STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

PROVISION OF INFORMATION TO PARLIAMENT

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 23 MARCH 2015

Members

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

Hearing commenced at 3.40 pm

Mr PAUL LARSEN
Chief Executive Officer, Brookfield Rail, examined:

The CHAIR: Good afternoon. On behalf of the committee, I would like to welcome you to today's hearing. I will commence by asking you to state your full name, contact address and the capacity in which you appear before the committee.

Mr Larsen: Paul Larsen, CEO of Brookfield Rail, and with me as advisers I have Megan McCracken, head of human resources and corporate affairs of Brookfield Rail and also Brian Pereira, chief financial officer of Brookfield Rail.

The CHAIR: But you will be answering the questions and they will just be providing you with advice?

Mr Larsen: That is correct.

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Larsen: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them, and also ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public; although, I should correct that, as this committee has a policy of actually making the uncorrected version of Hansard available on the web within a couple of days, but it is still clear that it is an uncorrected version, so people should not be quoting from it or using it other than just reading it. I advise that publication or disclosure of the uncorrected transcript of the evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. But, as I say, the committee has made its own decision to publish and put them on the web after hearings.

Before I invite you to make any introductory statement, I did think it was worth providing you with a little bit of background to the inquiry. You would have probably seen our terms of reference. We are holding an inquiry into the provision of information to Parliament, and the circumstances in which the information should be provided. Obviously documents, contracts with government, where claims of commercial-in-confidence are made by government agencies have been one of the issues that have come up as part of our inquiry as to when that information should be provided to the Parliament. We have chosen to adopt a number of case studies to look at specific cases of where information has been requested, and not just commercial-in-confidence but certainly in terms of your situation that is the issue that we are dealing with. The committee is certainly looking to try to understand the processes that government goes through, and also the private sector, and how the provision or non-provision of that information affects the private sector. Obviously your particular organisation's case provides an interesting case study, because initially the contracts were refused when asked for by this committee. Subsequently, part of that information, it turned out, was available on American or United States' websites, and then finally the government provided it to

a committee in the other place, and that contract and most of that documentation have now been made public. So, obviously, it provides an interesting case study for this committee to look at in terms of the provision of information to Parliament.

I also want to indicate to you that the committee has sought a legal opinion from Mr Bret Walker, SC, about the operations of sections 81 and 82 of the Financial Management Act. Section 81 is, obviously, the section in the Financial Management Act that makes it clear that government agencies should not enter into any contract that prevents them from being able to be provided to Parliament. That is a short summary of our view of section 81. Section 82 requires that, should a minister fail to provide or refuse to provide information to the Parliament, including its committees, it is incumbent upon the minister to lodge a certificate under section 82 that then also requires the Auditor General to look at whether it was reasonable and appropriate for the minister not to provide that. Obviously, a claim of commercial-in-confidence is one of the key areas that this committee is looking at, and that is why we have asked you along today to ask you some questions about it and the way in which the Parliament seeks information and what impact it would have on you as an organisation. It is not to look at the broader questions of the whole operation of your lease. I am sure you have had enough parliamentary inquiries for a while in that regard, although obviously some of it may interconnect. So, that is a bit of background. I would ask whether you want to make any introductory statement. If not, some members have questions they would like to ask you.

Mr Larsen: Thanks, Mr Travers, I will do that. I would just like to first talk about our business. Actually, my introduction will be very brief, recognising that you have questions you want to ask. Brookfield Rail's vision is to run a safe, efficient and reliable railway to enable the economy of Western Australia to grow. Brookfield Rail has invested over $2.5 billion in the rail network since 2001, growing freight volumes from 30 million tonnes per annum to 75 million tonnes per annum. This outcome has been beneficial for the state, our customers and our investors. We are moving record tonnes on the railway and have the capacity to do more, and our business plan is to continue to invest in the rail infrastructure, to support economic growth in Western Australia through the provision of a safe, efficient and reliable rail infrastructure. That is my opening statement completed.

The CHAIR: Okay, thank you. I invite members to ask questions.

Hon ALANNA CLOHESY: I will start with a general question. Could you describe the process that you went through with government in determining which parts of your arrangements with government, your contractual lease, would be public and which would be private? First of all, I just want to focus on the process that you went through in determining with government which of those would be the case.

Mr Larsen: I am sorry, is it Mrs Clohesy?

Hon ALANNA CLOHESY: It is Ms.

Mr Larsen: Ms Clohesy, we were asked by the parliamentary inquiry—and when I refer to that, I mean the committee chaired by Ian Blayney—to provide certain information.

Hon ALANNA CLOHESY: So, that was the original one?

Mr Larsen: The Economics and Industry Standing Committee chaired by Ian Blayney, yes. So, we were asked by that committee to provide certain information, and also as part of that process to make comment but with substantiation as to what information might be confidential. We complied and provided all the information requested of us, and we also took the opportunity to flag to the committee what information was confidential within those documents and why. Then, clearly, the committee has decided to keep some but not all of that information that we requested confidential, and we do not have any further comment to make on the decisions of that committee. The reason that we might ask for the information to be kept confidential is that if that information being

released to the public could result in it having an adverse effect on our business, that is the reason we would ask for it to be kept confidential. And adverse effects could include relationships with lenders, investors, customers, suppliers; those adverse effects that, in turn, have negative consequences for the ongoing wellbeing of the Brookfield Rail business. I am happy to give an example, if you wish.

