

2009

(No. 59)



PARLIAMENT OF TASMANIA

PARLIAMENTARY STANDING COMMITTEE ON PUBLIC WORKS

Brooker Highway Upgrade

Presented to His Excellency the Governor pursuant to the provisions of the Public Works Committee Act 1914.

MEMBERS OF THE COMMITTEE

Legislative Council

Mr *Harriss* (Chairman)
Mr *Hall*

House of Assembly

Mr *Best*
Mr *Green*
Mrs *Napier*

TABLE OF CONTENTS

INTRODUCTION	2
BACKGROUND.....	2
DOCUMENTS RECEIVED	3
CONCLUSION AND RECOMMENDATION.....	3
ANNEXURE 'A'	4
ANNEXURE 'B'	5

INTRODUCTION

To His Excellency the Honourable Peter George Underwood, Officer of the Order of Australia, Governor in and over the State of Tasmania and its Dependencies in the Commonwealth of Australia.

MAY IT PLEASE YOUR EXCELLENCY

The Committee has investigated the following proposal: -

Brooker Highway Upgrade at Elwick/Goodwood Roads and Howard Road Roundabout

and now has the honour to present the Report to Your Excellency in accordance with the *Public Works Committee Act 1914*.

BACKGROUND

Pursuant to section 16(2) of the *Public Works Committee Act 1914*, at the meeting of the Executive Council on Monday, 16 February last, Your Excellency was pleased to refer the abovementioned work to the Committee for inquiry and report.

A hearing date of Monday, 27 April was set and the Committee invited public submissions by way of an advertisement placed in the Mercury of Saturday, 4 April.

On Wednesday, 1 April, an email communication was received by the Committee Secretary from the Senior Executive Officer Programming, Operations Branch, Department of Infrastructure, Energy & Resources in which the Secretary was: advised that it was no longer intended to proceed with the proposed works; and requested to provide advice as to how a reference could be “cancelled” once referred. The Secretary advised that the advice of the Solicitor-General should be sought by the Department.

A copy of such advice dated 28 September last from H. T. Foulds, Senior Crown Counsel to Mr Peter Todd, General Manager Roads & Traffic, Department of Infrastructure, Energy & Resources was provided to the Committee (Appendix A). The essence of the advice is that there is no mechanism open under the Act to “revoke” a reference once made and the only avenue open to the Committee is to not recommend the works.

The Minister for Infrastructure, Hon Graeme Sturges MP in correspondence to the Chairman of the Committee, Hon Paul Harriss MLC (Appendix B), dated 26 November, formally indicated that it was no longer the intention of the Department of Infrastructure, Energy & Resources to proceed and on that basis intended not to furnish the Committee with any supporting documentation or verbal evidence in support of the works. The Minister further requested that the Committee not approve the works.

DOCUMENTS RECEIVED

The following documents were received by the Committee:

- Message from His Excellency the Governor-in-Council;
- Copy of advice dated 28 September last from H. T. Foulds, Senior Crown Counsel to Mr Peter Todd, General Manager Roads & Traffic, Department of Infrastructure, Energy & Resources;
- Correspondence dated 26 November last from the Minister for Infrastructure, Hon Graeme Sturges MP in correspondence to the Chairman of the Committee, Hon Paul Harriss MLC.

CONCLUSION AND RECOMMENDATION

The Committee is of the view that it is entirely unsatisfactory for a reference to be made pursuant to the Public Works Committee Act until there is sufficient progress through the many statutory and Government planning and approvals processes to the extent that such reference can be made with some confidence of the works being commenced.


It is a regrettable situation when the Committee is placed in the position of having to not approve a project on the basis that, to use the terminology of the Courts, 'no evidence is tendered' in support of a reference.

The Committee is of the view that references to the Committee should be made only after any other planning issues have been finalised, rather than concurrently.

There are no statutory requirements for withdrawing a referral to the Committee or any other formal processes which must be adhered to in seeking a withdrawal if the proposal of the Government to carry out the works has been abandoned. The Committee is of the view that an appropriate amendment to the Act should be made to provide for the withdrawal of a reference in these circumstances.

The Committee notes the advice of the Minister for Infrastructure and accordingly, does not recommend the project.

**Parliament House
Hobart
21 December 2009**



**Hon. A. P. Harriss M.L.C.
Chairman**

ANNEXURE ‘A’



TASMANIA

SOLICITOR-GENERAL OF TASMANIA

15 MURRAY STREET, HOBART 7000

Telephone: (03) 6233 3408

Fax: (03) 6233 2510

DX: 15 Hobart

e-mail: solicitor.general@justice.tas.gov.au

Our reference: 34353 HTF

Your reference: 001604-07

28 September 2009

Mr Peter Todd

General Manager Roads & Traffic

Department of Infrastructure, Energy and Resources

Attention: Ms Narelle Harvey

Email: narelle.harvey@dier.tas.gov.au

Revocation of the Brooker Highway upgrade project for referral to the Parliamentary Standing Committee on Public Works ("PSCPW")

I refer to your memorandum of 1 September 2009 with copy documents enclosed, my telephone conversation of 25 September 2009 with your Ms Narelle Harvey, and regret the delay in providing this advice.

