STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

PROVISION OF INFORMATION TO PARLIAMENT

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 30 MARCH 2015

SESSION ONE

Members

Hon Ken Travers (Chair)
Hon Peter Katsambanis (Deputy Chair)
Hon Martin Aldridge
Hon Alanna Clohesy
Hon Rick Mazza

Hearing commenced at 9.55 am

Mr REECE WALDOCK
Director General, Department of Transport, examined:

Mr GRAEME DOYLE
Acting Managing Director, Policy, Planning and Investment, Department of Transport, examined:

Mr DAVID BROWNE
Executive Director, Safety and Strategic Development, Public Transport Authority, examined:

The CHAIR: On behalf of the committee, I would like to welcome you to today's hearing. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard and a transcript of the evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record and please be aware of the microphones and try to talk into them; ensure that you do not cover them with papers or make noises with them and please try to speak in turn. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. We may keep going with public questions and then come back to those at the end, if there is a request for closed session. If the committee grants your request, any public or media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public, although I advise you that, as with our estimates hearings, we make our uncorrected version available on the internet once it has been made available by Hansard. I advise you that publication or disclosure of the uncorrected transcript of your evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee? You are obviously aware of the terms of reference we are looking at in terms of sections 81 and 82 of the FM act.

Mr Waldock: Yes, we all have a copy and we have all read the terms of reference. I guess the only comment I would make, Mr Chairman, is that, clearly, the letter I received is fairly wide. I have taken the opportunity to bring somebody in from, perhaps, the capital projects area, and somebody who has been very close to the grain line. That is the best guess I could make, given the lack of clarity.

The CHAIR: I guess we are looking at the broad interpretation of sections 81 and 82 and how, as an agency, you view it. It is in a broad sense, so, hopefully, we will see how we go. If there are no further opening statements, I will throw it open to questions.

Hon ALANNA CLOHESY: In general terms, can you describe the process that you go through in determining what matters within a contract could be identified as public and which should remain private, both with the company you signed the contract with, and with other parts of government?

Mr Waldock: To do that, maybe it is best if I give an example.

Hon ALANNA CLOHESY: Because it is too hard to do it broadly.

Mr Waldock: It is too hard to talk in general terms and I think the example, in your mind as well, would be some of the issues that emerged out of the grain freight lines. Certainly, there is little doubt there were a number of issues there that we put forward as confidential. We did that on the basis of, clearly, the contract—the lease agreement which had a broad clause in that of confidentiality—and we found that in terms of that particular clause, I do not think there is a great deal of flexibility in the interpretation of that. It is confidential. It was put there on the basis, I think, that certainly whoever purchased the grain line at the time—let us talk about Brookfield today because there have been a number of parties before that, of course—our sense is that it was there for very good reason. It was there to look at and protect the purchasers in terms of their risk of disclosure of confidential information of a commercial type—so confidential, commercial disclosure. There is another thing that I would say about that. This is an issue that came up, and I think our advice to Mr Travers was that when we provided a lot of information to a request, as we always have done, we did in fact ask to keep a number of things confidential. That was on the basis of, first of all, we checked with Brookfield —

Hon ALANNA CLOHESY: Can you describe how that that particular process came about?

Mr Waldock: Yes. We go out and speak to Brookfield. Again, we would never put ourselves in a position that we were able to be the arbitrator or the adjudicator of what they believe is confidential. Particularly in the current round when it was being requested, of course, themselves and CBH were under an access code arrangement as they were moving through. 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. Throughout many of the discussions in the grain business we have consulted with SSO. David Browne was very clearly involved in the day-to-day discussions. It occupied almost 12 months of his life. David, do you want to add anything to what I just said?

[10.00 am]

Mr Browne: I think you have covered it very well. We are bound by clause 38 of the lease, which is the broad requirement for us to maintain confidentiality of the lease and all of the associated confidential information that comes in there. Our requirements were to operate in accordance with that. We sought Brookfield's input into that.

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.

Hon ALANNA CLOHESY: So in no way would you negotiate and say, "Well actually, we've got this section in the Financial Management Act that we have to respond to"?

The CHAIR: Can I just interrupt there? How do you interpret Clause 38.4 as part of the lease? You say it is very clear that the lease is confidential but 38.4 seems pretty clear to me.

Mr Browne: For the information of others, clause 38.4 states that nothing prevents the minister from tabling a copy of the agreement in Parliament, or providing a copy to any member of Parliament.

Mr Waldock: That is the agreement, and certainly I think that I am on the record as saying that we have never in any way given advice that that agreement could not be made available by ministers, and we have done that in successive governments and under successive ministers.

Hon ALANNA CLOHESY: You have never given advice?

Mr Waldock: No, I am saying that when the lease has been asked to be tabled, we have always provided advice to the government of the day that we would certainly allow that to be tabled. As I say, various ministers' decisions over a number of years were that it would not be tabled. It was certainly nothing to do with the public servants.

The CHAIR: I guess my point is that you are saying that the contract is very clear about those matters—that it is a confidential contract—but that would suggest quite the contrary, that there has always been the option of tabling it in the Parliament, or providing it to a member of Parliament.

Mr Waldock: We accept that.

The CHAIR: That is what I am trying to work out. When you are preparing a response to parliamentary questions—because it is not from the public—you were saying you go through a process. Why is the process not just that we table it in Parliament? There is a provision there that says you can do that.

