

**STANDING COMMITTEE ON ESTIMATES AND
FINANCIAL OPERATIONS**

PROVISION OF INFORMATION TO PARLIAMENT

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 16 MARCH 2015**

SESSION TWO

Members

**Hon Ken Travers (Chair)
Hon Peter Katsambanis (Deputy Chair)
Hon Martin Aldridge
Hon Alanna Clohesy
Hon Rick Mazza**

Hearing commenced at 3.36 pm**Mr PAUL EVANS****State Solicitor, State Solicitor's Office, examined:**

The CHAIR: On behalf of the committee I would like to welcome you to today's hearing. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Evans: I have.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make any noises near them. I remind you that your transcript will become a matter for the public record. 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. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your evidence is finalised, it should not be made public. I might add that the committee has resolved as a matter of course for our hearings that we make the uncorrected version available on our website, but we make it clear that it is an uncorrected version and it cannot be quoted from or used anywhere else. It is just for people's information. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I invite you to make an opening statement to the committee if there is anything you want to raise, or we can go straight to questions—whatever you prefer.

Mr Evans: Thank you, Chair. I have no particular opening statement to make although it is probably prudent to make what I might call a clarification of position. I come here at the invitation of the committee. My position as State Solicitor is that I am the legal adviser to executive government. We do not traditionally, in my office, advise the Parliament on legal matters although there may be occasions when at the invitation or direction of the Attorney General we will do so. Nor do we disclose the content of legal advice which we have provided to our clients in executive government. There may therefore be questions which it is impossible for me to answer to the extent that you seek from me what is either legal advice to the Parliament or legal advice that my office has provided to our clients in executive government.

The CHAIR: All right. I do understand that. I guess that almost, in a sense, possibly starts us at the opposite end of the hearing we just had with the Auditor General, which is you also provide advice to the Auditor General.

Mr Evans: We do.

The CHAIR: How do you internally manage the conflict that can potentially arise between advising the executive and advising a position that is seen as an independent officer of the Parliament?

Mr Evans: I would not say we see that there is a conflict. We have a statutory obligation to advise the Auditor when he seeks advice.

The CHAIR: I would have thought, though, they have different roles, so you would still need to be having some internal process to ensure some independence in the way in which you advise one versus the other.

Mr Evans: We take the view that all our advice is independent and we also take the view that whenever we give advice to the greatest extent possible—this is not always possible because of the way in which we may be instructed—the advice is consistent no matter who asks us; that is, if a minister and the Auditor were to ask us the same question about sections 81 and 82 of the Financial Management Act on the same facts, we would give them precisely the same answer.

The CHAIR: I think you also received a copy of a legal opinion —

Mr Evans: From Mr Walker, SC.

The CHAIR: Yes, Mr Walker, QC.

Hon PETER KATSAMBANIS: I think he goes by SC.

The CHAIR: SC, sorry. I take your earlier point, but I am interested in terms of whether or not you are of the view that that advice conflicts with the way in which you interpret the operation of section 81 and 82 and section 24 of the Auditor General's act.

Mr Evans: I think it does to some extent although I have not actually referred to advice that we have provided to the Auditor General for that purpose, so I am basing it simply on my first pass impression of the advice without having sought to reconcile it against other advice that we may have given.

The CHAIR: Right. Are there particular areas where you think that that differs?

Mr Evans: As I said, I have not attempted to reconcile it with the advice, but I am, shall I say, slightly troubled by Mr Walker's treatment of section 81 and the notion of commercial-in-confidence and in particular by the proposition that the fact that a minister has properly, in terms of section 81, reserved the ability to disclose matters from Parliament, notwithstanding they might otherwise be commercial-in-confidence, means that he must disclose those matters to Parliament even though he assesses that they are commercial-in-confidence—I find that a difficult proposition.

The CHAIR: I think it all becomes how you define commercial-in-confidence at that point, though, does it not?

Mr Evans: I am not sure it does. The position as I would see it is this: there are many matters which are commercial-in-confidence where quite properly and consistent with section 81 the department or minister would provide that material may be disclosed to Parliament; whether they do disclose it to Parliament is an entirely different question.

The CHAIR: That is right. Section 81 says you cannot be in a position to not disclose it to Parliament, but section 82 then clearly indicates that you should be disclosing it unless it is reasonable and appropriate, when read in conjunction with section 24 of the Auditor General's act, that those matters should be being disclosed to the Parliament.

Mr Evans: I think that is the question and, as I said, I have not reconciled it against the advice that we may have given to the Auditor in relation to those matters. Perhaps to go further would either be giving you advice about how section 82 operates or to be disclosing advice that we may have given, so if you want to put that to me as a question for advice to the committee, then I will take it away and undertake that reconciliation and seek the Attorney General's advice as to whether he wishes me to give that advice.