On 16 February 2009, pursuant to subsection 16(2) of the Public Works Committee Act 1914 ("PWCA") the Governor referred, in writing, a proposed project (work) to the PSCPW.

You said that by letter of 28 May 2009, the Glenorchy City Council ("the Council") advised your Department that it withdrew its "in principle support" for the project. You say that as a result of that withdrawal it is now necessary to revoke the referral of the project to the PSCPW in its entirety. However, in the course of my abovementioned telephone conversation, your officer conceded that as a result of the Council's withdrawal of its support, you do not wish the project to proceed but you have no settled view about the manner in which that is accomplished.

Initially, you sought and obtained advice from Mr David Colegrave, Secretary to the Executive Council (sic). Mr Colegrave suggested a means (section 22A of the *Acts Interpretation Act 1931*) whereby the Governor could revoke the original referral, but strongly suggested that you seek legal advice as to whether revocation by the

Governor was necessary and if it is, whether the draft documents attached to his advice would achieve that aim. You duly seek advice from this Office in relation to those matters.

Subsection 16(2) of the PWCA provides:

"The Governor shall by writing under his hand addressed to the PSCPW refer every such proposed work to the PSCPW for their report thereon."

Subsection 16(4) provides:

"The PSCPW shall, with all convenient dispatch, deal with the matter and shall as soon as conveniently practicable, regard being had to the nature and importance of the proposed work, report to the House of Assembly, if the House of Assembly is then in session, and, if not, to the Governor, the result of their inquiries." (the underlining is mine)

Section 22A of the *Acts Interpretation Act 1931* ("AIA") provides:

"22A. Power to grant right includes power to vary or revoke

A power in an Act to grant a right includes a power exercisable in a like manner and subject to the same consent and conditions, if any, to vary or revoke the right."

The most important point to note about subsection 16(2) of the PWCA is that it is mandatory in its terms. That is to say, the draftsman's use of "shall.... refer" imposes an obligation on the Governor to refer "the proposed work" to the PSCPW. It does not, in my opinion, confer a power on the Governor "to grant a right" in the terms of s 22A of the AIA. It follows that s 22A does not apply in this instance and the Governor has no power to revoke his referral.

My conclusion is supported by the similarly mandatory provisions of subsection 16(4) of the PWCA which obliges the PSCPW to deal with the proposed work by making appropriate enquiries and report the result of their enquiries to the House of Assembly. To allow the Governor to revoke the reference would frustrate what I perceive to be the intention of the legislature which is that the House of Assembly must be informed of and be aware that proper enquires have been made into a proposed work the estimated cost of completion of which is greater than \$5 million (see subsection 16(1) of the PWCA). It follows that not only do I consider that revocation by the Governow is unnecessary but it would be contrary to law.

Subsection 16(5) of the PWCA provides:

"If in a report under subsection (4) of this section, the PSCPW does not recommend the carrying out of the work to which the report relates, that work shall not be commenced unless and until it has been authorized by an Act."

Subsection (5) is self-explanatory in that if the PSCPW does not recommend the carrying out of the work, it cannot be commenced unless it has been authorised by an Act of Parliament. The grounds upon which the PSCPW could recommend against the carrying out of the work are not specified in the subsection nor have I been able to discover such grounds anywhere else in the Act. In any event, if there were to be a recommendation against the carrying out of the proposed work, for whatever reason, it would be a matter for the House of Assembly to legislate to the contrary.

In summary, it is my opinion that it is not open to the Governor to revoke his referral but it is open to the PSCPW to recommend against the proposed works for the reason given or, for that matter, any other reason or reasons. Once that has occurred, the matter is out of the PSCPW's hands and it need do nothing further

A handwritten signature in black ink, reading "H T Foulds". The signature is written in a cursive, flowing style with a large initial 'H' and 'F'.

H T Foulds
SENIOR CROWN COUNSEL

ANNEXURE 'B'

Graeme Sturges MP
Minister for Infrastructure

Level 10, 10 Murray Street, Hobart TAS 7000
GPO Box 907, Hobart TAS 7001 Australia
Phone (03) 6233 0804 Fax (03) 6233 2671
Email graeme.sturges@dier.tas.gov.au



26 NOV 2009

The Hon A P Harriss MLC
Chairman
Parliamentary Standing Committee on Public Works
Parliament House
HOBART TAS 7000

Dear Mr Harriss

I refer to the request of the Parliamentary Standing Committee on Public Works to consider and report on the Brooker Highway project which has an estimated cost of \$10 million when completed.

Following extensive negotiations with the Glenorchy City Council regarding the proposed scope of works, I wish to advise it is no longer the intention of the Department of Infrastructure, Energy and Resources (DIER) to proceed at this time. On this basis DIER is not intending to furnish the Committee with any supporting documentation as required under section 16(3) of the *Public Works Committee Act 1914*, nor provide any evidence at a hearing.

Under the circumstances I would request that the Committee not approve the proposed works. Your early advice to this request would be appreciated.

Yours sincerely,

Graeme Sturges MP
Minister for Infrastructure