STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS

INQUIRY INTO THE PROVISION OF INFORMATION TO PARLIAMENT

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 22 FEBRUARY 2016

Members

Hon Ken Travers (Chair)
Hon Peter Katsambanis (Deputy Chair)
Hon Liz Behjat
Hon Alanna Clohesy
Hon Rick Mazza

Hearing commenced at 2.07 pm

Mr PAUL EVANS
State Solicitor, State Solicitor's Office, examined:

Hon MICHAEL MISCHIN
Attorney General, examined:

The CHAIR: On behalf of the Legislative Council Estimates and Financial Operations Committee, I would like to welcome you to today's hearing. Can you confirm that you have read, understood and signed the document headed "Information for Witnesses?" That is obviously not for you, minister.

Mr Evans: I have.

The CHAIR: Witnesses need to be aware of the severe penalties that apply to persons providing false or misleading testimony to a parliamentary committee. It is essential that all your testimony before the committee is complete and truthful to the best of your knowledge. This hearing is being recorded by Hansard and a transcript of your evidence will be provided to you. The hearing is held in public, although there is discretion available to the committee to hear evidence in private, either of its own motion or at the witnesses'. 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, before answering the question.

Before we commence, do either of the witnesses wish to provide an opening statement?

Hon MICHAEL MISCHIN: I do not believe so.

The CHAIR: As you know, we are having an inquiry into the provision of information to Parliament, in particular, section 82 of the Financial Management Act. Could you explain, Attorney General, the process of advice you receive when considering the question of whether to disclose information to Parliament?

Hon MICHAEL MISCHIN: Not having had the situation arise in my case in either of my portfolios, to my recollection—I have to work on supposition here—but I would expect that I would be informed of the request. If I received a request, I would get advice on it from the department as to disclosure. If there was any question of the soundness of that advice, I would have it referred to the State Solicitor to give me some advice on that.

[2.10 pm]

The CHAIR: If you are acting in your representative capacity, do you leave it simply to the minister you represent to make that decision?

Hon MICHAEL MISCHIN: By and large, as a matter of practicality, yes. However, I would speak to the minister about it and get information from the minister as to the basis for withholding of information if that is what was being proposed in order to satisfy myself that it is well based and in order that I am able to answer any questions regarding that, should they be raised. There is a two-step process in that regard. Of course the minister has primary responsibility for it. However, I do have my obligations of a political nature to Parliament under the system with which we operate and I would have to be satisfied that I am in a position of being able to deal with any challenges to that decision.

The CHAIR: In your capacity as Attorney General, are you ever required to provide advice to ministers on how they should handle providing information to Parliament?

Hon MICHAEL MISCHIN: I do not recall an instance in which that has arisen. Of course primarily that advice would be sought directly from, I think, the State Solicitor's Office as the legal adviser to government agencies. It may well be that a minister will seek my counsel on the subject and then I would explore it further but I do not recall an instance in which it has arisen.

The CHAIR: So you are never involved in providing the advice that is provided by the State Solicitor?

Hon MICHAEL MISCHIN: To my recollection, I have not been asked to do so to date. I would not say never; it just has not arisen. If my advice is sought, then of course I would assist.

The CHAIR: The Auditor General, in a submission to us, listed the common reasons a ministerial decision was not reasonable or appropriate under section 82. He said a feature of many of these decisions was a lack of sufficient consideration of issues by the agency advising the minister. Is that an issue that as the Attorney General you have a role in ensuring that the ministers are getting appropriate advice? I ask that in light of the fact that many of them argue that they rely on the State Solicitor's advice in their decision.

Hon MICHAEL MISCHIN: The State Solicitor's Office is available to advise all government agencies and ministers as necessary. Generally, instructions would be issued to the State Solicitor to take any necessary action. It would not be passed through me as a matter of routine. There may be circumstances in which a minister may choose to approach me in order to obtain further advice on a subject—I am speaking theoretically because, as I say, I do not recall a situation having arisen to date under my watch—or to obtain a second opinion on something, perhaps from the Solicitor-General or perhaps from other counsel. That is something that I would entertain in the circumstances, but it has not arisen, so I would have thought that the usual process would be that if there was a request received by a minister or an agency, they would make their own assessment. If there is any doubt in their mind, they would obtain legal advice from the State Solicitor and that advice would be given; it would not ordinarily be passed through me as a matter of routine. Mr Evans is probably far more attuned to the processes involved outside my portfolios than I am in that regard, but I rely on the State Solicitor's Office to do its job without having to refer to me on every occasion.

The CHAIR: I guess this is one where it may be that Mr Evans is able to assist us. Is there any internal documentation that is given to ministers to assist them to make a decision? For example, does such documentation define "commercial-in-confidence", "commercially sensitive" or "the public interest"?

Mr Evans: I cannot say there is anything which is promulgated generally in relation to that; I do not think it is anything we have ever been asked to do. It might be desirable to do it. The requests that tend to come in to us are bespoke; they relate to a particular set of circumstances and a particular query. I would have to say, having looked at the list of queries upon which the Auditor General has reported in the last few years, I do not think many of those have come through our office, in fact; or, if they have, they may have come through as part only of the issue. If a question is raised as to whether an objection should be taken, we can advise upon the regulatory framework—that is, the circumstances in which the question arises and falls to be answered—and the legal considerations that go to that, but obviously there is a wider gamut of considerations that the minister, as decision-maker advised by their department, may take into account beyond the purely legal considerations.

