GOVERNMENT INSURANCE COMMISSION AND CORPORATION**

- (1) On November 16 1988 the Legislative Council resolved as follows:

"That the Standing Committee on Government Agencies consider and report on, as a matter of urgency, the financial management and accountability of the State Government Insurance Commission and the State Government Insurance Corporation."

- (2) The Committee met on a number of occasions, took evidence, deliberated and presented an interim report to the House in December 1988 (Report No 21).

- (3) Following the 1989 Election, the reconstituted Committee resolved to continue the enquiry.

- (4) During the enquiry, the Committee requested the Auditor General to provide the following documents -

1. the report of McLaren and Stewart to the Auditor General with regard to their examination of the management of the Commission's investment policies;
2. details of the number of concerns with regard to the support of Rothwells by SGIC;
3. details of the concerns that the Minutes of the Commissioners do not adequately document the bases upon which the decisions were made in respect to Rothwells;
4. to report if any directions were issued to the SGIC in respect to the Rothwells deal and what records were made available to the Auditor General on this deal; and
5. to report what action has been taken by the SGIC to overcome the disclosed deficiencies in investment management.

(Appendix 1)

- (5) In a letter dated October 24 1989, the Auditor General advised that, after discussions with the Crown Solicitor, he believed that he would breach S91 of the *Financial Administration and Audit Act 1985* if he complied with the Committee's request.

(Appendix 2)

- (6) The Committee resolved to seek advice on the Auditor General's letter of October 24 1989. The Clerk (L B Marquet) advised in a letter of October 30 1989 that he was of the view that if the documents requested were germane to the Committee's enquiry, it should and could order their production. He further advised that should the Auditor General not comply with such an order, the matter be referred to the House.

(Appendix 3)

Mr P W Johnston of the University of Western Australia Law School advised the Committee in similar terms to that of the Clerk.

(Appendix 4)

- (7) Following the advice referred to in (6) above, the Committee wrote to the Auditor General on December 7 1989, ordering that he provide the documents referred to in (4) above.

(Appendix 5)

- (8) The Auditor General responded in a letter dated December 13 1989 in which he suggested that the Committee should seek clarification of the issues surrounding his concern with s.91 of the *Financial Administration and Audit Act 1985*.

(Appendix 6)

He also provided the information ordered by the Committee, although he sent the McLaren and Stewart report in a separate, sealed envelope with a request that the Committee deliberate on his submission before accessing the report.

- (9) On December 21 1989, the Auditor General again wrote to the Committee, again stressing his concern at the consequences of s.91 of the *Financial Administration and Audit Act 1985*, especially in relation to the independence of the Auditor General.

(Appendix 7)

A copy of the Crown Solicitor's opinion on the matter provided to the Auditor General was made available to the Committee.

(Appendix 8)

- (10) A sub-committee of the Standing Committee was appointed to consider the whole matter and the sub-committee reported to the Committee on February 15 1990 as follows:

"On December 21 the Chair received a letter from the Auditor General outlining his reasons for asking the Standing Committee on Government Agencies to return unopened the working papers. The sub-committee met with the Auditor General on February 1 and received a further detailed verbal and an additional written submission. The Auditor General's submissions made the following points:

1. the request for access to his working papers could be viewed as our Committee investigating him in his role as Auditor General;
2. the FAAA requires that secrecy be preserved with regard to all matters that come to his knowledge in the course of his duties;
3. the Crown Solicitor had advised the Auditor General to comply with his obligation of secrecy under the Act;
4. that to do otherwise would be to run the risk of closing off his ability as auditor to get the full co-operation that he currently receives from every area in the conduct of his audits;
5. that the Burt Commission Report states that the duties of the Auditor General were required to be performed independently of control by either the legislative or executive arms of Government;

