

**THE PARLIAMENTARY STANDING COMMITTEE OF PUBLIC ACCOUNTS
MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON FRIDAY
16 JULY 2004.**

FIBRE OPTIC CABLE

Mr ROBERT NICHOLL, DEPUTY SECRETARY, DEPARTMENT TREASURY AND FINANCE WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Mr Fletcher) - Welcome to the meeting, Rob. We understand that you have a busy schedule and you have put yourself out to appear here and we appreciate that. The matter before us primarily is your request that certain documents be considered as commercial in confidence by the committee. We would like to hear some argument in relation to that. Further, we made contact with you regarding other needs that we had and we might seek to discuss those at some length if you have a capacity to do that following the initial part. If you are not prepared to do that, you will explain the reason and we will understand. Can I, in the first instance, suggest to you that we have considered the documents that you have prepared for us - and we think they are comprehensive - and we have a really open mind. We believe that there is clearly a case for some of the information to be commercial-in-confidence, but not necessarily all. We would like to consider aspects of that and how we might be able to best use those in the writing of a report about the subject matter we have to consider. Could you explain your position, or the Government's position, in relation to the need for commercial-in-confidence?

Mr NICHOLL - In the first instance I should make clear that our request for confidentiality would not extend to consultants reports that have been provided as part of the package that went to the Government. The focus of the request was on the commercial contracts between the parties involved in the construction, financing and handover of the optic-fibre cable. As I understand from my perusal of the material that we sent to you, there are some reports that were provided to the Government from technical advisers and in some cases those reports refer to indicative costings that were the basis of judgment by these technical advisers. I would not consider those to be commercially in confidence.

The specific terms of the commercial contracts and the pricing and cost information that would be reflected in the contracts we would request be treated in confidence because parties to the agreements had an expectation when they entered into those agreements that the contents of the contracts would remain confidential between the parties to the agreement. For an industry such as the telecommunications industry, which is very complex, if the Government were to reveal the contents of those contracts, it is not entirely clear to us which bits of information in those contracts, in addition to specific pricing information, would be valuable information to competitors out in the market. Given that the Government is going through the process at the moment of evaluating responses to its expression of interest with a view to possibly entering into some

negotiations with one of the respondents to become a partner to the Government in telecommunications arrangements, there may be elements of those contracts that we would not want to be revealed to the strategic partner because it could weaken the Government's position if it ends up negotiating a development agreement. That is one aspect of it.

Another aspect of it is that if the parties to these agreements find that all of a sudden commercial contracts that they have entered into come into the public domain through a process that the Government was involved in, I think it would significantly undermine the Government's credibility to be involved in private-sector-related projects in the future if they didn't think that they had the confidence that those elements of their dealings with the Government that were truly confidential would remain as such. I think part of the problem here is - a comment I made earlier - that in many respects unless you are an active player in the industry, sometimes it is very difficult to make judgments about what elements of a contract would be strategically important information to a competitor.

There are two options. One is for us to go through the contracts and highlight those areas that we thought should remain confidential. The risk of doing that is the risk of our overlooking something that we are not aware of. The alternative is to request that the documents in toto be considered confidential. I guess a third option is for us to go back to the proponents and ask them to identify those parts of the contracts which they would not be happy with being released. That would take some time, given the amount of time that it took to get responses from them in the first instance. I think we did point out in our letter that in the responses we had from all the parties to the contracts, when we advised them of this inquiry and the committee's request for information, they were happy for the information to be provided to the committee but they did all state that they would like this information to be treated in private.

Mr WILKINSON - Am I right to say, Rob, that in relation to the contracts that the Government and the other parties are a bit edgy because they are saying that if certain areas of the contract technically and academically are not commercial-in-confidence they are scared that unless, as you say, you are involved in the industry and working in it day by day, what may be put out into the arena is something which is commercially in confidence -

Mr NICHOLL - It could be inadvertently.

Mr WILKINSON - Yes - so therefore they say, 'Keep the whole lot out', as opposed to leaving it to the judgment of the Public Accounts Committee.

Mr NICHOLL - One comment I would make is that you could take the view that how would you weigh the cost of not making the information more widely available when the committee will in itself have access to the information as the basis of writing its report anyway, against the cost of inadvertently releasing something that was strategically important? I guess that is the way I look at it in my mind. It is not so much an act of a deliberate release of information, it is more that inadvertent release.