Hon MICHAEL MISCHIN: If I may just add one comment, it is going back a bit, about not disclosing information to Parliament. I assumed your question was framed in terms of the Financial Management Act and the like. There are occasions, of course, as you would be aware, on which I am asked a question without notice, or sometimes even on notice, in respect of a case or

something that is sub judice, and I will make the point that it would not be appropriate to comment in that regard if a matter of legal professional privilege may be disclosed and those sorts of things; I have not counted those in my answer. Those matters are relatively routine and I can make those decisions on an assessment of the circumstances in which the question is asked, so I take it you are not referring to those sorts of questions.

The CHAIR: No, it is related to those that would be captured by section 82 of the Financial Management Act. I am sure you would have tried to shut us down if we went beyond our terms of reference, Attorney General!

Hon MICHAEL MISCHIN: True, but in case I misunderstood the direction you were taking because there are, of course, circumstances where I am asked about pending investigations, for example, or investigations underway, matters that are before a court, matters where there may be a disclosure of advice that has been given that is privileged, or matters involving public interest immunity for cabinet, and those, generally, if the advice or draft answer or whatever is provided, I will instinctively know whether that is a sound objection to take. So, those sort of things I would not ordinarily consult with the State Solicitor on anyway.

The CHAIR: No, although, of course, section 82 is fairly broad in its definition. It relates to the conduct or operation of an agency, so whilst I accept your point that there may be other areas that do not go beyond that, I would imagine even some of those examples that you have given, it is an arguable point as to whether they are captured by section 82.

Hon MICHAEL MISCHIN: True, and what I would expect as part of the parliamentary process anyway is if a member has asked a question and they disagree that it is sub judice or disagree that it involves legal advice or that they have framed the question infelicitously, then they would take that up with me and I would provide what information I could.

The CHAIR: Are there principles that are relied upon when providing advice to agencies regarding what is commercial-in-confidence, commercially sensitive or in the public interest? If there is not a document as such, are there some generally accepted principles on which you rely in providing that advice?

Mr Evans: There is certainly a thought process which you go through in looking at a particular problem, principally from a legal perspective. If one takes commercial-in-confidence, which is, I think, probably the most controversial of the cases that has attracted this committee's attention, first you will look to the question of: Is there a confidentiality obligation arising out of the commercial dealings of the parties? First, is there an express obligation—that is, does a contract between the parties contain a confidentiality clause? Between the state and a third party, as between private parties, it is not uncommon for the third party or possibly the state to seek confidentiality over the whole or part of the relationship. That will be subject—assuming that proper advice has been taken—to section 81 of the Financial Management Act, because section 81, as you well know, precludes the minister or an agency from contracting so as to prevent the minister from providing information to Parliament.

[2.20 pm]

The CHAIR: Prevent or inhibit actually.

Mr Evans: Prevent or inhibit, yes. That simply ensures that a minister can provide information, not that a minister should or must provide information. It will probably have a dozen other exemptions. I have negotiated and sought to enforce confidentiality agreements over many, many years and they will invariably have a shopping list of exemptions depending on particular circumstances, whether between the state and a private party or between two private parties. So the first question is: what is the contract arrangement and is there some understanding as a result of that that some or all of the information in or generated as a result of a contract will be confidential? That then calls for a second round of scrutiny, which is what is the impact of confidentiality on the relations between

the parties, the ability of the state to enjoy the benefits of the contract, the ability of the state to participate in market-related activities, the inhibitory effect of disclosure upon the state's ability to obtain the benefits of the contract or of some other contract or dealing. These are all questions that can arise from a disclosure of particular information in particular circumstances, and every one needs to be evaluated separately. So you have look at what are the consequence of disclosure. You then consider whether partial disclosure, redacted disclosure, may or may not be satisfactory, and that forms what I call the legal basis consideration. There may then be policy and other considerations which sit on top of that or beside that, but the advice that we can provide is around the legal framework issues and the commercial legal implications of disclosure. That is as far as my office can go.

The CHAIR: You seem to focus there on negative impacts of disclosure. Is there any weight given to the positive impacts of disclosure?

Mr Evans: Certainly in considering redacted disclosure, if that is appropriate, that is in a sense considering the positive impacts of disclosure. If I can put it in these terms: we operate in a framework as a government where there is freedom of information legislation, which has as its prime construct the notion that information concerning dealings with government should generally be disclosed without achieving the requirement to proceed through the FOI process; however, there are acknowledged exceptions within that legislation to that principle. If information would be available through the FOI process and would not be subject to a successful challenge to prevent disclosure, then one would generally assume positively that it should be disclosed because it falls within the disclosure net in any event. However, if information has a sensitivity associated with it and will be unlikely to be disclosed within the FOI net, then there is not that positive element driving disclosure and it then falls to consideration within section 82 and the broad ambit of the public interest considerations that it embraces as to whether disclosure should be made.

The CHAIR: One of things that you said earlier on there was that one of the things that you would look at is whether or not the contract includes any provision regarding confidentiality, obviously that being subject to the requirements of section 81 of the Financial Management Act, but other than for section 81, a requirement to keep it confidential. When the government is negotiating a contract, what are the principles they use to determine whether they will put anything into the contract regarding confidentiality? As you can see, you then rely on that decision, so I am trying to work out what is the basis on which you make a decision to put something in the contract that would require it to be kept confidential?

Mr Evans: I cannot say there is a principle in relation to that. Most of the contracts the government enters into, other than the standard form procurement contracts, are bespoke, and the ones that are politically interesting are almost invariably bespoke, so it would depend upon what the subject matter is, which will generally draw in that wider set of considerations as to impacts of disclosure; you want to protect the information that has potentially some impact. Then it is very much dependent on the negotiating bargaining strength of the parties as to what the confidentiality outcome of that is. I am not a commercial lawyer; I am a commercial litigator, so I tend to look at these things at the backend when we come to enforce the clause.

