# PUBLIC

**THE LEGISLATIVE COUNCIL SELECT COMMITTEE ON THE PRODUCTION OF DOCUMENTS MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON FRIDAY 29 NOVEMBER, 2019.**

**Ms ANNE TURNER**, ADVISORY OFFICER TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS, AND **Mr ANDREW HAWKES**, ADVISORY OFFICER TO THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON ESTIMATES AND FINANCIAL OPERATIONS, LEGISLATIVE COUNCIL OF WESTERN AUSTRALIA, WERE CALLED VIA VIDEO-CONFERENCE AND EXAMINED.

**CHAIR** (Ms Forrest) - Thank you for joining us and we appreciate that the Legislative Council is sitting over there today.

I know we had some information the last time we started, but there were lots of interruptions so we would appreciate if whoever wants to take the lead can give us an overview of the way the estimates of financial operations and the standing committee worked to seek the production of documents and how that came about - whether that is a model that works well, and if it does not work well, why not; and if you were starting from scratch, what model you might use to support the production of documents where there are challenges in getting them out of the government. We have had discussions with New South Wales, Victoria and the ACT about the models they use, which were similar but all slightly different.

**Mr HAWKES** - I thought I might start with the genesis for section 82 in Western Australia. In the late 1980s early 1990s we had some financial difficulties and a section added to the predecessor of the Financial Management Act, the Financial Administration and Audit Act 1985. It dealt with the production of documents to an extent, but it was more of an implied right. When the AAA was replaced with the Financial Management Act, they made the provision of documents section more explicit.

If it helps the committee, I might read that section out.

**CHAIR** - That would be great, thank you.

**Mr HAWKES** - Section 82 -

> (1) If the Minister decides that it is reasonable and appropriate not to provide to Parliament certain information concerning any conduct or operation of an agency, then within 14 days after making the decision the Minister is to cause written notice of the decision -
>
> (a) to be laid before each House of Parliament or dealt with under section 83; and
>
> (b) to be given to the Auditor General.
>
> (2) A notice under subsection (1)(a) is to include the Minister's reasons for making the decision that is the subject of the notice.

What you basically have is a provision that says it is up to the minister to decide whether certain information can be provided to the parliament. If the minister decides it is not reasonable or appropriate to provide that information to parliament, that triggers the minister to produce a notice. Having produced the notice, that means the Auditor-General is then required to analyse whether that decision was reasonable and appropriate.

We have a corresponding section in our Auditor General Act which is separate from our Financial Management Act. The Auditor General Act is about the responsibilities and powers of the Auditor-General. Section 24(1) says the Auditor-General is to produce a report at least once a year to both Houses of parliament arising from the performance of their functions. Section 24(2) says, among other things, that it

> … 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.

In practice, that has meant the Auditor-General in Western Australia produces reports more frequently than that, but they will tend to combine several at notice in a single report. Because of the Auditor-General doing their analysis of whether the minister's decision was reasonable or appropriate, the Auditor-General focuses on the public administration component. Their audit practice statement sets out how they deal with that particular aspect. In particular, that section sets out when it is considered commercial-in-confidence is appropriate and it also considers when that methodology would be in the public interest. In the methodology the Auditor-General uses, the first thing they do is determine whether a notice is required under the act. If the notice wasn't required, then the Auditor-General [inaudible] parliament; if required, they will review the information in the notice, with an explanation sheet. They will have a discussion with ministerial and agency staff and examine all the relevant documents and advice provided to the minister. Then, based on that review, they will make a decision. If it was reasonable and therefore appropriate, or unreasonable [inaudible]

**CHAIR** - We are having trouble hearing you, Andrew.

**Mr HAWKES** - Did we lose each other?

**CHAIR** - No, it faded out.

**Mr HAWKES** - I will take it back a step. The Auditor-General will assess whether a notice is required, then they will review the documentation and have discussions with agency staff over that decision-making process. Having done that review, they will form an opinion on whether it was reasonable and appropriate, or not reasonable and therefore not appropriate. Once the Auditor-General has made that decision, they will table a report in parliament.