Hon ALANNA CLOHESY: The reasons for those determinations, can I just put to one side for a second?

Mr Larsen: Sure.

Hon ALANNA CLOHESY: That is because I think we would all like to go into those reasons in more detail and discuss those with you. I want to talk about the process that you went through. So, the first step in determining what parts were public and what you wanted to keep private, the first step you had in discussing with government about those, was with the Economics and Industry Standing Committee? Was that the first time you had talked to government about what could be public and what could be private?

Mr Larsen: I will have to confess that I do not know the answer to that question, in terms of exact timings, and come back to you on that, but I believe so.

The CHAIR: Because I suspect that you may find that this committee had previously asked for copies of the contract and variations to the contract and any agreements, but that was certainly back in November 2013.

Mr Larsen: Yes. I do not believe that we have ever received a direct request from this committee for those documents. I believe this committee may have asked the PTA for those documents.

The CHAIR: Yes.

Mr Larsen: We were asked directly by the other committee that I referred to, chaired by Ian Blayney, for those documents directly, but I do not believe we have ever been asked directly by your committee.

[3.50 pm]

The CHAIR: No; not directly, but I guess what we are asking about is, when this committee asked the government to provide those documents, whether the government consulted with you prior to providing advice to this committee. Back in November 2013, did they contact you?

Mr Larsen: I believe they may have but I will have to take that question on notice. As you are aware, we have come here with very short notice, so I apologise if I have to take any questions on notice.

Hon ALANNA CLOHESY: We appreciate that.

Mr Larsen: We were happy to oblige to come at short notice, but that one I will have to take on notice. How does that work with the questions on notice?

[*Supplementary Information No A1*.]

The CHAIR: We will make that A1 and you can give us an overview of whether the PTA contacted you. Well, it could be the Department of Transport, but I suspect the PTA.

Hon ALANNA CLOHESY: We will just say from government.

The CHAIR: Anyone from government who contacted you about providing information either to this committee or to the house.

Mr Larsen: Okay. There may have been other requests before that to table the lease in Parliament, which I cannot recall.

The CHAIR: There was also an occasion when I asked many years ago for a copy of the contract in Parliament and a copy of that contract was provided to me on a confidential basis outside the parliamentary process.

Mr Larsen: By the PTA.

The CHAIR: By the PTA, and I am think you were consulted on that.

Mr Larsen: I cannot recall. I will have to check my records.

The CHAIR: For the record, I also note that that copy that was provided to me has never leaked, despite numerous requests to do so.

Hon ALANNA CLOHESY: That is a gold star!

Hon RICK MAZZA: If this committee or another parliamentary committee had asked you directly for a copy of that contract, would you be able to provide that or would you have been stopped from doing it by the contract you have with the government? In other words, would you have had to consult with the PTA before you could have given us anything anyway?

Mr Larsen: I do not have that document here with me today but I believe that it requires both parties to the contract to be in agreement that disclosure to a third party could occur. I believe that to be the case.

Hon RICK MAZZA: The confidentiality side of things was a contractual agreement between yourself and the government?

Mr Larsen: That is right, yes.

Hon ALANNA CLOHESY: So that any part of the contract being discussed with anyone else needs to be agreed to either by you or by government, depending who is doing it?

Mr Larsen: Certainly, in the case of commercial contracts between ourselves and other organisations, most confidentiality clauses work in a way such that information flow can occur between the two parties, with both parties being confident that that information would remain confidential so as to avoid the adverse effects on either party's business that I talked about before might occur. It gives both parties the confidence to deal with each other to share information such that it can be done in a way that they know that that information will not be released publicly and, potentially, have an adverse effect, as I mentioned before.

Hon RICK MAZZA: Were you ever asked by the government whether it could release information and you refused, and vice versa?

Mr Larsen: Are you referring to the parliamentary committee?

Hon RICK MAZZA: Just any information for a copy of the agreement or any request through a parliamentary committee where the PTA might have said to you, "Well look, we've been requested to disclose this information; we'd like to, but we need your agreement." Have you ever refused for that to be released?

Mr Larsen: Certainly, I can comment in terms of the EIS committee, chaired by Mr Blayney, that we agreed for information to be released, but as we were entitled to seek confidentiality for certain parts of those agreements, we highlighted the parts of the agreement that we thought needed to remain confidential.

Maybe if I could go back to Ms Clohesy's questions, which I have not answered for you yet, which is: how do we arrive at what might be confidential? I suppose, at the end of the day, we need to form our own view on what confidential information might exist within our business, including within our agreements, which, if disclosed publicly, might have an adverse effect on our business. In some cases, actually talking about the disclosure of what the nature of the adverse effect is, in its own way, discloses what the confidential information is, so that is also a consideration in disclosing

or talking about confidential information. Having said all of that, I want to reiterate that we did provide the parliamentary inquiry of EISC with absolutely every single piece of information they asked. Only where we were asked to express our views about confidentiality, did we, and we did so with substantial substantiation. That committee then took that on notice and considered that information, as in our substantiation. It then made its own decisions as to what would be published and what would not and we do not have any further comment to make on the results of that inquiry.