The CHAIR: For 17 years in some cases.

Mr Evans: Yes, in some cases. My commercial guys do the individual contracts, and those are very much bespoke arrangements depending upon the nature of the transaction.

The CHAIR: I might be wrong on this, but it strikes me that at least in part there seems to be that if a company asks for a confidentiality clause, a government will grant that, if the request is made, without too much rigour being put into questioning whether or not that should be included in the public interest.

Mr Evans: I am not sure that is right, but in any event it is subject to section 81, so if the company asks for it, what it gets is the benefit of a ministerial discretion in relation to disclosure. Sometimes the state may seek confidentiality, depending upon circumstances. But if one is in a tight market, for example, for contractors—and there have been times when the market for contractors has been very tight in this state—then confidentiality in relation to cost-based information in a tight market is a very reasonable request, because to permit the publication, or to provide any encouragement of the publication, of competition-sensitive information puts, first, the state at some prejudice in being able to attract a sufficient pool of contractors and, second, the counterparty at some prejudice in relation to future bidding. In terms of maintaining a competitive dynamic, actually confidentiality is very often at the heart of maintaining competition through the contracting process.

The CHAIR: Do you have any empirical evidence to support that claim? It is something that is often claimed, but my sense is as you go around the world there are various forms of contracting out and some of it is fully disclosed and others are kept secret. I am trying to find examples of where there is a material change in the behaviour of the private sector when there is more open disclosure about the nature of the contracts.

Mr Evans: Empirical, I am not aware of that being done. I spent 28 years in the private sector and I had a lot of clients who were extraordinarily paranoid about the confidentiality of their information.

The CHAIR: That is often because it is in their interest to keep it confidential, not necessarily in the public or state's interest for it to be kept confidential.

Mr Evans: That may be true, but it is in their interest in the sense that they were prepared to be a participant in a particular market provided they could compete upon the basis that certain of their information, certain only of their information, was kept up their sleeve. When one plays poker around a table, the players have their cards to their chest; they do not have them out on the table, and commercial negotiations are poker games.

Hon MICHAEL MISCHIN: It might depend on timing as well. At the time of settling the contract, there may be one set of circumstances. Once the contract has been in operation for some period of time, it may be that the confidentiality and the sensitivity of the information may decrease.

Mr Evans: Certainly in the period up to the time when the contract is set and settled, confidentiality would normally be significant. Post settlement, confidentiality may still be more or less acute depending on what consequential arrangements need to be entered into. For example, one might enter into a master contract at a point in time, the execution of which is dependent upon a number of subcontracts being entered into, where the subcontracts may not be locked away for a period after the master contract is set. In that circumstance you would expect confidentiality to be desired by the master contractor until his subcontracts were set away and perhaps for some period after that.

The CHAIR: Does the state ever insist on confidentiality in the contracts? Is confidentiality ever put in at the request of the state; and, if so, what would be the circumstances where we would request the confidentiality? What are some examples?

Mr Evans: I cannot say in the context of the current contracts that you have been looking at, because I was not involved in their negotiation. I can certainly see circumstances where confidentiality would be appropriate. For example, if the state was committing to a particular negotiating position in one set of contracts and then had to go out and deal in the marketplace on a similar or related set of contracts, it would want to keep its negotiating position to itself in order to maximise its position. Similarly, in relation to state intellectual property issues—do we actually have intellectual property; generally from time to time—confidentiality in relation to that, we would certainly want to maintain in order to maximise the state's value in that confidential information. Again it is bespoke or dependent upon the particular circumstances, but I can certainly envisage that

the state would have a legitimate interest in seeking confidentiality, at least through a phase of a contracting process.

[2.30 pm]

The CHAIR: Once a contract has been completed or an arrangement terminated, is it ministerial or departmental practice to disclose the information? Again, you mentioned the FOI act. The intent of the FOI act is to make information public wherever it can be. Is there ever a process in any of your agencies, minister, to ensure that when contracts are no longer needed to be kept confidential, they are disclosed?

Hon MICHAEL MISCHIN: From my personal experience, I cannot say; I have not encountered that. The State Solicitor will probably have greater exposure to it. As you have indicated, there is a bias towards the disclosure unless there is a very good reason not to, but I can imagine circumstances where even if a contract has terminated that there may be some residual interest in ensuring that features of it are confidential, say, if the contract has been renewed or a new one being negotiated, if it may reveal bargaining positions—things of that nature. Perhaps Mr Evans can expand on that, but I can see circumstances where that might be the case.

Mr Evans: I think that is correct; certainly where there are ongoing, generally, market impacts of information you would not expect that information to be disclosed, certainly where it would undermine the state's bargaining position. Obviously, on an agency level aggregated information that is sometimes relatively granular information may be available through the annual agency reporting process. To what the extent one can distil it out would depend upon the relative size of a particular transaction to an agency's activities is one example.

The CHAIR: Minister, when you first became minister, was there any education, training or mentoring provided to new ministers about the issues that they should consider when making a decision to make information public or to withhold it?

Hon MICHAEL MISCHIN: No; not that I can recall in my case. I would have expected that if a circumstance arose that required my decision in that case, I would be briefed about the problem and the inquiry and the issues involved and asked for my instructions, my decision, in those circumstances. As I have indicated, it would be a question of how persuaded I am by the advice that I am given. If I am satisfied that that advice is sound and I can see the basis for that advice to withhold information, then I would issue instructions accordingly. If I had some doubt about it because I did not see the argument myself or was concerned that some aspects had not been covered, then I might seek further advice on it. If I am still not satisfied, I would seek the advice of the State Solicitor. But to my recollection, that has not arisen to date in my portfolios.

