

SELECT COMMITTEE ON PRIVILEGES

**Evidence of Mr Mark Sullivan to the Select
Committee on Estimates 2009-10**

MAY 2010

Report

Committee membership

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Resolution of appointment & terms of reference

That this Assembly:

- (1) pursuant to standing order 276, establish a Select Committee on Privileges 2010 to examine whether a breach of privilege or contempt of the Assembly has been committed by Mr Mark Sullivan, Managing Director of ACTEW Corporation, in relation to evidence given on matters relating to the Murrumbidgee-to-Googong bulk water transfer pipeline:
 - (a) at the Select Committee on Estimates 2009-2010 on 18 May 2009; or
 - (b) at the 2 December 2009 or the 18 February 2010 hearings of the Assembly's Standing Committee on Public Accounts in its inquiry into Annual Reports 2008-2009; or
 - (c) in any directly relevant evidence;
- (2) the Committee shall report back to the Assembly by Tuesday, 22 June 2010; and
- (3) the Committee shall comprise:
 - (a) one member nominated by the Government;
 - (b) one member nominated by the Crossbench; and
 - (c) one member nominated by the Opposition;

notified to the Speaker by 4 p.m. this sitting day

(23 February 2010)

On 6 May 2010, the resolution of the Assembly of 23 February 2010, which established a Select Committee on Privileges, be amended by the addition of a paragraph (2A) as follows:

“(2A) if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its report to the Speaker, or in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, circulation and publication;”.

(6 May 2010)

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SELECT COMMITTEE ON PRIVILEGES

FINDINGS & RECOMMENDATIONS

FINDINGS

The committee accepts that Mr Sullivan's answer to Mr Smyth accurately reflected the actual position at the time with regard to the TOC, that there was no intention to mislead the committee and that no issue of contempt of the Assembly arises with regard to this part of Mr Sullivan's evidence to the Estimates Committee.

With regard to Mr Sullivan's answer to Mrs Dunne on the costs of the Murrumbidgee to Googong pipeline project the committee has concluded that, although the figures provided had been superseded, there was no deliberate intention to mislead the committee on Mr Sullivan's part and thus no contempt was committed.

RECOMMENDATIONS

- 1. The committee recommends that the Speaker write to the Chief Executive Officers of all ACT government departments and Territory-owned corporations and remind them of the obligations of witnesses before Assembly committees particularly with regard to matters relating to claims of public interest immunity and that Chief Executive Officers ensure that their staff are properly informed of their obligations.**
- 2. The committee recommends that the Legislative Assembly adopt a resolution clarifying its position with regard to claims of immunity from answering questions or providing documents made by witnesses, stating that claims of immunity must be made by ministers or the appropriate senior officer of other public agencies and territory owned corporations and that details of the harm that might be caused by providing the information must be included in the claim.**

SELECT COMMITTEE ON PRIVILEGES

1 PARLIAMENTARY PRIVILEGE

The Powers of the Legislative Assembly

1.1 The *ACT Self-Government Act 1988* at section 24 (3) states that:

Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives and its members and committees.

1.2 The Assembly has not made any such law, thus the powers of the Assembly remain the same as those of the House of Representatives, with the exception contained in sub-section 24 (4) of the Act, that the Assembly has no power to impose a fine or imprison a person. The powers of the Assembly include those necessary to assert and to protect its privileges.

1.3 The privileges of the Legislative Assembly comprise those immunities and powers necessary for the conduct of the business of the legislature. Immunities are exemptions from the ordinary law which enable Members to carry out their duties. The most important of these is the exemption from the laws of defamation or libel in regard to the proceedings of the Assembly and its committees. This is considered essential for the protection of Members' (and witnesses) freedom of speech in the Assembly.

1.4 The powers of the Assembly to examine and, if necessary, to punish, contempts are analogous to the powers of a court to punish any interference with the free conduct of business. They are the powers necessary to enable the institution and its members to discharge their responsibilities.

1.5 There is no exhaustive list of what may constitute contempt of a legislature. The *Parliamentary Privileges Act 1987* (C'wealth) and the proceedings of the Commonwealth Parliament provide relevant guidance. Reports of previous privilege inquiries by Assembly committees also provide precedents. The Assembly has, at standing order 277, identified some matters which may constitute contempt. These include seeking to improperly influence a Member by threats or inducements; solicitation by a Member of some benefit in respect of his discharge of his duties a Member and various forms of obstruction of the Assembly.