The CHAIR: I have a copy of your contract here. Now that it is in the public domain, I do not think we need to keep it confidential. Clause 38 is the main clause regarding confidentiality says, "No confidential information may be disclosed by a party to any other person except in", and it provides a whole range of circumstances. It then goes on, "A party disclosing information must use all reasonable endeavours to ensure that the persons receiving confidential information do not disclose the information except in the circumstances outlined in clause 38(1)." But in 38(4) it states, "Nothing in this clause prevents the minister from taking a copy of this agreement in Parliament or providing a copy to any member of Parliament." Why would that not then make it clear that when the contract was originally entered into between government—I think it precedes your time; but for the original lessee of the lines—why would there not then have been an expectation that the information contained in that contract could be made public by a minister at any time? Because there is requirement on them to consult with you; there is no requirement on them to keep any information confidential. Why would you believe anything other than the minister has a right to table that information at any time they see fit?

Mr Larsen: Mr Travers, I do not have a copy of the contract here with me and I cannot profess that I read it every night before I go to bed but, I think, if you have read that clause that quickly, which I presume you have —

The CHAIR: Notwithstanding this clause. I am happy to send a copy around to you.

Mr Larsen: I suppose, with all due respect, your question in relation to that clause has to be directed to the minister and the government because it is a clause that is to their benefit. It is there for the government to decide to use that clause or not.

The CHAIR: One of the reasons the government comes to us is that it says, "But the other party to the contract didn't want it released." But when you have a clause in a contract that makes it very clear that the minister can table a copy of that contract in the Parliament, with no qualifications, I am trying to understand how you as a private sector organisation would therefore see anything other than working on the assumption that all of that information from then onwards has the capacity to be made public so you would operate your business assuming that at any time, that information could be made public.

Mr Larsen: I understand your question. I think the danger with contracts is reading individual clauses in isolation. The reality is there is a header clause there about confidential information which is to respect the rights of both parties to the contract around the exchange of confidential information for the sorts of reasons I spoke to Mr Mazza about earlier. I think to take one subclause of a header clause and talk about that in isolation may be dangerous. I still think that your question is an appropriate question more so for the minister and the government. At the end of the day, this contract does afford us to be asked the question by the other party as to whether we believe any information is confidential, and to respond to that, which we do. We are not the party that decides whether a document will be tabled in Parliament or not, but we do have the right to say whether any piece of information within a contract may be confidential or not. That is what we are entitled to say in response to the utilisation of that clause.

[4.00 pm]

The CHAIR: Yes. I guess my point is—I do not disagree—that the minister is someone who has to answer the question as why they did not provide it to the parliamentary committee when they

clearly had the capacity to do so. But part of the issue for this committee is to try to understand why an organisation would be reluctant to have that information made available to the Parliament, particularly when there is a clause so clear in the contract. You can even bring that into the operation of the Financial Management Act, which says that governments cannot enter into any agreement that would prevent the provision by the minister to Parliament of information concerning any conduct or operation of an agency. There is also, as I say, a new section that was introduced in 2006, because that section about not entering into contracts precedes the current act. On top of that, there is now a provision that if they decide that it is reasonable and appropriate not to provide information to Parliament, they have to send it off to the Auditor General, and that triggers a requirement for the Auditor General to consider whether it is reasonable and appropriate. One of the things that we are trying to get to is what is reasonable and appropriate. Therefore, understanding how as an organisation you would view these matters is really important to enable us to understand how you could arrive at it being reasonable and appropriate not to provide that information to the Parliament.

Mr Larsen: I am not a lawyer, but I do understand enough about contracts to know that to read a subclause on its own, without the context of the other parts of the clause and the entire agreement, may be risky. At the end of the day, as I said, I think the decision as to whether to table the document in Parliament or not is a right that rests with only one side, that being the minister or the government. The rights that we have revolve around the ability to express what we perceive to be confidential and believe to be confidential information. So, we do that, and then the government or the PTA or the minister has to form their own view, based on that information that we have supplied about what we say is confidential, to arrive at the decision as to whether to table the document or not. I suppose what I am saying is that in the overall clause of confidentiality, there is one element that talks about tabling the document. But that cannot be considered in isolation of the confidentiality provisions overall—it cannot be. The remaining confidentiality provisions cannot be ignored for the sake of subclause (4) on its own, if that makes sense.

The CHAIR: Following on from that, my understanding is that a copy of the contract, except for the attachments and schedules, was available on the United States Securities and Exchange Commission's website. So, if it is confidential, why was it available on that website when it was not available to the people of Western Australia at the time through the parliamentary process?

Mr Larsen: My understanding is that the reason it was on a website in the USA is that under company law, Genesee and Wyoming, which was a partner in the ownership of the business for the first five or six years, was required to disclose some parts of the agreement on—I am just trying to think what the equivalent is in America of ASIC here. They were required to disclose by law some elements, but not all, of the contract on that website, because they had to disclose it to that organisation.

The CHAIR: And that, again, overrode the confidentiality clause of the contract?

Mr Larsen: Quite often, confidentiality obligations between parties recognise that—it is different contract by contract of course—if required by law to provide information, that may override a confidentiality provision. But of course every contract has different words and full stops and commas et cetera for those provisions.

