



REPORT OF THE

STANDING COMMITTEE ON
ESTIMATES AND FINANCIAL OPERATIONS

IN RELATION TO THE

TRANSPORT CO-ORDINATION
AMENDMENT BILL 1998

Presented by Hon Mark Nevill MLC (Chairman)

Report 30

STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

Date first appointed:

December 21 1989

Terms of Reference:

1. There is hereby appointed a Standing Committee to be known as the *Estimates and Financial Operations Committee*.
2. The committee consists of 5 members.
3. The functions of the Committee are to consider and report on:
 - a) the estimates of expenditure laid before the Council each year; and
 - b) any matter relating to the financial administration of the State.
4. The Committee shall report on the estimates referred under clause 3 by or within one sitting day of the day on which the second reading of the *Appropriation (Consolidated Revenue Fund) Bill* is moved.
5. For the purposes of clause 3(a), the House may appoint not more than 6 members at any stage of its examination.
6. A reference in clause 3 to "estimates of expenditure" includes continuing appropriations, however expressed, that do not require annual appropriations.
7. The Committee may initiate investigations under clause 3(b) without prejudice to the right of the Council to refer any such matter.

Members as at the time of this inquiry:

Hon Mark Nevill MLC

Hon Muriel Patterson MLC

Hon Ed Dermer MLC

Hon Simon O'Brien MLC

Hon Ljiljana Ravlich MLC (appointed March 21 2000)

Hon Bob Thomas MLC (resigned March 21 2000)

Staff as at the time of this inquiry:

Ms Lisa Hanna, Committee Clerk

Mr Paul Grant, Advisory Officer

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

Website: <http://www.parliament.wa.gov.au>

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REPORT OF THE STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

IN RELATION TO THE

TRANSPORT CO-ORDINATION AMENDMENT BILL 1998

1 REFERRAL

- 1.1 The long title of the Transport Co-ordination Amendment Bill 1998 (“the Bill”) is as follows:

“A BILL FOR AN ACT to amend the Transport Co-ordination Act 1966 and to validate certain past acts.”

- 1.2 The Bill was introduced in the Legislative Assembly on April 8 1998. The Bill passed through the Legislative Assembly on June 17 1999, following a number of amendments. The Bill was read a first and second time in the Legislative Council on June 17 1999. On Tuesday, March 14 2000 the Legislative Council referred the Bill to the Standing Committee on Estimates and Financial Operations (“the Committee”) on a motion by Hon Tom Stephens MLC, as amended by Hon Ljiljana Ravlich MLC:

“[T]o examine the financial arrangements that are proposed to ensure that there is no repeat of the financial losses that are associated with the Government’s contracts for leasing of the light vehicle fleet and that the Committee report back to the House within three weeks.”

- 1.3 A reporting date of within three weeks (by April 4 2000) was set by the Legislative Council. The Committee commenced its consideration of the Bill on March 15 2000. Hearings were conducted in relation to the Bill on March 22 2000. At those hearings, evidence was taken from the following persons:

- Mr Michael Harris, Acting Director General of Transport, and Mr Trevor Maughan, Manager Legislative and Legal Support, Department of Transport.
- Mr John Langoulant, Under Treasurer, and Mr Michael Barnes, Principal Project Officer, Treasury Department.

- 1.4 On March 30 2000, the Chairman sought and was granted by the Legislative Council an extension of the reporting date to May 11 2000. On May 10 2000, a further extension of the reporting date was granted to June 29 2000.

2 BACKGROUND

- 2.1 Buses, along with passenger trains and a small ferry service, form Perth's public transport system known as "Transperth". The Government introduced a public transport reform program in September 1993. As part of that reform, about half of Transperth's bus services were put to competitive tender in 1995. Most tenders were won by private sector bus operators who have, since late September 1996, provided about half of Transperth bus services. The remainder is still provided by the government owned operator Metrobus.
- 2.2 In his 1997 report "*Bus Reform: Competition Reform of Transperth Bus Services*",¹ the Auditor General of Western Australia stated the following conclusions:²
- a) the Department of Transport has achieved its initial aim of obtaining the existing bus service at less cost through a competitive tendering process; and
 - b) it has successfully managed the transition of service delivery to the private bus operators.
- 2.3 The Committee understands that the Office of the Auditor General is currently undertaking a follow-up review of the arrangements in place for the operation of the Transperth bus services.
- 2.4 The Transperth bus fleet is currently owned by the State through the Treasury Corporation. The fleet consists of approximately 870 buses, which the Government plans to replace with a new fleet of 1070 buses by the year 2015.³ The average cost of a bus is currently somewhere between \$250,000 and \$300,000.⁴ The total cost of the contract for the replacement of the Transperth bus fleet by 2015 cannot be given at this stage due to the length of time over which the buses will be supplied, the associated changes in technology and design, and the fact that the components of the

¹ Auditor General of Western Australia, *Bus Reform: Competition Reform of Transperth Bus Services*, Performance Examination, Report No. 3, June 1997.

² Ibid, p. 1.

³ Minister for Transport's Second Reading Speech & Committee Notes, pp. 2-3.

⁴ Mr Michael Harris, Acting Director General of Transport, Transcript of Evidence, March 22 2000, p. 2.

buses (which are purchased from Germany) are paid for in Deutschmarks and are therefore subject to exchange rate fluctuations.⁵

2.5 The stated aim of the Bill is to provide for the sale, lease or rental of the Transperth bus fleet through contracts with the private sector, should a better financial arrangement than that presently existing be found. According to the Minister for Transport's ("the Minister's") Second Reading Speech & Committee Notes on the Bill, the Department of Transport has recently been considering various options for the future management of the Transperth bus fleet, including:

- a) the sale and lease back of the bus fleet; and
- b) the outsourcing of the management of the Transperth bus fleet to the private sector.⁶

2.6 In 1998, the Matrix Finance Group won a competitive tender (Request for Tender 350/97) for the outsourcing of the ownership and management of the present and future Transperth bus fleet. This arrangement was reported in *The West Australian* newspaper on October 12 1999.⁷

2.7 The Request for Tender 350/97 documentation states the following:

*"[Department of Transport] through [Department of Contract and Management Services] proposes to outsource the ownership and management of the [Transperth bus] Fleet, subject to being satisfied that the successful Tenderer has formulated appropriate mechanisms by which the Minister (as the public transport co-ordinator) can meet his statutory responsibilities as the co-ordinator of public transport."*⁸

2.8 The Request for Tender 350/97 documentation further describes the proposal as follows:

"The proposed outsourcing of the ownership and management of the existing fleet and the proposed Bus Procurement Strategy and Bus Procurement Programme can be divided into three principal categories, as follows:

⁵ Ibid.

⁶ Minister for Transport's Second Reading Speech & Committee Notes, pp. 1-5.