1.6 Of relevance to this Committee's inquiry is paragraph 277 (l) (iii):

(l) Offences by witnesses etc

A witness before the Assembly or a committee shall not:

...

(iii) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

- 1.7 All witnesses appearing before Assembly committees are provided with a statement in relation to Parliamentary Privilege:
- “Parliamentary privilege” means the special rights and immunities which belong to the Assembly, its committees and its members. These rights and immunities enable committees to operate effectively, and enable those involved in committee processes to do so without obstruction, or fear of prosecution. **Witnesses must tell the truth, and giving false or misleading evidence will be treated as a serious matter.** [emphasis added]
- 1.8 The practice of the Assembly (and of the Commonwealth Houses) has been to use their powers to investigate and punish contempts sparingly. In the particular case where a witness may have given false or misleading evidence legislatures now also require clear evidence of a “culpable intent”.
- 1.9 The wording of standing order 277 (l) (iii) follows that of the Privileges Resolution of the Senate. Thus it is useful to have regard to the Senate’s view on the approach adopted in dealing with misleading evidence. The Senate Privileges Committee has generally confined its investigations to “serious matters potentially involving significant obstruction of the Senate...” and “... now regards a culpable intention on the part of the person concerned as essential for the establishment of contempt”.¹

¹ For discussion of this see *Odger’s Australian Senate Practice*, <http://www.aph.gov.au/Senate/pubs/odgers/chap0233.htm> accessed 28 April 2010.

2 BACKGROUND

The committee's reference

2.1 This committee was charged by the Assembly,

(1) pursuant to standing order 276, ... to examine whether a breach of privilege or contempt of the Assembly has been committed by Mr Mark Sullivan, Managing Director of ACTEW Corporation, in relation to evidence given on matters relating to the Murrumbidgee-to-Googong bulk water transfer pipeline:

(a) at the Select Committee on Estimates 2009-2010 on 18 May 2009; or

(b) at the 2 December 2009 or the 18 February 2010 hearings of the Assembly's Standing Committee on Public Accounts in its inquiry into Annual Reports 2008-2009; or

(c) in any directly relevant evidence

2.2 It is important to note at the outset that this report will not consider the substantive issues relating to the Murrumbidgee-to-Googong Pipeline². The committee is concerned only with the statements made by Mr Sullivan at the Estimates Committee and his comments on the matter at other committee hearings and elsewhere and whether any part of them may constitute contempt of the Assembly. The report will also consider Mr Sullivan's obligations to the Assembly both as a witness and as the Chief Executive of a Territory-owned corporation.

ACTEW Corporation

2.3 ACTEW Corporation is "...an unlisted public company ... wholly owned by the ACT Government. The company's voting shareholders are the Chief Minister and Deputy Chief Minister of the ACT".³ The purposes of

² The committee has used the terms 'project' and 'pipeline' throughout this report as shorthand for the Murrumbidgee-Googong Water Transfer Pipeline unless the full name is required to avoid confusion.

³ ACTEW Corporation Limited, *2008-09 Annual Report to the ACT Government* (2009), p. 5

establishing government enterprises such as ACTEW as Territory-owned corporations include to enable them "...to operate at least as efficiently as any comparable business" while maximising sustainable returns to the Territory, showing a sense of social responsibility and "...operating in accordance with the object of ecologically sustainable development".⁴

