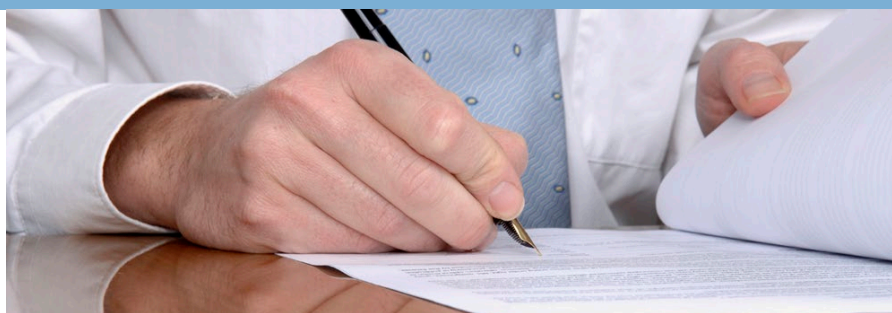


Western Australian Auditor General's Report



Opinion on Ministerial Notification



Report 7: 2019-20
26 September 2019

**Office of the Auditor General
Western Australia**

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The Office of the Auditor General acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past and present.

WESTERN AUSTRALIAN AUDITOR GENERAL'S REPORT

Opinion on Ministerial Notification



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

Opinion on Ministerial Notification

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

It deals with a decision by the Minister for Ports, the Hon Alannah MacTiernan MLC, not to provide Parliament with a copy of the Harriet Point Agreement.

A handwritten signature in black ink, appearing to be "C Spencer".

CAROLINE SPENCER
AUDITOR GENERAL
26 September 2019

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Minister for Ports, the Hon Alannah MacTiernan MLC, not to provide Parliament with a copy of the Harriet Point Agreement (the Agreement).

Section 82 of the *Financial Management Act 2006* (the FM Act) 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 we did

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 entity documents
- a review of any advice provided to the relevant Minister by entities, the State Solicitor's Office or other legal advisers
- interviews with key entity 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.

We have not performed an audit, however, our procedures follow the key principles in the Australian Auditing and Assurance Standards.

Opinion

The decision by the Minister for Ports, the Hon Alannah MacTiernan MLC, not to provide Parliament a copy of the Agreement was reasonable and therefore appropriate.

Background

On 22 May 2019, the Hon Martin Aldridge MLC submitted a question out-of-session about the Pilbara Ports Authority (PPA) to the Legislative Council's Estimates and Financial Operations Committee (the Committee) for its 2019-20 Budget Estimates Hearings:

I refer to the Harriet Point Agreement and I ask:

- (a) Will the Minister please provide a copy of the agreement to the committee;*
- (b) If no to (a) will the Minister provide a copy of the agreement in confidence to the committee;*
- (c) What is the financial cost/benefit to the Authority in 2019/20 directly related to the agreement;*
- (d) Has the agreement been amended since its execution of August 2008;*
- (e) If yes to (4) on what dates were the amendments made;*
- (f) Who has access to the agreement;*
- (g) Who are party to the agreement; and*
- (h) In summary what does the agreement provide for?*

On 10 June 2019, the Minister submitted a written response to parts (c) to (h) but declined to provide the information requested in parts (a) and (b), replying:

- (a) No.*
- (b) No.*

The Minister's full response is included in Appendix 1.

On 26 June 2019, the Auditor General received the Minister's notification of the decision not to provide the requested information in accordance with section 82 of the FM Act.

Key findings

The decision by the Minister not to provide a copy of the Agreement was reasonable and therefore appropriate.

The Minister properly sought advice from the Department of Transport (the Department) before responding to the request. The Department in turn sought advice from the PPA, the entity responsible for managing the Agreement, before advising the Minister.

The Department recommended the Minister not provide a copy of the Agreement. The Minister followed the Department's advice.

The Minister's section 82 notice advised that the information could not be provided to Parliament because it is commercially sensitive and confidential, and disclosure could result in detriment to the State in the form of liability from a breach of contractual obligations, as well as reputational damage.

We have previously assessed the confidentiality of the Agreement¹ and found that its disclosure would breach the explicit confidentiality requirements contained within it. In our view, the commercial interests of the State are likely best served by continuing to keep the Agreement confidential.

We assessed if a copy of the Agreement could have been provided to the Committee with a request that it be kept confidential, and found that the Legislative Council Standing Orders allow the Committee or the Legislative Council to order the release of private evidence.² Therefore, providing the Agreement to the Committee, even with such a request, would relinquish responsibility for its confidentiality to the Committee and the Legislative Council when protecting confidentiality is the Minister's responsibility.³

Response from the Department of Transport

The Department has reviewed and supports the summary of findings. The Department has no further input to the final report.

¹ Office of the Auditor General. [Opinions on Ministerial Notifications](#), Report No 14 (2019) pp. 11-12.

² Legislative Council of Western Australia, Standing Orders, clause 175(4), January 2019.

³ Office of the Auditor General. [Opinions on Ministerial Notifications](#), Report No 17 (2014), p. 4.

Appendix 1: Minister's full response to the Estimates and Financial Operations Committee

On 10 June 2019, the Hon Alannah MacTiernan MLC replied:

Answer:

- (a) No.*
- (b) No.*
- (c) The Harriet Point Agreement provides that the parties to, provisions of, and the terms of any transaction contemplated by the document, must be treated confidentially.*
- (d) Yes.*
- (e) April 2010 and August 2012.*
- (f) Access to the Harriet Point Agreement is restricted to authorised personnel of the parties, their respective professional advisers, and otherwise as required by law.*
- (g) BHP and Pilbara Ports Authority.*
- (h) The Harriet Point agreement was entered into between BHP and the State of Western Australia to facilitate the access by third parties to the Port of Port Hedland. This access was critical to the ability of non-BHP companies to establish their iron ore trade.*

The Harriet Point Agreement provides the basis for the orderly development of port infrastructure within the Port of Port Hedland, to facilitate the progressive expansion of trade volumes within the constrained area of the Inner Harbour. The Agreement provides for such development to not adversely affect BHP's rights.

Auditor General's reports

Report number	2019-20 reports	Date tabled
6	Opinions on Ministerial Notifications	18 September 2019
5	Fraud Prevention in Local Government	15 August 2019
4	Access to State-Managed Adult Mental Health Services	14 August 2019
3	Delivering Western Australia's Ambulance Services – Follow-up Audit	31 July 2019
2	Opinion on Ministerial Notification	26 July 2019
1	Opinions on Ministerial Notifications	19 July 2019

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