Hon RICK MAZZA: Chair, I am not quite sure whether you asked this question a bit earlier, but I will couch it differently anyway. Has there been any cases where commercial-in-confidence information has been inadvertently disclosed where a party has suffered some disadvantage from that?

Hon MICHAEL MISCHIN: I do not think it has been asked but I am not aware of a case of it. I am aware of cases where a parliamentary committee has disclosed sensitive information that has caused harm, not in a commercial sense.

Hon RICK MAZZA: I am talking about commercial contract—commercial sense.

Hon MICHAEL MISCHIN: The point I suppose is that the fact that information may be disclosed to even a parliamentary committee, there is no guarantee that it will be kept confidential and there has been one particular case that has caused quite some personal damage to a particular person because the information disclosed in confidence to a parliamentary committee ended up being published in one of its reports and was not, could not, be withdrawn. As I say, it did not occur in a commercial context. But there is always that concern on the part of government that something inadvertent like that might occur that can cause damage.

Hon RICK MAZZA: I am talking more about a commercial nature. It makes me wonder whether we jump at shadows with this commercial-in-confidence. I know with just about every commercial contract everyone always pushes for confidentiality to maybe protect some sort of commercial intelligence, whatever the case may be. I am wondering whether it should be so standard that every contract we have—you say it is bespoke—but, I mean, pretty much every contract you get out of the Solicitor's office wants a commercial-in-confidence type clause in it.

Hon MICHAEL MISCHIN: Perhaps the State Solicitor can expand on it, but most contracts are on a personal level. If you contract with me for a particular purpose, it is a deal that we have struck together looking after our own interests. Probably we would not want everyone in the street to know about it or for it to be published in the newspapers or whatever, for our reason reasons. Government of course has a different level of responsibility because it is acting on behalf of the community and it represents the state's interest. Once again, the bias there is a different one, however, because of a public interest to know that the government is acting responsibly in the community's interest. So there are tensions there. Whether people are jumping at shadows or not, I do not know but certainly there may be an inclination to be conservative rather than to be as open as some might like. That is where the balance needs to be struck, so I am not aware of a circumstance where there has been damage caused but, then again, I do not deal with that sort of contract, or rather, that situation has not been brought to my attention. Mr Evans may be aware of some.

Mr Evans: It is actually one of the hardest things in dealing with confidentiality agreements generally to quantify the impact of the cat-out-of-the-bag, because sometimes they can be very subtle. Let us say that information in a tender includes a pricing schedule that exposes how a tenderer structures their bid and prices certain unit items in that tender. That then becomes public so that a competitor of that tenderer becomes aware of that pricing schedule. That facilitates that competitor pricing the next bid, which has comparable inputs because they will have an idea about what their competitor is doing in the contracting market. The contractor loses the bid; they do not know why they lost the bid; they do not know whether it is because of that information or a combination of that information and other factors. So one very rarely gets to litigation about the disclosure of confidential information of that type because by the time that information has gone, the competitive damage has been suffered and it is very hard to run a case. There are more straightforward instances of confidential information disclosure that are much more commonly litigated than that. I think the Attorney is right; there is a certain conciliatism around this because it is hard to predict or quantify what the risks are. It is simply perceived and rationally explicable that there are risks for the commercial position of one party or another, which will tend to cause them to adopt a conservative approach about the disclosure of that sort of information. In a large and complex tender, there is a vast amount of unit information in granular detail, and also high-level information in relation to negotiating positions which are adopted—things which are important to one contractor and are important to the state but which might not be important to another. For example, if there are two competing contractors, one of whom has a particular sensitivity around one issue which is not a sensitivity for the other, even that identifies it as a commercial weakness which one can exploit in either that or a subsequent negotiation.

[2.40 pm]

Hon RICK MAZZA: I can see that there would be certain circumstances where there are company secrets in the way they do business that they do not want to get out because it will affect them in the competitive market. I suppose the point I am trying to make is—I accept the fact that we are conservative in negotiating contracts—is the government a bit quick to jump in for garden variety-type contracts to have a commercial-in-confidence clause in there when in reality if some of that information got out probably it would not be detrimental to that particular provider?

Mr Evans: It is an ex-ante analysis that you cannot perform. You simply do not know. Therefore, to that extent the information, to be conservative, is protective in our particular circumstances because of section 81. We are actually able to do an ex-ante—sorry, an ex-post—analysis and say, "Well, on this occasion now I can make a decision that this information should be disclosed, notwithstanding confidentiality." One of the interesting reasons, of course, why one might use the FOI process rather than the section 82 process to disclose information is that in the FOI process, the third party who is affected gets a say; in the parliamentary process, they do not, or at least they do not explicitly. So, in the balancing of interests under FOI, third-party interests have an explicit role.

Hon RICK MAZZA: Thanks, Chair.

The CHAIR: In your explanation, there seemed to be a lot of focus on potential damage, even though we have no evidence to suggest that there is—it is anecdotal. There is no evidence that where there are regimes of open disclosure, it means that people do not bid. There did not seem to be much weight given to what might be the benefits to the state by having that disclosure—that it actually might lead to a lower cost outcome for the state in future tenders. Surely part of the public interest that you should look at is to ensure that you are getting competitive tendering on an ongoing basis if everyone knows what the price paid by others in the past was for those tenders.

