PUBLIC ACCOUNTS COMMITTEE

INQUIRY INTO PUBLIC SECTOR CONTRACT MANAGEMENT PRACTICES

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 3 APRIL 2019

Members

Dr A.D. Buti (Chair)
Mr D.C. Nalder (Deputy Chair)
Mr V.A. Catania
Mr S.A. Millman
Mrs L.M. O'Malley

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Hearing commenced at 10.20 am

Mr NICHOLAS EGAN
State Solicitor, State Solicitor's Office, examined:

The CHAIRMAN: Thank you very much, Mr Egan, for coming. We appreciate that you did make a special effort, because we know that you wanted to put it back for a week. We are thankful you stayed with our schedule.

Mr Egan: No, no, that is quite okay.

The CHAIRMAN: We appreciate it. Thank you for appearing today to provide evidence relating to the committee's inquiry into the public sector contract management practices. As you know, my name is Tony Buti; I am the committee Chair and member for Armadale. Then I have to my right Lisa O'Malley, who is the member for Bicton; and to my left I have the member for Mount Lawley, Simon Millman; to his left is the deputy chair and member for Bateman, Dean Nalder; and at the end there is Mr Vince Catania, member for North West Central. It is important that you understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. While your evidence is protected by parliamentary privilege, this privilege does not apply to anything that you might say outside of today's proceedings. I would also like to advise that today's hearing will be broadcast live through the Parliament House website. Do you have any questions about your attendance today?

Mr Egan: No.

The CHAIRMAN: Would you like to make an opening statement before we pose any questions?

Mr Egan: No.

The CHAIRMAN: Okay, thank you very much. I will commence. I am referring to the state inquirer's final report, so, the Langoulant report, volume 1, page 111, where you are quoted as saying —

> *"...there is an absolute need across the sector for better contract management which on the whole I would describe as very poor".*

On what basis have you formed this view, and what are the most significant and systemic shortcomings in contract management across the public sector? Secondly, are these issues similarly evident through the GTE sector?

Mr Egan: I formed the view on the basis of my experience in the public sector over the last 15 years advising government, its various departments and agencies on contract management and contract disputes and related issues. You need to understand that I, of course, see the problem matters rather than those matters that are going well. As a consequence of seeing the problem matters, I observe perhaps the poor contract management which is somewhat endemic across the sector. I do not see that for the GTEs, not least of all because the State Solicitor's Office generally does not do the work for the GTEs.

There was a recent report by the Australian and New Zealand School of Government entitled, "2030 and Beyond: Getting the Work of Government Done", published in March 2019. This reflects my view on the matter. I am quoting from a summary of the report by The Mandarin, which came out on 1 April. It reads —

> An analysis of Australian National Audit Office reports —

They are reports from 2017 and 2018 —

and other government-commissioned studies revealed the following challenges:

- a failure to understand the service that is to be procured.
- insufficient time allowed for service specification.
- unrealistic expectations about cost and flawed assumptions about potential economies of scale.
- a lack of good process and a failure to follow procurement guidelines in designing and applying evaluation criteria.
- a lack of effective competition in selecting providers

I only see pockets of that in terms of Western Australia. Lastly, there is —

- poor quality contract management.

I think that reflects entirely my view of the state of the public sector in terms of procurement and contract management.

Mrs L.M. O'MALLEY: To follow on from that line of the contract management side of things, my questions also relate to the Langoulant report, volume 1, page 107, which found —

> Suppliers of goods and services to government are rarely performance managed and often do not have their outcomes properly monitored and validated.

There are three questions related to that, the first being: would you agree with the assessment? Secondly, is this more a function of how the contracts are drafted or how they are managed? Thirdly, what can be done to address this issue?

Mr Egan: I would agree in part in relation to contracts being rarely performance managed—and the only reason I agree in part is because, as I indicated at the outset, I do not get to see all the contracts. Rather, I get to see a snapshot of the ones that have gone or been dealt with poorly. In terms of whether it is a function of the contracts, I suspect that the answer to that is: yes and no. I say that for these reasons. Firstly, because many departments and agencies draft and enter into contracts without getting proper legal advice, or alternatively use precedents which are outdated, or alternatively do not have sufficient service specifications attached to them, or alternatively do not have the necessary levers within the contract that can be relied upon by a principal to properly manage it. Perhaps lastly, it is very common across the sector for contract managers to have not read the contract. I would say that that is perhaps the norm, certainly in relation to all of the contracts that I see, which makes contract management particularly difficult. To the extent that they have—or certain contract managers have—read the contract, in my experience it is not always the case that they agree with the risk allocation within the contract, and in those circumstances decisions are taken as to whether or not they should be managed in a particular way in accordance with that contractual framework.

In terms of what needs to be addressed in relation to it, I think that there are a broad number of things that need to be done. Firstly, I think that there needs to be a recognition that there is a problem. Secondly, there needs to be a shift in the mindset of departments and agencies at senior levels as to the importance of contract management. In this regard, I think that consideration needs to be given by those senior levels to the consequences of not managing contracts properly. My sense is that those in senior positions within departments and agencies consider that the risks are being managed, or alternatively that the risks are not such as to warrant additional resources—whether they be individuals or financial resources—being devoted to managing those contracts. In those circumstances, I think it would be useful if the mindset was along these lines: that there needs to be a recognition that if they are properly managed there will be a reduction in contract risks such that the risks to government will be reduced. Those risks include a reduction in contract claims and

a reduction in overpayments and underpayments, that there will therefore be contract savings, and that will result in improved service delivery by departments and agencies and result in improved organisational performance. But unless they can be measured, as I say, my sense is that departments and agencies consider that their resources are better deployed engaged in other sorts of matters, and that those contracts are working adequately.