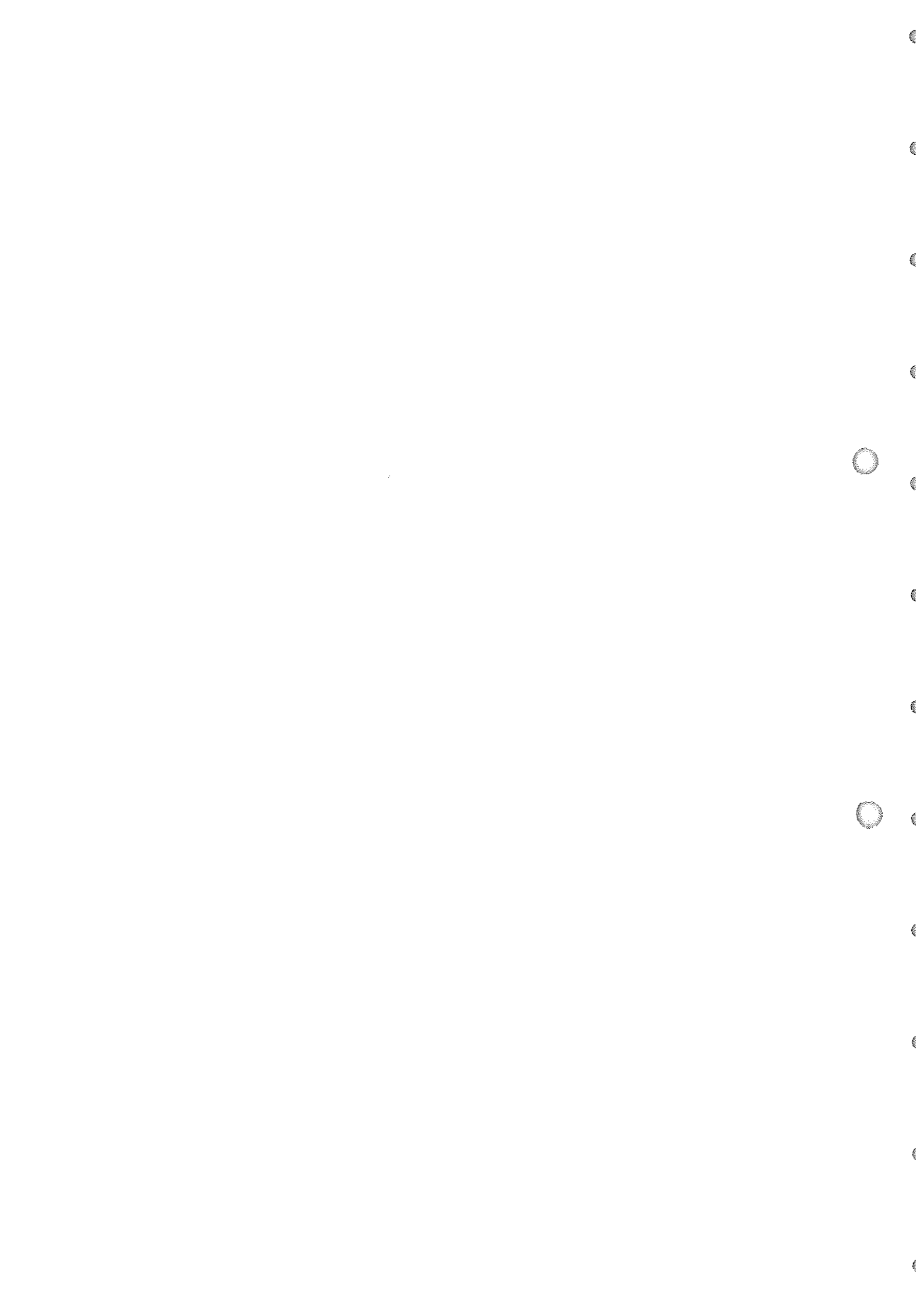
6. that the order of the Committee had been complied with by the Auditor General in that his Report to the Parliament (which he had made available to the Committee) had included verbatim the words of the McLaren and Stewart report sought by the Committee; and
7. the Auditor General undertook to make his staff available to the Committee to assist in any investigation.