Mr Evans: I can show you the piece of economics on whether that is right, with respect, because the state has the benefit that it knows what it says in its tenders. So, on the assumption that you are having to put the best bid on the table, it is a game-theory question. If you have to put your best bid on the table to get attention, lacking any knowledge of what your competitors are putting out, then at least in theory, as I well understand the economics, you should always get the lowest bids out of that process in an efficient and competitive market. The state has the benefit of seeing every bid that is put to it. So it can actually benchmark both in that transaction and across transactions to understand whether it is extracting good outcomes from the market, whereas —

The CHAIR: If you accept the argument that you are getting the best price in those circumstances, then what is the damage done by disclosing the best price, remembering, too, that price is often only a very small component of any tender analysis? If you are going to go for price, you go for value for money. So there is a whole range of other selection criteria that come into play, of which price is often a very small component, if any, in reaching the value-for-money elements of it. If you are arguing that you are getting the best price under the system, what is the damage by disclosing that price, ultimately?

Hon MICHAEL MISCHIN: The damage may not necessarily be to the state. It may be to the contracting party, who have shown what they are prepared to provide for the price that is being offered. It may also be that they will display the profit margin that they are prepared to accept. It may be that some information that they are providing may be the basis of a future bid, and that their hand is being shown in advance as to what they are prepared to go for—prepared to accept—in order to provide the service that is being offered and so might jeopardise their position in the future. There are a number of possibilities. It is not simply a prejudice to the state here. It is the interests of others in order that the state can have the confidence of the market, that people are able to offer a service for a particular amount, and that they are not going to be damaged in the market in future negotiations or, indeed, in other contracts. They may be prepared, for example, to offer government a better deal than they may be prepared to offer in the open marketplace, simply in the hope that in the future, there will be a commercial relationship between the state and them that will stand them in good stead for future operations—add some goodwill, as it were. I am speculating here. It operates at the number of levels. So I do not think that there can be any hard and fast rules. It is not simply a case of there being damage to the state by disclosure.

The CHAIR: No, and I guess my point is it is all speculation and no-one has any empirical evidence, and in the meantime, the negative side of it is that there is not public disclosure about public money.

Hon MICHAEL MISCHIN: True, but quite apart from just general curiosity, what is it that is being hoped to be discovered by the information that is being pursued?

The CHAIR: I will give you one example that this committee has looked at—for instance, the Public Transport Authority, and it has a contract with MSS security. The Public Transport Authority asked for the hourly rates for the MSS security officers to be kept confidential, or the contract rate for MSS. The total value of the contract was disclosed. I am pretty confident that any competitor knowing what the tender was for, and knowing what the total contract is, would probably be able to do a fairly reasonably good analysis to work out what the hourly rates being charged by the contractor were. The only people that are then denied that knowledge are this committee. One of the reasons why as a member of this committee I wanted to see those hourly rates and to be able to have a public debate about it is: was it costing the state more to be employing contract workers than if the state had employed transit officers—if we had directly employed transit officers, would we have had a cheaper outcome and officers who had greater powers? By having the request and that information kept confidential, that denies that public debate about is the state getting value for money. That is just one example, and that is an example that this committee is looking at, where it is very much a matter of public policy and what is the best outcome for the state in terms of its financial affairs.

Hon MICHAEL MISCHIN: I cannot comment on that specific instance, of course; it would be a matter for the minister concerned to explain the confidentiality —

The CHAIR: But often they go back and say, "We got advice from State Solicitors", so we get into a circular argument that they rely on the advice. That is why I am trying to get to the point of understanding the principles on which the advice is provided as to how you measure what is the public interest and what is the benefit. It strikes me that it seems to be very much focused on if there is a request from the private sector, as opposed to if we had a regime that started with everything will be disclosed—which does not seem to be where it is at the moment.

Hon MICHAEL MISCHIN: Yes. I can see your point. It also may be that you started off with that regime that anything that you do in terms of cutting your deals with government will automatically be disclosed unless you provide a very good reason for it and it is outside the bounds of—I will start again. If there were that premise, it may be that you might find fewer people wanting to contract with government. Again, how do you know? It is based on, I suppose, commercial experience, understanding the way that the market works—things of that character. I mean, the State Solicitor could provide a framework for considering these questions. He cannot make the ultimate decision, because that is an assessment by the minister concerned or the department concerned, but can certainly provide advice as to whether an argument is sustainable, if I understand him.

[2.50 pm]

Mr Evans: Which is what we do. We look at the legal framework arguments and the commercial considerations as best we understand them, and whether they make sense. We cannot make a determination as to whether they are valid, ultimately, because that is an evaluative decision for the risk owner in relation to that particular project.

Hon MICHAEL MISCHIN: There may not be a right answer to it, because of many things. It is a matter of judgement in the circumstances, and one person might look at it and say "Yes that's fair enough as an objection", and on the other hand others might take the view that it is far too cautious and go the other way. There may not be right or wrong answers in many of these cases.

The CHAIR: It is public money, though, at the end of the day.

Hon MICHAEL MISCHIN: True, but what I am saying is that these are matters for judgement along the way.

Mr Evans: In terms of doing an empirical assessment, it would be fascinating to do, but very hard to actually devise the case study that would be required to do it. It is not impossible, I would think, to do it, but you would need an apples-for-apples comparison to do a proper empirical study.

The CHAIR: Well, I think you could look at other parts of the world where they actually have a far more open disclosure regime around contracts.

Mr Evans: Then you have to determine whether they are producing better, the same, or worse financial outcomes, and that is where the apples-for-apples difficulty comes in. If you had, for example New Jersey and Pennsylvania both bidding a 50-unit school bus contract for 10 years on a fixed date with fixed routes, one going open and one going closed, then you could do an apples-for-apples comparison with a marginal appreciation. Absent that sort of direct comparability, it still becomes a largely evaluative question as to whether you are getting a better outcome or not.