Mrs L.M. O'MALLEY: Thank you. Just a follow-up to that: are you aware of any agencies that develop and manage contracts consistently well; and, if so, are you able to, you know, share that information with us on who they are?

[10.30 am]

Mr Egan: I would not be in a position to put my hand on my heart and say that any contract or that any department or agency—certainly the ones that I see—are managed well. There are pockets, obviously. Certain contracts are undoubtedly managed well, but the ones that I see are often managed quite poorly. Just by way of example, it would be a very rare thing for me to see a contract-management plan in relation to any contract that comes across my desk or that is handled within the State Solicitor's Office. The Department of Finance policy guidelines contemplate that there should be a contract-management plan in place unless the agency determines that it is not necessary. I do understand, for instance, in the Department of Finance, that it is commonplace for contract-management plans for run-of-the-mill-type contracts to be in place, but I certainly have not seen a contract-management plan for the bespoke contracts that I deal with, which are high risk, high value or, alternatively, low value, high risk.

Mr D.C. NALDER: Just on those comments you made, I am trying to understand if there is a clear delineation of responsibility with regard to the management of contracts. By that, I mean: do departments understand that it is their responsibility when it comes to management of the contract, or is it possible that there is a bit of confusion in this area, with departments assuming that the State Solicitor's Office—particularly when you are sitting at the table on committees—is the one that has actually put the contract into place and, therefore, are they perhaps expecting the State Solicitor's Office to take responsibility for the management of those contracts? It is that question of whether it is clear or not.

Mr Egan: In my view, it is clear. The State Solicitor's Office would only become involved in a governance capacity during the procurement phase. It is an unusual thing for my office or for anyone within my office to be on a committee that is responsible for the ongoing management of that contract. It does occur. There are examples of high-risk, high-value contracts or low-value, high-risk contracts, but even in those circumstances, in my view, there is no doubt in the minds of the departmental or agency officers that it is their responsibility to manage the contract.

Mr D.C. NALDER: Okay. Coming back to your comment earlier that you feel that there is a need for them to take greater responsibility, how is that consistent with what you have just said? You said that they understand that there is a problem, but they are not acknowledging a problem. I am a bit confused as to what you mean by those two statements.

Mr Egan: I do not think that there are sufficient people within the public sector who know what "good" looks like. So, while they might be managing the contract, I do not know that they understand the standard to which the contract should be managed.

Mr D.C. NALDER: And how should that be addressed?

Mr Egan: That is a good question. I have answered already and proposed some things that would need to be done at senior levels of departments and agencies to commit to resolving the problem. There has been a proposal advanced, I think by the UK, that there be a—I beg your pardon. Within my papers, one of the studies suggests that there should be a centre of excellence within the public

sector—not within Western Australia, but certainly within the public sector that was in consideration in that case—that is responsible for providing leadership and direction across the sector in relation to proper and robust contract management. That unit would be in a position to identify, for the benefit of the sector as a whole, what good looks like. In other jurisdictions, there are very clear contract-management policies and guides to contract management. They exist, for example, in the Northern Territory and South Australia. In South Australia, which was reviewed in July 2017, it provides, for instance, that all procurements greater than $550 000 have to have not only a procurement policy, but also everything in excess of $4.4 million needs to have a specific contract-management plan, and there are no exceptions to that. Certain other jurisdictions require those sorts of contracts—that is, those over a specific value of $4.4 million or $5 million—to be the subject of annual reviews by a committee within the department.

Mr D.C. NALDER: You are talking about establishing a standard that should be applied across all departments. In your view, who should take responsibility for ensuring that standard?

Mr Egan: It should be a central agency. That central agency would either be DPC or, alternatively, Treasury.

Mr D.C. NALDER: So, not the State Solicitor's Office?

Mr Egan: No.

Mr V.A. CATANIA: Sorry, I just want to get this clear: you have agencies that have contracts of which you, the State Solicitor's Office, has no visibility unless a problem occurs later on and the department then comes to you. In the making up of the contract, the State Solicitor's Office is not involved in any way, shape or form in that contract development?

Mr Egan: Not in all cases, no.

Mr V.A. CATANIA: Given the fact that you are saying there clearly is an issue of what "good" looks like, there has been no department that has sought your advice to ensure that they know what good looks like before things go pear-shaped, for want of a better word—and it is then that they come to you? Are there any departments that are seeking advice from the State Solicitor's Office to ensure that they know what good looks like so they do not get into a predicament where the state loses out on a contract that has not been worded properly, or they ensure that the state is protected, or they understand that possibilities around the contract could leave the state in a position where it could cost the taxpayers a huge amount of money? I find that really questionable, especially with large projects.

Mr Egan: I would answer that this way: the State Solicitor's Office generally becomes involved in—and I say generally; there are exceptions—contracts that are high risk and high value because they are what might be called strategic projects for the benefit of the state. As a rule of thumb, we would be involved in all of those.

Mr V.A. CATANIA: Can you give some examples, perhaps?

Mr Egan: Well, Fiona Stanley Hospital, Perth Children's Hospital, the stadium—those sorts of large infrastructure projects. There are certain contracts, however, which are procured by departments or agencies themselves and where we do not get asked to be involved. A good example of that might be, for instance, the Huawei contract. We were not asked for advice in relation to that contract.

Mr D.C. NALDER: Which one, sorry? Huawei?