**Ms TURNER** - Just on that issue of how the Auditor-General decides whether it is appropriate, this is linked to the definition of 'agency' in section 82, and 'agency' is defined as 'a department or subdepartment or statutory authority'. We have had one instance that I am aware of where a minister prepared a notice and the Auditor-General said that the particular authority was not in fact a statutory authority. That is a fundamental first step which is: has it an agency as defined in section 3 of our Financial Management Act?

**Mr HAWKES** - Any agency covered by the FMA is subject to section 82. There are certain agencies outside the Financial Management Act that are also subject to section 82. The Joint Audit Committee, when it reviewed the Financial Management Act, made the point that there was an inconsistent application of those provisions to government trading enterprises.

Enabling legislation for the port authorities and the Western Australian Land Authority provides for the limited applicability of the Financial Management Act that explicitly subjects those authorities to sections 81 and 82 of the FMA. However, our electricity and water corporations aren't subject to section 82 - not explicitly so - so that may mean a minister or the entity could act in a manner that would prevent or inhibit the provision of information to parliament - that is our section 81 of the FMA - or the minister would not be required to notify the parliament or the Auditor-General if they had decided that it was reasonable and appropriate not to provide certain information about that corporation, that being section 82. The view of the Joint Audit Committee was that the Treasurer assess, as part of the review of the governance accountability arrangements of the government trading enterprises, whether all government trading enterprises should be subject to sections 81 and 82 of the Financial Management Act in Western Australia.

**CHAIR** - Has that happened?

**Mr HAWKES** - The review is underway. We don't yet know whether that review will cover that particular aspect as requested by the Joint Audit Committee. That gives you a sense of the scope of the act.

**CHAIR** - I can understand the Auditor-General's capacity to assess a claim of privilege on a commercially sensitive or commercial-in-confidence claim, because they often relate to the financial details of an organisation. How well do you believe the Auditor-General is placed to determine the appropriateness of the report in saying that documents are not to be released under the public interest immunity claim or the executive privilege claim, for example?

**Mr HAWKES** - This is one of the sections which the Auditor-General was probably least comfortable with, given that it requires them to be in the public domain in a way they are not typically asked to, so this provision is unique and this responsibility on the Auditor-General is unique to Western Australia. Whether it is a commercial-in-confidence or a public interest-based request, they still apply their audit and assurance standards to the best of their ability. It is part of their audit practice statement. They set out the criteria they use for commercial-in-confidence. I can talk to those if you are interested. Their other items are not captured in their practice statement.

**CHAIR** - It must present some challenges for the Auditor-General.

**Mr HAWKES** - Yes. There was an instance in which the Auditor-General was not provided with sufficient information to be able to form an opinion. That was in relation to the training of justices of the peace. I will try to find the appropriate material. It was in the context of the Auditor-General having sufficient power to obtain information. When the Auditor-General was given powers, it was considered by parliament and by the Auditor-General that they would have access to Cabinet documents. However, that has turned out not to be the case. In 2014, the Auditor-General undertook a performance audit into training and support for justices of the peace and they were refused access to documentation on the basis of Cabinet-in-confidence. In that instance, they weren't able to receive the documentation, but that didn't prevent them from concluding the performance audit. That's not necessarily related to section 82, but a year later, in 2015, the Auditor-General was asked to review three decisions by the Minister for Sport and

Recreation, who refused to provide the information to the parliament on the new Perth Stadium. The Auditor-General sought legal advice that the Department of Sport and Recreation had to advise the minister that the requested information should not be provided to parliament. The department declined to provide that information on the basis that it was subject to legal professional privilege.

Accordingly, the Auditor-General reported -

> Because this legal advice was crucial to DSR's advice to the minister, my inability to view this material meant that I was unable to reach an opinion on those decisions.
>
> The inability of an auditor to access the information they need to meet their obligation is a serious matter for the auditor and for those who rely on their opinions.
>
> The state solicitor's office had previously advised me that the Auditor-General Act did not provide my office with the authority to demand access to legal advice, so this is the first time I have been unable to fulfil my legislative obligation.
>
> In the event that an auditor is unable to obtain sufficient appropriate audit evidence, auditors have few options. One of these is to issue a disclaimer of opinion.