The CHAIR: Earlier, you were about to provide a specific example of adverse consequences. Do you want to return to that?

Mr Larsen: Sure. It might not be specific, but it is an example. We talked about an adverse effect on our business. If we were in the middle of trying to raise some funds in the investment market to invest into the rail network, and if some information was released publicly—I am not talking about any specific information, but some information—without the appropriate summation, context and timing, that could spook the investment market and put at risk our ability to raise funds to invest in the rail network, because the investment market expects to be delivered information in a manner

that they can interpret with the appropriate summation and context. So that is an example of an adverse effect on a business.

The CHAIR: But at the time the request was made either by other parliamentary committees or by the government as a result of the original request from this committee, was that an issue for your company?

Mr Larsen: Actually, it was, because near that time we had been through, and were about to go through, subsequent processes of seeking investment from investment markets into our business.

The CHAIR: How would the release of things like your performance standards impact upon those investment decisions?

Mr Larsen: It is interesting. The performance standards, we did not deem that to be confidential information, because we publish those on our website. So, from recollection, I do not think we had any problem with that. Of course in all of our contracts with our customers, we have an agreed performance standard that we must achieve. So we are required to publish the axle loads and speeds of certain line sections. The ERA requires us to publish that information.

The CHAIR: Has that always been the case?

Mr Larsen: I think even when it has not been the case with the ERA, we have published that information and made that available on the performance standards of each and every individual line section of the railway.

The CHAIR: It is interesting you would say that, because when we were finally referred to the contract—in fact, we were not provided with the contract back in November 2013; we are simply referred to the United States' website that had it, and it had deleted the attachments and schedules, and obviously one of those schedules is the performance standards. So are saying that the performance standards from your point of view have never been a confidential piece of information?

Mr Larsen: Certainly the performance standards of the railway as it performs today, which exceed the performance standards that are in the lease, have been published on our website for a long period of time.

The CHAIR: So if you are performing above the lease requirements, why would releasing the performance standards in the lease have any negative or detrimental impact on you?

Mr Larsen: As I said, the performance standards I do not believe are part of what we would have said was confidential information within the lease. When we were asked by the parliamentary inquiry what was confidential and what was not, my recollection is that we did not have a problem with the performance standards being made public, but there was other information in there that we deemed to be confidential.

The CHAIR: What was some of the other information that you would deem to be confidential? As you said, performance standards has certainly been one of the key ones, and certainly in terms of the variation to the agreement—the terms of the variation—again, that was something that was clearly kept confidential. So things like a cap on what you can charge on lines that have had investment made in them, why should that be kept confidential?

Mr Larsen: I will actually refer to a letter—this letter is in the parliamentary inquiry's report—as to why that is the case. I will read from that letter what we said about that particular clause, Mr Travers. It says "Clause 10 is particularly commercially sensitive to Brookfield Rail as the information in it regarding fee cap arrangements with the PTA and processes for dealing with annual profits would be fundamentally misleading to potential users of our railway network and would have the potential to unnecessarily disrupt negotiation processes both within and outside the code. The release of this information would prejudice BR's position in the current access proposal by CBH under the rail access regime" et cetera.

[4.10 pm]

The CHAIR: But I do not understand how that works. How does the other party, knowing that there is a legal requirement on you for certain lines, to not charge above a certain rate, how can denying them the knowledge that that agreement even exists prejudice the negotiation?

Mr Larsen: I think I have answered your question specifically about the information provision, but I think that question does not fall within the scope of this inquiry.

The CHAIR: It does. The very heart of the reason it is not being provided is because you are arguing it has a negative commercial impact on you. I am trying to understand what that negative commercial impact would be that the other parties to negotiations, knowing that you, for those lines, cannot charge them more than a fixed rate until 2016.

Mr Larsen: It is as I have outlined in our letter to the committee, which I just read from.

The CHAIR: But that does not answer the question, with all due respect. Is that the only answer you can give?

Mr Larsen: I think it is quite an extensive answer. It does actually say that —

The CHAIR: How does it —

Mr Larsen: It says what the adverse impacts on our business could be.

The CHAIR: But that adverse impact would suggest that you are able to then negotiate a better outcome over and above what you are able to get if that cap is known. Clearly the intent of the cap was to restrict how much you would get from those lines. If the party does not even know there is a cap in place, how can they do their own assessment, if you offer them a total access fee across the whole network, as to whether you are complying with that legal requirement?

Mr Larsen: The point that I made earlier about the disclosure of confidential information and then getting into the detail about the nature of the adverse effects could in fact expose confidential information in its own right which could have an adverse effect. I am satisfied that the answer that we provided to the parliamentary inquiry responds to your question. I do not have any further information to add to that question. I think we have explained in that letter why, in that case, we asked for that piece of information to be kept confidential. I think your questions are probably going further now than the actual purpose of why we are here. I am happy to talk to you as a member of Parliament outside this inquiry about that. I would be happy to do that. We provided everything that was asked of us. Where we were asked to explain why we thought something was confidential and we did. The committee then took that information, made a decision, in some cases to publish, in other cases not to publish. We respect the decisions of the committee and have no further comment on the inquiry.