[10.40 am]

Mr Egan: The Huawei contract. That was managed in house by PTA. We do not go looking for work in the sense that we do not always know what contracts are being procured, so in circumstances where we do not know, we cannot offer our services. Where we do know that there are certain

strategic contracts, whether they be high risk, high value or low value, high risk, then it would generally be the case that we would reach out to the department or agency inquiring as to whether or not they would want assistance. In some cases they do; in some cases they do not. In terms of your second question about coming to us and assisting them with what good looks like after it has been procured, generally not; however, in circumstances where we have been involved during the procurement phase, it would generally be the case that our assistance would be ongoing for a portion of the implementation phase of the contract. For the first six months, 12 months, 18 months of a new contract, then more or less we would be involved in terms of how it should be administered, not down to the nitty-gritty detail of it; however, cases of dispute notices, interpretations of particular provisions, what should be done in this case or that case where, for instance, there might be an abatement and the like. But over time what happens is that our role becomes less and less and the department's role becomes more and more.

Mr V.A. CATANIA: Just on that higher risk—and you mentioned the Huawei contract, a foreign-owned company coming in to manage public transport in this state—you are saying that the Department of Transport, I would imagine, would have that contract.

Mr Egan: The Public Transport Authority.

Mr V.A. CATANIA: It never sought State Solicitor's advice to ensure that all the checks and balances are there, that the state would not be left vulnerable or be at high risk, especially being a foreign-owned company. Given the history of that company in other parts of the world, do you find that quite odd that a department would not seek your advice on such a potentially controversial contract that has been signed?

Mr Egan: Very.

Mr V.A. CATANIA: So you are saying very concerned?

Mr Egan: Yes.

Mr V.A. CATANIA: After I think it may have been brought to the attention of the public's eyes back in August, I think, or March last year, after the attention that Huawei received and the transport authority, was there any advice sought from the State Solicitor as it came out in the public that the state government had signed a contract with Huawei?

Mr Egan: Yes. Advice has now been sought and advice has been provided on an ongoing basis in terms of the management of the contract.

Mr V.A. CATANIA: That is after they have procured the contract, signed the contract with an overseas company, which is, you know, in the public's eye, controversial, so they sought advice after the fact—everything was signed.

Mr Egan: Yes.

Mr D.C. NALDER: Can I just ask you a follow-up question on that. Is there any obligation of the departments or the agencies when they are establishing legal contracts to actually come through the State Solicitor's Office?

Mr Egan: No, there is no Treasurer's instruction or Premier's circular in that regard.

Mr S.A. MILLMAN: Would a framework address that?

Mr Egan: Yes, it would.

Mr S.A. MILLMAN: The PTA have their own in-house lawyers.

Mr Egan: Yes They have two.

Mr S.A. MILLMAN: And the departments that enter their own contracts that do not get advice from the State Solicitor's Office have their own in-house lawyers.

Mr Egan: Some do; some do not.

Mr S.A. MILLMAN: In terms of the way that the public sector departments then liaise with the State Solicitor's Office, you said earlier that the State Solicitor's Office do not go looking for work.

Mr Egan: No.

Mr S.A. MILLMAN: No, because you have got plenty of work on already.

Mr Egan: We have got 160 solicitors, all of whom have too much work on at the moment.

Mr S.A. MILLMAN: In the vernacular of the legal profession, you are more directed to back end rather than front end. You are dealing with the disputes rather than with the formulation of the relationships?

Mr Egan: No.

Mr S.A. MILLMAN: No?

Mr Egan: We have four sections within the office, one section of which is the front-end commercial section. That deals exclusively with front-end contracts.

Mr S.A. MILLMAN: And that was the section that you were the head of?

Mr Egan: Correct.

Mr S.A. MILLMAN: What are the other three sections?

Mr Egan: We have just undergone an organisational restructure which was rolled out on 1 April. The four sections are the commercial section, a litigation section, which has two separate streams —

Mr S.A. MILLMAN: What are they?

Mr Egan: Civil and commercial—and a native title and state land section, and an advice and policy section, in addition to a small dedicated counsel team.

Mr S.A. MILLMAN: Counsel, not council?

Mr Egan: Yes.

Mr S.A. MILLMAN: Not providing advice to local government.

Mr Egan: No.

Mr S.A. MILLMAN: You said 15 years in the public sector?

Mr Egan: Yes.

Mr S.A. MILLMAN: You started as the head of commercial in 2012, so about 2004 with the State Solicitor's Office; would that be right?

Mr Egan: In 2005, yes.

Mr S.A. MILLMAN: My understanding is that in 1996 the State Solicitor's Office entered a new model of core and non-core, and for your non-core services you compete with the private sector.

Mr Egan: Yes.

Mr S.A. MILLMAN: In terms of the commercial unit, the work that the commercial unit does, is that all core, or is some of it core and some of it non-core? How does the core–non-core delineation overlap with the four teams that you have just identified?

Mr Egan: There are core guidelines in place that assist with identifying what is core and non-core. There is no particular rule of thumb in relation to what is non-core. A rough and ready approach is: is it the sort of work that would be done by the private sector? However, if it involves two or more departments in relation to a commercial matter, then obviously we treat that as core work.

Mr V.A. CATANIA: Further to that, would you consider a $200 million contract core work for the State Solicitor to be involved with to ensure that $200 million of taxpayers' money is being appropriately spent in the public's eye?

Mr Egan: It would depend upon the nature of the contract and the service or the goods that are being procured. If you are saying $200 million worth of goods over a 10-year term, those goods might be pens and paper, for instance.

Mr V.A. CATANIA: I will give you a good example: the Public Transport Authority procuring a contract, say, Huawei, for their communications—a $200 million contract. Do you see that as core business of a State Solicitor's Office to be involved with?

Mr Egan: I would say this: even if it was not core, we might well treat it as core, but if it was not core, such that it would be treated as non-core work and therefore we would bill for it, there would be, as part of the procurement budget, a budget for legals, or there should be and, in addition to that, our rates are approximately half the rates of the private sector. It is not as though we make any money out of it. We are providing a service to government for the benefit of government.

Mr S.A. MILLMAN: If it is non-core, you would bill the PTA

Mr Egan: Correct.