The CHAIR: I think the argument goes both ways, and therefore, by not disclosing it, that secrecy potentially allows other negatives, such as corrupt practices with the like, by not having public disclosure of those details. Are you seriously suggesting, Attorney General, in your answer, that people would not be bidding for work to provide security work for the government, when it is one of the largest employers of it?

Hon MICHAEL MISCHIN: I am putting factors into consideration and saying that there may not be necessarily a right or wrong answer. Plainly, on a scale, there will be certain circumstances where it would be patently justified to withhold certain information, but at the other end of the scale, patently unjustified, and I suspect that the bulk of the cases fall somewhere in between. It is the usual bell curve that we are familiar with, where things may drop one way or the other, and neither would be potentially wrong, because there are competing arguments that are equally valid. It may be that much of it is speculative, because you do not know what the outcome might be, so you would tend to take, in some cases, a more cautious approach. In others you assess it as being unlikely to cause any damage, and so it is something that you reveal. What to do depends on the views of the other party. As the State Solicitor has pointed out, one of the advantages of the FOI process is that there is a requirement for the views of the other party to be taken into account as part of that evaluation, to see if there are any objections, and a weighing of the objections. I am not being dogmatic about it at all; I am just saying that there are no doubt different approaches to the issue. Some countries—some jurisdictions—might have one particular way of looking at it, but whether theirs is the best, we may never be able to know; it is arguable.

Mr Evans: To take your security guard example, Mr Travers, as a particular instance, similar to the question of reverse engineering the numbers in any event, which is in a sense a different question. You do not know, and I do not know what the outcome would be, but if I am the security guard company bidding for a contract with the government, and I am confident that the terms of that contract are confidential, then I am bidding against my competitors to get that contract. I am only concerned with the economics of securing that contract. If I am doing it in a high-disclosure environment the risk is that that bidder then has to consider, in their bid, the impact of the contract upon their portfolio of contracts then current and in the future. That is the conservative position, which you generally adopt in relation to commercial-in-confidence evaluation, which directly impacts on the state's ability to secure the best price, if they adopt a more conservative bidding position and say, "I don't actually care if I lose this contract at a certain price point, because I'm better off not having the contract then suffering the ripple-through impacts on my other contracts, present and future, than being seen to take that price point."

The CHAIR: That would be right if you selected one contract rather than having a standard process across all contracts. So, for instance, the education department let contracts with respect to security services at rates below, according to the evidence we received from MSS, the point at which they

could do it and make any profit. So they were clearly coming in at a loss, basically. It is a competitive market, but I do not know—the companies themselves can work that out. The only people you are actually denying that information to, in my view, are the parliamentarians who want to, for public policy outcomes, scrutinise it.

I might move on and see whether Hon Peter Katsambanis has some questions.

Hon PETER KATSAMBANIS: I think we have covered most of the questions I had, but one issue that strikes me is that, in the term of this current committee as it is constituted, we had one instance where what you would deem commercially sensitive information, what was previously commercially confidential information, was inadvertently disclosed to the committee at a public hearing. Has any assessment been made of the commercial impact that that disclosure had on any of the parties—the contracting party or the government—in relation to that inadvertent disclosure?

Mr Evans: I am not familiar with the instance, but I could certainly make some inquiries as to whether we had formed a view in relation to that, if I knew which one it was.

Hon PETER KATSAMBANIS: I do not really want to exacerbate the situation by disclosing too much.

Hon MICHAEL MISCHIN: I think it is probably all there on the public record and there is nothing left to disclose!

The CHAIR: I am happy to dob your colleague in if it makes it easier!

Hon PETER KATSAMBANIS: It was in relation to major events contracts, and the cost of those.

The CHAIR: It was a tourism contract.

Hon PETER KATSAMBANIS: Tourism/major events.

Hon MICHAEL MISCHIN: Sorry, I am not familiar with it, so I cannot help you.

Hon PETER KATSAMBANIS: Since we have the State Solicitor here, it is always good to ask the question.

Mr Evans: I am not familiar with that particular one. Again, the major events contracting market, in my understanding, tends to be very bespoke. Each event is relatively unique. You cannot do an apples-for-apples comparison between an ultramarathon and a wine festival, particularly. Whether it had an impact on the next wine festival, if it was a wine festival, I have no idea. I will take the question on notice to have a look at it if you want to put it as a question on notice.

Hon PETER KATSAMBANIS: I guess we can ask the agency the same thing, because they may have had a different view.

Hon MICHAEL MISCHIN: We would need some more information.

Mr Evans: They would be much closer to the market impacts than we would.

[*Supplementary Information No A1*.]

The CHAIR: The last area I want to cover was, when we had the Port Hedland Port Authority come before us, there was some discussion around an agreement called the Harriet Point agreement. In public session, it was admitted that there had been confidentiality clauses in the agreement constructed in such a way that the CEO could not even have a discussion in a public forum about the agreement. I guess the issue I am interested in is: is that the only agreement of that type that exists in the state, or are there potentially other agreements? I am looking at your face, Attorney General. The reason I am asking you is that I would have thought it might be easier for the State Solicitor to be able to tell us whether other agreements exist where it is written into the agreement that the existence of the agreement cannot be disclosed or discussed in any public forum.

Hon MICHAEL MISCHIN: I am not aware of that.

The CHAIR: The alternative is to go to each agency and say, "Do you have that?" I am just intrigued as to whether it is an isolated case or whether there are other agreements. Obviously, I am not asking you to disclose what the names of those agreements are, but just simply whether there are other agreements.

Mr Evans: I am certainly not aware of any others. I am aware of the way in which the Port Hedland Port Authority has treated that agreement. It is a GTE agreement. It is not a core state agreement. Indeed, I think we became aware of the terms of that agreement only in our work in relation to ports privatisation in the last few months. I do not understand that we were involved in its inception.