The Auditor General's submission sought the return of the papers.

These issues were discussed with the Auditor General and subsequently by the sub-committee. The sub-committee resolved as follows to recommend to the Standing Committee on Government Agencies:

- (1) that the envelope containing the McLaren and Stewart report be returned forthwith unopened to the Auditor General;
 - (2) that this decision not in any way be taken as a precedent in determining the issue of the rights of the Legislative Council for access to papers from the Government;
 - (3) that the Committee recommend to the House that an amendment be made to s.91 of the *Financial Administration and Audit Act 1985* to enable the Committees of Parliament to demand access to information from the Auditor General."
- (11) The Committee determined at its Meeting on February 15 1990 that the report of the sub-committee form the basis of an interim report to the House as part of the continuing SGIC enquiry.
 - (12) At its Meeting of June 2 1990 the Committee resolved that Section (3) of the sub-committee's report be amended to read:

"That the Committee recommend to the House that an amendment be made to s.91 of the Financial Administration and Audit Act 1985 to clarify the situation of access by Committees of the Parliament to papers held by the Auditor General."
 - (13) The Committee further resolved at its Meeting of June 2 1990 to terminate its enquiry into the SGIC in view of the fact that the Commission and Corporation are being adequately investigated by other Parliamentary Committees.
 - (14) Appendices 1-8.



October 19 1989

Dear Sir

State Government Insurance Commission

Following consideration of your First Report "Treasurer's Annual Statements, Departments and Statutory Authorities", the Standing Committee on Government Agencies at its meeting today resolved that the Auditor General, as Auditor of the State Government Insurance Commission, be requested to provide to the Standing Committee on Government Agencies on or before Thursday October 26 1989 the following -

1. the report of McLaren & Stewart to the Auditor General with regard to their examination of the management of the Commission's investment policies.
2. details of the number of concerns with regard to the support of Rothwells by SGIC.
3. details of the concerns that the Minutes of the Commissioners do not adequately document the bases upon which the decisions were made in respect to Rothwells.
4. to report if any directions were issued to the SGIC in respect to the Rothwells' deal and what records were made available to the Auditor General on this deal.
5. to report what action has been taken by the SGIC to overcome the disclosed deficiencies in investment management.

This request is part of the Committee's on-going enquiry into the State Government Insurance Commission. Should you have any queries relating to this request, please do not hesitate to contact me.

Original copy of letter to follow.

Yours faithfully



HON NORMAN MOORE, MLC
Acting Chairman

The Auditor General
Supply House
815 Hay Street
PERTH WA 6000



office of the
AUDITOR GENERAL

APPENDIX 2

The Hon Tom Stevens
Chairman
Standing Committee on Government Agencies
Legislative Council
Parliament House
PERTH WA 6000

Our Ref: 6803005

Dear Sir

STATE GOVERNMENT INSURANCE COMMISSION

I refer to the acting Chairman's letter of October 19, 1989 in which he advised that the Standing Committee on Government Agencies has requested that I provide certain information to the Standing Committee.

Having discussed the matter with the Crown Solicitor, I believe I should draw the Committee's attention to section 91 of the Financial Administration and Audit Act 1985, which obliges me to preserve the confidentiality of all information received by me in the course of my carrying out my duties under the Act. I have considered carefully each of the requests for information in the numbered paragraphs of the Standing Committee's letter and have come to the view that in each case I would be in breach of the section were I to either answer the particular question or to discuss any of the matters referred to.

Yours faithfully

A.D. SMITH
AUDITOR GENERAL

October 24, 1989



Office of the Clerk

Dear 

SGIC and AUDITOR GENERAL

Thank you for your letter of October 27 seeking my advice on a matter involving the committee and the Auditor General. I propose to deal first with the general issues arising from the matter, and then deal with the specific situation.