- 2.4 In introducing the Territory Owned Corporations Bill in 1990 the then Chief Minister, Mr Kaine, emphasised that the model being adopted was one of corporatisation not privatisation and that corporatisation was designed to improve the "...cost structures, overall efficiencies, and the quality of services provided" and "...to maximise returns to the Government on its investment in business enterprises or, in other words ... returns to the taxpayer whose money is invested in these business enterprises". Mr Kaine emphasised the importance of accountability by Territory-owned corporations and the role of the Legislative Assembly as a guardian of that accountability.⁵
- 2.5 In essence, Territory-owned corporations were to be freed from the restrictions applying to mainstream public service departments to enable them to operate as businesses without reducing their accountability to government or to the legislature. This is emphasised throughout the legislation, which provides for a number of significant roles for Ministers and the Assembly with regard to the establishment and operation of such corporations, for example with regard to the constitution of a corporation, the appointment of directors and shareholding in such corporations, reporting requirements, acquisition and disposal of undertakings, Ministerial directions and audit by the ACT Auditor General.⁶
- 2.6 Section 10 of the Territory-owned Corporations Act makes it quite explicit that '...the obligations imposed by this Act on a company or the directors or shareholders of a company are additional to the obligations that are imposed on them by any other law...'.⁶
- 2.7 Section 19 of the Act requires a corporation to submit an annual Statement of Corporate Intent to the voting shareholders i.e. the Chief Minister and the Treasurer, and that statement must be tabled in the Assembly within 15 sitting days. Sub-section (4) is of particular interest to this inquiry in that it allows the Minister to delete any "...commercially sensitive information" prior to tabling such a statement. If the Minister does make such a deletion he or she is required to present a further statement "...setting out the general nature of the

⁴ *Territory-owned Corporations Act 1990*, part 2, s.7(1)

⁵ Legislative Assembly for the ACT, *Parliamentary Debates, First Assembly, 1990*, vol. 5, pp. 4813-4

⁶ *Territory-owned Corporations Act* op cit. ss. 10 -13, 16 &16A, 17 & 18.

material and the reason for the deletion”.

- 2.8 Section 19(4) clearly indicates that the intention of the legislature in setting up Territory-owned corporations was to balance any necessary commercial confidentiality surrounding their activities with a clear obligation to provide as much information as could reasonably be provided without compromising that confidentiality and to explain publicly the reasons for withholding such information where it was deemed necessary.
- 2.9 Mr Sullivan as the Managing Director of a corporation is subject to a range of legal obligations - to the board of the corporation, its shareholders and as a public official accountable to the legislature for the corporation’s activities.

The Murrumbidgee-Googong Pipeline Project

- 2.10 As indicated above the committee is not examining the actual project. However an understanding of the management of this and other major capital works projects being undertaken on behalf of ACTEW is essential.
- 2.11 The construction of this pipeline is part of the ACT’s Water Security Program and includes the enlargement of the Cotter Dam and the Tantangara Transfer Project. These large infrastructure projects are being undertaken by the Bulk Water Alliance, a consortium of major construction and engineering companies in alliance with ACTEW. The use of an alliance structure differs from a normal tendering approach in that the alliance partners have been selected because they have,
- ...the necessary technical, management and financial capability and experience to met [ACTEW’s] objectives for the Program.⁷
- The selection of the alliance partners is not made on the basis of a costed tender to construct a specific project.
- 2.12 The Alliance agreement offers ACTEW a degree of flexibility as to the actual components of the Water Security Program and the approach taken to its completion. A major difference between an alliance and a conventional tendering approach is that the alliance is formed to,

⁷ ACTEW Corporation, *Program Alliance Agreement, Bulk Water Program, Contract No: MP07002* (2007), p. 1

...carry out all work necessary for the implementation planning, design, detailing, documentation, construction, Commissioning and defects rectification of the Works for each Project.⁸

- 2.13 The alliance partners are involved in developing all aspects of the Program including its cost, which is described as the Targeted outturn cost (TOC). The targeted outturn cost is defined as the ‘...total estimated value of Direct Costs to deliver the works within a Project under this Agreement’ and ‘...TOC Development means the process of finalising the scope of work and TOC for a Project’.⁹
- 2.14 The alliance agreement acknowledges that it may not be possible to reach an agreed TOC for a project, i.e. that the works required cannot be carried out at a cost acceptable to ACTEW, in which case the scope of the project may be varied or the project removed from the overall Program.¹⁰ In practice the TOCs for each of the projects within the Water Security Program are interrelated because of the overall constraints on the total expenditure for the program.
- 2.15 It should be noted that the TOC for a project is not the same as the total cost of the project to the owner, ACTEW Corporation. The total cost to ACTEW includes expenditure prior to, or independent of, the formation of the alliance, for example on land acquisition.