The CHAIR: I was not even going to get into the question of how the ports privatisation operates with that agreement, but that is another story!

Hon MICHAEL MISCHIN: So they may have obtained advice from other parties.

Mr Evans: They may well have obtained externally. The Port Hedland port authority, along with all the other port authorities, is externally advised in relation to their transactions. They are not an SSO client.

The CHAIR: But they are still covered by sections 81 and 82.

Mr Evans: They are still covered by the Financial Management Act, but one of the difficulties is that those who are not familiar with the FMA may not give adequate respect to it.

The CHAIR: So you are not aware of any other agreements that exist?

Mr Evans: No, but I have not asked my staff that question, so it is my personal knowledge, which is negligible in relation to these.

The CHAIR: Is that something you could take on notice to see whether there are any other agreements where —

Hon MICHAEL MISCHIN: We can do, but it would seem that it is unlikely that the SSO would be aware of them if they are government trading enterprises that are making these agreements without seeking advice.

The CHAIR: And it may be elements of the agreement. I understand that there were elements of the Westadium agreement where the government clearly chose not to disclose certain elements of that contract until such time as they made public announcements about it. But that is very different from having elements of a contract that actually contract out the disclosure of that element of the contract, and that is what I am after.

Hon MICHAEL MISCHIN: I wonder whether, given that we are talking about government trading enterprises —

The CHAIR: No; I am asking about not just government trading enterprises, but whether or not —

Hon MICHAEL MISCHIN: All right, but dealing with government trading enterprises, it is not likely that we would be aware of those. The relevant minister under whose authority or control those enterprises come may be able to make inquiries to find out if there are any such clauses or contracts of that character. It is probably better directed to individual ministers.

The CHAIR: I accept that in terms of GTEs, but I am asking on a broader basis. I am not asking you to go back and re-read every contract, but I would have thought your officers would know whether that is certainly a common practice in contracts.

Mr Evans: It sounds exciting the thought of going through 20 years of contracts we might have been exposed to at some stage. If the question could be framed in terms of "are we presently aware of", that is a question I could answer. "Have we ever seen" is a question that would take us a very long time.

The CHAIR: I would have thought the nature of it is such that your current officers would remember if they put that into a contract. That is what I am asking for—for them to be asked are they aware of those provisions in any contracts—not for an exhaustive examination of the contracts.

Hon MICHAEL MISCHIN: We will do what we can with what we have got.

[*Supplementary Information No A2.*]

The CHAIR: Going back to the response you provided to us regarding the opinion of Mr Walker that I think you are aware of, are you not, Attorney General —

Hon MICHAEL MISCHIN: Yes.

Mr Evans: I recall that, yes.

The CHAIR: At the bottom of page 4, you make reference to, in doing so, Mr Walker suggested the Auditor General must form their own opinion and not defer to the minister's position if to do so would be not to form and report on his or her own actual opinion; that is an unusual role for an Auditor to perform if it involves the assessment of conflicts judgements rather than processes or technical compliance with a set of externally described behavioural norms.

You then go on to talk about the fact that there are political considerations that would need to be taken into account by a minister that would not be considered by the Auditor General.

Mr Evans: Which are more difficult for the Auditor General to consider and evaluate.

The CHAIR: Yes. Can you give us some examples, when you make those comments "political considerations", of what you mean by "political considerations"?

Mr Evans: I am not attempting to predict for the government what the range of circumstances are and it certainly would not be appropriate for me to do so, but, ultimately, that is an outworking of the fact that section 82 is fundamentally a section about politics, rather than about the question of defining the political obligations of a minister in their interaction with Parliament. It might be, for example—I am not saying this has happened or would happen—that a minister formed the view that a particular question in a particular context about a particular theme either had been asked and answered on several occasions or was a matter which was not in fact genuinely an inquiry for the purposes of the Financial Management Act into the affairs of an agency but was framed for a political purpose, and might decide on that basis that it was reasonable and appropriate to decline to answer that question, recognising that in doing so they risk political opprobrium from the other side of the house for refusing to answer that question. That is a question that the minister has formed as a matter of political judgement in a particular context. It is difficult to see how the Auditor General can form a view as to whether or not that is a politically correct view. What the Auditor General can do—it is obviously more easily couched in terms of decisions where politics are not a predominant factor—is look at the process of exposed reasoning that the minister goes through based on the advice that the minister receives and say, "Does this look like a reasoned and reasonable decision in the circumstances?" One notes from the Auditor General's reports that where the Auditor General has been critical of ministerial decisions, it has often, if not usually, been on the basis that they were not reasoned and reasonable rather than necessarily that they were wrong, but rather one could not decide whether they were right or wrong because one could not actually work out why the decision had been made.

The CHAIR: I do not disagree with that. I think that is the issue and I think that was one of the points that Mr Walker was making—that they need to actually put themselves into the shoes of the minister effectively under his interpretation of the act and make a decision in his own mind not to look at the process, whereas the Auditor General has tended to become a process-orientated approach.

Mr Evans: Up to a point—this is possibly being a little critical of the Auditor General—it is a measure beyond the process. But there is a certain point where one would hesitate to say the

Auditor General properly can go, which is why I said in my letter that, although they look like the same question and they are questions, I do not think they are actually the same question, because there is a point where the Auditor General, as an officer of the Parliament, based upon the materials which are available to the Auditor General, cannot overlap entirely the decision the minister makes. That is a view, and it is almost a philosophical view, as to the function that section 82 and section 24 are performing.

[3.10 pm]

The CHAIR: In those circumstances, do you have a view about whether or not there should be amendments made to section 82?