Mr Browne: It is not that we can table it; it is that the minister can table it. We can only simply give the minister advice, and we have said on a number of occasions that we see no objection—the PTA certainly has no objection—to the minister tabling the document in Parliament. We were simply seeking—this was in relation to a committee of Parliament, not tabling in Parliament—Brookfield's input about its opinion or thoughts about this being tabled to a committee of Parliament, so it was subsequently provided to this —

Mr Waldock: As far as I am concerned, Mr Chairman, it was never the view that we would not table it; it was the aspect of what should remain confidential. There is that aspect to it. I do not believe that the executive has too much ground to move on that. As we have said on a number of occasions, I do not believe that we should adjudicate that. That clause, I believe, when it was intended to be done, does not give us much flexibility. We asked the leaseholder, and they say it is confidential. I am not sure that we can take that any further other than to deliver that message.

The CHAIR: To the minister?

Mr Waldock: Yes.

Hon RICK MAZZA: Can I just ask a question on this? With those confidentiality agreements, when you are negotiating a contract, whether it be Brookfield Rail or any other commercial agreement, do you scrutinise what those clauses contain, or do you basically, if the private company that you are dealing with says it wants this confidentiality agreement inserted in the contract —

Mr Waldock: This is in the original agreement, yes.

Hon RICK MAZZA: Yes. What scrutiny do you actually give those confidentiality clauses when you first negotiate the agreement, which then prevents you from being able to disclose these matters? Is that something you scrutinise thoroughly?

Mr Waldock: There are two aspects to that. The lease we are talking about was negotiated over 1999 and 2000, well before any of us—it was outside even Government Railways, and I took over Government Railways in 2001. It was a task force set up, and it went through a great deal of deliberation, working with private sector lawyers to develop those clauses. I really cannot comment on that, because I was not part of it. In a wider sense—and I can perhaps share some of the issues that you will be raising in this particular set of discussions—it is always going to be difficult, as we potentially see the sale of government assets, to determine what is in the public interest for

Parliament to disclose versus purchasers who expect a number of clauses and information sets to remain confidential. That is going to be a challenge for governments in the future, as it is now.

Hon RICK MAZZA: Just to finish, if you do not mind, what is the nature of the injury that some of these companies believe they are going to incur if the information is disclosed?

Mr Waldock: I would not want to speak for the company, but I did actually understand that you did speak to Paul Larsen last week.

Hon RICK MAZZA: I am not specifically speaking about Brookfield, but only in general terms, because there are a lot of contracts that you have with private companies.

Mr Waldock: As I say, I think the issue is a risk of commercial disclosure. I would have thought that if I was buying a government asset, I would not want to be tabled for the public a lot of information in the future that would assist me in commercial negotiations. That would be my view if I was them. Similarly, I can understand where Parliament is coming from. These are government assets and government sales, and they have got a right to ask questions and to challenge and to be appropriate oversight agents. It is a difficult one, but I certainly would argue that if Parliament did disclose confidential information in the future, and I would have thought that private companies would be a little bit nervous about entering into these, and they would probably consider that as part of their decision-making.

The CHAIR: So, parking that to one side, even if we accept the argument that the private sector will always want to keep the information confidential, whereas you, as the government, surely your job then is to attest to the public interest, as to what is the public interest. What measures do you evaluate when determining whether or not it is in the public interest to release it? I accept your point that the private sector might want to keep it confidential on every occasion. How do you judge what is in the public interest in making that information available? That is the test you have got to go through.

Mr Waldock: I think that is the minister's test under section 82 more than mine. I would have thought that what I do is very much constrained by agreements, as we have done, and I do not think that I am in any way seen to be the decision-maker. My sense is that we follow the letter of the law, and SSO have made it very clear on a number of occasions—if I could just finish—that it is a broad clause and we have little flexibility in terms of interpretation.

[10.10 am]

The CHAIR: Okay; so little flexibility for yourselves, but the clause clearly says it can be tabled in Parliament. So, then, why would you do anything other than provide it to the minister and say, "Clause 38 says that it's able to be tabled in Parliament. It's now your job, minister. We're out of this; it's no longer the role of the PTA or the Department of Transport"? Why are you doing anything if that is your interpretation of the act?

Mr Waldock: What are you suggesting we are doing, Mr Chairman?

The CHAIR: I am asking you. You are saying it is not your job to assess the public interest; that is the minister's. Therefore, why would you do anything other than provide the minister with a copy of the contract, note clause 38, and then leave it for the minister to make the decision under section 82 as to whether it is fair or reasonable to —

Mr Waldock: You are suggesting we are not doing that?

The CHAIR: Well, are you doing anything —

Mr Waldock: No; you said, "Why are you not doing" —

The CHAIR: Because 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 you do not do any assessment of the test about whether or not what sections will be provided in terms of the public interest.

Mr Waldock: That is totally outside what we are about in this space. I do not think —

The CHAIR: Why did you ring Brookfield then?

Mr Waldock: Because that is the process which has been adopted. I was going to say, David, in all cases we have made that information available.

Mr Browne: Exactly right. What we have done is we have simply provided the information, but with an understanding that some of Brookfield would like some of this information kept confidential. I think that was part of the letter from the minister to this particular committee, so all the information was provided, but with a note that, "Could you please keep this information confidential, given that CBH and Brookfield Rail are currently going through negotiations at the moment for access?"

The CHAIR: Just to be clear, you make no assessment about the broader public interest; you simply provide advice to the minister that Brookfield has requested this information be kept confidential, and you then make no assessment about whether or not there still may be a broader public interest in making that information public.

Mr Waldock: That is correct.

The CHAIR: So that is the role of the minister to then make that decision.

Mr Waldock: That is right.

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.

The CHAIR: All right. If that is the case, how do you see section 29 of the public transport act operating in respect to all of these matters?

Mr Waldock: Do you want to relay what that is, Mr Chairman?

The CHAIR: I thought you would know it off the top of your head.

Mr Waldock: No, I do not. I must admit I have failed on that.