1. Relevant powers of the committee

SO 38(g)(9) empowers the committee in the course of an inquiry to send for persons, papers and records. The validity and effectiveness of the standing order is based on the law and custom of Parliament generally, and the provisions of the *Parliamentary Privileges Act 1891* in particular. That Act, in turn, was made in terms of s 36 of the *Constitution Act 1889*. Section 4 of the *1891 Act* provides:

" ... any committee of either House, duly authorized by the House to send for persons and papers, may order any person to attend ... before such committee ... and also to produce ... any paper, book record, or other document in the possession or power of such person." .

Before dealing with the extent of the power, I should say something about the form of request.

2. Invitation v Summons

The acting chairman's letter to the Auditor General "requests" him to provide the committee with certain documents not later than October 26 1989. The request is consistent with the usage of the Council that persons are first invited to attend or produce documents rather than being ordered to do so. *May 20th ed 697, 698* comments:

"Select [standing] committees very often choose to keep in reserve their power formally to send for individuals, and simply issue by their Clerk an informal invitation to give evidence. In extending such invitations to government departments the committee will usually rely on departmental cooperation in the selection of witnesses ... Nevertheless, when a select committee has the power to send for persons, that power is unqualified except to the extent that it conflicts with the privileges of the Crown ... As when sending for persons, select committees generally hold in reserve their power formally to send for papers and records and proceed by informal invitation." .

Subject to what I advise later, the committee may decide to order the Auditor General to produce the papers in order that the *1891 Act's* application is beyond doubt.

3. The context of the invitation

The committee is empowered—

"To make such examination as it deems necessary and to inquire into the purpose, finance, accountability, extent, nature, administrative control and methods of state government agencies, including statutory corporations ... (SO 38(g)(1)(i))

I understand that the request for papers arises from an inquiry into certain activities of the SGIC which is a statutory corporation properly within the committee's ambit of inquiry. The extent to which the committee decides to investigate any agency otherwise within jurisdiction is a matter for the committee—

"The interpretation of the order of reference [SO 38(g)(1)(i)–(v)] is a matter for the committee."

May 20th ed 687.

4. The issues arising from the committee's request

(a) *The request*

I note that in his reply the Auditor General has declined the committee's request on the sole ground that he would breach s 91 of the *Financial Administration and Audit Act 1985* " ... were I to either answer the particular question [in each case] or to discuss any of the matters referred to." . Strictly, the Auditor General is entitled to decline to do anything in answer to a request *contra* an order. In my opinion, there is no question of the Auditor General being in contempt nor could that matter be open for consideration unless the refusal to produce was made in answer to the committee's order.

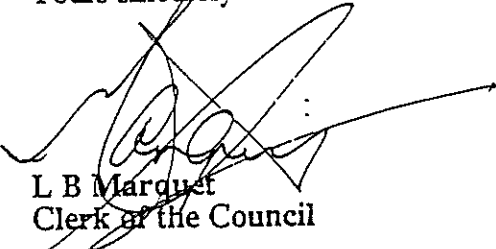
(b) *Future action*

If the committee believes that the documents are germane to its inquiry, it should now require their production in answer to its order. If the Auditor General believes that he must still decline to produce the documents, the committee is obliged to report the matter to the House. I must stress that there is an obligation on the committee to report the matter by reason of the fact that any contempt that may have been committed is a contempt of the House and is therefore a matter for the House, not the committee, to determine.

The validity of the ground advanced by the Auditor General for not producing the documents is for the House to determine in the event that the Auditor General is ordered to produce and fails to comply.

I would be pleased to provide further information should the committee so wish.

Yours sincerely



L B Marquet
Clerk of the Council

October 30 1989

Ms June McKinnon
Secretary Committee on Government Agencies

Law School
University of Western Australia
NEDLANDS WA 6009

November 29 1989

Hon T G Stephens, MLC
Chairman
Standing Committee on Government Agencies
Parliament House
PERTH WA 6000

Dear Mr Stephens

In your letter of November 15 1989 you referred for my opinion letters respectively from the Auditor General dated October 24 1989, and from the Clerk of the Legislative Council dated October 30 1989.