Mr S.A. MILLMAN: The PTA have their own in-house lawyers, so the PTA lawyers provided advice to the PTA. I do not want you to breach legal professional privilege and refer to the advice that you have provided, so I am sensitive about the way in which I can ask these questions—I am sensitive about the way in which these questions can be asked; I do not know if other people are. But in terms of the way in which the contract was entered into, presumably it would make sense for the PTA to have used their own lawyers.

Mr Egan: The PTA in that case used, as I understand it, both their own lawyers and some private sector lawyers.

Mr S.A. MILLMAN: Precisely—my next question. They retained outside expert legal advice from a commercial law firm.

Mr Egan: Yes.

Mr S.A. MILLMAN: Which is entirely sensible, is it not?

Mr Egan: It depends upon the nature of the expertise that that private sector law firm has and whether they are alive to the risks that government encounters in those sorts of contracts.

Mr V.A. CATANIA: Which is a core business of the State Solicitor's Office to make sure that the taxpayers' risk is minimal, if, at best, not there.

Mr Egan: Yes.

The CHAIRMAN: But any lawyer has an obligation to their client, so whether it is the SSO or whether it is a private lawyer, their obligation is to provide the advice that has been asked. We can argue —

Mr D.C. NALDER: I think it is for us to put the questions, Chair.

[10.50 am]

The CHAIRMAN: Yes, I know, but I can have an exchange with my colleague, Deputy Chair. It is arguable the PTA or the minister or whoever makes the decision on who they want to seek advice from. You may argue that the SSO, because of its experience, its culture and obviously its expertise in this area is the appropriate body, but it is not unreasonable for government departments to seek independent legal advice from other —

Mr D.C. NALDER: But the problem we have —

The CHAIRMAN: Can I finish, please. It is not unreasonable or unheard of under any government to seek independent legal advice that is not from the SSO.

Mr Egan: It seems to me that your question addresses two matters. The first is whether departments or agencies should be obtaining legal advice from that who is best placed to provide that legal advice. In matters of high-risk, high-value, or low-value, high-risk, where the State Solicitor's Office is accustomed to dealing with that risk, and accustomed to better understanding the risk allocation for those contracts across the sector, then we should be engaged. If, however, your question goes to ministers seeking advice from people outside of government, then I entirely agree that it is not unusual and it is not inappropriate for them to do so.

Mr S.A. MILLMAN: Any lawyer doing their job would have to be turning their mind to the risk of a particular party entering into a particular contract in a particular way. What you are saying is that in your view, the SSO was better placed than the independent private sector lawyers. I am in the Labor Party and I believe that government should be engaged in a whole range of activities, particularly the SSO. My friends sitting physically to the left of me but philosophically to the right of me seem to be contending for the same point, that we need more government intervention to how these contracts are done.

Mr D.C. NALDER: No.

Mr V.A. CATANIA: No. You are actually missing the point here.

The CHAIRMAN: Excuse me, the member for Mount Lawley is asking a question.

Mr S.A. MILLMAN: I have not finished my question yet.

Mr D.C. NALDER: Well, do not pre-empt us.

Mr S.A. MILLMAN: But —

Mr D.C. NALDER: No, you were trying to build an argument around us, and it is totally inappropriate.

The CHAIRMAN: Stop. Can we just conduct this interview in a civilised manner, and he is asking a question.

Mr D.C. NALDER: Okay, ask your question, but keep it to the question.

Mr S.A. MILLMAN: All right. My question is this: would the SSO benefit from providing input into the framework that Treasury or the Public Sector Commission formulates in order for people entering into contracts to identify a risk?

Mr Egan: Absolutely.

Mr V.A. CATANIA: The logic that the member for Mount Lawley is putting forward is that it is okay for the PTA to have its in-house lawyers and go seek external lawyers to assist in procuring a contract in this manner, a Huawei contract, yet my understanding is you are saying that is okay, and so the State Solicitor is not to be involved in that making of that contract. But, given what has occurred after that contract has been signed and the public viewing that contract and concerns over that contract, you are now involved. Why, given your logic that it is okay to have internal and external lawyers, but now given that there are question marks over choosing a foreign-owned company, you are now being involved after the fact that the contract has already been written, and why are you suddenly being brought into the situation after the fact rather than, as you said, the majority of contracts—people do not know what good looks like? The whole point is: perhaps you should have been brought in at the start, given there was a $200 million contract, but now you are at the pointy end, you are being brought in. Clearly there may be an issue between the in-house lawyers and external lawyers —

The CHAIRMAN: We do not know that.

Mr V.A. CATANIA: —and the State Solicitor's Office is now getting involved?

Mr D.C. NALDER: Can I frame the question?

Mr Egan: Just before you do, perhaps I could address that this way. The test for me is what is best for government. That test can be referenced by reason to who is best placed to provide the advice, because whoever is providing the advice is familiar with those matters, the subject of the contract or familiar with the risk allocation across the sector as a whole, or can do it more cheaply or can do it quicker. The State Solicitor's Office will not, in every case, tick all of those boxes. For instance, to the extent that the State Solicitor's Office gets requests for advice in relation to banking matters, we do not have a banking capability so we would brief that out. To the extent that it is necessary to deliver for the benefit of the state a major infrastructure project that requires a number of solicitors dedicated to a specific project, we do not have that sort of surge capacity. In those circumstances, we would partner with the private sector. Likewise, in terms of any particular major litigation, we do not have five or six solicitors generally who have the ability to deal with that sort of surge capacity, so we would partner with the private sector.