The CHAIR: So beautifully put! I will certainly ask you to take that away and to seek the advice of the Attorney General, because I think it is quite important that we understand. What we would certainly hope to do as part of this committee is to try to get some common understanding of how section 81 and 82 and 24 of the Auditor General's act can and should operate, but also, obviously, one of the issues that we would then be looking at is: can we improve that system? Are there ways in which the current act does not operate effectively? And, therefore, trying to improve the system in terms of a disclosure regime that also does not place unnecessary burden on the executive does

not place the Auditor General in a position of constantly being seen to be making decisions that will bring his role into a political debate, but by the same token trying to work out a way in which we can ensure that there is a proper disclosure regime for information to Parliament. I just give that as a background as to where that might help inform yourself and when you are advising the Auditor General—certainly, I think it would be fair to say that is the committee's view as to what we are hoping to do to understand how it operates. If you can take that on notice—in normal hearings we give them numbers, but I think go away and —

Mr Evans: I will be able to extract it from the transcript.

[3.45 pm]

The CHAIR: Yes. I guess that also brings in the question around if and when agencies should be lodging section 82 certificates and at what point an agency should be lodging a section 82 certificate.

Mr Evans: That triggers again a separate and discrete question. I think the question you are putting is: what is it that triggers the requirement under section 82—that is, what is the relevant non-disclosure, and to put that in a parliamentary question? Presumably that is in a context where a minister has had a question addressed to him or his department which calls for an answer and where the minister then determines to answer that and determines in the course of that that there is certain information that should not be disclosed. Those are matters in the minds of the relevant minister or relevant department in framing the answer.

The CHAIR: Again, I am happy if you indicate you have got to take this on advice, but if a minister was to say they believe that is better sought under FOI, whether it is to a parliamentary committee or in the Parliament, would you consider that is a refusal to provide the information that should then trigger a section 82 certificate?

Mr Evans: I would have to think about that. I think the answer may well be yes, but I would have to give it consideration.

The CHAIR: Maybe if you could take that on notice to come back to us. From there, there are also the cases where the minister may provide an answer but where there have been specific requests made. I can give an example when I made specific requests to an agency about the reason they were conducting valuations on properties. The answer was to just advise me of the addresses that they had conducted the valuations on, but none of the specific reasons as to why they were conducting those valuations. Again, whether or not that would be something that in your view should be triggering a section 82 certificate—if you could potentially look at that.

Mr Evans: I understand the question.

The CHAIR: So, where you believe that point would arise that even though they may provide an answer to the question, they have not actually answered the specifics of the questions asked—at what point should a section 82 certificate be triggered in terms of the Parliament? I think one of the issues that has come up earlier is whether or not agencies are currently operating on the basis of, “If we do not provide a section 82 certificate, the Auditor General will not look at us so that is actually a better outcome than providing the section 82 certificate.”

Mr Evans: Which may or may not indicate a lacuna in the process. I have a lot of sympathy with the position of the Auditor General that he cannot look unless he knows, and the only means of knowing is a section 82 certificate.

The CHAIR: I think Mr Walker's advice is that there is an obligation if it comes to his attention and he does have some role in terms of that. We just had the Auditor General in here earlier, and I think we made the point that we understand that we are not expecting the Auditor General to be trawling through the *Hansard* on a daily basis saying, “Well, that minister hasn't answered that question; we'd better come back in 14 days to see whether the section 82 certificate has been

lodged. But where there is, and I have raised this with the Auditor General previously, regular noncompliance in my view with section 82, that questions have been asked of agencies and those agencies are not providing a section 82 certificate, it would be my view that even if not under the Financial Management Act specifically but under the general provisions of the Auditor General's role in ensuring government agencies are compliant with the financial legislation of the state, he would have an obligation to be able to examine and report on whether or not agencies are in general terms complying with section 82; even if not going into specifics. I mean, Mr Walker obviously suggested that there is the opportunity for him to go into specific cases, but I would also argue that if the Auditor General, however it is brought to his attention, was to form an opinion that there is a systemic failure to lodge section 82 certificates, that is a matter that he could report on. I again would appreciate your views about whether or not that is a view that would be held by the government as well; and, if not, how do you argue against the views both put by Mr Walker and also my view I have just expressed about them where there is a belief that there is systemic failure to comply with the financial legislation of the state.

Mr Evans: I think I understand that question.

The CHAIR: Is there anything you want to comment on at the moment?

Mr Evans: No. I think it is a matter which I would need to (a) consider and (b) because I think that does involve advice and actually the interpretation of legislation, it is a matter properly referred to the Attorney.

The CHAIR: All right. What I might suggest is that the committee might also have some further written questions. I suspect that in light of where we are going today that the simplest thing might be for us to provide some written advice, rather than to go through the questions, have them recorded by Hansard. It makes it easier for me, rather than transcribing it any other way, but I think it might be easier for us to then, if we go through any other written questions, to submit them to you.