The CHAIR: We are not so much looking at the other inquiry of the other house. We are looking at the information that has been provided to this committee or not provided to this committee, and also looking at the broader questions of how it moves forward in trying to understand commercial impacts. Can I make the point that I certainly have no problems with the information or the relationship I have had with you wearing other hats, apart from the chair of this committee, in that regard.

Mr Larsen: Likewise.

The CHAIR: There is a role in terms of Parliament and there are also roles in terms of shadow spokespersons or whatever else.

Mr Larsen: Mr Travers, I respect that. That is why I am pointing you to this letter that we wrote, which we put some thought into. We have, we think, succinctly described why it is we think that information was confidential and I honestly do not have anything further to add at this point.

The CHAIR: Obviously the committee in the other place took a decision to make that information public, so they obviously did not feel that the answer was sufficient. I am giving you another opportunity to see if there are other explanations. As a member of Parliament, sitting in this role as a committee that is given the role of oversight of government expenditure, the fact that a committee is denied even the knowledge of an agreement that seeks to cap, after a significant government investment, the fee that can be charged on a line but that that is never made public for potential users of that line, in my view potentially becomes a nonsense if no-one can even know that there is a cap there.

Mr Larsen: I thank you for the opportunity to add more information to that response, but I honestly do not have any more to add than what we added in that letter.

The CHAIR: I realise we are getting into commercial negotiations here; I want to try to avoid that as much as I can. When you have a figure that talks about your access fees for the rail network for CBH, where a significant component of that is, in theory, now we are aware, capped—because that information has been released—yet the overall access fee for the total network goes up by 30 per cent, it does leave one wondering what the increase on the uncapped lines must be. For members of Parliament who are trying to ensure that the overarching interests of the state are being protected, that the money that is being invested on behalf of the state is being put to good use and all of the requirements are being met, it makes it very hard to understand that.

Mr Larsen: They are excellent questions, and questions that in fact we were asked by the other committee, which we answered. As I said, we provided absolutely every single piece of information they asked for and in the format they asked for it. Where we thought it was confidential, we asked for it to be kept confidential, and the committee made its decision to respect that or otherwise. They did, and we do not have any further comment to make on their decisions.

The CHAIR: At what point does your desire to keep some of this information secret, at what point does reputational damage to your company become more important in terms of maybe supporting it being made public? There is the other broader question that comes into all of this: from a company perspective, even if you exercise a right to keep everything secret, is there a point where you suffer reputational damage whereas if that information had been made public in the first place —

Mr Larsen: If I could just clarify that —

The CHAIR: — the reputational damage is greater than any impacts that releasing that information may have had?

Mr Larsen: If I could just clarify that. In all the information that we provided to the parliamentary inquiry in terms of information they requested, we certainly did not ask for it all to be kept confidential. That would be a nonsense. We only asked for the parts that were confidential to be kept confidential. I suppose for us in fact, from a brand perspective, the greatest disappointment for us was not in relation to the confidential information issue but in fact we supplied over 100 pages of non-confidential information in our submissions. Not one piece of that was utilised in the parliamentary inquiry's report. That was probably more of a concern for us than anything else in the nature of the flow-on effect of the brand and such. We are very disappointed that of all the evidence we supplied, not one piece of it was used in that parliamentary inquiry's report.

The CHAIR: One of our difficulties is we are not here looking at what the other committee did. There is obviously a role between the two houses. We do not look at what they do and they do not look at what we are doing. As I say, we are very much focused on those requests by this committee at various stages, and the broader questions about the provision of information to Parliament rather than specifically what the other committee did or did not do. In terms of answering my question I was not going to shut you off because you were clearly wanting to make a point, which was reasonable in terms of reputational damage, but I am just clarifying that we are not here to look at

what the other committee did. I accept that in answering your question that was an important part of the answer to my question.

Mr Larsen: Maybe if I could summarise by saying that we provided absolutely everything that was asked. Where we honestly thought information was confidential, we flagged that to be the case. We have to live with the committee's decisions. But you asked me about brand and reputation. My biggest concern was the non-use of all of the non-confidential and very detailed submissions that we made. That is why I —

The CHAIR: That is why I did not stop you saying it. I am trying to clarify that we are not here to look at what the other committee did or did not do—we cannot do that. We are looking very much at the provision of information in the main to the Legislative Council. I will invite Hon Alanna Clohesy to ask a question.

Hon ALANNA CLOHESY: In terms of adverse consequences for your company in the provision of information prior to the Blayney committee hearing, what would the definition of "additional non-grain revenues"—what adverse consequences would arise as a result of making public that which is in the contract?

[4.20 pm]

Mr Larsen: As I said when I got here earlier today, I have only been given very short notice. I will have to take that one on notice. I would like to say that I know the answer to every single question that you have got today but that one, I will have to take on notice. I apologise.

Hon ALANNA CLOHESY: What I might do then is go through —

The CHAIR: Rather than give it a number, I suspect you have a couple of further questions so we will just go through those and give them all the same number.

Hon ALANNA CLOHESY: Also, what would be the adverse consequences to your company, however described, if the definition of annual grain track access revenues was made public?

Mr Larsen: Which agreement is this in the context of?

Hon ALANNA CLOHESY: The project agreement for capital works—dedicated narrow gauge grain lines.