The purport of the first is that the Auditor General, on the basis of advice furnished by the Crown Solicitor (presumably given pursuant to s.88 of the Financial Administration and Audit Act 1985 - "the FAAA") has declined a request to attend before the Committee to provide certain information and reports. This is on the basis that, as he understands it, he is obliged by s.91 of the FAAA to preserve the confidentiality of all information received in the course of carrying out his duties under the Act.

I am largely in agreement with the observations made in the Clerk's letter concerning the significance of the Auditor General's reply, and the proper measures that are available to the Committee in response to it.

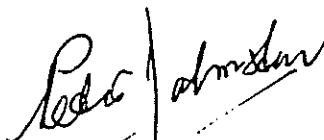
In the first place, in accordance with what I understand to be normal practice, the initial request fell short of a coercive order to attend. Therefore, the action of the Auditor General in declining the request, in accordance with what presumably he conscientiously understood his legal position to be, should not be regarded as contempt. At this stage, then, there are no grounds for reporting to the House unfavourably upon the matter.

At this stage, I agree that if the Committee determines to pursue the matter, it would need to order the Auditor General to attend to produce the previously requested information, or give to the Committee further reasons in justification of what would then be his refusal to comply. I add this latter qualification because it seems to me that the legal and constitutional relationship between the Auditor General's responsibilities under the FAAA (including the duty to report to Parliament on certain matters) and the provisions of the *Parliamentary Privileges Act 1891* is a complex one: If further action were to be taken in this matter, any assistance provided by the Auditor General in stating his position in a fuller way would be desirable. If the Auditor General were to decline to comply with such an order to provide the information, the proper course of action, in my opinion, would be that indicated by the Clerk; namely, to report the matter to the House for its consideration. The House would then have several courses open to it.

It could consider whether the action of the Auditor General constitutes a contempt of the House. Alternatively, and perhaps more in accord with the apparent desire of the Auditor General not to act unlawfully (as he understands his situation), the House could resolve in appropriate terms to confirm the order of the Committee. This would then arguably furnish the Auditor General with specific protection against prosecution for breach of the secrecy provisions of s.91 of the FAAA. There is some authority to suggest that such a prosecution would itself amount to a contempt of the House. I should add, though not without some doubt, that the Standing Orders may well provide sufficient protection without such a resolution. These, however, are matters on which it would be premature to give definitive advice at this stage. In the short term, it is for the Committee to determine whether it should move to compel compliance, and then decide, in the light of the Auditor General's response, what further action it should take by way of reporting to the House.

I am prepared to enlarge on this advice if requested to do so.

Yours sincerely


P W JOHNSTON
Counsel

December 7 1989

Dear Sir

State Government Insurance Commission

Further to our letter of October 19 1989, the Standing Committee on Government Agencies, at its meeting today, resolved that the Auditor General be ordered to provide to the Committee by 5 pm Wednesday next, December 13 1989, the following:

1. the report of McLaren & Stewart to the Auditor General with regard to their examination of the management of the Commission's investment policies.
2. details of the number of concerns with regard to the support of Rothwells by SGIC.
3. details of the concerns that the Minutes of the Commissioners do not adequately document the bases upon which the decisions were made in respect to Rothwells.
4. to report if any directions were issued to the SGIC in respect to the Rothwells' deal and what records were made available to the Auditor General on this deal.
5. to report what action has been taken by the SGIC to overcome the disclosed deficiencies in investment management.

Yours faithfully

**T G STEPHENS, MLC
CHAIRMAN**

The Auditor General
Supply House
815 Hay Street
PERTH WA 6000



office of the
AUDITOR GENERAL

Mr T G Stephens MLC
Chairman
Standing Committee on Government Agencies
Parliament House
PERTH WA 6000

Our Ref: 6803005

STATE GOVERNMENT INSURANCE COMMISSION

I am in receipt of your letter of December 7, 1989.

