Western Australian Auditor General’s Report

Opinion on Ministerial Notification

Report 15: September 2017
Opinion on Ministerial Notification
OPINION ON MINISTERIAL NOTIFICATION

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

This report deals with a decision by the Minister for Fisheries, Hon Dave Kelly MLA, not to provide Parliament with legal advice about the State’s likely exposure to compensation claims if a State subsidised shark deterrent device proved ineffective in a shark attack.

I wish to acknowledge the cooperation of the staff at the Department of Primary Industries and Regional Development.

COLIN MURPHY
AUDITOR GENERAL
6 September 2017
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Ministerial decision not to provide information to Parliament

Introduction

This report deals with a decision by the Minister for Fisheries, Hon Dave Kelly MLA, not to provide Parliament with legal advice about the State’s likely exposure to compensation claims if a State subsidised shark deterrent device proved ineffective in a shark attack.

Section 82 of the Financial Management Act 2006 (the FM Act) requires a Minister who decides that it is reasonable and appropriate not to provide certain information to Parliament, to give written notice of the decision to both Houses of Parliament and the Auditor General within 14 days of the decision.

Section 24 of the Auditor General Act 2006 (AG Act) requires the Auditor General to provide an opinion to Parliament as to whether the Minister’s decision was reasonable and appropriate.

What did we do?

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 agency documents
- a review of any advice provided to the relevant Minister by agencies, the State Solicitor’s Office (SSO) or other legal advisers
- interviews with key agency 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 Fisheries not to provide Parliament with the legal advice about the State’s likely exposure to compensation claims if a subsidised shark deterrent device proved ineffective in a shark attack event, was reasonable and appropriate.

Background

In Parliament on 29 June 2017, Hon Rick Mazza MLC asked the Minister representing the Minister for Fisheries for information about the shark deterrent subsidy scheme:

I refer to part (3) of my question without notice 315 asked on Wednesday 28 June, 2017, which reads—

Given that this subsidy is highly indicative of the government’s confidence in the effectiveness and reliability of these devices, has the government sought legal advice on the state’s exposure to claims for compensation should a subsidised device prove ineffective in a shark attack event?

and to the Minister’s response, which reads—

I understand the Department of Fisheries has sought legal advice on the rebate scheme.

(1) Can the minister provide a copy of the legal advice provided to the Department of Fisheries on the rebate scheme?

(2) If not, why not?

On 29 June 2017, the Minister declined to give this information:

I thank the member for notice of the question. The Minister for Fisheries has provided the following answer.

(1) No.

(2) The legal advice is subject to legal professional privilege.

On 12 July 2017, we were notified of the Minister’s 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 the Department of Fisheries, now part of the Department of Primary Industries and Regional Development, before responding to the request. The Department recommended he decline as it was legal advice protected by legal professional privilege.

The Victorian Government Solicitor’s Office has provided guidance on what is covered by legal professional privilege in an article titled ‘Understanding legal professional privilege’. It says, to be covered by legal privilege, communications between client and lawyer must be:

‘…for the dominant purpose of legal advice or in relation to actual or anticipated litigation.’
The Department provided documentary evidence that the legal advice existed and that it met the dominant purpose test. We were therefore satisfied that the legal advice was subject to legal professional privilege and that the Department appropriately advised the Minister not to provide it.

Legal professional privilege

Further information on legal professional privilege and its application in relation to the Auditor General’s opinions on ministerial notifications is available on our website www.audit.wa.gov.au.

Response from the Department of Primary Industries and Regional Development

The Department agrees with the opinion and the key findings.
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