Mr WILKINSON - In relation to that, I know it has been happening often and governments obviously do it for some good reason - and some, perhaps, do it for not-so-good reasons. It seems to be something that has occurred in recent times that with most of the contracts

that are entered into between government and whoever, the vast majority are classed as being as commercial-in-confidence. Technically, one could argue that that is not always the case. What do you say about that?

Mr NICHOLL - That is a more general principle that you are asking me about.

Mr WILKINSON - It is, because a lot of this would probably be general as well. It is just a continuation of what has happened in the past but we do not want to leave it to chance. That seems to be the answer that I make for myself that the governments do not want to leave it to others to decide what is commercial-in-confidence and what is not.

Mr NICHOLL - The comment I would make is that in the event that the Government commits to provide some financial or related assistance to a company then I think the public has the right to understand and know the extent of that assistance. In some instances it may be sufficient for people to know the total quantum of assistance for that to be enough information for the community to make use of in terms of its judgment of what the Government has done or not. In many cases the release of the detail of documents would not really add much to a community debate about the merits or otherwise of the Government becoming involved in policy decisions as such. Unless you were a party to the agreement or an active participant in the market, you would not be able to understand a lot of the terms and conditions of these contracts. It is really an issue about the degree of detail, rather than whether the Government is prepared to release that information. If the Government was supporting project x, and that project required, say, \$5 million in assistance to get it up, the question then becomes 'should the public know that the \$5 million has been provided. Yes'. Then if they know the \$5 million has been provided, what are the merits of providing further information that explains what that \$5 million supports. Generally I think the Government has been forthcoming in terms of explaining the rationale for its support of projects. As I said earlier in defence of our request for confidentiality of the telecommunications stuff, where there is sensitive pricing information or terms and conditions in a contract that you might not want to reveal to another party in the market, I think the parties have every right to think that those contracts would be treated commercially, as they would in the private sector.

I think the issue is about scrutiny of the Government's policy decisions. Depending on the circumstance, I think there will be differing degrees of detail which will require revealing in terms of people being able to have proper scrutiny of these sorts of decisions. In cases where these issues are being dealt with, an inquiry such as the one before the committee at present, the information is available to the committee and the committee can use that information to write its report. The question in my mind would be: what benefit is there in making some of this detail more widely available?

CHAIR - I would like to ask a couple of questions to try to summarise the position, Rob. It seems to me that you are arguing that contracts between private sector companies dealing with matters relating to the telecommunications interest are and should continue to be commercial-in-confidence and that there is a commitment by the Government to deliver that outcome to the people they have entered into contracts with. From the committee's point of view, the committee will be required to make judgments about those and to reach conclusions about what the contractual obligations of the Government were in

certain circumstances. I accept that if the committee is convinced it can report accordingly. I want to come back to that again at a later stage.

The second matter is the document that deals with the due-diligence process. My observation is that that has been a thorough process, well thought out, well delivered and it is a sustainable argument. It seems to me that there would be a public interest in that document being available to those who wanted to have it available to them at some stage in the future in the public domain. Would you agree or disagree that there is a difference between the private sector contracts and the due-diligence documents that you have provided to us?

Mr NICHOLL - I would have to look at the due-diligence report again, but to the extent that it does not inadvertently reveal anything that would have been in the contracts that is a document that should give the community comfort that there was a process in place to scrutinise the transaction prior to it taking place.

CHAIR - One section of the due-diligence contracts does deal with detail and I would like to get your general comments. It might be too much to expect you to remember the detail, but there is a section on page 15 which deals with pre-existing contractual arrangements between Downer EDI and Tas 21. It deals with those pre-existing contractual arrangements and the quantum and instalment of payments between the private sector companies. Would you consider that information to be commercial-in-confidence or would that have no great relevance to the commercial nature of the contracts between the parties?

Mr NICHOLL - This is largely in regard to the operation and maintenance for the SCADA services?

CHAIR - Yes, that's right.