⁷ Southwell, Michael, "Matrix in bus lease deal", *The West Australian*, Tuesday, October 12 1999, p. 6.

⁸ Request for Tender 350/97 for The Ownership and Management of the Transperth Bus Fleet, (closing date July 18 1997), p. 2.

(a) Fleet Ownership: both the existing fleet and the replacements and incremental additions to the fleet ...;

(b) Fleet Management: this includes maintenance and fleet deployment ...; and

(c) Bus Procurement Strategy: this includes the initial acquisition of a minimum of 133 replacement buses and the on-going replacement and incremental additions to the fleet, and the disposal of old buses ...

This approach to categorisation should not be regarded by Tenderers as a definitive definition of the Scope of Services or as a restraint on Tenderers considering or raising alternatives in their Tender. Tenderers are encouraged to consider and address additional matters and issues in their Tenders.”⁹

- 2.9 During hearings in relation to this inquiry, the Committee was advised by the Under Treasurer that the conditional mandate given to the Matrix Finance Group upon its successful tender was, in part, conditional upon the Matrix Finance Group obtaining a ruling from the Australian Taxation Office that the proposed finance structure submitted by the Matrix Finance Group was valid.¹⁰ The Under Treasurer further advised the Committee that the Matrix Finance Group had not provided such a tax ruling to date and, as a result, the arrangement had not been pursued.¹¹
- 2.10 Advice given to Treasury by taxation consultants Arthur Anderson indicates that the Commonwealth Government’s recent and proposed changes to the taxation laws would impact adversely upon the arrangement proposed by the Matrix Finance Group.¹² Arthur Anderson also expressed concern that the proposed arrangement may be subject to some scrutiny by the Australian Taxation Office due to various structures in the arrangement that minimise taxation. Arthur Anderson noted:

“In our opinion, there is a considerable risk that the Commissioner could seek to apply Part IVA [of the Income Tax Assessment Act 1936 (Cth)] to the transaction. This is based upon:

- the approach taken by the Ralph Review in its characterisation of what constitutes tax avoidance;*

⁹ Ibid, p. 3.

¹⁰ Mr John Langoulant, Under Treasurer, Transcript of Evidence, March 22 2000, pp. 4-5.

¹¹ Ibid, p. 5.

¹² Letter from Arthur Anderson to Skea Nelson & Hager, December 3 1999.

- *the Government's announcement on 11 November 1999 regarding the proposed modification to Part IVA. These include providing guidance regarding the "reasonable hypothesis" test regarding the determination of what would have occurred in the absence of the scheme, and expanding the concept of "tax benefit". These amendments are likely to have the effect of further broadening the scope of Part IVA;*
- *the recent Consolidated Press Holdings decision, which highlights that unless there is a commercial basis for a particular means of structuring, in the absence of any tax advantages obtained, a purpose of tax avoidance will be taken to exist;*
- *the recent Eastern Nitrogen case, in relation to the application of Part IVA to financing strategies, and the evidence required to allow a Court to overturn an ATO reliance on Part IVA; and*
- *the current approach of the Commissioner to tax planning arrangements.*

The Eastern Nitrogen case is of particular relevance as it involved a financing transaction. It was significant to the decision that the sale and leaseback transaction involved arose from a marketing proposal from a investment bank and not from an organic business need of the taxpayer. The taxpayer could not prove its assertion that the non-tax commercial benefits was the driver for entering into the arrangement to the satisfaction of the judge. This demonstrates the critical importance of being able to prove, by contemporaneous documentation, every assertion about the commercial non-tax motivation of a transaction."¹³

2.11 In response to a query by the Committee as to whether the conditional mandate granted to the Matrix Finance Group had been formally terminated, the Under Treasurer wrote:

"I can advise that the conditional mandate that was provided to Matrix has not been formally terminated. The conditional mandate was subject to several requirements including the passage of the Transport Co-ordination Amendment Bill 1998. It has been

¹³ Ibid, p. 4.

considered inappropriate to formally terminate the conditional mandate prior to the passage of this legislation. However, agreement has been reached with Matrix that they would not continue to work on the financing arrangement, especially having regard to the actual and proposed changes in taxation law that have occurred following the recommendations from the Ralph Committee in the review of the Australian taxation system.”¹⁴

- 2.12 Notwithstanding the fact that the conditional mandate granted to the Matrix Finance Group has yet to be formally terminated, both the Under Treasurer¹⁵ and the Acting Director General of Transport¹⁶ confirmed before the Committee the Minister’s advice to Parliament that the Government has no immediate plans to alter its present arrangements for the Transperth bus fleet, ie, the Treasury Corporation owns the bus fleet, with approximately half of the bus fleet being operated by private sector bus operators.

3 SPECIFIC PROVISIONS OF THE BILL

- 3.1 In short, the Bill seeks to amend the *Transport Co-ordination Act 1996* (“the Act”) as follows:
- a) Clause 4 of the Bill inserts the following words into the long title of the Act: “*in certain circumstances to provide or to arrange for the provision of certain forms of public transport*”. This amendment is designed to ensure that the long title of the Act encapsulates the intent of the changes to be made by the Bill.
 - b) Clause 5 of the Bill empowers the Minister to appoint an agent or attorney to execute documents on his behalf, and allows for the use of a facsimile or stamp of the Minister’s (or the Minister’s agent or attorney’s) signature or seal to execute documents.
 - c) Clause 6 appropriates funds from the Consolidated Fund to meet any commitment under a State guarantee incurred by the Minister in the performance of his functions under the Act (see clause 9).
 - d) Clause 7 ‘clarifies’ s18C of the Act by providing that management of metropolitan passenger services is a function of the Minister, and by empowering the Minister to enter into contracts with suppliers for the

¹⁴ Letter, Mr John Langoulant, Under Treasurer, to the Committee, May 3 2000, p. 1.

¹⁵ Mr John Langoulant, Under Treasurer, Transcript of Evidence, March 22 2000, p. 2.

¹⁶ Mr Michael Harris, Acting Director General of Transport, Transcript of Evidence, March 22 2000, p. 5.

provision of such passenger services. Clause 7 also empowers the Minister to acquire, give surety and enter into financial arrangements or to dispose of real and personal property, including motor vehicles and real estate. Finally, where the Minister enters into an arrangement to acquire or dispose of all or any substantial part of the Transperth bus fleet, he must table a cost/benefit statement, verified by the Under Treasurer, in both Houses of Parliament setting out the projected savings.