Mr Evans: Yes, and I am more than happy to receive those and I can refer them accordingly.

The CHAIR: Yes. And, as I say, I think there are a number of other points in terms of the opinion of Mr Walker SC, that we would certainly be interested in trying to ascertain from the government as to how, if they do not agree with Mr Walker's interpretation, how they believe it should be interpreted. As I say, coming back to that issue with certainly trying to see if we cannot either seek an agreed view about how the legislation should be interpreted, but also whether or not there are ways in which we can improve the legislation. And one of the things that I put to the Auditor General today is whether or not there are regimes around the world where there is far more constant and ongoing disclosure. And also the questions, when you are providing advice to government about commercial-in-confidence, what tests you apply to that so that we can better understand that. I will put that on notice now, rather than putting it in a submission. A case I would invite you to look at as a potential case study is the recent contract for the multipurpose stadium at Burswood, where even the annual ongoing payments have been deemed to be commercial-in-confidence and unable to be disclosed either to this committee in private or in public. Will that now mean that the government intends to also seek that amount to be recorded in the annual budget as a commercial amount that is not disclosed even in the annual budgets to the Parliament, which again I would find very interesting if that is where we end up. And if it is not, then does it not highlight that there is a problem in the failure to disclose that when disclosing that both through the ongoing regime of the Department of Treasury for disclosing contracts, but also this committee has specifically asked for that contract and we have been advised that we cannot have that information as a specific question. So, I would be interested in your advice through the Attorney General as to how and on what basis the government arrives at a view that that information cannot be disclosed to the Parliament when in my view it will be at the time of the budget, so why can it not be disclosed as part of the contract?

Mr Evans: That question probably poses two questions, if you want to pose them at the level of generality; that is, the factors that may be brought in to bear generally as to why something may or may not be commercially in confidence, and those are almost infinite in their diversity. And separately the question as to that specific contract, if you want to frame that, we will accept that as a specific question, then I will take it on board as a specific instance on that.

The CHAIR: And we certainly are interested in trying to understand how the government views the question of when commercial-in-confidence should apply. And we have gone through, and obviously there is an argument with the department, or the tourism commission has set up a regime and they have a clear view that if it is an ongoing event where it is subject to poaching—for want of a better term—but then they want to keep the amount that is paid confidential, but where a contract has been entered into that is now completely a one-off contract that has been signed, what is the commercial-in-confidence reasons for keeping that contract confidential? Also, again, the Auditor General gave an example of contracts that there were other contracts of a similar nature being negotiated, but at the time that all of those contracts are then negotiated, why they should not be made public? And, finally, things like hourly rates of pay, why that would need to be kept confidential in a contract that has been signed that lasts for five or 10 years? So, anything you can do to give us a better understanding of that would be —

Mr Evans: I will see how I can assist.

The CHAIR: Finally, the other one which I will just put now rather than putting it into writing, is: since the enacting of the legislation in 2007—I think it was first enacted then although it was a 2006 bill—has the view about how section 82 should operate changed at any time between the initial interpretation of section 82 and where we are today; and what was the reason for that change?

Mr Evans: Not that I am aware of, but it is not uncommon for views to evolve as one has the opportunity to consider more and more instances of the actual operation, although my office does pride itself on maintaining consistency in the long haul, which is why our opinions database goes back to pre-1945. But we do try to take one view and stick to it, not always.

The CHAIR: One of the things from a conversation with the Auditor General we had earlier was that we recognise that this is relatively new legislation, both in a Western Australian sense but also no other jurisdiction in either Australia or the commonwealth has provisions —

Mr Evans: It is a specific response to a specific episode in Western Australian history, which attracted, I think, three committees of review, which turned their minds to, and took slightly divergent views in relation to, how sections 81 and 82 should ultimately be framed.

The CHAIR: Yes, and we do accept that that means that there is constant review. In fact, that is part of, I guess, one of the issues, whether we have got it right or, if you go back to that history, whether if you took the current interpretation of section 82 and section 24 in the Auditor General's act, whether those documents that sparked those inquiries would still today be able to be kept confidential and therefore defeat the whole purpose of why those clauses were put into the act; in which case, if that is the case, we would welcome any suggestions through the Attorney General or if there is any advice that you could give us about where you think the legislation could be improved to achieve those outcomes in meeting those original aims and obligations.

Mr Evans: Understood.

The CHAIR: All right. Thank you for your evidence before the committee today. A transcript of this evidence will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added by these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected

transcript of evidence. I certainly would ask if possible you could also provide the answers to the questions we have discussed within that 10 days, or if it is not possible for some reason to prior to that 10 days indicate to us (a) that you are not able to and (b) when you would expect that you might be able to provide it to the committee.

Mr Evans: I understand.

The CHAIR: Thank you very much for your time.

Hearing concluded at 3.59 pm
