

Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 2: April 2017

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WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinion on Ministerial Notification

Report 2
April 2017



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION

This report has been prepared for submission to Parliament under the provisions of section 24 of the *Auditor General Act 2006*.

This report deals with decisions by the then Minister for Commerce, Hon Michael Mischin MLC, not to provide Parliament's Standing Committee on Estimates and Financial Operations with copies of submissions to the review of the *Workers' Compensation and Injury Management Act 1981* and the Minister's drafting instructions to change the Act.

I wish to acknowledge the cooperation of the staff at WorkCover WA.

A handwritten signature in black ink, appearing to read 'C. Murphy'.

COLIN MURPHY
AUDITOR GENERAL
6 April 2017

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Ministerial decisions not to provide information to Parliament

Introduction

This report deals with decisions by the then Minister for Commerce, Hon Michael Mischin MLC, not to provide Parliament's Standing Committee on Estimates and Financial Operations with copies of submissions to the review of the *Workers' Compensation and Injury Management Act 1981* and the Minister's drafting instructions to change the Act.

Section 82 of the *Financial Management Act 2006* requires a Minister who decides that it is reasonable and appropriate not to provide certain information to Parliament, to give written notice of the decision to both Houses of Parliament and the Auditor General within 14 days of the decision.

Section 24 of the *Auditor General Act 2006* requires the Auditor General to provide an opinion to Parliament as to whether the Minister's decision was reasonable and appropriate.

What did we do?

The Audit Practice Statement on our website (www.audit.wa.gov.au) sets out the process we follow to arrive at our section 82 opinions, including:

- a review of agency documents
- a review of any advice provided to the relevant Minister by agencies, the State Solicitor's Office (SSO) or other legal advisers
- interviews with key agency persons including discussions about our draft findings and the Auditor General's opinion.

Our procedures are designed to provide sufficient appropriate evidence to support an independent view to Parliament on the reasonableness and appropriateness of the Minister's decision.

While the investigations we conduct do not constitute an audit, our procedures have followed the key principles in the Australian Auditing and Assurance Standards.

Opinion

The decisions by the then Minister for Commerce not to provide Parliament with information concerning changes to the *Workers' Compensation and Injury Management Act 1981* were reasonable and appropriate.

The information requested was:

- stakeholder submissions to the review of the *Workers' Compensation and Injury Management Act 1981*
- the Minister's drafting instructions to amend the Act.

Background

On 27 October 2016, during the Standing Committee on Estimates and Financial Operations 2015-16 Annual Report Hearings, the Minister for Commerce was asked to provide the following information concerning the review of the *Workers' Compensation and Injury Management Act 1981*:

- (a) Can the Minister provide copies of the submissions made by the people who are listed at appendix 4 of the legislative review final report?*
- (b) Would the Minister be prepared to give the Committee a copy of the drafting instructions?*

On 14 November 2016, the Minister responded to the Committee.

In response to (a) he declined to give 59 of the 66 submissions noting that:

The submissions were given to WorkCover WA in the course of its legislative review and contain confidential information that was obtained in circumstances of confidence.

However, he provided 7 submissions that had been published in the public domain by the stakeholder. The Minister explained that because these submissions were already in the public domain, no obligation of confidence exists.

In response to (b), the Minister also declined to provide the information, explaining that drafting instructions:

...were submitted to Cabinet for its consideration, consistent with the usual practice followed by government for the drafting and enactment of legislation in Western Australia.

As such, they:

...are subject to Cabinet confidentiality, and therefore attract public interest immunity...¹

On 25 November 2016, the Minister notified the Auditor General of his decisions not to provide the requested information in accordance with section 82 of the *Financial Management Act 2006*.

¹ See Appendix 1 for the Minister's full response.

Key findings

The decisions by the Minister not to provide the requested information were reasonable and appropriate. The Minister properly sought and followed written advice from WorkCover WA, which recommended the Minister decline to provide copies of the stakeholder submissions and drafting instructions.

We found that the Minister had considered the 2 requests individually and informed the Committee why it was appropriate and reasonable not to provide information for either. His decisions reflected WorkCover WA's advice that the requested information was confidential and he therefore should not provide it to Parliament.

WorkCover WA provided its advice to the Minister in a briefing note. The briefing note included summaries of SSO advice WorkCover WA received and referred to correspondence with the Information Commissioner on a related matter.

Stakeholder submissions

The Committee's first information request to the Minister was for stakeholder submissions provided to WorkCover WA during the course of the review.

Sixty-six stakeholders gave submissions to WorkCover WA during the review. The Minister released 7 submissions that had been published by stakeholders and were already in the public domain. WorkCover WA advised the Minister that the remaining submissions should not be released, as assurances were given when inviting submissions that they would remain confidential.