In my response to your first request for the details outlined in your letter ordering me to provide particulars, I drew your attention to section 91 of the Financial Administration and Audit Act (FAAA), which section imposes certain obligations on me. The Crown Solicitor advised me orally that I would be in breach of the section if I responded as requested.

My response was not in disrespect to the Committee, for I see the role of the Committee as playing an important part in the Parliamentary System. I was concerned however, that the Committee be aware that it required me to breach the law by giving such evidence. I do not propose to seek written advice from the Crown Solicitor or to refrain from co-operating with the Committee. Perhaps the Committee should, itself, seek clarification and if there is a need, consider recommending an amendment to the FAAA.

With respect to the particular matters raised I have some concern that the Committee enquiry appears to touch on audit conduct and not the principal matter of the conduct of business of the State Government Insurance Commission and State Government Insurance Office. In particular, with

respect to item 1; such request is tantamount to an inspection of audit working papers. Whilst McLaren and Stewart conduct the audit on contract, I am the auditor and their report to me is merely a working paper upon which I make judgements and report to the Parliament pursuant to the requirements of section 95 of the FAAA. Should such working papers be reviewed by the Committee, I believe such action impinges on my independence.

In view of the above I attach that report, in a separate sealed envelope, and ask that the Committee first deliberate on my submission before accessing the report. If the Committee does not access the report it should be returned to me. Should the Committee access the report I ask that the report not become a public document and be received "in camera" and not form part of the Committee's records. The Committee may be assisted to know that the McLaren and Stewart report referred to on page 26 of my First Report covers a number of audit issues, however that part dealing with investment policies is included verbatim in my report to the Parliament.

With respect to item 2 relating to details of concerns with regard to the support of Rothwells. These concerns are, I feel, spelt out in my report. I advise as follows :

- (1) Documentary evidence of authorisation of the provision of funds from the SGIC to Rothwells is limited.

No evidence of formal agreements between the parties was produced. From information available and in the light of the informal investment policy and procedures it is clear that the SGIC advances to Rothwells were made within a framework of the on-going State Government support and guarantee to Rothwells and were authorised by the Chairman, Director/Finance and/or Manager investments.

- (2) My second and third concerns are self explanatory. I can add no more than say that what I proposed is good management practice.
- (3) This matter is dealt with above. I may, however, add that such records are essential for appropriate accountability.

- (4) As previously stated, documentary evidence of authorisation of provision of funds from SGIC to Rothwells is limited. No written record of any direction issued by the Minister was given to audit and it is clear that the advances were made within a framework of on-going State Government support.
- (5) Since my report of January 1989 the SGIC has undertaken numerous arrangements directed at overcoming deficiencies in their investment practices.

The audit has confirmed that a policy has been adopted, a procedures manual has been prepared which was reviewed by audit prior to its final implementation and an internal structure has been achieved for the future management of the SGIC's investment function.

Each of these areas was developed during the financial year and implementation was effected towards year end. Accordingly audit has not yet evaluated systems operating in the Commission, although it was noted an improvement in the maintenance of information during both interim and final audits.

It has been noted that investment decisions are now supported by an increased level of documented evaluation and expert advice and that appropriate authorisations are obtained.

The SGIC policy has established the following portfolio mix :

	Target	30/6/89	Actual
	%	%	\$M
Property	25	28	350
Equity - Domestic	25)	19	244
- International	5)		
Fixed Interest	25	44	551
Liquids	20	9	112
	<u>100</u>	<u>100</u>	<u>1 257</u>

It is acknowledged that certain existing investments will be retained for strategic reasons outside the portfolio mix established in the investment policy. Until these investments are satisfactorily disposed of there will continue to be a portfolio imbalance, however at this point of time audit consider this to be an appropriate course of action.

Investment systems and procedures will be subject to a detailed examination during the 1989-90 audit.

I trust the above information satisfies the Committee's demands.

A handwritten signature in black ink, appearing to read 'A.D. Smith', with a horizontal line underneath.