Mr NICHOLL - No, I don't think that the release of that information would raise any great concern. The reason is that there is now a line in the Budget in Finance-General that reflects the Government's costs of this contract on an ongoing basis. I think a figure of around \$300 000 was included in the budget for 2004-05 to reflect the obligation under this arrangement. The issue came up in Estimates that it is publicly known that there is an operation and maintenance contract in place to cover that. As I say, although the exact amounts are not provided for in the Budget, you would get a feel for the order of the contract payments.

CHAIR - It might be too much to expect that to be indicative of matters in the whole document, though I might be wrong in relation to that. I suppose there may well be a fourth option which you did not mention. The fourth option is that the committee should proceed on the understanding that the documents are commercial-in-confidence. We would ask you to reconsider the due-diligence-process document in greater detail and, if we see a need to produce data that may be significant or commercial-in-confidence, that we arrange to have that vetted as some stage. We could arrange a further meeting where we could discuss with yourself or your representative or others the general nature of what we have done or attempted to do and discuss those specific matters.

Mr NICHOLL - I think we would accept that as a reasonable position for the committee to take.

CHAIR - Am I right then in saying that, of the documents we have to date, you request us to hold the contractual arrangements between private parties in confidence?

Mr NICHOLL - Yes.

CHAIR - You have a more open mind about the need to hold the due-diligence process as commercial-in-confidence -

Mr NICHOLL - Yes.

CHAIR - but that you wish to consider that further and if you change your mind in relation to that you will come back to us as a matter of urgency to further clarify that matter?

Mr NICHOLL - We can certainly do that. We wouldn't consider the technical reports to be commercial-in-confidence, insofar as they don't refer to specific costing information out of any of the contracts - which I don't recall they do. Those reports, where they refer to assessments of the technical advisers on the proposed costs of the project at the time, were indicative numbers that were put forward on the basis of the experience of the technical advisers as advisers in the industry as opposed to commercial participants in the industry.

CHAIR - There is a consultant's report from Gibson Quai, which deals with the telecommunications network modelling. Would you consider that to be a technical report that deserves special classification?

Mr NICHOLL - In principle I would consider it to be a technical report. The first part of this report is on an indicative basis, as I understand. I cannot recall whether Gibson Quai were asked to make comments and report specifically on cost proposals that were part of the Downer EDI contract. Insofar as they did refer to specific proposals between Duke and Downer, I would say that that falls under the commercial-in-confidence. To the extent that they are based on indicative assessments of Gibson Quai, I would say that falls under the technical report category.

CHAIR - And can be made available.

If there are no other matters with regard the nature of that, the committee is anxious to proceed and finalise its business. There are some outstanding matters dealing with that period of time prior to September 2001 when the Government entered into a heads of agreement and certain other agreements with parties, the substance of which we have available in the documents. We would like to better understand the process leading to the decision making at that time. I think we have written to you and perhaps had a phone call to you with regard to those matters. Whilst we welcome any contribution you make towards that at this stage, the more important point is: can you give us any indication as to when the response to our request might be available to us so that we can move on?

Mr NICHOLL - I am anticipating that we will be able to give you a firm response by the middle of next week. What I can say is that we have discovered two small documents

that were held by Premier and Cabinet and they have just been recently revealed to me as appropriate documents to provide to the committee. I am having someone check with Premier and Cabinet as to whether they hold any other documents that would have been relevant to that period. I fully expect that we will be able to respond by Wednesday of next week at the latest.

CHAIR - Thank you very much. Rob, thank you for your attendance. Whilst it took a long time to get the information to us, the information, when it arrived, has been comprehensive. We appreciate that and look forward to a further follow-up of that in the middle of next week so that we can conclude our work.

Mr NICHOLL - As I said at Estimates, I apologise for the delay in getting the material to you but, as you can see, it was quite a lot of material to work through. It took us quite some time to get responses back from all the respondents. We wrote to them last year and request their release of the information and it took some of them quite some time to get back to us. It is just unfortunate that most of the responses came just before the Budget.

Mr WILKINSON - I must say I haven't read every bit of it!

Mr NICHOLL - I could not claim to have read every page either, but I certainly skimmed most of it. I was not around and involved in the project at the time that this was put forward. Having been through all of that as an exercise, it certainly left me with the impression that it was fairly thorough in terms of covering the technical aspect of it. We were guaranteed of an asset that was functioning and in that regard it was very comprehensive.

THE WITNESS WITHDREW.