The CHAIR: It is the deletion of commercially sensitive matters. Is that not something that you give consideration to?

Mr Waldock: Do you just want to expand on what it says?

The CHAIR: Well, in broad terms, none of you or none your advisers are aware of that clause.

Mr Waldock: Our lawyers would be on top of this. I mean, certainly Michelle at the time would have been very knowledgeable in that respect.

The CHAIR: What section 29 says is —

(1) The Authority may request the Minister to delete from —

(a) a copy of a report under the *Financial Management Act 2006* (and any accompanying document) that is to be laid before a House of Parliament or made public; or

(b) any other document of the Authority that is to be, or might be, made public,

a matter that is of a commercially sensitive nature, and the Minister may, despite the *Financial Management Act 2006* section 64 or an obligation, however arising, to make the document public, comply with the request except where under paragraph (b) the document is to be laid before either House of Parliament by its own order.

(2) A copy of a document from which any matter has been deleted under subsection (1) must —

(a) contain a statement, at the place in the document where the matter was deleted, detailing the reasons for the deletion; and

(b) be accompanied by an opinion from the Auditor General stating that the information deleted is commercially sensitive.

So when this committee asked for a copy of the contract, and we were given a link to a United States website that did not include any of the annexures to that contract, did you not at any point consider whether or not section 29 would apply and whether you should have got advice from the Auditor General about the deleting of those subsections as confidential, and include that at the time?

Mr Waldock: Do you want to take us back then, David? This is when the minister first advised that it was based on a website.

Mr Browne: Yes. My understanding was that that was the decision of the minister.

Mr Waldock: It certainly was.

The CHAIR: So, you did not request at that point any of that information be kept confidential when you provided the advice to the minister?

Mr Browne: I cannot recollect, and I have a fairly good recollection of that, so that is not my understanding.

Mr Waldock: We can check.

Mr Browne: We can check that. But we subsequently provided all of the information again to this committee and requested that the Attorney General —

Mr Waldock: And to the Auditor General and to the other committee, yes.

The CHAIR: Eventually. But the initial request from this committee—we were only give the website and no further information. So if you could take it on notice.

[*Supplementary Information No A1*.]

The CHAIR: What I am also interested in is, based on what you have said earlier, it suggested to me that you would have provided to the minister a copy of the contract and the request from Brookfield for that information to be kept confidential. That is what you indicated earlier —

Mr Waldock: Yes.

Mr Browne: Yes.

The CHAIR: — that you would have advised the minister, "Here is the clause and this is the information that Brookfield requested be kept confidential."

Mr Waldock: Request confidentiality —

Mr Browne: Indeed, it was the request of this committee for information. We sought Brookfield's advice so that we could inform the minister, because otherwise he would be saying, Well, what did Brookfield think about this? They're the other party to it and it's only reasonable that they be consulted on it." Then we provided that advice to the minister and a letter was provided to this committee saying, "Here's the information, but could you please keep this information confidential?"

Mr Waldock: I think it is picked up in that letter to you, Mr Travers, on 20 June, that particular issue you have just raised.

The CHAIR: That might be a statement as to why you have kept it confidential, but the second part of that section 29 would suggest that you should have got an opinion from the Auditor General. Is section 29 not something that you would give regular consideration to with respect to these matters?

Mr Browne: Certainly no, because that is saying that we would be keeping information confidential and not releasing it, which was not the case here. We provided all the information that was requested.

The CHAIR: Eventually. But at the time of the initial request, you did not provide it. The annexures were kept confidential.

Mr Browne: Again, I would go back to whether or not the PTA did that. So, again, we will take that on notice and we can have a look at the —

The CHAIR: All right.

Mr Waldock: I think your basic issue is whether PTA in fact advised just to acknowledge a website elsewhere without the schedules. I will confirm that.

The CHAIR: Which is why I find it interesting that you are saying to us you do not actually provide commentary on that; you just provide the copy of the contract and the advice that Brookfield is given. But you then, as an organisation, do not seek to try and provide any advice to the minister on whether there is a broader public interest in releasing some of that information.

Mr Waldock: In these areas we actually felt the legal agreement was unequivocal, and that is our advice.

The CHAIR: But the —

Mr Waldock: I am sorry; As I say, we —

The CHAIR: It is unequivocal in terms of everything bar providing it to Parliament, Mr Waldock. If it has been provided to Parliament, you are absolutely right; it is unequivocal—it can be provided to the Parliament. So, somebody has to make a decision around public interest tests and provide advice to the minister so that they can make decision under section 82.

[10.20 am]

Mr Waldock: As I say, we followed the lease, we took as much advice as possible and we provided what we believed in the legalities of that lease we should provide, and that is the advice we have given. If we have not looked at the wider issues of public interest, I think that is because of the way we have interpreted the lease and all we can say was "Yes." I am interested, because certainly, as I say, our senior lawyers would have been well aware of that clause, but certainly supported our approach throughout the whole process.

The CHAIR: One of those annexes that you deleted was performance standards.

Mr Browne: When you say deleted —

The CHAIR: You did not provide. In the original request of this committee, one of the items that was never provided—even if we went to a US website that, by the way, did not link initially, but, anyway, that is another story—was the performance standards.

Mr Browne: Again, we have got that on notice, because you are saying we did not provide it. I am not 100 per cent sure that the PTA had an involvement in that particular response to you where the link was simply provided. Again, we will need to go back on that and confirm the background to providing the information.

Mr Waldock: I suspect we did not have any objection.

Mr Browne: Again, we have advised the ministers on several occasions that the PTA has no objection to the minister tabling the lease and the schedules, including schedule 4 of the performance standards, in Parliament.