Mr D.C. NALDER: Further to this, Chair —

The CHAIRMAN: The PTA is coming in next week or so, so we can follow up that particular line. You can ask a question in a minute, Deputy Chair, but I want to ask a question, thank you. I am referring to recommendation 12 of the special inquirers' report. We should realise this is going live, and we should try to deal with some civility in this matter. It states —

> Government agencies must be required to inform the State Solicitor's Office of intentions to enter into material contract negotiations. Agencies must be required to maintain a contract risk register and a litigation risk register and to provide quarterly reporting to Cabinet through the State Solicitor's Office.

That is volume 1, page 20. Are you able to tell us if that recommendation has been implemented, and is there likely to be a minimum contract value threshold to which the recommendation applies?

Mr Egan: It has not yet been implemented. I understand that it is in the process of going to cabinet in June or July of this year. It will include, necessarily, certain criteria for contracts to appear on the register or for litigation risks to appear on the register because otherwise the registers will be too significant, so they will probably have a contract value of somewhere between, as a minimum threshold, $5 million and $50 million.

The CHAIRMAN: Just one more question. In regards to transparency and its whole issue about commercial-in-confidence and so forth, to what extent do commercial confidentiality and legal professional privilege issues inhibit access to information that should go to transparency, in regards to a level of transparency in regards to major contracts, so that the ministers, Parliament and committees like ourselves will have access to that information?

Mr Egan: The majority of contracts would have a confidentiality provision and the nature of the confidentiality provision is taken into account in determining whether or not and in what circumstances the contract can be made public. There are a number of models of confidentiality provision that we use depending upon the nature of the deal which is being considered. Certain information within contracts is considered to be particularly confidential by contractors for their own business interests because, if made public, then their competitors would know what their rates are. Other contracts, for instance, are made entirely public, and a good example of that is if you take, for instance, corrections contracts for the delivery of or the running of private sector prisons. Those contracts are legislated by the Prisons Act to be tabled in Parliament. Notwithstanding that, certain contractors would like provisions of the contract to be made confidential, then there is no

possibility of that occurring because the entirety of the contract and its amendments get tabled in Parliament.

[11.00 am]

The CHAIRMAN: Just to follow up on the commercial-in-confidence, not so much the legal professional privilege: in your number of years now in the SSO, do you think governments have at times used commercial-in-confidence as a ruse or a way to ensure that the public, Parliament or committees do not receive information that they should?

Mr Egan: I cannot speak for what governments do in terms of their decision-making. I provide advice in relation to whether the contract in question contains a confidentiality clause that would prevent it contractually from being disclosed to the public and, in the alternative, whether certain aspects of the contract can be disclosed and other information redacted. But I am not the decision-maker in that regard.

Mr D.C. NALDER: My understanding is that the purpose of this inquiry is really looking at contract management across government. We have had some major contracts that have had some troubles and a lot of that has been around the management of those contracts, and, in your view, it is the deficiencies in the management of those contracts. The case you raised on Huawei was more to do with the inconsistency of approach by different agencies of when they may or may not involve the State Solicitor's Office. Am I making a correct assumption there?

Mr Egan: The PTA does, from time to time, approach the State Solicitor's Office and seeks our involvement in contract formulation and seeks advice on particular sorts of contracts. Why on this occasion they decided not to approach the State Solicitor's Office to get that advice but instead go to the private sector, I do not know.

Mr D.C. NALDER: Part of what we have been talking about is whether or not a standardised approach to contract management will lead to better outcomes for the state, because there seems to be an inconsistency across agencies; is that correct?

Mr Egan: Yes, correct.

Mr D.C. NALDER: You are using Huawei just as an example of that circumstance?

Mr Egan: Yes.

Mr S.A. MILLMAN: Can I follow on from Mr Nalder's question? You said before that the SSO can farm in outside expertise if and as required. At the moment, agencies can also do exactly the same thing. So the Department of Education can go to Sparke Helmore for advice on mitigating their workers' compensation liability.

Mr Egan: Correct.

Mr S.A. MILLMAN: Is it your contention, using the Huawei example, that before government agencies farm in outside expertise, that they should check that with you; is that what you are saying?

Mr Egan: My view is that in a perfect world the State Solicitor's Office should administer a panel of acceptable firms for the benefit of the sector.

Mr S.A. MILLMAN: I do not disagree with you as a proposition, but, for example, the Insurance Commission of WA have two separate panels for their workers' compensation work and for their motor vehicle accident work. So you would say that rather than the power to have that panel retained by the Insurance Commission, that power should be retained by the State Solicitor's Office.

Mr Egan: Not in relation to ICWA, no; I think that they are a standalone entity and they can manage their own affairs and are accustomed to doing so and have done so for some time.

Mr S.A. MILLMAN: Yes, so a bad analogy—but the Department of Education?

Mr Egan: Departments like education, finance, health and the like, in my view, we should administer a panel for the benefit of the departments and the agencies and government as a whole.

Mr S.A. MILLMAN: Once you have identified the solicitors on that panel, do you have a veto over who those departments might go to for particular advice before they farm in that expertise?

Mr Egan: It would depend upon the nature of the matter. If it was —

Mr S.A. MILLMAN: Where would the criteria for that assessment reside? Would they reside in the framework?

Mr Egan: It would be in the framework for the establishment of the panel arrangement, yes.

Mr S.A. MILLMAN: I am just thinking about it from a practical perspective. If I am the in-house lawyer at the PTA and you are the convener of the panel of outside expertise that has MinterEllison, Herbert Smith Freehills, and Clayton Utz, and I decide that I want to go with MinterEllison, do I need to get that checked off with you or can I just proceed on the basis that they are the nominated experts that you have identified for the panel work?

Mr Egan: Over the years, a custom has developed but it has been eroded. The custom has generally been that if a department or an agency wants to engage a private sector firm in relation to any particular matter, then they would come to the State Solicitor's Office and ask. As I say, that has been eroded over recent years. The practice has now developed in certain cases, but not all, for departments to go directly to the private sector firms.