Hon MICHAEL MISCHIN: What, to cover that particular point?

The CHAIR: Well, to improve or clarify the operation of it.

Hon MICHAEL MISCHIN: I would have to consider what it is that is considered a shortcoming of it, but I think that the Auditor General's role cannot be elevated into determining the rights and wrongs of political decisions; that is not his function. That would put the Auditor General in a position above elected governments, so there are natural constraints as to his ability to look at other than processes to see that certain matters have been considered, perhaps, as part of the decision-making process—that weight has been given to certain considerations and the like—but ultimately he cannot be the political arbiter. I am not sure if that is entirety answering your question, but I think that the function of the Auditor General as an officer of Parliament is still distinct from the responsibilities of an elected government and a minister appointed with responsibility for certain decisions of that government. Now, it may be that there is some clarity that can be put into what is provided for in the legislation to draw the distinctions to make it easier for the Auditor General to understand the function expected of him and to make it easier for the public to understand, but it has to be in the light, I think, of that consideration, just as the role of the State Solicitor is one to provide legal advice and counsel, not to make, ultimately, the decision as to whether something is commercial-in-confidence.

The CHAIR: In terms of the issue of those political considerations you talked about earlier, is it not possible for the Auditor General, if that was the decision, for the minister to provide those political considerations to the Auditor General for them to consider those considerations and to determine whether they were fair and reasonable— or reasonable and appropriate, I should say?

Mr Evans: The difficulty then is the Auditor General is providing the evaluative function, not the process function. It is entirely proper to say, "These were the considerations which were taken into account." It is entirely proper to say, "Of the range of possible considerations, the decision maker appears to have taken into account all of the relevant considerations." It is not proper to say, "And they made the wrong decision and should have made this decision." That is evaluative.

The CHAIR: But do you not accept that that is how sections 82 and 24 of the Auditor General Act are currently constructed, and if the government has concerns about that they should be seeking to amend that act? It was actually raised in a minority report when the bills went through the Parliament—the issues that you are raising now, in fact.

Mr Evans: As you will have seen from me, that is not the view that I take as to what the Auditor General's function is to make that final evaluative decision. Frankly, it would be unfair on the Auditor General to —

The CHAIR: Surely, that is exactly what section 24 says. I can understand why you might not want that to be case, but section 24(c) says —

> is to include an opinion as to whether a decision by a Minister not to provide information to Parliament concerning any conduct or operation of an agency is reasonable and appropriate.

Mr Evans: And "reasonable and appropriate" involves looking at those things that an auditor can properly look at; that is, is this a reasoned decision which was in the range of possible decisions? It is very rare to see an audit position which says, "This is right."

The CHAIR: But it is the same language used in 82.

Mr Evans: I recognise that and it does raise a dissonance issue between the two, because to my mind, my analysis, section 82 actually raises a wider range of considerations which reflect the political issues that a minister faces than section 24 can properly impose as an obligation of the Auditor. That is the view I express in the letter.

The CHAIR: Yes, and I am just trying to tease that out because I see the language as being identical. It strikes me that it is an attempt of what we would like to see the legislation say rather than what the legislation says.

Hon MICHAEL MISCHIN: It may be that some refinement is advisable then to make it quite plain, so there is not any confusion about that. But, as has been pointed out, there are philosophical as well as practical limitations as to the sort of responsibilities you can impose on the Auditor General; he is not there as some kind of backup government to make political decisions as to the rightness or wrongness of particular actions, as opposed to audit process and to advise accordingly.

The CHAIR: I understand fully the dangers of politicising the role of the Auditor General and the way in which these sections do it, but my point is, at the moment, as the law stands under section 81, 82 and 84 of the Auditor General Act, that is exactly what they do, and that is what I am trying to get to and, certainly, in my view, the view that was formed by Mr Walker in his advice to this committee.

Mr Evans: It is and also this will be different from that advice because, viewing the obligation in the context of the Auditor General Act, to impose that obligation upon the auditor when an alternative sensible and available construction is there is to impose an obligation on the auditor that he should not be fixed with.

The CHAIR: Just to finish off, the term inhibiting the prohibition by the minister, have you considered that at all in terms of the meaning of that in section 81?

Mr Evans: Not particularly, but I can see the circumstance for which there might be an inhibition. For example, you might cast a confidentiality clause in terms which say, not that you cannot disclose the information, but that if you do disclose the information, we need 28 days prior notice before you can do so, or it will cost you $2 million which is our quantified economic risk of disclosure. Both of those would inhibit the disclosure of information although neither would preclude it. Now, I do not think I have ever seen those sorts of clauses provided for nor indeed sought and I would not expect anybody to be silly enough to do so, frankly. But there are things you could do structurally to inhibit the disclosure of information without precluding it.

The CHAIR: But where some of those contracts actually have specific clauses about maintaining confidentiality of information is that not inhibiting the provision in some form?

Mr Evans: If they contain an appropriate caveat, "except for disclosure of Parliament, in terms of section 81 of the FMA", that does not inhibit, because it leaves complete latitude for the minister to do so or not in terms of section 82. There is no contractual constraint upon the minister, therefore, there is no inhibition.

The CHAIR: Any other questions? The committee will email the transcript of evidence, which includes the questions you have taken on notice highlighted on the transcript, to you in the next couple of days. The corrected transcript will be requested to be returned within five working days of receipt. The answers to questions taken on notice will be requested to be returned by 8 March 2016.

Should you be unable to meet this due date, please advise the committee in writing as soon as possible. The advice is to include specific reasons as to why the due date cannot be met. On behalf of the committee, I thank you for your attendance today.

Hon MICHAEL MISCHIN: Thank you.

Hearing concluded at 3.18 pm

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