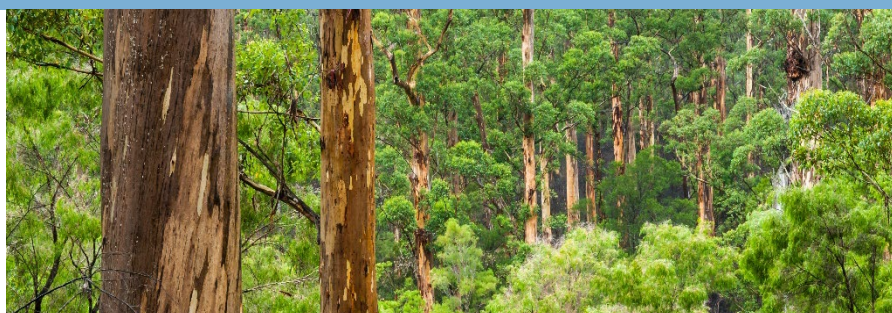


Western Australian Auditor General's Report



Opinion on Ministerial Notification – FPC Arbitration Outcome



Report 1: 2021-22

29 July 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 – FPC Arbitration Outcome

Report 1: 2021-22
July 2021



**THE PRESIDENT
LEGISLATIVE COUNCIL**

**THE SPEAKER
LEGISLATIVE ASSEMBLY**

OPINION ON MINISTERIAL NOTIFICATION – FPC ARBITRATION OUTCOME

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 Minister for Forestry, the Hon Dave Kelly MLA, not to provide information to Parliament about the outcome of arbitration between Forest Products Commission and an individual sharefarmer in December 2020.

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

CAROLINE SPENCER
AUDITOR GENERAL
29 July 2021

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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Minister for Forestry, the Hon Dave Kelly MLA, not to provide information to Parliament about the outcome of arbitration between Forest Products Commission (FPC) and an individual sharefarmer in December 2020.

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 State government entity documents
- a review of any advice provided to the relevant Minister by entities, the State Solicitor's Office (SSO) 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 Forestry not to provide Parliament with information about the outcome of arbitration between FPC and an individual sharefarmer in December 2020 was reasonable and appropriate.

The information requested was confidential under the *Commercial Arbitration Act 2012*.

Background

In Parliament on 12 May 2021, the former Member of Parliament, Ms Diane Evers, asked the Minister for Regional Development representing the Minister for Forestry, in Legislative Council Question Without Notice 110, for the following information about the outcome of arbitration between FPC and sharefarmers in December 2020:

I refer to the recent arbitration case regarding payments to sharefarmers by the Forest Products Commission.

- (1) *What was the outcome?*
- (2) *What does the FPC propose to do as a result of the case, and when will this occur?*
- (3) *Will all sharefarmer payments be recalculated as a result?*
- (4) *If yes to (3), what is the time frame for this to occur?*
- (5) *If no to (3), why not?*

The Minister provided most of the requested information, but declined to provide information for part 1, replying:

Arbitration proceedings were completed in December 2020 between the Forest Products Commission and an individual share farmer. Pursuant to the Commercial Arbitration Act 2012, details of the arbitration are confidential information.

On 17 May 2021, the Minister for Forestry notified the Auditor General of his 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 the requested information was reasonable and appropriate.

The Minister properly sought advice from FPC before responding to the request and FPC recommended he decline to provide the information.

FPC obtained internal legal advice and sought advice from the SSO who confirmed that it would not be appropriate for the Minister to provide information from the commercial arbitration.

We assessed whether releasing the information would be in breach of the *Commercial Arbitration Act 2012* using the following criteria:

Does the legislation specifically require the information to be kept secret?

This criterion was met. Under section 27E of the *Commercial Arbitration Act 2012*, parties to an arbitration must not disclose confidential information, which includes an award or ruling of the arbitral tribunal.

Although a relevant potential exception exists, section 27F(2), which allows disclosure with the consent of all parties to proceedings, FPC did not explore this. Instead it holds the view that commercial arbitration is inherently confidential. SSO supported FPC's view and did not specifically consider this exception in detail.

We considered whether it was reasonable for FPC not to seek consent of the parties to disclose. We also considered the significance of confidentiality, which underpins the

legislation, in addition to the context of this specific arbitration, which was with an individual sharefarmer and intended to resolve a long-running dispute.

We assessed whether the public interest would be served by disclosure. We found that disclosure could potentially be in the public interest if it:

- promoted the principle of transparency of government conduct
- made other sharefarmers aware of possible issues with payments by FPC.

In assessing whether this was sufficient to indicate that FPC should have pursued disclosure, we noted the following factors:

- an independent audit of sharefarmer payments is in progress
- confidentiality is a central principle of commercial arbitration and disclosure could undermine this and potentially damage future government negotiations.

Based on these factors, in our view the public interest is limited in this instance and FPC's decision to not seek disclosure was reasonable.

Is any or all of the information already publicly available?

This criterion was met. We found no evidence that the outcome of the arbitration is available publicly.

Response from the Forest Products Commission

It is clear that under section 27E of the *Commercial Arbitration Act 2012*, Parliament sought to establish confidentiality as a key component of the arbitration process, and this consideration underpinned the FPC's response for information relating to arbitration details. Although the FPC acknowledges many aspects of its operations are a matter of public interest, parties enter commercial arbitration on the expectation that the process will be conducted confidentially. The FPC is of the view that providing details of particular arbitrated disputes unreasonably serves to jeopardise the commercial operations of both the FPC and its contractors and impacts upon the ability of such parties to resolve disputes in a timely and efficient manner.

Auditor General's 2021-22 reports

Number	Title	Date tabled
1	Opinion on Ministerial Notification – FPC Arbitration Outcome	29 July 2021

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