The CHAIR: It is dated 9 July 2010.

Mr Larsen: I am familiar with the agreement; I am just trying to recall the context in which that particular piece of information is used. Again, I will have to take that question on notice.

Hon ALANNA CLOHESY: That is on page 2. The additional "non-grain revenues" definition is on page 2 of that contract too. Similarly, the definition of "annual track access revenue" and "annual operating and overhead costs on page 2 of that agreement. These are all definitions. What would be the adverse consequence to your company if the definition of "annual profit" on page 2 was made public? What would be the adverse consequence to your company of providing a definition of "CPI", on page 3, and the definition of "excluded grain track access revenues" on page 3, including the heading and all of the clauses 10.1 to 10.6 on pages 13 and 14?

Mr Larsen: That one I can answer because I think that was the clause that I addressed in the letter to Mr Blayney dated 3 October 2014, which is part of the report that has been published.

Hon ALANNA CLOHESY: Okay.

The CHAIR: So that is the capped access rates, effectively.

Hon ALANNA CLOHESY: So clause 10 is capped access rates.

Mr Larsen: That is correct, I believe. Yes.

The CHAIR: You may or may not be able to answer those questions now. As you go through an ERA process and then ultimately into arbitration, would that information not need to be provided at some point throughout that process either to the ERA or to the arbitrator?

Mr Larsen: The questions that Hon Alanna Clohesy was asking was around definitions, and I am not sure where those terms get used in that agreement. That is why we need to take those questions on notice. Definition is one thing and then how they get used multiple times within an agreement is something that obviously we perform some analysis on, which I do not have here.

Hon ALANNA CLOHESY: My questions relate specifically to the definition and the page number. If you wanted to expand on that in the answer to my question—how it might be used further in the agreement—that is helpful too. My questions are specifically in relation to those definitions.

[*Supplementary Information No A2.*]

The CHAIR: Did you want to continue with the other definitions?

Hon ALANNA CLOHESY: Yes. Where did I get to? I got to clause 10 and the entirety of schedule 5. This is all part of the one question. What adverse effects would it have on your company if the entirety of schedule 5 was made public?

Mr Larsen: If I recall, schedule 5 was published in a redactive form. Clearly, we have been afforded the opportunity by the other committee to provide reasons why that information might be confidential and they have agreed to not publish that information. For me to then go on and describe —

Hon ALANNA CLOHESY: As best you can.

Mr Larsen: As I said earlier, by describing what the adverse effect of something might be, you in turn end up disclosing what the confidential information is.

Hon ALANNA CLOHESY: You could also describe it in quite general terms, as in "it may have an impact on future negotiations".

Mr Larsen: Through the provision of information to the other inquiry, as we are legally entitled to, we provided the justification for why that information would be confidential. I do not have that to hand with me today but clearly the other committee has taken that on board and agreed with our assessment.

Hon ALANNA CLOHESY: You might be able to do a cut and paste in response to the questions that I have asked you. The evidence provided to the previous committee is not available to this committee. All that is available to this committee is the report. None of the evidence that you have provided to that committee or any other committee is available to this committee.

The CHAIR: Even if it is on their website, we need to separately collect it as our own.

Hon ALANNA CLOHESY: Because it has to come in as evidence to this hearing. That is one reason. Another reason is that all of that boxed information is not available. In asking all of those questions, it is helping this committee understand what may constitute adverse impacts on your company in decision-making about what is confidential and what is not.

I come back to the information that I am requesting—the references in the project agreement index on page 2 of that agreement to all clauses set out above, so all of the clauses that I have talked to you about, and a reason why that may have an adverse impact on your company, assuming it had not been but if it were made public. All of these questions will come to you when Hansard provides you with the information and also the committee will provide you with those as well.

Mr Larsen: And we will consider those in due course.

Hon ALANNA CLOHESY: Those are some specifics.

The CHAIR: That is all A2 in terms of the reasons why there needs to be that confidentiality.

Hon RICK MAZZA: Mr Larsen, I respect the fact that you are a private corporation and your duty is to do the best you can by your shareholders and make the maximum profit you can and negotiate the best contract you possibly can commercially. I respect the fact that where you have confidentiality rights within that agreement, you can keep those things confidential. When that contract was negotiated with the government with that particular confidentiality clause, was there much resistance from government in some of the requirements you needed in that confidentiality clause?

Mr Larsen: Mr Mazza, I cannot respond to that question because I was not with the organisation at that time. I joined the organisation in 2003.

Hon RICK MAZZA: So it was after that time.

The CHAIR: Any further questions?

Hon RICK MAZZA: No, I was just interested to see what the government's position was at the time.

The CHAIR: Do you consider the project agreement for capital works that was referred to earlier that was signed in July 2010 to be a variation to your contract?

[4.30 pm]

Mr Larsen: I am not really in a position to answer that question because I am not a lawyer. It is outside my area of expertise. Certainly, I think the agreement reflected the negotiations between the two parties and was captured and executed. I do not think I can answer that question because I am not a lawyer, as I said before, Mr Travers.

The CHAIR: But internally, do you treat it as a variation to the contract or do you treat it as a completely separate, stand-alone contract? So things like the confidentiality clauses, it does not appear to have its own sets of confidentiality clauses, so would that mean that the overarching confidentiality clause of the head agreement applies or would you say that there is no confidentiality in terms of that project agreement?