We assessed whether the 59 submissions the Minister declined to release met our confidentiality criteria. We found that the criteria were met and that there are reasonable grounds to treat the information as confidential.

Criterion 1 – the information was provided under an understanding that it would remain confidential.

This criterion was met. In inviting stakeholders to make submissions, WorkCover WA clearly stated that submissions would remain confidential.

Criterion 2 – information should not generally be known or ascertainable.

This criterion was met as most of the information is not publicly available.

We tested a sample of the submissions the Minister declined to provide. We could not find evidence that they had been publicly released, or their details disclosed in full.

We found that in June 2014 WorkCover WA made reference to 18 of the 59 withheld submissions in its *Review of the Workers' Compensation and Injury Management Act 1981: Final Report*. WorkCover WA advised us that these were comments from peak bodies and interest groups, not individuals, and did not include personal details. We reviewed the report and verified this. WorkCover WA also advised us that it sought the permission of stakeholders before publishing any part of the submission.

In our review, we noted that the report contains only summaries or samples of submission comments. In no case did we find all of the comments in a submission revealed.

As the submissions have not been publicly discussed, or only discussed in part, we accepted that they were not generally known.

Criterion 3 – disclosure would cause unreasonable detriment to the owner of the information or another party.

This criterion was met. We assessed a selection of stakeholder submissions and found that they contained personal and/or sensitive matters such as: information on personal claims, third parties, or matters of commercial sensitivity. If released in full, WorkCover WA's promise of confidentiality would be breached. It is reasonable to expect this may deter stakeholders in engaging in future reviews.

We are of the view that the summary information provided in the report allows members of the public to understand, to a certain degree, stakeholder views without breaching expectations of confidentiality.

Drafting instructions

The Committee's second information request related to the legislative drafting instructions provided to Cabinet during the review.

The Minister declined to provide the drafting instructions, explaining that they were subject to Cabinet confidentiality.

The Minister's decision and explanation are aligned with the advice he received from WorkCover WA.

We assessed the information provided to the Minister against our Cabinet-in-confidence considerations. We found that the considerations were met and there are reasonable grounds to treat the information as confidential.

Consideration 1 – was the main purpose of the information to inform Cabinet?

Drafting instructions are prepared for 2 purposes. Firstly, for consideration by Cabinet when it decides on new legislation or changes to existing legislation. The instructions are then provided to the Legislation Standing Committee of Cabinet who review the Cabinet minutes, Cabinet decision and drafting instructions, and allocate a drafting priority and schedule the proposed Bill into the legislative program.²

The other main purpose of drafting instructions is to inform the Parliamentary Counsel's Office (PCO) of the detail of legislative changes requested by Cabinet. The PCO drafts all Government Bills and all amendments to Bills required by the Minister during the passage through Parliament.

We found that in this instance the drafting instructions were provided as part of a Cabinet submission when the Minister sought approval to draft legislation.³ We are therefore satisfied that the drafting instructions formed part of Cabinet submissions made by the Minister and are therefore covered by Cabinet confidentiality.

Consideration 2 – would releasing the information reveal a deliberation or decision of Cabinet?

We reviewed the Cabinet submissions and drafting instructions. We found that the drafting instructions contained recommendations and decisions relating to the review of the *Workers' Compensation and Injury Management Act 1981*.

The drafting instructions did not contain options for Cabinet consideration. Rather, they were the recommended position. However, if released, a comparison of what was submitted to

² Department of the Attorney General Parliamentary Counsel's Office – *Getting Government Legislation Drafted and Enacted Guidelines and Procedures*, 12 August 2016.

³ Department of Premier and Cabinet WA – *Cabinet Handbook 2013*, pp 3.

Cabinet against what was drafted following Cabinet approval may show the deliberations or decisions of Cabinet.

We therefore considered the Minister was justified in not releasing the drafting instructions for reasons of Cabinet confidentiality.

Consideration 3 – is part or all of the information publicly available, or readily available within the agency?

We are satisfied that the drafting instructions are not publicly available as they were prepared specifically for Cabinet consideration.

Consideration 4 – did the Minister consider providing any sections of the information that would not reveal deliberations and decisions of Cabinet?

The Minister was advised by WorkCover WA that the drafting instructions are covered by Cabinet-in-confidence as they form part of a Cabinet submission. WorkCover WA told us this was based on advice it received from SSO.

Although we could not see the SSO advice because of legal professional privilege, we reviewed the drafting instructions and found that the confidential information is woven through the document. As such, we formed the view that it would not be possible for the Minister to release parts of the document.

Appendix 1: Minister Mischin's full response

The Minister's full response to the Committee on 14 November 2016 about submissions to the review of the *Workers' Compensation and Injury Management Act 1981* (1) and drafting instructions for the revised legislation (2) is set out below.