In that case, the Auditor-General issued a disclaimer of opinion on the grounds that the information that was not provided was commercial-in-confidence, and the legal advice for that was also not provided.

Does that provide the committee with some assistance in that respect?

**CHAIR** - Yes. I think Meg Webb has a follow-up question so I will hand to her for the moment.

**Ms WEBB** - Across the time this provision has been in place and the Auditor-General has been conducting these reviews and giving determinations, what has the mix been in terms of whether there have been commercial-in-confidence matters, public interest matters or executive privilege matters? Has it covered all those grounds, or have they fitted into particular categories more than others?

**Mr HAWKES** - We don't have sufficient data to be able to give you an answer.

**Ms TURNER** - We don't have that data, but anecdotally we can tell you that legal professional privilege is uncommon. Probably the vast majority are commercial-in-confidence, I would assume. There is the odd statutory secrecy provision, but that is pretty uncommon as well. It is Cabinet-in-confidence on occasions, but overall it's commercial in-confidence.

**Ms WEBB** - Which is the area where the Auditor-General feels there is that confidence to make those determinations, unlike those other areas which might be more legalistic rather than financial?

**Ms TURNER** - And probably as her practice statement only refers to commercial-in-confidence.

**CHAIR** - Just on that point, there are some jurisdictions where the Audit Act clearly provides for access to Cabinet documents, particularly in circumstances as you've just described, where your Auditor-General couldn't access that information. Have there been any suggestions that Western Australia should change its legislation to give effect to that?

**Ms TURNER** - Actually, that's not true. Our Auditor-General can access Cabinet-in-confidence documents. It has to be in-house; they cannot take anything away. It all has to be done there and then, and it depends on what documents the Auditor-General has placed in front of them.

**CHAIR** - So the Auditor-General view these documents? If that is the case, why wasn't that opportunity taken with the case you described, or was it?

**Ms TURNER** - Sorry, I don't have the actual details. It's in our *Cabinet Handbook*.

**Mr HAWKES** - It very much depends on the government at the time. If the government gives them the access, they can access it. In this particular instance they did not. There is an administrative arrangement that allows for the provision, but it is not a legal one.

The Joint Audit Committee, in its review of the relevant acts, has recommended that the Auditor-General be given an explicit power to access those documents. We understand that the Treasurer has agreed to that. We were actually expected that the Financial Management Amendment Bill would be presented halfway through the year, but I think they are still working on it. We expect that amendment bill to include a provision to that effect.

**Mr DEAN** - I want to follow up on the question relating to Cabinet-in-confidence material. I think you said there had been some findings, , but not so many. Is material coming out of Cabinet discussions marked in any way? Some areas have it marked with a watermark - 'Cabinet discussion', or whatever it might well be.

**Mr HAWKES** - We wouldn't know. We don't review the material. We don't see it. It goes to the Auditor-General, because the Auditor-General is independent of that parliamentary setting.

**Ms TURNER** - I would be surprised if it wasn't watermarked with something to the effect that it is Cabinet-in-confidence.

**Mr DEAN** - It is in some other jurisdictions. Thank you. We can follow that up with the Auditor-General.

**Mr WILLIE** - When access was refused, did the parliament respond to that at the time?

**Ms TURNER** - No. This is one of the limitations we have with our system. We really can't compel compliance with our section 82 provision and we can't penalise, so there is that secondary aspect as well. These section 82 notices are not debated in the House in any shape or form. They are simply tabled. There is no debate around them and, frankly, they don't garner [inaudible] parliamentary debate. The Auditor-General doesn't routinely audit compliance with section 82

notices but has instead, as we said earlier, developed this practice statement around them. There are limitations with section 82.

**Mr HAWKES** - In saying that, members are probably more conscious of this provision now than they were in the past. Frequently members will ask, as part of their questions, 'If you won't provide that information to us, will you be submitting a section 82 notice to the parliament?' Again, that puts the onus on the minister and reminds the minister of their obligations to the act.

**Ms TURNER** - We can tell you that in the previous four or five years, the number of notifications the Auditor-General has received has doubled, from 14 to 26. Consequently, the cost of running them has also doubled. That shows there has been that elevation in awareness of the tool to get documents.