- e) Clause 8 ensures that the ‘clarifying’ amendment to s18C of the Act contained in clause 7 of the Bill does not have the effect of limiting the Minister’s powers under s18C to those set out in that clause. The Minister’s powers under s18C are also expressly stated to be exercisable by the Minister in relation to particular arrangements entered into by the Minister for the provision of bus and ferry services in the metropolitan area pursuant to s18D of the Act.
- f) Clause 9 empowers the Treasurer to provide State guarantees for financial arrangements entered into by the Minister by virtue of his powers under s18C of the Act as amended by the Bill. Such a guarantee is expected to facilitate more competitive financial arrangements for the Government.
- g) Clauses 10 to 12 provide for increased penalties and infringement notices for certain penalties, such as fare evasion, under the Act. The Bill provides for the owner of a motor vehicle to be issued with an infringement notice and deemed to be in charge of the vehicle at the time of a parking offence in certain circumstances where the driver of the vehicle at the relevant time cannot be identified.
- h) Clause 13 provides for regulations to be made in relation to infringement notices and also for the setting of fares and for the conduct of passengers on metropolitan public transport operated under contract to the Minister.
- i) Clause 14 seeks to remove any ambiguity by retrospectively validating prior acts done by the Minister under section 18C of the Act as if they had been done after the coming into effect of the amendments contained in the Bill. Notwithstanding clause 14, the Government maintains that section 18C of the Act always empowered the Minister to enter into the kind of arrangements which are expressly provided for in clause 7 of the Bill.

3.2 The Committee has identified specific concerns with respect to clauses 5, 6, 7 and 9 of the Bill.

3.3 The Committee’s greatest concern is in regard to the extent to which the Bill purports to limit the ability of the Parliament, and the wider public, to effectively scrutinise the kind of financial arrangements envisaged by clause 7 of the Bill.

4 THE EXISTING POWER OF THE MINISTER TO ENTER INTO SALE AND LEASE AGREEMENTS WITH THE PRIVATE SECTOR PURSUANT TO DIVISION 4 OF PART II OF THE ACT

4.1 Section 18C (which has a section heading entitled “Function of Minister under this Division”) of Division 4 (which has a division heading entitled “Arrangements for the provision of omnibus, ferry and rail services in the metropolitan area”) of Part II of the Act states:

“(1) It is a function of the Minister to facilitate and promote the provision of reliable, efficient and economic passenger services by omnibus, ferry and train in the metropolitan area, so far as in the Minister’s opinion it is practicable to do so.

“(2) The Minister may do all things necessary or convenient to be done for or in connection with the performance of the function described in subsection (1).”

4.2 It should be noted that s18C was inserted into the Act in late 1994 by the *Acts Amendment (Perth Passenger Transport) Act 1994* (No. 64 of 1994). In the then Minister’s Second Reading Speech for that Act, he stated:¹⁷

“With these changes, the Department of Transport will be able to: Administer contracts, issue licences and franchises for area and route services and undertake contract compliance audits; manage public transport user facilities and infrastructure, as well as facilitate the supply of rolling stock and facilities for subsequent lease to competitively contracted service providers as required; and prepare budget, administer a revenue distribution system, and provide subsidies as required.”

4.3 The Department of Transport obtained legal advice on the extent of the powers conferred upon the Minister under s18C of the Act.¹⁸ That advice, provided by the Crown Solicitor’s Office, was that whilst s18D of the Act (which was also inserted by Act No. 64 of 1994) probably provides adequate power for the Minister to enter into contracts with the various Bus Service Providers under the existing arrangements for the Transperth bus fleet, the whole of the powers of the Minister under Division 4 of Part II of the Act rests on an interpretation of the function of the Minister under

¹⁷ Hon E.J. Charlton MLC, Minister for Transport, *Parliamentary Debates (Hansard)*, Thirty-Fourth Parliament, Second Session, Wednesday, June 1 1994, p. 673.

¹⁸ Saunders, Brian, “*Transport Co-ordination Act 1966 Amendment Drafting Instructions*”, March 27 1997.

s18C(1) to “facilitate and promote the provision of ... passenger services by omnibus”. The Crown Solicitor’s Office advice further goes on to state that:

*“In the context of **Division 4** it is doubtful the facilitate and promote function is adequate to support the acquisition of buses and other assets from Metrobus, and consequently the leasing of those buses to the Service Providers.*

It is essential that the Minister is able to demonstrate good title to the existing bus fleet and hence to provide good title to a purchaser of the fleet and to validate any doubts that attach to the existing leases.

There must therefore be an enhancement and broadening of the functions of the Minister under section 18(C)(1) and a clear power on the part of the Minister to acquire and dispose of real and personal property as well as deemed good title to assets already acquired.

The concepts of acquire and dispose of need to be broadly defined so as to encompass not only legal title to property itself, but also lesser interests such as choses in action and other interests in assets so as to cater for rights of the Minister to use buses (and ferries) owned by third parties and also to grant user rights to third parties such as the Service Providers. This would need also to extend to granting and acquiring leasehold and other rights and interests e.g. licences in real property.”

- 4.4 In view of the Government’s stated position that it has no immediate plans for changing the current management arrangements for the Transperth bus fleet, there appears to be no great urgency for the implementation of the amendments to the Act contained in clause 7 of the Bill, except in so far as they would validate those past transactions arising from the contracting out of bus services to private operators which may otherwise remain of doubtful validity. However, as the Acting Director General of Transport pointed out to the Committee, the legal advice is far from definitive as to whether or not the Minister presently has the power under s18C of the Act to sell and lease back the Transperth bus fleet.¹⁹ On one view of the proposed amendment, according to the Acting Director General of Transport, the purpose of clause 7 of the Bill is to merely express the Minister’s existing powers more clearly, ie, as the powers of the Western Australian Government Railways Commission to enter into various financial arrangements with the private sector for the provision of the State’s railway

¹⁹ Mr Michael Harris, Acting Director General of Transport, Transcript of Evidence, March 22 2000, pp. 2-3.

services are specifically set out in section 8B and 15, and Part V of the *Government Railways Act 1904*.²⁰

- 4.5 The Committee has serious concerns about the adequacy of the provisions of clause 7 of the Bill in so far as they relate to proposed procedures for reporting to Parliament on financial arrangements entered into by the Minister pursuant to Division 4 of Part II of the Act. The tabling of a cost/benefit statement in both Houses of Parliament by the Minister, as provided under clause 7, is insufficient to allow Parliament to effectively monitor all of the risks to the Government involved in complex financial arrangements which, as was pointed out by the Auditor General in the case of the Government's light motor vehicle fleet contracts, may be heavily reliant on various assumptions as to the continuation of specific taxation arrangements and market demand.²¹
- 4.6 Clause 7 also fails to provide a definition of "*any substantial part of the Transperth bus fleet*". The absence of such a definition gives rise to concerns as to exactly what circumstances will require the Minister to table a cost/benefit statement upon the acquisition or disposal of part of the Transperth bus fleet. For instance, would the proposed amendments contained in the Bill require the Minister to table a cost/benefit statement in the event that only a relatively small number of Transperth buses were sold and leased back by the Government on a number of occasions within a relatively short period of time? Such a scenario may arise in the event that those buses currently being operated by private operators (who combined only operate half of the Transperth bus fleet) are progressively sold and leased back on the basis of one operator at a time.
- 4.7 Notwithstanding the above, the Committee is of the view that, subject to a number of issues concerning public accountability and transparency of financial arrangements being addressed (as will be further discussed below), there are no significant concerns which arise from clause 7 to the extent that it seeks to clarify (and clause 14 to the extent that it seeks to validate past exercises of) the Minister's powers under Division 4 of Part II of the Act.