A.D. SMITH
AUDITOR GENERAL

December 13, 1989

Attach



office of the
AUDITOR GENERAL

The Hon Tom Stevens
Chairman
Standing Committee on Government Agencies
Legislative Council
Parliament House
PERTH WA 6000

Our Ref: 6803005

Dear Sir

STATE GOVERNMENT INSURANCE COMMISSION

I refer to your order to me dated December 7, 1989 and to my response thereto.

That response was made in a desire to assist the Committee. I have since had time to further reflect on the order and am very concerned that the fundamental relationship between the Auditor General and the Parliament may be breached if the Committee accesses my response, in particular the sealed portion of that response.

I had assumed that the Committee, itself, would consider the legal implications to which I have referred. Informal discussions I have had now suggest that the Committee, in accessing the document, does not itself breach the law, but I do, and that I am very concerned about.

The advice I have is that the Committee, as a Committee of the Council cannot override a law proclaimed by the Parliament viz; section 91 of the Financial Administration and Audit Act. I therefore seek the Committee's leave to withdraw my submission until I can reconsider my position and allow me to seek written legal advice. Of course, if the Committee is of the view that I should not be placed in this invidious position it may well decide to return the document without further action being required on my part. The Committee is, I am sure, well able to obtain access to the primary SGIC records upon which my audit report was based.

I cannot stress too strongly that I am concerned about the actions of the Committee. The action touches on the fundamental principle of independence of the Auditor General in the Westminster system of Parliamentary democracy.

I draw to the attention of the Committee to passages from the "Burt Commission Report" who endorse the need for strong independence - in particular

Page 19

"The Auditor General is an independent Office holder appointed by the Crown under statute, in whom statutory powers and authorities are directly vested, and on whom statutory functions and duties are imposed. These functions and duties are required to be performed independently of control by either the legislative or the executive arms of government."

Page 20

"In order to properly discharge his responsibilities in terms of law, the Auditor General must be independent, and must be seen to be independent. He must not be subject to any pressure, influence or interference from any source that may erode such independence."

Irrespective of the legal position I believe the order of the Committee does not accord with the understanding of the Burt Commission.

I respectfully ask that you return my submission so that I may seek written legal advice and protect my position which I now see as being vulnerable.

Yours faithfully



A.D. SMITH
AUDITOR GENERAL

December 21, 1989

NB In substitution for hand written draft dated December 21, 1989.

APPENDIX 8



CROWN SOLICITOR'S OFFICE

CROWN LAW DEPARTMENT

Westpac Centre,
103 St. George's Terrace,
Perth, Western Australia 6000

Box 8317 G.P.O. Perth 6001
Telephone (08) 327 1711
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Your Ref:
Our Ref: CLD
Enquiries: PANEGYRES:RBS

Mr. A.D. Smith,
Auditor General,
815 Hay Street,
PERTH 6000

STANDING COMMITTEE ON GOVERNMENT AGENCIES

You have asked me to confirm the verbal advice I had previously given in respect of the application of Section 91 of the Financial Administration and Audit Act.

I understand that, pursuant to the powers contained in section 82 of the Act, you appointed McLaren and Stewart to carry out the audit of the SGIC, and that you subsequently received their report. You then reported to Parliament.

You have subsequently been required by the Parliamentary Committee on Government Agencies to disclose to the Committee the report to you from McLaren & Stewart. I would expect that the Committee would be exercising its powers under section 4 of the Parliamentary Privileges Act which authorises a Parliamentary Committee to call for the production of documents. That general power is subject to any relevant specific and later law. In particular it must be subject to section 91 of the Financial Administration and Audit Act which obliges the Auditor General and anyone appointed by him to assist in any particular matter (which would include all the staff of McLaren & Stewart), to preserve secrecy with respect to all matters that come to their knowledge in the course of their duties under the Act, and forbids communication of any such matters to any person.

You are therefore precluded from complying with the request from the Parliamentary Committee.


CROWN SOLICITOR

6th February, 1990

[PAPP2574L]