The CHAIR: So, in terms of answers to questions, as well as in the contract, there was also a question back on 17 October 2013 from myself to the Minister for Transport about the Miling–Bolgart line that asked what is the required performance standard for the Miling–Bolgart line and has the performance standard for this line been reduced, and the answer was the performance standard for the Miling–Bolgart line is confidential. You have never provided that sort of advice to the minister—that the performance standards are confidential?

Mr Browne: We have advised that Brookfield have advised us that schedule 4 and the performance standards have been confidential. They saw those as confidential information because of their negotiations with various parties. We advised the minister in relation to that that, yes, those things were sought by Brookfield Rail to be confidential.

The CHAIR: It is interesting, as Mr Waldock mentioned earlier, we had Brookfield Rail in and they said they have never requested the performance standards be kept confidential.

Mr Waldock: You will have to make your own decision on that.

The CHAIR: I guess my question to you is: would their advice have been in writing to you where they requested whether or not matters be kept confidential?

Mr Browne: It is a long-held issue for the performance standards to be kept confidential—that it was key confidential information from Brookfield's perspective.

The CHAIR: I am not arguing. Our problem is we have now had two sets of advice. I am wondering if there is any written documentation that would go to the heart of that issue that would clarify that for us beyond reasonable doubt as to whether there was ever a request from Brookfield Rail for the performance standards to be kept confidential.

Mr Browne: I am sure that we would have something, but I cannot off the top of my head refer to that. But I am sure we would have something in an email or something.

Mr Waldock: Do you want to make that A2?

The CHAIR: You said you would make an inquiry about the website and the history of the website, so we will make that A2, and the request for the performance standards to be removed and what advice you have provided in the past will be A3, and then if we can make A4 any record of a request from Brookfield requesting that the performance standards be kept confidential.

[*Supplementary Information No A2, A3 and A4.*]

Mr Browne: Indeed, actually I can answer that right now. In further review of the letter of 20 June 2014 that we sent to yourself, Brookfield claims confidentiality in relation to, and objects to the end of disclosure of, the schedules and annexes to the network leases. That was Brookfield's written advice to us, which we conveyed to this committee.

The CHAIR: If it is possible to get a copy of that original correspondence as part of A4, I would appreciate that comment.

Mr Waldock: On a confidential basis.

The CHAIR: Yes. I do not know if you are aware, Mr Waldock, but I was actually provided way back in about 2009 with a copy of the Brookfield lease by the then minister in accordance with the provision of the act, and I was given it on the basis of confidentiality. You might note that in that whole time, it has never leaked from my office. If I give my word about something, I sometimes regret that I accept it on that basis, but I took it on a confidential basis at the time and I maintained it.

Mr Waldock: I suppose that leads to my perhaps more general point that sometimes I believe the executive are in an invidious position between ministers and Parliament. That is a good example, I think, where those lease documents were requested and you had them in confidential information, but they were not ever made available by the minister at the time. So I guess you are sharing with what I find. We are somewhat victims or pretty impotent in this space and I just would like to share that and place it on the record with the executive.

The CHAIR: I guess that is part of the point of the inquiry—trying to get to what process. Also, I think partly there is this sort of view that if you provide it to a parliamentary committee and request that it be kept confidential, somehow that will leak out. In terms of when it was provided to me, there was no parliamentary privilege or anything attached; it was just my word to the minister at the time that I would keep it confidential. Later I believed it should be made public, and I went through the parliamentary processes to do that, because I did not feel I was in a position to release that document in any way, shape or form because I had given a commitment that I would not.

Mr Waldock: That took about six years.

The CHAIR: Yes.

Mr Waldock: Six years is a long time.

The CHAIR: That is the issue. Particularly going back to performance standards, it has always struck me that when you have got someone operating a lease, I would have thought that the public interest clearly falls with potential users of that line being able to know what the performance standards of that line are. So, is that anything that you, as an organisation, have ever been asked to give, or have given, consideration to in terms of the public interest of the users of the line being aware of what the performance standards of the line are?

Mr Waldock: I can honestly say no, never. But it is a good question and it is a good question that picks up your question, committee person, on the issue of: if we do future contracts and agreements, what do we learn from that? It is not just this agreement; every agreement we enter into, and given that sometimes they take 50 years and sometimes 99 years, we have got to be pretty clear just what we lock in. If we do not get it right, we will continue to wring our hands for the next 50 to 99 years saying, "If only."

Hon RICK MAZZA: It starts from the negotiation point.

Mr Browne: Can I just add to that? We did take notice of this and, indeed, when we did the lease agreement for the Tilley to Karara railway line, it was based on the Brookfield/WestNet lease and there is no confidentiality requirement. It is a registered lease that is available on the intranet for everyone to look at. So there are no confidentiality requirements in that particular lease.

Hon ALANNA CLOHESY: Intranet or internet?

Mr Browne: Internet; sorry.

Mr Waldock: We did learn from that, but again we should be mindful of that given that these issues will be coming up in future.

Mr Browne: Again, just on that as well, in relation to the performance standards, there was an application by CBH through the FOI process for access to that and we went through the full FOI process and the FOI commissioner found that that was confidential information that should not be released to the parties seeking it.

Hon ALANNA CLOHESY: So just in terms of the learning that you said you have gained from this, can you just give us a bit more detail about what it was? Obviously, you have deleted any sort of confidentiality clause out of any new lease. What other learning have you gained from the Brookfield experience or similar regarding confidentiality?