²⁰ Ibid.

²¹ Auditor General of Western Australia, *Selecting the Right Gear: The Funding Facility for the Western Australian Government's Light Vehicle Fleet*, Performance Examination, Report No. 2, May 1998, p. 14.

5 THE POSSIBILITY OF THE LIGHT MOTOR VEHICLE FLEET FINANCING ARRANGEMENTS BEING REPEATED WITH RESPECT TO THE TRANSPERTH BUS FLEET

- 5.1 The referral of the Bill to the Committee was expressed to be on the basis that the Committee was to examine the Bill to ensure that “*there is no repeat of the financial losses that are associated with the Government’s contracts for leasing of the light vehicle fleet*”.
- 5.2 The relevance of the Government’s light motor vehicle fleet financing arrangements to the Committee’s examination of the Bill was based primarily upon the assumption that, on their face, the type of financial arrangements that the Bill will facilitate (ie, the sale of Government assets and the lease back of those assets from the private sector) are generally comparable to those which have recently been entered into with respect to the Government’s light motor vehicle fleet. Furthermore, the Matrix Finance Group, a significant party to the light motor vehicle fleet arrangements, currently holds a ‘conditional mandate’ in relation to the outsourcing of the ownership and management of the Transperth bus fleet.
- 5.3 The Committee proceeded to examine the contract documentation in relation to the light motor vehicle fleet financing arrangements. The Committee also considered oral evidence presented by the Under Treasurer during the inquiry as to the distinguishing features of the light motor vehicle fleet financing arrangements compared to the type of arrangements that will be facilitated with respect to the Transperth bus fleet by the amendments contained in the Bill.
- 5.4 Pursuant to s5A(2) of the *State Supply Commission Act 1991*, the Minister for Services may determine that certain goods used in the operations of any public authority, or goods of a particular class so used, are to be sold as part of a scheme for the sale and lease-back of those goods. If the Minister makes a determination under s5A(2), the Minister may require the Commission to enter into a contract or contracts for the sale of the goods to which the determination applies.²² On June 27 1996 the Minister for Services made the following determination:

“[T]hat the goods (vehicles) more particularly specified in each Nominated Vehicle Specification (“Specification”) taken to have been transmitted by the State Supply Commission (“Commission”) to Matrix Facility Management Pty Limited (ACN 065 420 635) (the “Facility Manager”) under clause 4.3 of the Purchase Agreement referred to in paragraph (a) of this determination and which are used in the operations of the public authority more particularly specified in

²² S5A(3) *State Supply Commission Act 1991*.

that Specification are to be sold as part of a scheme for the sale and lease-back of those goods pursuant to which the relevant goods are to be:

- (a) sold by the Commission to Westfleet Pty Limited (ACN 059 614 836) (“Westfleet”) (who will raise the necessary funds for this purpose partly by loans from Bank of Western Australia Limited (ACN 050 494 454) and JEM Bonds Limited (ACN 068 273 503), and partly from the investors referred to in paragraph (b) of this determination) pursuant to a Purchase Agreement to be made between the Commission, Westfleet and the Facility Manager;*
- (b) hire purchased by Westfleet to an Investor (being Barclays Australia Limited (ACN 001 085 543) or Bank of Western Australia Limited) (“Investor”);*
- (c) hired by that Investor to the Commission;*
- (d) to the extent the relevant goods are not currently used in the operation of the Commission itself, on-hired by the Commission to the relevant public authority in whose operations the relevant goods are currently used; and*
- (e) the subject of a residual risk guaranty issued by Financial Security Assurance of Oklahoma, Inc in favour of Westfleet, which scheme is the subject of various agreements and other instruments including those which give effect to the transactions referred to in paragraphs (a) to (e) above, it being acknowledged that the parties to the scheme may change during the term of the transactions covered by the scheme.”²³*

5.5 Further to the above determination, the Minister for Services required the Commission to enter into the Purchase Agreement referred to in paragraph (a) of the determination pursuant to which the Commission would sell and transfer good title in the vehicles to Westfleet. The Minister specified June 27 1996 as the date on which the determination and requirement would take effect and come into operation.²⁴

5.6 The Auditor General noted in 1997 that the outsourcing of the Government’s light motor vehicle fleet involved an extremely complex set of arrangements made up of numerous individual contracts and many formal and informal relationships amongst a

²³ *Western Australian Government Gazette*, No. 97, July 12 1996.

²⁴ *Ibid.*

number of parties – the central and most complex of all being the financing and leasing arrangement.²⁵ The parties to the various contract arrangements are:

- a) State Supply Commission;
- b) JEM Bonds Limited;
- c) Bank of Western Australia Limited;
- d) Westfleet Pty Ltd (a wholly owned subsidiary of Matrix Group Limited);
- e) Barclays Australia Limited (“BAL”);
- f) Matrix Facility Management Pty Ltd;
- g) Lease Plan Australia Limited;
- h) Custom Service Leasing Limited;
- i) TNT Australia Pty Ltd;
- j) JMJ Fleet Management Pty Limited;
- k) Claymore Pty Limited as trustee for the Malcolm Family Trust trading as NBM Fleetcare;
- l) Mountsville Pty Limited;
- m) Financial Security Assurance of Oklahoma Inc.;
- n) Matrix Group Limited;
- o) Matrix Fleet Pty Limited;
- p) Permanent Trustee Company Limited;
- q) Barclays Bank PLC, Australia Branch.

5.7 The light motor vehicle fleet financing arrangement contract documentation provided to the Committee consists of four large volumes entitled “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, which contain the following documentation:

Volume 1:

1. Interpretation Deed;
2. Purchase Agreement;
3. Fleet Facility Agreement;

²⁵ Auditor General of Western Australia, *Selecting the Right Gear: The Funding Facility for the Western Australian Government’s Light Vehicle Fleet*, Performance Examination, Report No. 2, May 1998, p. 7.

4. Hire Purchase Facility Agreement – Barclays;
5. Vehicle Hire Facility Agreement – Barclays;
6. Hire Purchase Facility Agreement – BankWest;
7. Vehicle Hire Facility Agreement – BankWest;
8. Cash Management Agreement;
9. Loan Agreement;
10. Loan and Underwriting Agreement (together with margin letter).