Mr S.A. MILLMAN: In your opinion, does that represent a deficit?

Mr Egan: Yes.

Mr S.A. MILLMAN: Would it be preferable if that had not been eroded?

Mr Egan: Yes.

Mr S.A. MILLMAN: So we should return to something similar to what operated previously?

Mr Egan: Yes. The reason for that is because we have visibility in terms of how best the legal service could be delivered and by whom. It might be, for instance, that we would say we have done a deal in that space or have provided advice in relation to that issue for another department or another agency in recent times and we can leverage off that. Alternatively, we would be in a position to say that the likes of Mallesons handled a matter such as that three months ago and there will be economies of scale if you go there. But at the moment, departments and agencies have no visibility in terms of the legal service that has been provided to any particular department or agency and, therefore, they go with a firm who may or may not be best placed to deliver that legal service.

Mr S.A. MILLMAN: And there is no particular accountability mechanism in place either to determine whether or not—so in much the same way that somebody might select a particular service provider to build a hospital who has never had any experience building a hospital but then they decide to go with them, there needs to be a line of sight into how that accountability mechanism —

Mr Egan: That is right, and I would add this: the State Solicitor's Office has a panel of rates for private sector firms. That is a very aggressive rate schedule that we have negotiated with those firms. When the department or agency briefs a private sector firm, they do not have the benefit of that rate schedule, so they are paying rack rate.

Mr S.A. MILLMAN: I have one last question before we get onto some questions about the GTEs. A legal relationship is a reciprocal relationship between lawyer and client. There would be certain departments—I do not want to say this unkindly—where there is not the same capacity to have a sophisticated conversation with the lawyer about the legal services that they require, so you would

be able to identify where there might be deficits in the public sector in terms of how that relationship could be managed?

Mr Egan: Yes.

Mr S.A. MILLMAN: I have put a lot of words into your mouth. Is that a fair proposition that I have put to you?

Mr Egan: Yes.

Mr S.A. MILLMAN: Thanks. I had two questions about GTEs but Mr Nalder has identified that he wants to ask something. You said before in an answer to a question from the Chair that you do not see problems with GTEs. That proposition that you did not see problems with GTEs, is that because the problems are not there or is that because the State Solicitor's Office does not do their work?

Mr Egan: We do not do their work.

Mr S.A. MILLMAN: Okay.

Mr D.C. NALDER: It is a high-level question, because we are finding some agencies do not do their work either. We are talking about standardised approaches and trying to make sure that there is stronger contract management. In your view, if there is a standardised approach taken for government departments and agencies, should that include GTEs?

Mr Egan: Given the legislative framework within which those GTEs operate, I think that would be difficult. There has been suggestion in recent times that the State Solicitor's Office should have, through and in conjunction with Treasury, better visibility of, perhaps, key legal advice that is obtained by the GTEs in relation to certain matters. In circumstances where, for instance, a GTE seeks ministerial approval in relation to a business arrangement pursuant to the provisions of their legislation, then it would not ordinarily be the case that that GTE would provide any legal advice in relation to that arrangement. In those sorts of circumstances it has been suggested that perhaps the State Solicitor's Office should have more visibility, but it has not extended to the same sort of framework for the procurement of legal services for GTEs.

The CHAIRMAN: Just before the member for Mount Lawley asks some more questions, in a number of the questions that have been asked today and your responses, can I just get this overall picture in your mind: in the ideal world, you believe there should be a greater degree of consistency in how government departments operate in regard to contract management. I put this proposition to you: do you think that the SSO should either be providing the advice or if the department or minister seeks the advice of a private solicitor, that, firstly, you should be able to give advice if you think that firm is appropriate? That is the number one proposition. The number two proposition: in regard, though, to the actual management of the contract, I think you mentioned you believe there is not a sufficient amount of expertise in the public service, so in an ideal world, you believe there should be, like one of these overseas jurisdictions, a centre of excellence to provide the training needed to try to uplift the skill and capacity of the public service?

[11.10 am]

Mr Egan: Perhaps if I could deal with your second question first, I have suggested a centre of excellence as a possible model moving forward and I think a recommendation to that extent, or some other proposal that the committee could develop, would be of some assistance. I am also mindful where, for instance, in one of the other Australian jurisdictions—I think it is the Northern Territory—they have a requirement under their guide to contract management that, if contracts of a certain value are to be managed by a contract manager, then that contract manager needs to have undergone a particular training course and possess certain key competencies. We do not have that in that jurisdiction so I think that would be useful.

The CHAIRMAN: In regards to the papers you have referred to —

Mr Egan: I can provide the committee with copies.

The CHAIRMAN: Thank you.

Mr Egan: In terms of the first question, which was "To achieve greater consistency, should the State Solicitor's Office have visibility and the opportunity to comment upon any legal advice provided by private sector solicitors?", the short answer to that is yes. The long answer to that is it can be difficult because we get involved at the twelfth hour, perhaps when the matter is being considered by cabinet, or in the approach to a cabinet decision, or some sort of decision. It is therefore too late to unpick that which might have been negotiated during the negotiation phase of the contract. So, if, for example, having reviewed the contract we identify that the risk allocation was not ideal for government and did not reflect the consistent position which had been adopted in not dissimilar contracts across the sector, then there would really not be an opportunity to reopen that negotiation. The difficulty in those circumstances, of course, is that then you have a contract or a precedent which has a watered-down risk allocation provision that is used by either that contractor or generally becomes known within the sector to force the state in subsequent negotiations or subsequent contracts to that position.

The CHAIRMAN: My question was—I think it was mentioned in earlier questions—do you think you should be basically given approval or give advice on whether the department should be seeking advice from that law firm, rather than coming to you?

Mr Egan: Yes.