[10.30 am]

Mr Waldock: Certainly, from my point of view, one of the issues is—it has come up in this particular contract—who should pay for the next round of major upgrades and the like. In this case, and I think for good reasons, based on a major bit of work—the strategic rail network review—various forms of government stumped up with the money. I just think it should have been made unequivocal at the front how that would work and how it could work. I think it let too much room for potentially the lessee to seek support where I think that if it had been clearer when they bid, they might have actually not have seen—I mean, it was always complex, because they could always, as we know, and I will not go through details, surrender the lines based on the number of tests. But again, and we can all be in hindsight, I think it would have been better if it had been clearer how those grain lines were going to go, and what were the expectations of government, because I think that lack of clarity meant that we had to go through a fairly long and arduous process to come out the other end—in fact, probably six years of consideration, and that is far too long.

So there are lessons, and my sense is more generally, in a wider sense, I look at airports and public interest and how that has gone. I look at ports; ports are going to be—around Australia they have been—privatised now. In fact, WA is probably one of the last bastions of public ports. My sense is what we potentially see around Australia is that state governments seeking to maximise the returns are potentially not having strong access and pricing regimes in place, which means the purchaser of those ports, whether it be 50 or 99 years, will have enormous ability to have, I think, quite strong monopolies. And who pays for them in the end? The community pays for them in the end in some form. A good example is what is happening at Melbourne port now, where they have, supposedly, and it is a court action, increased the DP World's leasing costs by 800 per cent to get it ready for private sale now. I think all these things should not just be about maximising return short-term; they should be about the long-term interests of the state and the community. These are the things that are very complex, and far smarter people than me will get around the table, but you can see that there is always a bit of a potential conflict between short-term maximising revenues of sale versus long-term interests of the community.

The CHAIR: It is an interesting point about ports and I think one of the things is that where they have been privatised all that it has done has pushed up the price of it—some before they get sold, and others once they have been sold. There used to be a view that ports were for trade facilitation not profit making, but those times seem to have been lost.

Just going back to the issue, you said the learnings with respect to the lease for Karara to Tilley, if that was the case, why did you not also include those learnings when you did the variation to the Brookfield agreement as part of that project agreement for the capital works?

Mr Browne: Because those and any variations were confidential information in accordance with the definition in the primary lease. It is not just the lease that is now public; it is every other associated document that has anything to do with the lease is confidential information. So even though in some ways it has made my life easier that there is a lot of public information now—the lease and all of the schedules et cetera and I do not have to do as many briefing notes for the minister and PQs et cetera—people need to understand that all of the other information is still

confidential. So information generated today is still confidential information in accordance with that lease.

The CHAIR: What I am saying is that you negotiated an agreement that was signed on 9 July 2010 that varied that original agreement in a whole range of ways.

Mr Browne: Yes.

The CHAIR: Did you seek to have as one of those variations the confidentiality so that that whole 9 July agreement could be made public?

Mr Browne: Look, my recollection—I mean, it is going back nearly five years. I cannot remember, but I would have thought that it would be simply—and the position of Brookfield, or WestNet as it was at the time—that this was simply more confidential information under the umbrella of the lease.

The CHAIR: The state was putting in, and I think Mr Waldock referred to it earlier, a significant capital injection of substantially commonwealth government money as part of an upgrade, that they would then have a capacity to operate and make a return on. They would get the return on that investment. Surely, if you had a view that these things should be made public, that would be the time to also include as part of those negotiations that we want this variation to the original agreement to be made confidential.

Mr Waldock: David, you can respond. I guess our sense would have been the head lease is still the head lease and we were not going to change the very basic principles of the head lease.

Mr Browne: Exactly right.

The CHAIR: Even though the new agreement did have its own clauses, with respect to confidentiality included in it?

Mr Browne: As I said, every document that has the definition of "confidential information" is all information relating to the policies, business, technology or other affairs of the party or any related entity of the party—and it keeps going on. It is a very broad definition of confidential information, and it catches everything not only in the lease, but associated with the lease.

The CHAIR: It has its own quite extensive—it went a lot further in my view—clause 24.5, "Confidentiality and Disclosure". It is not as clear in terms of providing it to the Parliament, and it has a whole range, subclause (2), that seems to go a lot further in terms of confidentiality in my reading of it. Why would you go further if your view is that you want to actually move in the opposite direction?

Mr Browne: I think, again, it is providing all of the details, the very detailed commercial arrangements of a commercial organisation when it is doing a major project. Brookfield's perspective, or WestNet as they were at the time, was that they would have seen that there is very commercially confidential information.

The CHAIR: One of the things that you negotiated as part of that agreement, though, was a cap on what can be charged until 2016. Without getting into too much detail as to why the 2016 date was chosen—although if you are in a position to answer that I would love to know—what is the point of having a cap, if that cap is then never made public to the potential users of the line, because of confidentiality agreements?

Mr Waldock: It is an interesting issue you raise, because it was raised during the previous committee's discussions. My general response I would say to that is we did two things, if you remember. We actually maintained the cap and we also looked at the issue, which was raised as this so-called profit sharing. So there were two issues which were at the time quite significant. In terms of the cap our sense is whether it is confidential or not, the users of those lines will get the significant benefits, nominally for a five-year period. We thought that was pretty substantial. It is interesting that you might argue that perhaps ministers and politicians generally would love to go

out and spout just how good they are and how successful they have been. Interestingly enough, that just never occurred to us. We were certainly just considering the interests of all parties when we actually put that cap in place and that cap has been maintained and it will be maintained until the end of next year. My sense is maybe we are not as smart as we could be, but it was certainly ensuring the beneficiaries, all players in the business, would be benefiting with that investment.

The CHAIR: How do you make that claim when, according to news reports, the access fees for the total network were increased by 30 per cent? That would suggest that the capped lines might be being kept down, but the uncapped lines have increased by well over 30 per cent, so from a business model, and if the potential users of those lines are not even aware that there is this supposed cap sitting on the lines that had money invested in them, how can they make a reasonable assessment that they are not being scalped on the non-capped line?