**Mr DEAN** - Over what time has it doubled?

**Ms TURNER** - Those statistics are available in the annual report of the Auditor-General for 2018-19, which has just been tabled. Those results are in Table 18 of the report, for reference.

**Mr WILLIE** - You mentioned cost. What sort of increase has there been?

**CHAIR** - Who bears the cost?

**Ms TURNER** - This is another interesting thing. There are no particular budget line items for the Auditor-General to assess these notices, but we know that in 2015, when she first started recording the costs, it was $232 000. This year it was $483 000. They are quite expensive and she has to find that money within her normal appropriation.

**CHAIR** - On that point, in Tasmania the Public Accounts Committee is consulted regarding the budget for the Auditor-General. I am a member of the Public Accounts Committee, the Chair of that committee is Ivan Dean, and Josh Willie is also a member now too, so we are well versed in the Public Accounts Committee. We can't dictate the Auditor-General's budget but we can have the Auditor-General talk to us about demands on the office. Does that sort of process happen in WA too? Could the Auditor-General could meet with a similar public accounts committee to make a case for an additional budget line item for this?

**Mr HAWKES** - Absolutely. Our Auditor General Act provides for the Auditor-General to meet with the Joint Standing Committee on Audit, the audit committee I referred to. Section 44(1) says -

> In the determination of the budget of the OAG for a financial year regard is to be had to any recommendation as to that budget made to the Treasurer by the Joint Standing Committee on Audit.

A parliamentary body has looked at the budget of the Office of the Auditor-General and reported on those instances on five occasions. On four occasions the report was by the Estimates Committee, which did that job before the audit committee came along, and then the audit committee look at it thereafter. The Auditor-General noted that the Estimates Committee's representations on the matter led to it having a higher budget on at least one occasion.

**CHAIR** - You have talked about some of the limitations with the system that exists in Western Australia, particularly around the determinations that may need to be made around things that are

more of a legal nature, like executive privilege and public interest immunity as opposed to commercially sensitive information. If you were to consider another model that may be less limited and looked at models such as in New South Wales, Victoria and the ACT, what do you think would be a better model? Or do you think this works well?

**Ms TURNER** - In the back of Report 62, we look at other jurisdictions' ways of dealing with this. I must confess to an interest in the independent legal arbiter which I think is available in New South Wales and the ACT.

**CHAIR** - And Victoria, but it hasn't been used there.

**Ms TURNER** - I was wondering about this use, whereas our system shows that it is being used and in fact it is increasingly being used. I know our Clerk favours section 82 as well because I have discussed that with him.

**CHAIR** - As opposed to an independent arbiter?

**Ms TURNER** - [Inaudible] I want to also talk to you about the FOI.

**Mr HAWKES** - Another model could be that the freedom of information commissioner or the Information Commissioner is given the responsibility for making these assessments. Arguably, that is what they do already and they will do that in the context of freedom of information requests from members of the public. Often members of parliament will use that mechanism to obtain information from a department. Arguably, members shouldn't need to use that mechanism to obtain information; they should be able to obtain it through the normal parliamentary business.

**Ms TURNER** - As a rider to that, in 2015 the former president of the upper House went on record as saying that members really shouldn't need to use FOI because of answers to questions on notice and questions without notice.

**Mr HAWKES** - If you were looking for an independent arbiter, an information commissioner could be one, given that it is really within their existing remit in determining whether a document should be subject to public interest immunity.

**CHAIR** - Isn't there a different level of status with a parliamentary committee, or our parliament in sitting, asking for the production of a document, than a member of the public or a member of parliament acting as a member of the public, effectively, asking for a document?

**Mr HAWKES** - Sure. Absolutely, as we were saying, members shouldn't need to use that mechanism to obtain information in the course of parliamentary business. I couch those comments in the context of: if you are going to have an independent body to do it, they could be one of those bodies.