Mr S.A. MILLMAN: I think the answer to that was yes, previously. I have a couple of questions to follow on from that. In reference to your invocation of the Northern Territory and South Australia as jurisdictions that seem to be handling this well, have you spoken to your counterparts in those jurisdictions?

Mr Egan: No, I have not. In the lead-up, last week, to today's appearance, I have just downloaded the materials. I have not had an opportunity to engage —

Mr S.A. MILLMAN: It would be interesting to know, and it might be for the committee rather than for you, whether or not they feel as though those frameworks that are now in place—firstly, what prompted the adoption of those frameworks and, secondly, whether or not those frameworks have been effective in delivering changes in the culture and changes in the benefits for government.

Mr Egan: I can make some inquiries of my counterparts in that regard.

Mr S.A. MILLMAN: If that is all right —

Mr Egan: Yes.

Mr S.A. MILLMAN: I would appreciate that. In terms of the capacity of the public sector and the allocation of risk, there are a whole range of different commercial team contract categories—public–private partnerships, design–build–operate, maintain, build–own–operate–transfer, design and construct, direct build and alliancing. There might be more; there might be some that are obsolete now and all the rest of it. In terms of the advice that the State Solicitor's Office provides to government, is it an iterative relationship whereby the government spells out some of its objectives and then the State Solicitor's Office comes back with the advice on which of these contract templates—I use the term in its broadest sense—would work to deliver that particular project?

Mr Egan: As part of the procurement phase for projects of the nature that use those sorts of contracts, there is a procurement options analysis, which is undertaken that seeks to identify what delivery model should be best employed for that particular project. In circumstances where a delivery model is then identified, the State Solicitor's Office would become involved in drafting the

contract. We have a template for that contract with generally standard, yet state-favourable, risk allocation positions. However, they get revisited, taking into account the nature of the deal that is being negotiated.

Mr S.A. MILLMAN: Yes—for particular circumstances a particular contract?

Mr Egan: Correct.

Mr S.A. MILLMAN: Is there a matrix or a chart that assesses or lists the criteria that would be preferenced by particular types of contracts? For example, a design and construct contract might provide A, B, C and D; an alliance contract might provide C, D, E and F—that sort of thing. Then the state comes to the State Solicitor's Office and says, "Look, the essential criteria that we want in this arrangement is C, D, E and F" and the State Solicitor's Office then advises accordingly. Is that fair?

Mr Egan: No.

Mr S.A. MILLMAN: No, okay. How would you describe it?

Mr Egan: Following a procurement options analysis, a particular model of contract is developed as the delivery model or a model of delivery is selected. Let us say it is an alliance contract, by way of example. We have a suite of alliance contracts for different sorts of projects. The boilerplate across the majority of alliance contracts should be the same for the benefit of government, although in an alliance model it is not a particularly good example because of the risk allocation. But, generally speaking, the risk framework would be there. It would be an unusual thing for the department or agency to seek to do any violence or interfere with that standard risk framework. Rather, any violence which is done to the risk framework in terms of particular provisions or risk allocations is generally done during the negotiation phase, following negotiations with the other side.

Mr S.A. MILLMAN: Do you have any pushback when government has particular objectives that it is trying to achieve and you have a contract that you have proposed but your contract manager has a preference for a different type of contract? If, for example, the government says, "These are the objectives that we are trying to achieve" and the State Solicitor's Office advises that the best way to achieve that is an alliance contract but the contract manager from the particular department says, "Actually, I find using a build–own–operate–transfer contract is easier because that is what I did on the last job"—do you ever get that situation?

Mr Egan: No, and the reason for that is because the procurement options analysis, or POA, is nine times out of 10 conducted by the department exclusively or, alternatively, for the other tenth occasion, conducted in conjunction with the State Solicitor's Office. So, there is a group of people who decide, as a collective, what model should be employed.

The CHAIRMAN: The special inquiry in regards to the Perth Children's Hospital, at volume 1, page 174, mentioned the issue about future infrastructure projects. You also mentioned that some projects do not even have a management plan and he mentioned that maybe there should be consideration by your office for additional levers to encourage the managing contractor to provide a contractually compliant construction program. In respect to that, do you know if the government has accepted that recommendation, and how would it be implemented?

[11.20 am]

Mr Egan: I could not say whether the government has accepted the recommendation. What I can say is that at the conclusion of every contract, we, in conjunction with the client on those strategic projects, undertake a lessons-learnt workshop, seeking to identify how, for the next occasion, the contract can be improved, which includes any levers.

The CHAIRMAN: Further to that, you mentioned that part of the problem is the capacity of the people to manage the contracts, which is obviously difficult to improve, but maybe the centre of

excellence could help. From your position, from a legal perspective, you said that you do a review, so do you think contract levers can assist to try to make people perform better?

Mr Egan: The contract levers are there for the benefit of the principal—that is, the state—applying that lever to the contractor to promote certain behaviours. You would not build in any contract levers into the contract for the benefit of the contract manager; rather, it is all about how the contract is to be administered vis-a-vis the contractor.

The CHAIRMAN: Also, it is the ability, or the preparedness, to use those contract levers.

Mr Egan: Yes, that is correct.

The CHAIRMAN: Which the Perth Children's Hospital seemed to suggest was not the case.

Mr Egan: Correct.

Mr S.A. MILLMAN: On contract levers, your centre of excellence would build capacity in the public sector—let me put it differently. Private sector lawyers have a sense of their clients' appetite for risk and a sense of their preparedness to go to litigation built up over a long symbiotic relationship. If it were suggested that although the Perth Children's Hospital contract was beneficial to government and had good levers but the reason that those levers were not used was because of an absence of this symbiotic relationship between the authors of the contract and the contract management team, what would you say to that? Let me put it differently —

Mr Egan: I am thinking.

Mr S.A. MILLMAN: You looked like that question was perplexing.