Volume 2:

11. Residual Risk Guaranty;
12. Residual Risk Guaranty Issuance Agreement;
13. Fee Letter;
14. Financier Mortgage and Charge (including certificate of registration of charge);
15. Financier Share Mortgage, (including certificate of registration of charge and share transfer executed in blank);
16. JEM Mortgage and Charge (including certificate of registration of charge);
17. JEM Share Mortgage, (including certificate of registration of charge and share transfer executed in blank);
18. BAL Mortgage and Charge (including certificate of registration of charge);
19. BAL Share Mortgage, (including certificate of registration of charge and share transfer executed in blank);
20. BankWest Mortgage and Charge (including certificate of registration of charge);
21. BankWest Share Mortgage, (including certificate of registration of charge and share transfer executed in blank);
22. FSA Mortgage of Deposit of Money, (including certificate of registration of charge and notice of assignment);
23. Priority Deed.

Volume 3:

24. Conditions precedent;
25. Income Tax;
26. Methodology letter;
27. Minutes/extracts of minutes;
28. Powers of attorney;
29. Letters from Treasurer and Treasury;
30. Exemption order under section 2A of the Hire-Purchase Act 1959;
31. Determination and requirement dated June 27 1996 under section 5A of the State Supply Commission Act 1991, together with an extract from Government Gazette dated July 12 1996;
32. Legal opinions;
33. Commonwealth Bank waiver letter;
34. Incumbency certificate from FSA;
35. Stamp duty;
36. Deed of appointment dated June 27 1996 by FSA of Corrs Chambers Westgarth as agent for the service of process;
37. Letters confirming satisfaction of conditions precedent.

Volume 4 (Bond Documents)

38. Declaration of Trust;
39. Security Trust Deed, (including certificate of registration of charge);
40. Instrument for JEM WA Vehicle Fleet Bonds Trust Registered Bond Programme;
41. Management Agreement;
42. Interest Rate Hedging Agreement;
43. ISDA Master Agreement;
44. Confirmation;
45. Extracts of minutes of meeting of directors of BZW Australia Limited;

46. Power of attorney by BZW Australia Limited.

5.8 There is evidence that the Government undertook an extensive examination of the risks and benefits of entering into this extremely complex financial arrangement prior to executing the various component agreements. The Minutes of Meeting No. 44 of the State Supply Commission, held on June 27 1996, relevantly state the following:

“Mr Jarvis [A/Director, State Contracts] advised that negotiations for the hiring of up to 10,500 vehicles valued at approximately \$250 million had now been completed under a sale and lease-back transaction and gave a brief overview of the evaluation process highlighting the following points:

- a thorough risk analysis and review had been completed;*
- the role of Commission under the proposed arrangement;*
- previous concerns raised by members had now been addressed;*
- benefits and savings;*
- impact of the recent amendment to the Sales Tax exemption eligibility; and*
- proposed marketing strategy.*

Members were further advised that Cabinet, at its meeting of 24 June 1996, had given approval for the State Supply Commission to execute the transaction documents relative to the fleet funding transaction, subject to finalisation of the necessary documents to the satisfaction of the Commission. Mr Duffield tabled a Determination by the Minister for Services under Section 5A of the State Supply Commission Act 1991, directing that certain vehicles (forming part of the Government’s car fleet) be sold and leased back, and that the Commission enter into a Purchase Agreement on 27 June 1996 to transfer title to Westfleet Pty Ltd.

The Chairman advised that a Resolution was needed as a basis to satisfy the Transaction’s Conditions Precedent, and Mr Jarvis

confirmed that the relevant transaction documents were due to be signed on Friday 28 June 1996.”²⁶

- 5.9 The basic purpose of the arrangement was summarised by the Australian Taxation Office in the following terms:

“Barclays Australia Limited (“the Bank”) proposes to participate in arrangements for the leasing of motor vehicles to the State of Western Australia. Under those arrangements, a company known as Westfleet Pty Limited will purchase from the State an existing vehicle fleet using predominantly loan funds advanced by the Bank and another financial institution. Westfleet will enter into a hire-purchase agreement for each vehicle with an “investor”, the investor paying a first instalment equal to an agreed fraction of the purchase price of the vehicle, followed by a series of interest-only instalments during the term of the hire-purchase arrangement. The investor will in turn hire the vehicles to the State. (In respect of some of the transactions, the Bank will be the “investor”).

As each vehicle reaches the end of the term for which it is required by the State, it will be sold. Westfleet will purchase new vehicles as required to maintain a fleet that meets the State’s needs. Purchases of new vehicles will be financed in the same way as the existing fleet, and they will similarly be subject to hire-purchase arrangements.

When a vehicle is due to be sold, the investor may exercise its option under the hire-purchase arrangement to buy the vehicle. If it does so, the vehicle will then be sold at public auction and the sale proceeds returned to the investor. If the option is not exercised, the vehicle will be sold at auction on behalf of Westfleet, and any amount by which the sale proceeds fall short of a predetermined residual value will be recovered by Westfleet from a residual value insurer.

It will be the investor’s responsibility to pay the annual fees required under the residual risk guarantee and the management fees provided for in the facility management agreement. ...

Fleet vehicles will be maintained by private sector fleet management companies retained by the State.

²⁶ An Official Excerpt from the Minutes of Meeting No. 44 of the State Supply Commission, Document 27(a), p. 2, “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, Vol 3.

We have been advised that although the continuation of the arrangements is subject to annual review, it is contemplated by all participants that they will continue for at least ten years.

“Certain changes have been notified to us in the obligations falling on the State under the fleet facility agreement. Specifically, the State will not have any responsibility to carry out or meet the cost of repairs to vehicles, as might otherwise have been the case under clauses 2.4, 6.3(b) and 6.6; and insurance policies taken out on the vehicles will not provide for any excess to be payable by the hirer.”²⁷

- 5.10 In relation to Westfleet Pty Ltd’s role in the arrangement, the Australian Taxation Office further noted:

“Westfleet will receive income in the form of payments from the investors under the hire-purchase agreements and fees from Matrix Facility Management Pty Ltd. Each hire-purchase instalment (other than the first instalment) for a vehicle will be equal to the interest payable by Westfleet at that time on the loan finance used to purchase that vehicle. The fee income will in turn be offset by Westfleet’s wage and rent expenses. And any profit received on resale of fleet cars that are not purchased by the investors will be payable to or on account of the residual value insurer. Accordingly, Westfleet should have no net income in any year of the proposed arrangements.”²⁸

- 5.11 Apart from the obvious advantage of freeing up capital to reduce Government debt, the decision to replace Government ownership of the light motor vehicle fleet with an arrangement whereby the vehicles were being owned by the private sector and being leased to Government, was also aimed at benefiting from the tax advantages then available to private financiers. At the relevant time, private financiers who were considered for income tax purposes to be the owners of leased vehicles could use depreciation benefits in particular to pass on cheaper finance than the Government could obtain through direct borrowing.²⁹

²⁷ Notice of Private Ruling given to Barclays Australia Limited by the Australian Taxation Office, May 2 1996, Document 25(a), pp. 1-2, “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, Vol 3.

