

Western Australian Auditor General's Report



Opinion on Ministerial Notification – Port Agreements



Report 27: 2020-21

11 June 2021

**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 – Port Agreements



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION – PORT AGREEMENTS

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

It deals with a decision by the former Minister for Ports, the Hon Alannah MacTiernan MLC, to provide Parliament with redacted copies of agreements between Cliffs Asia Pacific Iron Ore and Southern Ports Authority.

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

CAROLINE SPENCER
AUDITOR GENERAL
11 June 2021

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the former Minister for Ports, the Hon Alannah MacTiernan MLC, to provide Parliament with redacted copies of agreements between Cliffs Asia Pacific Iron Ore (Cliffs) and Southern Ports Authority (SPA).

Section 82 of the *Financial Management Act 2006* (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 former Minister for Ports, the Hon Alannah MacTiernan MLC, to provide Parliament with redacted copies of the deed of termination and release, and operating and lease agreements between Cliffs and SPA was, on balance, reasonable and therefore appropriate.

Background

In Parliament on 8 May 2019, the Hon Peter Collier MLC asked the then Minister for Ports for the following information in Legislative Council Question without Notice 418:

- (1) *Has the minister now received all advice from the State Solicitor's Office?*
- (2) *If yes to (1), will the minister now table the contract between Cliffs Asia Pacific Iron Ore and the Southern Ports Authority, the operating agreement and the lease agreements for shed 2 and shed 4, and the office building; and, if not, why not?*

The then Minister initially declined to give this information, replying:

I am advised that the State Solicitor's Office advice was received and that this matter was being considered by the previous Minister for Ports when there was a change in the portfolio allocations. I have not yet reviewed that advice from the State Solicitor, but I undertake to do that and to make a decision on the release of the documents within the week.

On 16 May 2019, the then Minister provided Parliament with redacted versions of:

- the operating agreement (including its variation)
- the lease agreement for sheds 2 and 4
- the lease agreement for the office building
- the deed of termination and release, which forms part of the contract between Cliffs and SPA.

On 8 April 2020, the Auditor General received the then Minister's notification of their decision to provide redacted versions of the information in accordance with section 82 of the FM Act. The notice stated that the requested information was commercially confidential, and that Cliffs had consented to the partial release of the contracts.

Key findings

The decision by the then Minister to provide Parliament with redacted versions of the requested information was, on balance, reasonable and therefore appropriate.

The then Minister properly sought advice from the Department of Transport (the Department) before responding to the request. The Department conducted an assessment and worked with SPA and Cliffs to redact information believed to be commercially sensitive to either Cliffs or the State. The Minister tabled the information with the redactions suggested by the Department.

In assessing the redacted information, we relied on our criteria for commercial sensitivity.¹ We found the redactions were, on balance, appropriate, as:

¹ Office of the Auditor General. *Audit Practice Statement* (www.audit.wa.gov.au), p. 18.

- the Department worked with SPA and Cliffs to specifically identify the sections that were commercially sensitive
- the redacted information was not generally known at the time of the then Minister's decision
- the redacted sections included information that could compromise Cliffs' competitive advantage, such as specific production costs or customer requirements
- some information had commercial value to the State. The contracts included a number of bespoke aspects, and disclosing this information could limit SPA's ability to negotiate in the future.

While the majority of redactions were reasonable, there were instances where the redacted information was already available in public sources or was inconsistently redacted between the documents. This included the date of the agreement, sections citing legislation, information that is publicly available in Port Standards and Procedures, or sections that appear in SPA's pro-forma agreements. Entities should take care in redacting information to be provided to Parliament, to ensure that Government can be as transparent as possible.

In our view, the Minister's decision to provide a redacted version of the contract is consistent with the public interest of protecting and reducing the risk of damage to the State and third parties. Releasing the full contract would have revealed commercially sensitive information from third parties or could negatively impact the State in future negotiations.

Response from the Department of Transport

On 13 August 2018, Cabinet endorsed the Government Support Package for Mineral Resources Limited (MRL) (including port pricing relief) and endorsed the Minister for Transport issuing a direction to Southern Ports Authority (SPA) due to the non-commercial nature of the transactions.

The Minister issued a direction to SPA on 20 August 2018 and confirmed the direction on 22 August 2018. The direction related to MRL and did not release detail of the Cliffs agreement other than high level information.

On 16 May 2019, the then Minister for Ports provided redacted versions of the agreement to Parliament. This was based on the advice received by the Minister from the State Solicitor's Office (SSO) and redactions agreed to by Cliffs.

SPA and Cliffs both considered that the agreements, when entered, were intended to remain confidential in their entirety, under the confidentiality provision in the agreements and would not be made public, and are not aware of any public release of details by either party.

The Department of Transport (Department) at the request of the Minister's Office undertook to redact the agreements in conjunction with SPA and Cliffs. The Department's advice to the Minister's Office was primarily to address the process and requirements of tabling the redacted documents in Parliament, given prior advice obtained by the Minister directly from the SSO.

Auditor General's 2020-21 reports

Number	Title	Date tabled
26	Audit Results Report – 2020 Financial Audits of Universities and TAFEs	2 June 2021
25	Delivering Essential Services to Remote Aboriginal Communities – Follow-up	2 June 2021
24	Opinion on Ministerial Notification – DPIRD Capability Review	18 May 2021
23	Local Government General Computer Controls	12 May 2021
22	Opinion on Ministerial Notification – Hospital Facilities Services	6 May 2021
21	Regulation and Support of the Local Government Sector	30 April 2021
20	Opinions on Ministerial Notifications – Policing Information	28 April 2021
19	Opinion on Ministerial Notification – Bennett Brook Disability Justice Centre	8 April 2021
18	Regulation of Consumer Food Safety by the Department of Health	1 April 2021
17	Department of Communities' Administration of Family and Domestic Violence Support Services	11 March 2021
16	Application Controls Audits 2021	8 March 2021
15	Opinions on Ministerial Notifications – Tax and Funding Information Relating to Racing and Wagering Western Australia	26 February 2021
14	Opinion on Ministerial Notification – Hotel Perth Campaign Reports	24 February 2021
13	Opinion on Ministerial Notification – Release of Schedule of Stumpage Rates	24 February 2021
12	Grants Administration	28 January 2021
11	COVID-19 Relief Fund	21 December 2020
10	COVID-19: Status of WA Public Testing Systems	9 December 2020
9	Western Australian Registry System – Application Controls Audit	26 November 2020
8	Regulating Minor Pollutants	26 November 2020
7	Audit Results Report – Annual 2019-20 Financial Audits of State Government Entities	11 November 2020

Number	Title	Date tabled
6	Transparency Report: Major Projects	29 October 2020
5	Transparency Report: Current Status of WA Health's COVID-19 Response Preparedness	24 September 2020
4	Managing the Impact of Plant and Animal Pests: Follow-up	31 August 2020
3	Waste Management – Service Delivery	20 August 2020
2	Opinion on Ministerial Notification – Agriculture Digital Connectivity Report	30 July 2020
1	Working with Children Checks – Managing Compliance	15 July 2020

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