Mr Larsen: I think I will have to take the second part of that question on notice. The first part, I think we do, I suppose, for management purposes view that document as a variation to our lease because I think it alters the terms of the lease. That was what it was intended to do, if that answers part A of your question. But part B, I think I will have to take that on notice.

The CHAIR: All right. I will make that A3. I think it is interesting whether or not you would see other provisions like the confidentiality overriding this set under that or otherwise.

[*Supplementary Information No A3.*]

Mr Larsen: I think the key issue for us is that we were asked to provide that document directly by the committee. We provided it. We were asked to highlight the parts that we thought were confidential, which we did, and then the committee then considered that information as input to their decision as to what it should publish or not.

The CHAIR: Actually, my mistake; there is a confidentiality clause at 24.5.

Hon ALANNA CLOHESY: Had you been asked prior to that committee inquiry for that document to be made public by government? Had government asked you prior to those hearings?

Mr Larsen: I think we had been asked for our views on what parts of it might be confidential in light of the confidentiality clauses within the agreements.

Hon ALANNA CLOHESY: Do you know when?

Mr Larsen: Again, I have come here on short notice and I did not know what questions you going to ask, so I do not know the answer to that question.

The CHAIR: Again, I am happy for you to take it on notice. Under 24.5, part 2, there are some quite specific and more detailed clauses in there regarding confidentiality and how the Financial Management Act would work —

> … the PTA will not make public any part of this Agreement, or any information provided by WestNet in fulfillment of any obligation imposed on it by this Agreement, that WestNet expressly and reasonably nominates to the PTA as confidential. However, the PTA may require WestNet to withdraw any claim to confidentiality in respect of any part of the Agreement or information provided pursuant to it, as a condition of PTA executing this Agreement or PTA continuing to perform its obligations under this Agreement.

Again, you may not be able to answer it here, but are you able to advise us as supplementary information whether that was a clause put in at your request, or at the PTA's request? Is that something you would have asked for, or did the PTA suggest it?

Mr Larsen: Honestly, I just cannot recall. That agreement was negotiated in 2010, from memory, and I am sure there were multiple iterations of it.

The CHAIR: I am happy to take that on notice and have a look at your records to see if you can identify any information in that regard.

Mr Larsen: We may not be able to ascertain that.

The CHAIR: No, but it is quite an unusual clause in terms of confidentiality compared to the standard clauses within government documents, so I would be intrigued know. We will ask the same question of the PTA, but if you are in a position to indicate to us the history of that whole subsection 2 of clause 24. In fact, how the whole of clause 24.5 and each of the subclauses came to be drafted in the way in which it is drafted.

Mr Larsen: What I can say, Mr Travers, is in the case of most commercial contracts between two commercial parties, that confidentiality is there and if a party wishes to disclose some information to a third party that it needs to seek the permission of the other party. That is quite normal business.

The CHAIR: Yes, and there are also fairly standard government clauses, that is why I am intrigued to know equally for wording that is outside of the usual to be included in a clause normally requires someone to have first proposed it. I would be intrigued to know who first proposed that particular subsection, but also the clause in general and how it was arrived at—whether it was at the request of your lawyers or at the request of the PTA lawyers, who first put it forward as a potential clause and also their reasoning for that deviation from the standard clauses that are used in government contracts of this nature. If you can take that as A4.

[*Supplementary Information No A4.*]

The CHAIR: I think in terms of some of the questions that were outlined today, I would certainly appreciate you going away and reviewing your records of the occasions on which the PTA have contacted you about information being tabled in the Parliament: what was the nature of those conversations that you have had for each occasion as to what the order was; whether you proposed things to be kept confidential, or they suggested whether items be kept confidential. So it is sort of a brief summary of the history of each occasion that you were asked, what you were asked, and what was your response to the questions—as best you can that your records can allow you to look at. I will make that all A5.

[*Supplementary Information No A5.*]

The CHAIR: The final area that I had to cover was, obviously a range of this information has now been made public. Has it adversely impacted on your operations; and, if so, how?

Mr Larsen: I am going to go back to answer that I mentioned before in terms of if I am to get into the detail of what adverse impacts are for our business, I could end up ultimately disclosing other

confidential information. I think the other thing I would like to say is that sometimes the impacts of these things are not felt immediately; they are felt over time and then later in the future. So I do not think you can draw a time line on these and say that if something is not occurred by a certain date that that means there will not be an adverse effect.

The CHAIR: No, but I am intrigued to know at this stage whether any adverse impact has arisen as a result of those documents. If you are concerned that the revealing of that would be detrimental, I am happy for you to provide that and ask for it to be kept confidential. The committee would give serious consideration to that. We have always adopted a very conservative approach on keeping information confidential where it is requested, and in fact we would never come back without coming back to you anyway is the history—before we released anything, we would test it. I think it is really important for this committee in terms of trying to understand and work out recommendations. In many parts of the world, government contracts are by nature made almost full disclosure once they are entered into.

Mr Larsen: One thing I would say Mr Travers —

The CHAIR: So I am trying to understand how it adversely impact on your business.