²⁸ Notice of Private Ruling given to Westfleet Pty Limited by the Australian Taxation Office, July 10 1996, Document 25(e), pp. 1-2, “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, Vol 3.

²⁹ Auditor General of Western Australia, *Selecting the Right Gear: The Funding Facility for the Western Australian Government’s Light Vehicle Fleet*, Performance Examination, Report No. 2, May 1998, p. 12.

- 5.12 By January 1998 there were 9,172 vehicles valued at \$222.04 million being leased under the arrangement for an aggregate monthly rental of \$1.69 million.³⁰ At that time the Auditor General noted savings to the Government of \$4.87 million per annum from the new arrangement which represented a reduction in annual vehicle costs of about 20% over the previous arrangement.³¹
- 5.13 The Auditor General noted in 1998 that the key feature of the arrangement is the acceptance by the Australian Taxation Office that the investors are the vehicle owners and therefore entitled to such taxation benefits as depreciation.³² Changes in the taxation laws with respect to limiting the use of accelerated depreciation by businesses following the Ralph Committee review of Commonwealth taxation mean that the financial arrangements for the light motor vehicle fleet are unlikely to continue to deliver the same level of benefit to the Government into the future. The most significant change in the taxation laws was that made by the *New Business Tax System (Capital Allowances) Act 1999* (Cth). Clauses 7 and 9 of the *New Business Tax System (Capital Allowances) Act 1999* (Cth) reformed the capital allowances system by replacing accelerated depreciation of plant and equipment with effective life depreciation, except in the case of small business taxpayers satisfying certain conditions.³³
- 5.14 Shortly after the Government entered into the arrangements for the light motor vehicle fleet, there was a substantial and sustained reduction in the second hand car market which was suffered by all motor vehicle sellers, not just government. Apparently, it was inexpensive new vehicles from South Korea which triggered the downward trend in used car values by attracting thousands of buyers at prices of \$12,999 "driveaway" who would otherwise have bought cars three or four years old.³⁴ The trend was magnified by a corresponding glut of late-model, ex-fleet Falcons and Commodores.³⁵ A report conducted by the NRMA in 1999 found that larger cars on average are experiencing depreciation over their first three years at the highest levels ever, with vehicles being valued at half their new car sale price after only three years.³⁶ Glass's Guide Passenger Yearbook, the independent pricing authority on used car values, has shown in its analysis of the 1998 vehicle market that in the two-year period from

³⁰ Ibid. p. 1.

³¹ Ibid.

³² Ibid, p. 13.

³³ Treasurer, Explanatory Memorandum - the *New Business Tax System (Capital Allowances) Act 1999* (Cth), p. 3.

³⁴ Tuckey, Bill, "Used-Car Values Sink into a Quagmire", Special Feature Prestige Cars, *Australia's Business Review Weekly*, Vol. 21, No. 10, March 22 1999.

³⁵ Wright, John, "Bargains Without Tears", *Sydney Morning Herald*, May 9 1997.

³⁶ "Fleet Fastlane News Page", August 1999. [<http://www.bobjane.com.au/Fleet4.htm>]

January 1997 to December 1998 used car values (based on three year old passenger vehicles) fell 25.2 per cent.³⁷ During 1999 three year-old Falcons and Commodores had a residual value of up to \$4000 less than 1997 levels.³⁸

- 5.15 The fall in used car values was not predicted back in 1995/1996 when the light motor vehicle fleet financing arrangements were negotiated, and was therefore not provided for in those arrangements. As a result, the resale value of the vehicles at auction has been consistently less than the notional residual value of the vehicles fixed for the purposes of the leases under the arrangements.
- 5.16 The Under Treasurer advised the Committee that over the last few months, however, the second hand car market had strengthened, and that the resale value was presently meeting the notional residual value.³⁹ It is also expected at this stage that the Goods and Services Tax ("GST") will not have as great an impact as first thought on the second hand car market, and that the notional residual values will continue to be met.⁴⁰ It was the Under Treasurer's evidence to this Committee that if the Government still owned the light motor vehicle fleet, it would have faced the same problem of financial losses associated with the depressed value of the second hand car market.⁴¹
- 5.17 The Under Treasurer also advised the Committee that, given the effect of the recent changes in the taxation laws, the Government is currently in the process of renegotiating the light motor vehicle fleet financing arrangements.⁴²
- 5.18 The Committee notes that there does appear to be some scope for the Government to terminate the arrangement should the cost to the Government arising from the arrangement exceed a certain amount. Clause 2.11 of the Interpretation Deed, entered into by all parties to the arrangement, relevantly states:

"2.11 (a) Subject to clause 2.11(d) the Hirer, JEM, the Financier, each Investor and FSA each agrees to commit itself to the Transaction for the Initial Commitment Term [ie, 10 years].

...

³⁷ Bowerman, Robin, "Ford Breakaway", *Personal Investment Magazine*, Vol. 17, No. 2, March 1 1999.

³⁸ Tuckey, Bill, "Used-Car Values Sink into a Quagmire", Special Feature Prestige Cars, *Australia's Business Review Weekly*, Vol. 21, No. 10, March 22 1999.

³⁹ Mr John Langoulant, Under Treasurer, Transcript of Evidence, March 22 2000, p. 8.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, pp. 9-10.

(d) Each of the parties to this deed acknowledges and agrees that the Commitment Term will also terminate:

(i) upon the termination (for whatever reason) of a Vehicle Hire Facility Agreement,”⁴³

Clause 9.7(a) of the Vehicle Hire Facility Agreement between Barclays Australia Limited, the State Supply Commission and Matrix Facility Management Pty Limited, dated June 27 1996, relevantly states:

“9.7 (a) (i) The Hirer [ie, the State Supply Commission] may at any time request the Facility Manager [ie, Matrix Facility Management Pty Limited] to determine whether the Marginal Cost of the Transaction has increased by more than 60% (measured relative to the Marginal Cost of the Transaction as at the Transaction Commencement Date as demonstrated by the Hirer Database and based upon the Assumptions as at the Transaction Commencement Date) and the Facility Manager must notify the Hirer promptly of its determination. The Hirer is entitled to dispute any such determination by the Facility Manager in accordance with the procedures set out in clause 7 of the Interpretation Deed.

(ii) The Facility Manager must also promptly notify the Hirer if it determines (independently of any request by the Hirer that it should do so) that the Marginal Cost of the Transaction has so increased by more than 60%.