Mr Waldock: I am sorry, I do not understand your point because —

The CHAIR: What—you think 30 per cent is a reasonable increase?

Mr Waldock: No.

The CHAIR: I am not looking forward to a PTA fare increase this year then!

Mr Waldock: Let me make the point that—clearly, this is where there is confusion; I do not think with this committee—certainly, we have no say, and there is a process to go through. If in any of the sections and any of the lines there were concerns about being exploited or price-gouged, then clearly all players can go to the ERA, and that is their job; it is not our job. All we did was where we invested public funds we expected a return. Not just a return to government; not just a return, but it was a return to the grain growers as well and I think, as you say, we did not have to do that but we thought it would be simple and a very good commitment to lock them in. We have since done the full audits, of course. David, do you want to pick up on those?

Mr Browne: Yes, that is correct. We have audited those lines, but for a very small discrepancy, and that discrepancy is only between the CPI, the date that CPI kicks in, and the days when Brookfield change their access rates, that they have complied with those clauses.

[10.40 am]

The CHAIR: That then means that the rest of the network has had massive increases—well above 30 per cent—if that is the case.

Mr Waldock: If CBH was concerned about that, they have got every right to take it to the appropriate bodies.

The CHAIR: If that is the case and the ultimate arbiter of it is the ERA, then why would you even bother putting a cap in, because ultimately, as you say, the ERA is going to be the final determiner?

Mr Waldock: Because we thought where the government spent money as an investment of taxpayers' money, we could at least mandate that. It was one little power we had to try to mandate no increase above CPI for a nominally five-year period. Again, it was put to us by people and I thought it was a particularly good idea.

The CHAIR: If you do not then do anything on the rest of the network, what is to stop them saying, "We needed a 20 per cent increase across the network? We cannot get it on these lines, which are capped, so we will just go for a 40 per cent increase on all of the uncapped lines."

Mr Waldock: Again, if CBH, or anybody, had any concerns they could immediately go section by section to the ERA. If they felt any section was being exploited, they could test that. There is a process, and it is not our process.

Mr Browne: We have no authority to do anything else with the other lines because we have no input, but we did on those particular lines; we sought to put that in.

The CHAIR: But the fact is that it is not even known to the people in the negotiation.

Mr Waldock: The benefit to them came in the outcomes for those lines.

The CHAIR: But you cannot be sure of that, can you?

Mr Waldock: Yes, we can. We have audited it.

The CHAIR: You are not looking at the increase on the non-lines, so how can you be confident that those non-lines have not been increased? It is okay for you to sit there and say, "We have done the audit," but if you are sitting there as a user of the lines and you get a 30 per cent increase and you do not know that there are 500 kilometres of line—probably a bit more, in fact; is it not?

Mr Browne: Seven hundred and fifty.

The CHAIR: It is 750 kilometres of lines that have had money invested in them and they are capped, how would you even know to go to the ERA on the basis that there is clearly an exorbitant increase on the uncapped lines? How would you even know that as a member of the public?

Mr Waldock: They do have them, because the users, CBH, would know section-by-section increases and they can challenge any of them.

The CHAIR: My understanding is they got a network price, not a section-by-section price.

Mr Waldock: That is not our understanding, but anyway we are not close enough. It is my understanding they can challenge section by section.

The CHAIR: They might be able to challenge, but it is a question of whether they know to challenge because that was never made public. Having a cap that no-one knows about, the potential users—regardless of who the company is—do not know about the cap.

Mr Waldock: So, what would you suggest we might do in that clause, if I could ask?

The CHAIR: Have the cap made public—to have made the fact that there is a cap on the use of those lines public. We are putting public money in and there is now a cap on the charge for those lines for the next five years.

Mr Browne: But in relation to that, whilst it was not made public at the time that the agreement was made in 2010, it was made public in November last year. When the Economics and Industry Standing Committee brought down its report, it made those documents public, including 10.1 and 10.2. So that went public November last year. This price increase was only announced in the last few weeks. So, they have been aware of that.

The CHAIR: The original increase was before the economic standing committee.

Mr Waldock: The original increase was.

The CHAIR: You are right, now that it has been made public it has changed the debate. My point is I cannot understand why, if you are putting a cap in, you would not have made that that is a public —

Mr Waldock: Maybe, Mr Chairman, you may have an issue there. I am not sure, but I do note your comments and maybe that could be potentially a lesson learnt in the future as well. I mean, I am not suggesting we are perfect but we do things for the right reasons, we believe.

The CHAIR: My point about that is that if then someone is doing an assessment about what information should or should not be made public under the contract or tabled in the Parliament, those aspects of it, where there is a public interest in that being known, that is the question. I can understand why from a commercial point of view a company would want everything kept confidential because that maximises their negotiating power, but us, as members of Parliament and you as the executive, we have a broader issue to look at, which is the public interest, not just a single entity's profit-making capacity.

Mr Waldock: I think some of these things might be useful for lessons learnt for future contracts. Let me say, I am not convinced of what you are saying, but it certainly is worth further investigation.

The CHAIR: I want now to turn to the MSS Security contract, which was also one of the issues. What damage is done by releasing the per unit rates for staff and why could they not be released?

Mr Waldock: I have to take that on notice. Of all the things I thought you might ask me today that was not foremost in my mind.

The CHAIR: That has been one of the ones that has been running with this committee for a while, and my apologies if you were not made aware that was one of the areas we were looking at.

Mr Waldock: I certainly was not.

The CHAIR: We requested back in 2013 the hourly rates for revenue protection officers and for transit officers, and we were asked to keep the cost of revenue protection officers confidential, so I am intrigued to know why. In fact, if you note, the next hearing we have is with MSS Security itself.