The other thing to say is, certainly in our House, I cannot recall where the House has ordered the production of documents. That option still exists. In the case where an auditor-general has found that the decision is not reasonable and not appropriate, the House could then take the next step and order the production of that document. In fact, even if the Auditor-General found it reasonable and appropriate not to provide it, the House could still use its powers and say, 'Regardless of what you have said, we would like the production of the document.'. I am not aware

of any orders for the production of documents in our House in the short time I have been here. Anne?

**Ms TURNER** - No, no. I am not aware of it.

**CHAIR** - So, it is not a mechanism that has actually been tested. Is that what you are saying?

**Mr HAWKES** - We've not used it. Though I think frequently we would say if -

**Ms TURNER -** We have a privilege of an immunity power under our Privileges Act which jurisdictions like New South Wales don't have, but as you know, those powers are implied. We have never gone that far, to the best of my knowledge, and required production.

At committee level, which is where Andrew and I work, we can get documents through summonses and things like that, but no, not to the best of our knowledge.

**Mr DEAN** - With the Auditor-General and their reviewing of these matters, what are the findings that are open to the Auditor-General in those circumstances? Can they find it to be unreasonably withheld and that it should be provided? Or is the position the minister has taken accepted? Or can they make a finding also that it be released in confidence to a member or to a committee? Does it go that far?

**Mr HAWKES** - It tends to be binary. It's either this is reasonable and therefore appropriate, or it was not reasonable and therefore not appropriate. What they may do in their report is say the department could have released some of this material publicly without impugning on the confidence, and the release of that extended material may have been sufficient to deal with the member's request.

**Mr DEAN** - Okay, thank you.

**Ms TURNER -** Just to look at the actual wording in the act, which section 82 says, 'reasonable and appropriate'. That's a composite [inaudible] that's interpreted here in Western Australia.

**Mr HAWKES** - If I may give one example, and this was a very early example. When the Auditor-General gave a decision that said it was not reasonable and not appropriate, a minister declined to provide certain information to the parliament and notices were generated. The Auditor-General reviewed it and the Auditor-General found that the request denying parliament access to that material was not reasonable and not appropriate because the minister had already given that material to a newspaper.

**CHAIR** - We have seen similar things happening in Tasmania just recently, so it is not immune to Western Australia, or confined to there.

**Mr HAWKES** - Yes. Victoria had a similar incidence on the level crossings; I think that may have been this week. The Auditor-General pointing out that the document and the material were already public makes a very strong case that the material should be provided.

I want to follow up by also saying, regardless of what the Auditor-General does, there is no compulsion on the minister to provide that information afterwards. The impetus thereafter becomes political and it is up to the House and the individual members to [inaudible] more fully.

**CHAIR** - It often does fall back to a political solution. I would like to follow-up on this question: when you talked about Western Australia having had no real challenges in getting documents through by summons, I know the Public Accounts Committee was seeking a document and it was only a letter - one piece of paper - and we issued a summons for that and for the Treasurer to appear with the document. The Treasurer appeared without the document, and we never saw the document unredacted, as was the request. So, in situations where members or committees have issued a summon, has that been successful in accessing those documents?

**Mr HAWKES** -I think so. That also happens very rarely. I think the general view is if the committee is going to issue a summons, it needs to be sure that the House will back it up in case it needs to be extended further. For example, if the summons is not complied with, the committee may then go to the House and say, 'We have requested this document, House, are you prepared to order the production in your name if it doesn't go that far?'

**Ms TURNER** - The non-provision pursuant to a summons could raise an issue of contempt. We have some standing orders on contempt that really come down to the question of whether it really impeded the committee's work.

**CHAIR** - Yes, a similar level of test. In New South Wales and Victoria they have actually suspended members who failed to produce documents, the leader of government business in the upper House in both parliaments. Western Australia has never gone to that level?

**Mr HAWKES** - I am not aware of any incidence where that -

**Ms TURNER -** No, I am not aware of any.

**CHAIR** - Another remedy that has sometimes been talked about, and possibly used in some parts, is the refusal to deal with government business, government legislation, until a certain document is produced, particularly if it relates to that legislation.