(iii) If the Facility Manager or (if applicable) the Actuary determines that the Marginal Cost of the Transaction has so increased by more than 60%, then subject to clause 9.7(b), the Hirer may by notice to the Investor [ie, Barclays Australia Limited] terminate this agreement on the date (“Early Termination Date”), being a Common Due Date [ie, the 15th day of each month] occurring not less than 20 Business Days after the date of the Hirer’s notice or on the last day of the Commitment Term, (whichever is the earlier) specified in the notice.”⁴⁴

⁴³ Interpretation Deed, June 27 1996, pp. 56-58, Document No. 1, “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, Vol 1.

⁴⁴ Vehicle Hire Facility Agreement, June 27 1996, pp. 14-15, Document No. 5, “Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents”, Vol 1.

An identical provision is contained in clause 9.7(a) of the Vehicle Hire Facility Agreement between the Bank of Western Australia Limited, the State Supply Commission and Matrix Facility Management Pty Limited.⁴⁵

- 5.19 Although a number of the component contracts of the arrangement contain provisions requiring consultation to take place between the various parties in order to assess options for restructuring the arrangement in the event that a change in any law renders aspects of the arrangement illegal,⁴⁶ the provisions set out above appear to be the only ones applicable in the event that a change in the law renders part of the arrangement financially unviable for the Government.
- 5.20 In his evidence to the Committee, the Under Treasurer was adamant that there will not be a financing arrangement for the bus fleet similar to that which currently exists for the Government's light motor vehicle fleet. The Under Treasurer's evidence was that due to changes in the taxation laws since the light motor vehicle fleet arrangements were entered into, there will not, and could not, be a repeat transaction of that kind because the taxation laws simply will not allow it.⁴⁷

6 INAPPROPRIATENESS OF COMMERCIAL CONFIDENTIALITY CLAUSES IN GOVERNMENT CONTRACTS WITH THE PRIVATE SECTOR

- 6.1 It is significant that the complex documentation which the Government entered into with the Matrix Finance Group and other parties in relation to the financing arrangements for the Government's light motor vehicle fleet has never been tabled in Parliament, nor otherwise made public.
- 6.2 In response to the request of the Committee to the Treasury Department for a copy of the contracts relating to the financing and management of the State's light motor vehicle fleet, the Committee was initially advised that these documents could not be disclosed to the Committee as the documents were subject to a confidentiality clause contained within the agreements. The documents were subsequently provided to the Committee, and the Committee wishes to note the valuable assistance given to the Committee by Treasury Department staff during the course of the inquiry. However, the initial claim of commercial confidentiality, based essentially on a contract clause

⁴⁵ Vehicle Hire Facility Agreement, June 27 1996, pp. 14-15, Document No. 7, "Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents", Vol 1.

⁴⁶ See, for instance, clause 10 of the Hire Purchase Facility Agreements (Documents 4 and 6, p. 13), and clause 10 of the Vehicle Hire Facility Agreements (Document 5 and 7, p. 16), "Matrix Group Limited, Fleet Lease Transaction for the State Supply Commission, Conformed Documents", Vol 1.

⁴⁷ Mr John Langoulant, Under Treasurer, Transcript of Evidence, March 22 2000, p. 3.

and also upon issues of intellectual property said to arise from the unique financing structures employed in the arrangements, does raise serious issues as to the extent to which the Government is entitled to invoke such claims in its dealings with Parliament.

- 6.3 The Committee expresses its disapproval at the use of commercial confidentiality clauses in contracts between the Government and the private sector. This practice can be used to try to prevent effective parliamentary and public scrutiny of financial arrangements involving millions of dollars of public funds. The Victorian Public Accounts and Estimates Committee has recently noted that there has been an increasing trend of Victorian public sector agencies refusing to supply information to that Committee and to individual Members of Parliament on the basis that it was commercial in confidence without any explanation as to why the disclosure would be harmful to the interests of the Government or to third parties.⁴⁸ The Victorian Public Accounts and Estimates Committee was of the view that such a trend has the capacity to undermine and jeopardise accountability and erode confidence in government.⁴⁹
- 6.4 Whilst there may be a legitimate basis for commercial confidentiality, in terms of exposing the Government to unnecessary financial risk during the negotiation stage of contracts between the Government and the private sector, it is the Committee's view that it would only be in exceptionally rare circumstances that commercial confidentiality could be sustained as a valid reason for non-disclosure of contract documentation after the negotiations have been finalised and the contract has been formally entered into. The Victorian Public Accounts and Estimates Committee distinguished between material that has been generated by or for government from material that has been provided to government by third parties:

*“Private sector enterprises resist disclosure of commercially sensitive material either because it may be used by competitors to compete more effectively, or it may prevent the full exploitation of some profit making opportunity. However, profit maximisation is not a significant goal of government. The function of government is to serve the public interest.”*⁵⁰

- 6.5 The Committee agrees with the view formed by the Victorian Public Accounts and Estimates Committee that:

⁴⁸ Public Accounts and Estimates Committee, *Inquiry into Commercial in Confidence Material and the Public Interest*, 35th Report, Parliament of Victoria, March 2000, p. xxiii.

⁴⁹ Ibid.

⁵⁰ Ibid, p. xxvii.

“While government must seek to operate efficiently in promoting the public interest, the provision of public services should not simply be undertaken at the lowest price, but should be designed to maximise overall value for money for the taxpayer. Issues other than production costs, such as community satisfaction, the public interest, privacy and equity must be considered.

Release of information may deny the government a possible financial benefit, but promote the public interest by enabling the community to be aware of the criteria for particular decisions.”⁵¹

- 6.6 The Committee also generally endorses the comment of Mason J (as he then was) in relation to claims of public interest confidentiality made by the Government in *Commonwealth v John Fairfax & Sons*:

“It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.

Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult

⁵¹ Ibid, p. 77.

to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.”⁵²

- 6.7 The Committee also notes the requirements placed upon the Government pursuant to section 58C of the *Financial Administration and Audit Act 1985*, ie:

“58C. The Minister and the accountable officer of every department, and the Minister and the accountable authority of every statutory authority, shall ensure that –

- (a) no action is taken or omitted to be taken; and*
- (b) no contractual or other obligation is entered into,*

by or on behalf of the Minister, department or statutory authority that would prevent or inhibit the provision by the Minister to the Parliament of information concerning any conduct or operation of the department or statutory authority in such a manner and to such an extent as the Minister thinks reasonable and appropriate.”

- 6.8 Clause 9.10 (entitled “Confidentiality”) of the Interpretation Deed which was entered into by the parties to the Government’s light motor vehicle fleet financing arrangements relevantly states the following:

9.10 All Confidential Information in the possession of any party to this deed is confidential to that party, its employees, legal advisers, auditors and other consultants and may not be disclosed to any person except:

...