Mr Larsen: One thing I would say is that sometimes it is not just the information on its own that may create an adverse impact. It is the nature in which that information is presented—the context and the timing. As I have mentioned before, I think the thing that—you asked about brand and reputation, our concern about the parliamentary inquiry was the non-use of all of the non-confidential information we supplied rather than —

Hon ALANNA CLOHESY: So you said.

Mr Larsen: Just as much as a concern about the confidential information being published. So I think sometimes there are issues of the information itself and then there are also issues of how that information might be disclosed and by whom and when and how. That also plays a part in potential adverse impacts for businesses.

The CHAIR: The freedom of information commissioner, often when looking at rulings of this nature, will say that just because an item is released does not prevent you releasing other information. So if you have non-confidential information that would help put context on a matter, then there is nothing to prevent you, as an organisation, even if someone else is releasing that information, from putting that other information into the public domain to provide that context. How would that not occur on this occasion? What would have prevented you, if you believe that the information was being put in without the context, from providing that additional information to the public to give that context?

[4.40 pm]

Mr Larsen: Well, I think the reality is that we did not in that case write the report or control the contents of the report. And then, clearly, that is a report that then gets published and we have to respond to it after, and the ability sometimes to play catch-up is limited and—that is probably all I have got to say about that point.

The CHAIR: Yes, but I guess that is an argument for putting out the information, potentially, in advance of any report. If you are saying there was non-confidential information that would have helped provide context, I cannot understand what would have prevented you from putting that non-confidential information out there into the public domain to allow that context. If people want to manipulate information, they will manipulate information regardless of what is there.

Mr Larsen: We supplied that information, as I said, in a non-confidential form to the inquiry and, I will say it once more, we were disappointed that none of it was used in the report.

The CHAIR: There is nothing to prevent you making that non-confidential information public. There are limits about what you can and cannot do in regards to parliamentary privilege if you have made it as a submission and they have not released it.

Mr Larsen: I think there are limitations actually, once you make a submission, as to what you allowed to do with it.

The CHAIR: That is right, with regards to the submission, but there is nothing that prevents you, if there is public information, making that information public outside of the parliamentary committee process, if it is non-confidential, and if it helps to provide context for the public in terms of those actions.

Mr Larsen: I acknowledge that, but I am sure that you would also acknowledge that sometimes that information coming later, after the fact, may not equally balance out the omission of that information from the original report.

The CHAIR: The problem is that if you take that argument, we would never have anything disclosed and the public would be kept in the dark on everything, and that is not acceptable. I do not think anyone would believe it is acceptable and in the public interest, that government contracts be kept confidential on the basis of what may happen in terms of people misusing that information.

Mr Larsen: I think, at the end of the day, the process requires that we supply information, which we did. We were afforded the opportunity to say what was confidential, which we did. Decisions were made and we have to live with those decisions. The ability to try and correct things later is sometimes more difficult; if information that could have been utilised in the report to help balance things was not used, it is more difficult later, to try and balance those things out, and I am sure that you would respect and understand that point.

The CHAIR: Yes, but there is also a danger—do not get me wrong on this one, I am not suggesting that there is any corruption when this occurred—that if you have a regime of secrecy with nothing ever being made public, it leaves the potential either for government agencies to cover up their failures, for corruption to occur, or for incompetence to occur in public sector agencies if they are not subject to some form of public accountability. That is the issue that we come at as a parliamentary committee, so that you understand why we are asking you these questions, and anything you can give us—if you want to ask for it to be kept confidential I invite you to do that—that helps us understand how there would be adverse impacts on your business. I appreciate your comment earlier about performance standards, but I am still struggling in terms of what you have provided to us today to understand how making the capping and the performance standards public in any way would have an adverse impact, so if you are in a position to assist us in understanding that. All I can do is give you feedback on what you have provided me today. I struggle to understand how that has a negative impact relative to the overarching public interest of that information being available to potential users of the asset that you manage on behalf the government.

Mr Larsen: I think, in relation to those two questions I have answered, those performance standards I have said have been publicly available for a long time. In relation to the other issue, I referred to the letter that is in the report that I wrote to Mr Blayney. I honestly do not have anything more to add to that at this point about adverse effects. What I would like to say is that I absolutely recognise and respect the importance of the roles that these committees play, and that is why we actually did provide absolutely everything that was requested of us. We were given the opportunity to say what was confidential and why, and we did. The committee made its decisions based on a range of inputs, and we respect those decisions. Whilst we might not like some of them, we respect them and we do not have any further comment to make about the decisions that the committee made.

Hon ALANNA CLOHESY: Similarly, our questions go beyond that committee experience, and pre that committee experience as well, so you were doing business with government before that committee experience—several years before, in fact, 2010 or even earlier—in providing your answers, think about if you want to provide the committee with more understanding of your experience about how you do business with government, and how those confidentiality provisions help your company or otherwise.

The CHAIR: Thank you for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days of the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be faulted. 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. As I said, there are a number of questions that you have asked to take on notice, so they will also be included at the time the uncorrected version is sent to you, and if you are able to provide those within that 10 days as well, that would be good. If you need an extension to research them, can you let us know before those 10 days to get an extension to get that information. With that, I again thank you for your attendance today, and we appreciate you coming in at short notice.

Hearing concluded at 4.47 pm