**Mr WILLIE** - Or a minister.

**CHAIR** - Or a minister, yes.

**Ms TURNER** - We are not House staff, we are committee staff. We are not that conversant.

**CHAIR** - That is fine, thank you. Meg, you had a question?

**Ms WEBB** - I think we have probably clarified it, but I just wanted to check in. So, once the Auditor-General makes a determination of either reasonableness and appropriateness, or not, and that is tabled, it is not debated in the House - it is just tabled, and there is no penalty that then can be applied either way? Nothing that can be compelled in terms of further action? I wondered if you can tell us about instances in which the Auditor-General's findings have been that there wasn't reasonableness and appropriateness, so an adverse finding. Has there been any kind of response from the House? You said we haven't gone as far as to suspend members, or those sorts of things. What has been the ripple effect of an adverse finding from the Auditor-General?

**Mr HAWKES** - We are not aware of any House response to those decisions.

**Ms TURNER** - The onus really is on the member to then follow that up rather than the House.

**Mr DEAN** - That would be the same with committees? Where a committee makes a demand, as the Chair just mentioned a while ago, in our position of where the Public Accounts Committee made the demand of the minister, and so on. Does that relate to a committee as well, or is there a different process for a committee requiring a document?

**Mr HAWKES** - It's the same process.

**Ms TURNER** - -It's the same process. In the previous parliament a committee did write to the minister and ask about a section 82 notification, and we just get a copy of the report saying what the outcome is. In this parliament that has not happened because we discontinued our practice of reminding ministers of their obligations under section 82.

**Ms WEBB** - I realise, in asking the question a moment ago, I have assumed that if the Auditor-General has had that adverse finding, that has then been ignored by the Government and it continues not to provide the document. Have there been instances in which the Auditor-General has tabled a finding that wasn't reasonable in appropriateness, an adverse finding, and then, in response to that, the Government has provided the documents? Has that course of events played out?

**Ms TURNER** - I have a vague memory of something like that happening. This is purely anecdotal. I could probably find it in Report 62. There was an occasion when, after the Auditor-General did their investigation, the minister then considered the matter and provided the information. I will have to email you with that specific instance. I can't call it to mind at the moment.

**Mr HAWKES** - To follow up, it is not very often that the Auditor-General finds that it is not reasonable and, therefore, not appropriate. More often than not, it is found to be reasonable. A lot of the requests are for how much is spent on a particular tourist event - the gourmet escape -

**Ms TURNER** - The Margaret River Gourmet Escape comes up every year.

**Mr HAWKES** - How much did our tourism entity provide to stage that event? It is a regular question and the Auditor-General, in reviewing that material, has found that not providing that information is reasonable. Incidentally, that has led to an improvement in the public administration or the public service response in advising the minister on whether it is reasonable and appropriate. Our tourism body, over time, has built up some robust guidelines, in the Auditor-General's view, on when that commercial-in-confidence claim should apply.

**Ms WEBB** - The fact that the majority of your instances have been commercial-in-confidence rather than some of those other privilege aspects might indicate why there have been more findings supporting the withholding of documents, potentially. If you are not pretty straightforward, a more straightforward determination around the financial commercial-in-confidence side of things may be other privilege aspects. That isn't a question; only speculation.

**CHAIR** - Could you summarise the positive aspects of the mechanism that exists in Western Australia, summarise the limitations and whether you think the existing model, not concerning yourselves as much with the other jurisdictions - i you were to tweak the Western Australian model to remove some of those limitations or make it more effective, what would you do?

**Mr HAWKES** - I think the mechanism we have is beneficial in that it does provide for a third party review. I think the question is: who is the most appropriate person to do that third party review? The third party review provides that buffer for the parliamentary involvement, when it may move along particular lines.

In terms of our regime, for the most part, these decisions have been found to be reasonable and appropriate. Where it is not found to be reasonable and appropriate, there is not necessarily follow-up by the House or the committee. It puts the onus on the requesting member to pursue the matter further. Then it becomes an issue of member priorities, not to say this system is without cost and, as pointed out, the cost has increased over time.