(c) if required by law (including, without limitation, in the case of the Hirer [ie, the State Supply Commission], to the extent required by the Financial Administration and Audit Act 1985 (WA) and in particular sections 58A and 58C of that Act) or required by any stock exchange or by any Government Agency”⁵³

Pursuant to clause 1.1 (“Interpretation”) of the Interpretation Deed the term “Confidential Information” is defined to mean the terms and conditions of the various contract documentation, any information provided to a party to the arrangement with

⁵² (1980) 147 CLR 39 at 52.

⁵³ Interpretation Deed, Light Motor Vehicle Fleet Contract Documentation, Vol 1, p. 93.

respect to the arrangement by another party to the arrangement, and all details of the arrangement otherwise known to a party to the arrangement.⁵⁴

- 6.9 Parliament has the power to send for **persons, papers and records**, pursuant to s4 of the *Parliamentary Privileges Act 1891*. Pursuant to Standing Orders 310 and 329, standing committees of the Legislative Council also have such power. Confidentiality clauses cannot override legislative provisions that enable information to be obtained by the Parliament.
- 6.10 The Under Treasurer advised the Committee that a difficulty which the Government has with respect to the publication of certain contracts with the private sector (such as the light motor vehicle fleet arrangements) is the intellectual property attached to the innovative financing structures and taxation arrangements involved in the contracts.⁵⁵ In many instances, these financial structures are unique, and the parties are keen to protect this intellectual capital, which it is claimed is worth a considerable amount of money in the marketplace. Given the difficulties confronted by the Government in maintaining confidentiality of such agreements in the face of parliamentary and community scrutiny of Government expenditure, the Under Treasurer advised the Committee that it will be very difficult in future for the Government to find the type of innovative financing arrangements which will provide the Government with a significant benefit.⁵⁶ However, the Committee notes the submission of the Gippsland Water Authority to the Victorian Public Accounts and Estimates Committee's inquiry into commercial in confidence material:

“In the case of large contracts, the provisions are known by hundreds of lawyers, advisers, financial consultants and it is arguable whether such information has much commercial value.”⁵⁷

- 6.11 The Committee notes that the Victorian Public Accounts and Estimates Committee has recently recommended that rather than confidentiality clauses, contracts between government and private sector enterprises should instead contain specific terms stating that their contents are *prima facie* public.⁵⁸

⁵⁴ Ibid, p. 10.

⁵⁵ Mr John Langoulant, Under Treasurer, Transcript of Evidence, March 22 2000, p. 5.

⁵⁶ Ibid.

⁵⁷ Public Accounts and Estimates Committee, op. cit., p. 88.

⁵⁸ Ibid, p. xxviii.

RECOMMENDATION 1

- 6.12 **The Committee recommends that the Government ensure that all private individuals and corporate bodies that it intends to contract with are fully informed that commercial confidentiality clauses do not act to prevent scrutiny of such contracts by the Parliament.**

RECOMMENDATION 2

- 6.13 **The Committee recommends that the Bill should be amended to provide for direct parliamentary scrutiny at the earliest possible opportunity of all financial arrangements entered into by the Minister under Division 4 of Part II of the Act.**

7 OTHER ISSUES ARISING FROM THE BILL

- 7.1 The Committee has not identified any problem with the proposed introduction of infringement notices and increased fines for certain offences against the Act.
- 7.2 The proposed s58B set out in clause 12 of the Bill is aimed at introducing owner's liability with respect to various parking offences relating to buses. The Committee notes that this provision is similar in wording and effect to the traffic infringement notice provisions under s102 of the *Road Traffic Act 1974*.
- 7.3 The Committee is of the view that the practical effect of clauses 5 and 6 of the Bill need to be further explained by the Government. It would be helpful if examples of exactly how these provisions will operate are provided by the Government to the Parliament.
- 7.4 The Committee notes that s15 of the Act already provides the Minister with a general power to delegate any of his functions, powers or duties under the Act to the Director General of the Transport Department or to some other departmental officer. However, the Committee believes that given the significant powers that will also be conferred on the Minister on the passing of this Bill to enter into various sale and leasing arrangements for the Transperth bus fleet that may expose the State to significant financial risk, it is important that the Minister first advise Parliament before he empowers any person (either under the existing s15 power of delegation or the proposed amendment to the Act as set out in clause 5 of the Bill) to act on his behalf for the purposes of Division 4 of Part II of the Act.
- 7.5 The Committee believes that the Minister should advise the Parliament as to whom the Minister intends to appoint as his agent or attorney for the purposes of executing deeds and other instruments. Will this person be an officer of the Transport

Department, one of the Minister's own staff, or a private contractor/consultant? Is it intended that this person will execute documents on behalf of the Minister for the type of asset sale and lease arrangements that will be facilitated by the proposed amendments to Division 4 of Part II of the Act?

- 7.6 The Committee considers that it is preferable that any delegation to perform the Minister's functions, or any appointment to act as an agent or an attorney of the Minister to execute instruments, arising from the type of financial arrangements that are proposed in this Bill under Division 4 of Part II of the Act should be conferred only upon the Director General of the Transport Department.
- 7.7 The Committee believes that the Minister should provide examples to the Parliament of the type of circumstances in which it would be preferable to use a facsimile or stamp of the Minister's (or an agent or attorney of the Minister's) signature or seal. Once again, the Committee has concerns about the use of such facsimiles or stamps where they are used to formalise the type of arrangements which will be facilitated by the proposed amendments to Division 4 of Part II of the Act.
- 7.8 The Committee also believes that the Minister should advise the Parliament as to the intended operation of clause 6 of the Bill. The intent of this provision appears to be to introduce an automatic appropriation from the Consolidated Fund for the purpose of meeting obligations arising from State guarantees in respect of arrangements entered into by the Minister under the Act. In accordance with the concerns expressed above by the Committee as to the type and extent of the commitments that the Minister may enter into pursuant to the proposed amendments to Division 4 of Part II of the Act, the Committee would like the Minister to clarify as to exactly when Parliament would be advised on each occasion that such an automatic appropriation had been made.

RECOMMENDATION 3

- 7.9 **The Committee recommends that the Minister provide the following further information to the Parliament:**
- a) **a clarification of the powers of appointment of an agent or an attorney to execute deeds and other instruments on the Minister's behalf under clause 5, eg, who does the Minister intend to appoint for this purpose? What types of documents will this person be executing on the Minister's behalf?**
 - b) **a clarification as to the circumstances in which a stamp or other facsimile will be used to execute documents instead of the Minister's signature or seal?**

- c) **a clarification of how clause 6 of the Bill will operate. How soon, if ever, after an automatic appropriation is made from the Consolidated Fund to meet a commitment under a State guarantee in respect of an arrangement entered into by the Minister under the Act will Parliament be advised of the nature and extent of that appropriation?**

**HON MARK NEVILL MLC
CHAIRMAN**

Date: June 28 2000