Mr Waldock: I can only apologise, I was —

Hon RICK MAZZA: On that, do you have a contractual obligation to keep those rates confidential?

Mr Waldock: I am not sure what the answer is. It could well be, member, but I am just not sure. What might help me—Mr Chairman, some of those responses go directly to the PTA so I do not see every response, particularly when it is probably more of what I class operational than strategic. But I did not realise it was a strategic issue. If I had of and if you had mentioned it, I certainly would have come prepared.

The CHAIR: We wrote to the minister back in March 2014, where we talked about the rail freight agreement lease and also the current state of the MSS Security contract.

Mr Waldock: Okay. I am more than willing to take some questions on notice, if you wish.

The CHAIR: The reason I am asking is that you asked for it to be kept confidential, but from anyone working within the industry, I would have thought, that potentially tendered for the contract, if they see the overall contract price, they will be able to do their own calculations fairly quickly to work out within reasonable accuracy —

Mr Waldock: Do you think they will?

The CHAIR: Yes; enough to be able to then work out how much they have to sharpen their pencils —

Mr Waldock: Even in tender documentation, you do not generally disclose the unit rates.

The CHAIR: But they know what you are asking for as a contract and they know what the final contract price was; the rest of the contract is made available. I reckon, if I was working in that industry, I would quickly be able to work out enough to know how much I need to sharpen my pencil next time to get the contract. Two things come into play there. One is: what is the damage to us? The public interest is clearly in encouraging people to sharpen their pencils when tendering for government work; is it not?

Mr Waldock: Sure.

The CHAIR: What would be the advantage in keeping those documents?

Mr Waldock: Can I ask why you are seeking the information?

The CHAIR: Yes. One of the reasons, which I think again is in the public interest, is to test what the cost of employing revenue protection officers by contract is compared to your own in-house

costs for transit officers. Looking at that comparison, it would appear that your transit officers are significantly cheaper. I congratulate you on that.

Mr Waldock: I am a very good employer.

The CHAIR: And your transit officers are not only cheaper to operate but also they have more powers than your revenue protection officers. So, as you are well aware, and we started to see an increase, but for an extended period of time we were employing revenue protection officers not transit officers, including at various times government putting bans on you employing more transit officers. Even though it was clearly —

Mr Waldock: I do not think government ever put a ban on us employing transit officers. My recollection is we always had enormously high standards and we just could not get people, especially during the boom.

The CHAIR: You had problems with standards. There was a window where it opened up and because there was a review going on, they would not —

Mr Waldock: There might have been a review, but certainly, we have always —

The CHAIR: You were maybe not banned, but encouraged not to employ for about 12 or 18 months.

Mr Waldock: I cannot confirm that. Seriously, I have not got the recollection of that—anyway.

The CHAIR: That is my recollection. The purpose of the question is: why would you be doing that when it was clearly cheaper to employ transit officers, rather than revenue protection officers, particularly because we know transit officers have far more power? They are able to provide a better service under your legislation than the revenue protection officers can provide.

Mr Waldock: I understand.

[10.50 am]

The CHAIR: So that was the background to it and why, in my view, I cannot see how releasing the cost of a revenue protection officer hourly rate compared relative to a transit officer in any way is other than in the public interest. If it means that the next time you go to tender, someone is a bit sharper with their pencil, the public interest is solid. So, if you could take that as A5 on notice. We are not satisfied that there is any damage that is done in the public interest. Again, I can understand from a commercial point of view if you were the company, you would not want that information released, but there has got to be someone doing a public interest test.

[*Supplementary Information No A5.*]

Mr Waldock: As I say, even in tender documents, though, we never break it down to unit costs of any particular category, but anyway, I take your point and we will have a look at that.

The CHAIR: The final area, and it is a very contentious one, but there are plenty of rulings both through the Senate and the FOI commissioner about your often claims for cabinet-in-confidence. What is your interpretation as an agency of what is cabinet-in-confidence?

Mr Waldock: Well, again —

Mr Doyle: Do you want me to have a go?

Mr Waldock: Yes. Mr Doyle has not said a word today. Mr Doyle.

Mr Doyle: We just basically take it as schedule 1 of the FOI act around cabinet-in-confidence and that is—I am not going to read it out—covered fairly well in terms of agendas, minutes, deliberations of cabinet or policy recommendations prepared for possible submission to cabinet and so on. There is a line that is drawn between the documents or the information that we are preparing that will end up in cabinet, then it becomes a matter that could be considered under cabinet-in-confidence. That is the way we take it strictly in accordance with the schedule in the act.

The CHAIR: But you are often in dispute with the FOI commissioner on some of those matters because you interpret it to include a whole range of reports that will never form part of a contact submission.

Mr Waldock: Are you talking about Department of Transport or PTA or Main Roads?

The CHAIR: I am happy with either or both. If Mr Doyle is the one —

Mr Waldock: Transport is very rarely—I do not think we have ever had a significant FOI commissioner issue in my time.

Mr Doyle: We have had some recently mainly around MAX, obviously, but there are a lot of documents that support the business case and the project definition plan for that particular project that went to cabinet. As you know very well, we provided our response back to the FOI commissioner with the department's rationale supported by, obviously, the legal advice that we go through with this as to what we consider to be cabinet-in-confidence or deliberations on that particular suite of documents.

Mr Waldock: Can you perhaps help us a bit, Chairman, with some examples?

The CHAIR: There is a range of times. I can give you a very quick one for the PTA—the recent one—the patronage modelling for the Forrestfield–Airport Link. How is the document on which that is based cabinet-in-confidence? It was not submitted to the cabinet as part of the cabinet submissions, yet you have claimed cabinet-in-confidence for that.