I also think we have found there is an improvement in the public administration, and this was something the previous Auditor-General reflected on to the Estimates Committee when it was looking at the provision of information to parliament. I don't have the quote at hand but basically, he said that if you compared what the public service had done early on when this provision came in to what it was doing now, they were doing much better analysis. I have found the quote -

> With this being in operation for some period now, we have seen improvement as people get used to the idea. Initially, they did not have good answers to our questions when we asked them what process they went through to get advice and how they documented things. We have been back now to agencies and have found that they have improved. Much of what we put into those reports is our endeavor to try to improve practice within the sector as [inaudible] analysis that was used to determine whether the minister's decision was reasonable or not.

**CHAIR** - That was a positive thing.

**Mr HAWKES** - That aspect is not necessarily reflected on all that often.

**CHAIR** - It is important reflection. In terms of when you are tweaking or making adjustments to the current arrangement that might make it more effective, would you have any ideas on that?

**Mr HAWKES** - I think if the Auditor-General is given the power to compel the production of documents covered by public interest immunity, that would expand the scope. To me, the scope of that section may need to be broader than the SMA itself so to include those government trading enterprises. Hopefully, the government trading enterprise review will pick up on that reflection by the audit committee.

I think the other thing to consider is how this third party review - regardless of who does it - is paid for. In the case of our model, the Auditor-General has had to refocus their efforts to deal with section 82. That means that in 2018-19, the reallocation of audit resulted in a lower number of broad and narrow scope performance audit tables. If it were done by a different body and the funding was not supplementary, that might require them to reallocate their resources. I think one thing to be cognisant of is that regardless of who does it there should be an appropriate funding mechanism in place for that work to be done.

**Mr DEAN** - For clarity, you have said the Auditor-General should have the right to compel the documents. I take it you mean compel the release of the documents to the Auditor-General?

**Mr HAWKES** - Yes, that is right.

**Mr DEAN** - So they can make the proper determination and decision. Is that it?

**Mr HAWKES** - That is right. That is a useful power for them to have [inaudible] material administratively.

**Mr DEAN** - I take it there is no time limit on the Auditor-General in coming back is there or is it time-specific?

**Mr HAWKES** - The act requires there to be a report at least once a year. At a strict reading that is all they need to do, but the practice of the Auditor-General would be to produce them more frequently. It may be that the Auditor-General will group decisions together or, if it is sufficiently important or currency is important, they will release that material when they can. They have to go through their internal steps and have sufficient confidence in the material they have received to form their opinion.

The other thing is these requests tend to be sporadic. It's very difficult to plan to deal with certain things.

I think, in the case of the Auditor-General or whichever body has to deal with it, not only will they have to reallocate their resources internally, it may also mean that other products have a lesser priority to deal with these matters. Does that make sense?

**CHAIR** - Yes. If the Legislative Council, for example, is responsible for funding the costs of the process, that could be done by way of requests for additional funding, for example. There are mechanisms, I guess. It is a valid point about making sure it is resourced.

The cost is obviously going to increase with the increased number of referrals or orders that require referral to the Auditor-General. You made the point that it has doubled in a fairly short time. Do you have any idea why? Is it greater awareness, is it that more members were using this or it was being used more frequently? What is driving that? Is it an awareness, is it a greater concern about the administration? Do you know what is happening that would drive that?

**Mr HAWKES** - I think so. I think you will find it is awareness. The number of ministerial notifications crept up prior to the Estimates Committee doing its report into the provision of information to parliament.

Once that report came out, it really highlighted in members' minds powers that they had to - not force the material to be provided but it reminded them of the minister's obligations under the act. I think the awareness aspect is partly the reason for an increase.

Also, the previous Estimates Committee had a particular compliance aspect to it. It would follow up a lot when it did not receive information it had requested.

There was a point where it became a table in the Estimates annual report, and it is a table that we have in those reports even now, even though the committee hasn't that same compliance focus.

**CHAIR** - It does have a broader impact on reporting, not just of the departments and agencies, but also the committees and the parliament.

**Mr HAWKES** - What happens in the budget Estimates hearings and the annual report hearings is, if a minister decides not to provide information, that will often be collated into a table with the instance and the issue, as a reminder to the House of those instances.

Again, the House and the members can choose to pursue those matters further.

**CHAIR** - We are nearly out of time. Do any other members have questions here?

Thank you very much for your time. I appreciate that you are committee staff, not House staff, and that has provided some challenges in responding to some of our questions.