(1) Answer:

The submissions were given to WorkCover WA in the course of its legislative review and contain confidential information that was obtained in circumstances of confidence.

I attach for the Committee only those submissions that were published in the public domain by the person or entity making the submission i.e. those in relation to which I am satisfied no obligation of confidence exists. These include 7 of the 66 submissions from the following persons/organisations:

- (a) Australian Petroleum Production and Exploration Association WA*
- (b) Combined Small Business Alliance of Western Australia (Inc)*
- (c) Faculty of Pain Medicine, Australia and New Zealand College of Anaesthetists*
- (d) Housing Industry Association (Western Australia)*
- (e) Insurance Council of Australia Limited*
- (f) National Insurance Brokers Association of Australia*
- (g) The Law Society of Western Australia*

*I have decided that it is reasonable and appropriate not to provide the remaining submissions to the Committee. The contents of the submissions are not in the public domain and known only to a small or limited number of people (and are, as such, confidential). Further, the submissions were sought by WorkCover WA in circumstances where assurances of confidentiality were given to those who provided submissions. Those assurances are reflected in the statement on page 8 of the *Review of the Workers' Compensation and Injury Management Act 1981: Discussion Paper*. I consider that the disclosure of this information contrary to the assurances of confidentiality given to those providing the submissions would detrimentally impact on the conduct of future legislative reviews that rely in part, on the voluntary provision of submissions by stakeholders*

Pursuant to section 82(1)(a) of the Financial Management Act 2006, I will be giving notice to both houses that I have decided not to provide the submissions to Parliament.

(2) Answer:

I have decided that it is reasonable and appropriate not to provide a copy of the drafting instructions sought by the Committee. The drafting instructions were submitted to Cabinet for its consideration, consistent with the usual practice followed by Government for the drafting and enactment of legislation in Western Australia. As such, they formed part of the deliberations of Cabinet. Cabinet confidentiality is necessary to ensure the proper functioning of Cabinet. It ensures that members of Cabinet may exchange differing views and maintains the principle of collective responsibility. Cabinet secrecy has been recognised by the Courts as an essential part of the structure of government. In these circumstances, the drafting instructions are subject to Cabinet confidentiality and therefore attract public interest immunity and I have decided not to provide them on that basis.

Pursuant to section 82(1)(a) of the Financial Management Act 2006, I will be giving notice to both houses that I have decided not to provide the drafting instructions to Parliament.

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1	Opinion on Ministerial Notification	30 March 2017
2016 Reports		
32	Vocational Education and Training for Year 11 and 12 Students in Public Schools	22 December 2016
31	Assessment of Progress to Improve Payment Security for Government Construction Subcontractors	22 December 2016
30	Measuring Tax Collection Performance	22 December 2016
29	Improving Immunisation Rates of Children in WA	21 December 2016
28	Malware in the WA State Government	7 December 2016
27	Opinions on Ministerial Notifications	7 December 2016
26	Opinion on Ministerial Notification	23 November 2016
25	Opinion on Ministerial Notification	9 November 2016
24	Audit Results Report – Annual 2015-16 Financial Audits	9 November 2016
23	Western Australian Waste Strategy: Rethinking Waste	19 October 2016
22	Opinion on Ministerial Notification	13 October 2016
21	Opinion on Ministerial Notification	6 October 2016
20	Ord-East Kimberley Development	7 September 2016
19	Information and Communication Technology (ICT) in Education	17 August 2016
18	Opinions on Ministerial Notifications	11 August 2016
17	Financial and Performance Information in Annual Reports	21 July 2016
16	Grant Administration	7 July 2016
15	Management of Feedback from Public Trustee Represented Persons	30 June 2016
14	Management of Marine Parks and Reserves	30 June 2016
13	Maintaining the State Road Network – Follow-on Audit	29 June 2016
12	Regulation of Builders and Building Surveyors	22 June 2016
11	Information Systems Audit Report	22 June 2016
10	Opinions on Ministerial Notification	8 June 2016
9	Payment of Construction Subcontractors – Perth Children's Hospital	8 June 2016
8	Delivering Services Online	25 May 2016
7	Fitting and Maintaining Safety Devices in Public Housing – Follow-up	11 May 2016
6	Audit of Payroll and other Expenditure using Data Analytic Procedures	10 May 2016
5	Audit Results Report – Annual 2015 Financial Audits – Universities and state training providers – Other audits completed since 1 November 2015; and Opinion on Ministerial Notification	10 May 2016
4	Land Asset Sales Program	6 April 2016
3	Management of Government Concessions	16 March 2016
2	Consumable Stock Management in Hospitals	24 February 2016
1	Supplementary report Health Department's Procurement and Management of its Centralised Computing Services Contract	8 June 2016 17 February 2016

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