Mr Waldock: It certainly formed part of cabinet's considerations and I guess it is where it starts and finishes. It is interesting that when you look at whether it is the business case development or whether it is the project definition plan, all of those, we think, are fundamental inputs to cabinet decisions and certainly in both of those and in particular in the project development plan—well, both—patronage modelling is an important input. I guess, again, perhaps not just in this government, it has been successive governments where that information has generally not been made available. In fact, I do not think that sort of information in both business cases and PDPs is made available generally around Australia, is it, when it is part of a cabinet deliberation?

Mr Doyle: The research we have undertaken indicates that for most major capital projects sometimes there is summary level information made public in terms of the business case or PDP or various forms of contract, usually after the event, after a decision has been made or a contract has been awarded, but the norm from our research is it is generally not made available.

The CHAIR: Right. Again, I still do not see how—you may actually give some figures as part of your cabinet submission, but the modelling on which it is done is not part of the cabinet deliberations, which, again, regardless of the FOI, if you look at the rulings of the Senate and a whole range of other groups about what is or what is not able to be provided to Parliament, the issues that can be provided to Parliament are clearly only those that form the minutes or the deliberations of cabinet, which is the submission and documents that are attached to that submission. So, again, it is a slightly —

Mr Waldock: FOI is a bit different from that.

The CHAIR: Technically, there is nothing that prevents a request for cabinet-in-confidence documents by a parliamentary committee. There is often a convention that that does not occur and I am not one to be wanting to break that convention, but I do not see how patronage modelling goes to that convention, and, also, when it is not provided, why a section 82 certificate is not being provided to the Auditor General is my next question. If you accept that your claim of cabinet deliberations, which is the parliamentary position, which is slightly different to the FOI commissioner, why would you not be submitting a section 82 certificate when you refuse to provide that information to a parliamentary committee?

Mr Waldock: You mean the minister?

The CHAIR: Well, yes. Normally, I imagine it is the job of the department to advise the minister to that effect.

Mr Waldock: I think the minister would be aware of it.

The CHAIR: As part of your advice to the minister, you do not recommend if you are not providing this information, you need to submit a section 82 certificate?

Mr Waldock: Section 82 is purely for ministers. It has got nothing to do with the public service.

The CHAIR: As an agency you never provide advice about whether or not a section 82 certificate is required by the minister?

Mr Waldock: No, not to my knowledge.

Mr Doyle: I have never provided advice along those lines.

Mr Waldock: And I do not think the PTA has either.

The CHAIR: Okay. Another one was Chronos Advisory or Mr Peter Iancov. Initially, your request, we were told to FOI it, as a committee, and then when you came back—you are now claiming it is cabinet deliberations.

Mr Waldock: Yes.

The CHAIR: So why was the claim of cabinet deliberations not made in the first request for that information?

Mr Waldock: I think you would have to ask the minister.

The CHAIR: That was a decision of the minister, rather than the agency?

Hon ALANNA CLOHESY: That is a yes.

Mr Waldock: Thank you.

The CHAIR: Whilst you are here, were you directed by the minister to employ Mr Iancov or Chronos Advisory?

Mr Waldock: Me personally?

The CHAIR: The agency. I assume under the—what is the communications agreement? It is either you or someone that is delegated by you?

Mr Waldock: Would you like to respond to that Mr Doyle?

Mr Doyle: There was a request to allocate further work in regard to that particular project, so we went through our proper procurement processes to get that work undertaken, and that is what we did.

The CHAIR: Right. But was there a request to undertake work that is only able to be performed by that company?

[11.00 am]

Mr Doyle: The request was to undertake the work, to review the assumptions.

The CHAIR: That was work that you did not feel necessary that was required at the time, but you were instructed to undertake it?

Mr Doyle: We complied with the request.

The CHAIR: One would assume that if you thought it was necessary, you would have already undertaken the work or for a minister to request you to do it. See, this is the point. The reason I am asking is that it goes to the heart of why sometimes when information is not provided to the Parliament it may be just that someone does not like what it reveals, rather than there is any legitimate claim for confidentiality.

Mr Waldock: It is a complex world.

The CHAIR: Thank you. Are there any other questions from members? I have one last question: with the rail contract, with the fact that it has now been made public and all the attachments, as an organisation are you aware of any damage that has been done as a result of the release of that information or it being made public?

Mr Waldock: Well, it is difficult to know; in fact, we did have a discussion with the ERA just the other day just to sort of get a better understanding of the process and where they are up to. No, we are not, but I do know the rubber hits the road very shortly; the 90-day negotiation period has just commenced, and I think, hopefully, during the negotiation period, but certainly hopefully through a truncated arbitration process if possible, we will find out. So, to be fair, no, but I do know this intensity of negotiations has been around for 12 months at least, and it is going to go potentially for another 12 months.

The CHAIR: I accept that it is going on, but you are not aware of any a damage that the release of that information has caused

Mr Waldock: No, but I do not think Brookfield would share it with me, anyway.

The CHAIR: Fair enough. But, again, the ERA process is an interesting one because the cost of going through that is enormous. I would imagine if we still had groups like the southern spur —

Mr Waldock: South Spur, yes.

The CHAIR: — I suspect their financial capacity would not allow them to access the ERA process.

Mr Waldock: They are reviewing their own code, and probably in a timely fashion as well.

The CHAIR: Who is?

Mr Waldock: The ERA.

The CHAIR: If there are no other questions, I thank you again very much for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within the period, it will be deemed to be correct. New material cannot be added, via these corrections. The sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Again, thank you very much for your attendance today.

Mr Waldock: It is always a pleasure. When I retire I will always see these as my magic moments!

Hearing concluded at 11.03 am

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