Is there anything you would like to say in closing? Are there any gems you would like to impart as we consider this really important matter?

**Ms TURNER** - I think we have covered pretty well everything.

**Mr HAWKES** - I can't think of anything offhand.

**Ms TURNER** - I suggest you have a look at our Report 62.

**CHAIR** - Yes, we have a copy of that.

**Ms TURNER** - There are a lot of case studies in there, so it fully illustrates the arguments - the various reasons - why ministers don't give out the information.

One of the things that jumps out at me and what struck us when we doing that particular inquiry, was the admission by a couple of ministers that they were really reluctant to hand over the information because they just didn't trust that the information would be kept private or confidential.

There is an argument that perhaps that sort of attitude might have then inspired other MPs to follow up on this; that, perhaps, despite their misgivings that the information couldn't be kept confidential, it should nevertheless be provided. [Inaudible] It is a bit of a red flag to other members. Certainly, we had some strong evidence that minister just did not believe the information could be kept confidential. For example, the India test match in 2014: the minister simply refused and said that 'I just don't trust that you can keep it confidential.'

**CHAIR** - It is interesting that the New South Wales scheme has been operating for 20 years and they have never had a leak.

**Ms TURNER** - What wasn't leaked?

**CHAIR** - Nothing. There has never been a leak in New South Wales.

**Ms WEBB** - Under their system, the members get to see the sensitive documents.

**CHAIR** - All the documents before they go to the arbiter.

**Ms TURNER** - In New South Wales, Brett Walker, when he provided a legal opinion for us, made the comment that the parliaments have good mechanisms for retaining their confidentiality of

documents and those kept in custody of the Clerk. There are ways and means around this but some ministers here simply did not trust the process.

**CHAIR** - Some ministers here are the same.

Thank you, this has been very helpful and we will look further into the report. It is a good read.

**Ms TURNER** - Can I point out another factor? Even if a committee, for example, were to hold a hearing and get the information in camera, as opposed to hearing it in private, if you heard it in camera, we have a standing order here that says the House can still release the information if [inaudible] from the House.

**CHAIR** - It is the same here.

**Ms TURNER** - Again, that makes ministers reluctant.

**Mr HAWKES** - In saying that, I might take it back a step and explain how our Standing Orders deal with certain provision of information. The way our Standing Orders work is that any information requested and provided to a committee is private in the first instance. Then, the committee itself has to deliberate to make that material public. One of the things the committee and staff have to do with ministers and the like is to build up that trust. When the request for information goes out, the caveat is, 'Please provide us with everything that we ask for; please identify particular areas that we shouldn't receive and possibly a redacted version, so we know which version should be released publicly.' It also helps that [inaudible] of that analysis, staff will often review that material. We have identified material that should be kept private that the minister had not.

**Ms TURNER** - And we have sent it back.

**CHAIR** - In a Public Accounts Committee inquiry into the energy crisis in Tasmania, Hydro Tasmania, which has the biggest stake in that, provided two submissions to the committee - one as a public submission and one as a private submission. It is another way of doing the same thing, which enables the committee to publish the public submission and to keep the other submission in confidence. There are many ways of doing it, but we still have the provision whereby, via a motion of the House, information received can be determined to be released. You would think members would take that very seriously.

**Mr HAWKES** - The other thing is that ministers and the department may prefer information to be summonsed in some instances because that provides them with legal protection. For example, if they had received a third-party document and were told they can't provide it further, the act of summonsing that document protects the minister from any response to providing that third-party document onwards. There are instances in which there is a dual purpose: the committee or the House receiving the material that it is after and protecting the minister and the department.

**CHAIR** - We have seen that sort of approach in Tasmania too on rare occasions. Anything else you would like to add in closing?

**Mr HAWKES** - I don't think so.

**CHAIR** - Thank you very much for your time. It has been very helpful and very informative and we pass our regards on to the Clerk and hope he doesn't have too busy a day.

**Mr HAWKES** - If any further information is required, please don't hesitate to contact us.

**CHAIR** - Thank you very much.

**THE WITNESSES WITHDREW.**