The private sector enter into contracts that they know they going to have to sue on or they are going to litigate on. They have an appetite for litigation, and their lawyers know that, so they draft their contracts accordingly. Part of the problem that was identified in the Children's Hospital inquiry is that although the contract was arguably beneficial to the state, the people responsible for managing the contract were reticent to use the levers. My hypothesis is that the reason the private sector is better at it is because there is a better relationship between the lawyers and the client and there is a closer understanding between the lawyers and the client about risk appetite, litigation appetite and those sorts of things. Part of the reason it does not exist in the public sector is because you build a billion-dollar children's hospital once every 40 years, so it is hard to build up capacity over time.

Mr Egan: Perhaps I could address that question by saying this. The Perth Children's Hospital is not a particularly good example. The reason for that is because in that case the State Solicitor's Office and me, personally, were involved extensively during the delivery phase of that contract and how the procurement should be managed and the contract should be administered, including the provision of very robust advice in relation to contractual provisions and contractual levers, but it was for others to decide whether those provisions should be utilised and those levers should be pulled. The relationship between the State Solicitor's Office and those senior public servants who were involved in that project was particularly good. I cannot imagine it would have been any better if it had been a private sector firm engaging or advising a private sector client. But it does come down to the appetite of government because, ultimately, certain decisions were made by government in relation to certain contractual levers, based on advice of whether it was appropriate in those circumstances to use the levers.

Mr D.C. NALDER: Taking a slightly different tack, we talked about departments not taking responsibility for contract management and about the consistency of contract management. I asked, "Should that be the State Solicitor's Office?" and you indicated your view was that it should be the Public Sector Commissioner or the Department of the Premier and Cabinet.

Mr Egan: It should be DPC or Treasury. The reason for that is because it seems to me that consideration would arguably need to be given to whether there should be a Premier's circular or a Treasurer's instruction, and in those circumstances one or other of those agencies would be responsible.

Mr D.C. NALDER: Given that we have had some contracts have issues that pose huge liability risks to the state, what action or recommendations has the State Solicitor's Office made through the Attorney General or any other department as to ways the state can improve contract management?

Mr Egan: I have provided advice to government in relation to the advantages to government and the state of a contract risk register and a litigation risk register. Those registers would enable my office and government to seek to identify where perhaps critical risks were in relation to particular contracts, and as a consequence they could be better managed by the department and/or with the State Solicitor's Office.

Mr D.C. NALDER: Are they in relation to a specific contract issue or is that more general advice?

Mr Egan: That is a more general approach.

Mr D.C. NALDER: Are we able to obtain copies of that advice so that we have a record?

Mr Egan: It is an advice to which —

Mr D.C. NALDER: If it is general advice, it is not as specific.

Mr Egan: I will take that on notice and I will speak to the Attorney about it.

Chair, there were two other matters that came up in earlier questions that perhaps I could just address briefly. There has been reference to the contract manager's role. In my experience, it is extremely unusual for a contract manager to be involved during the procurement phase of a contract. As a consequence of that, they are not particularly familiar with the contractual provisions, and, indeed, when they get lumped with the contract after it has been entered into, they might not necessarily agree philosophically with certain provisions of the contract and, therefore, they are not administered in as robust a way.

Secondly, in terms of capacity, in my observation, the officers at department and agency level who are presently managing contracts are also expected to take responsibility for procurement of those contracts, so their business as usual—their daily work—is involved in contract management. As and when the contract comes around for renewal or a new contract has to go out to market, it is the same individuals who are required to undertake the procurement, and, therefore, given that they have a nine-to-five or a nine-to-six job, or whatever it is, they do not really have the time to deal with that sort of procurement. In my view, that creates problems. I think that there is insufficient planning in terms of procurement as a result and contracts are probably rolled over more frequently than they should be. As a consequence of that, you do not get that competitive tension that you would otherwise get if you went to market.

Mrs L.M. O'MALLEY: My question goes to that. There are three key elements—the authorship, the procurement and the management—of a contract. The statement that you made earlier that often the managers may not have read the contract, or be really aware of the contract, really highlights that disconnect between those three really important key components. What are your suggestions around that to provide a greater connection between the three? Is there even any potential there for those who are involved in the procurement and management to be somehow participants in the authorship?

Mr Egan: Yes. In a recent contract—when I say "recent", it was probably four years ago—in relation to the Melaleuca contract, which is a Corrective Services contract, we specifically took the view that the contract manager should be engaged during the development of the new contract and

negotiating certain positions in relation to that contract. That is perhaps the exception, although there are certain departments or agencies—a good example would be Main Roads or PTA—where those contract managers are heavily involved in terms of procurement and negotiation, but, other departments or agencies, not so much.

Mrs L.M. O'MALLEY: Could this potentially form some other elements around the framework that you have talked about?

Mr Egan: Yes, I think that would be useful.

The CHAIRMAN: Just to clarify, you will seek advice in regard to the question from the member for Bateman and also you will provide the documents that you referred to. We may also have a series of questions that we will also send to you that we did not have time to go through or ask today.

Mr Egan: Yes.

The CHAIRMAN: Thank you for your evidence before the committee. We will forward a copy of the transcript of this hearing for correction of transcription errors. Please make any corrections and return the transcript within 10 working days of receipt. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be introduced via these corrections and 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. Thank you once again for your attendance today.

Mr Egan: Just in terms of a supplementary submission, if I was anxious to provide some brief submission in terms of the matters that I have discussed.

The CHAIRMAN: That would be very welcomed.

Mr Egan: How much time would I have to do that?

The CHAIRMAN: How much do you need?

Mr Egan: Four to six weeks.

The CHAIRMAN: Yes, no problem; and even a bit longer if it improves the quality. Thank you very much.

Hearing adjourned at 11.32 am