The sequence of events

- 2.16 Much of the debate on this matter has revolved around when decisions with regard to the costs of the project were taken and when those decisions were announced publicly. Thus the committee has included here a brief timeline of the major decisions, etc relevant to the inquiry:

April 2008 ICRC Report, *Water and Wastewater Price Review*, Report 1 of 2008 p. 73 – gives an updated estimate of the cost of the project as \$96.5 m. (2006-07 dollars) with a contingency allowance of 25%.

25 March 09 ACT Government announces project

⁸ Ibid., p.23, cl. 11

⁹ Ibid., p. 10

¹⁰ Ibid., p. 25

- 6 May 09 ACTEW prepares a paper for the ACTEW Board meeting “to inform the Board of progress during April 2009; seek approval of the budget to proceed to construction of the project ...”.
- 13 May 09 ACTEW Board considers project costings; approves a total budget of \$149.8 m. while recognising that the TOC (targeted out-turn cost) ‘had not been concluded’. This figure was an upper limit, approved to ‘allow the design work to proceed’. The estimate of the TOC considered at that meeting, including two provisional items, was \$116.7 m.
- 18 May 09 - Mr Sullivan’s evidence to the Estimates Committee
- 22 May 09 ACTEW advises its shareholders (ACT Govt.) of total budget for the pipeline.
- 28 May 09 Estimates committee receives an answer to a QoN giving \$96.5 m. plus 15-30% (in constant dollar terms) as the total cost of the project and stating that the TOC has been finalised.
- 16 June 09 Estimates committee reports and is disbanded.
- 3 Sept 09 ACTEW announces the total costs for the M-G Pipeline
- 4 Nov 09 ACTEW Board meets and is advised that the mini Hydro facility is to be included in the M-to-G project at a cost of \$6.9 m.
- 2 Dec 09 Mr Sullivan appeared at a hearing of the Public Accounts C’tee; no discussion of the M-G Pipeline.
- 18 Feb 2010 Mr Sullivan appears at a PAC hearing to consider ACTEW’s annual report.

Estimates Committee Hearing 18 May 2009

- 2.17 This issue arose out of Mr Sullivan’s appearance at the hearings of the Assembly’s Select Committee on Estimates on 18 May 2009. ACTEW’s representatives were being questioned about ACTEW Corporation’s borrowings to fund its capital works program including expansion of the Cotter Dam and the Murrumbidgee-Googong Water Transfer Project.
- 2.18 The design and construction of these major projects is being carried out by the BWA, also referred to as the water security projects alliance, which Mr Sullivan explained was ‘... a consortium which is headed by Actew and ActewAGL and includes John Holland engineering, Abigroup engineering. ...

It is a design and construction alliance for the water security projects announced some two years ago'.¹¹

- 2.19 Mr Smyth MLA referred to the statement in the Budget Papers regarding the final cost estimates for the three components of the water security program that.

Final cost estimates will be determined late in the 2008-09 financial year when the targeted cost of the projects (Targetted Outturn Cost numbers) are determined¹²,

and asked Mr Sullivan to explain the Targetted Outturn Cost (TOC) numbers.

Mr Smyth: ...What are they and what do they actually tell you?

Mr Sullivan: Targetted out-turn cost number is a price determined by the water security projects alliance as to how much that alliance will deliver a particular project for. It is a binding price. It is no longer a price estimate. ...

Mr Smyth: - Obviously the budget went to bed before you got the TOC. However, it says there¹³ that they will be determined late in 2008-09. We are getting fairly late in 2008-09. Have they been determined?

Mr Sullivan: Some of them have; some of them have not. The [enlarged Cotter] dam has not been determined. That is the largest one. **The Murrumbidgee to Googong pipeline is currently under consideration by the board. While we have got a draft TOC, it has got some process to go through before it is an agreed TOC. ...**¹⁴ [emphasis added]

- 2.20 Mr Smyth then asked whether the final TOCs would be available before the Estimates Committee reported in mid-June and, if so, they could be provided to the committee.¹⁵ Mr Sullivan answered, "I doubt they will be. I think they will be very public numbers as soon as they come out", to which Mr Smyth

¹¹ Legislative Assembly Estimates Committee 2009, Committee Transcript. (Hereafter Estimates Committee Transcript), 18 May 2009, p.173

¹² *Budget Paper No.4, Budget Estimates, 2009-2010*, p.438.

¹³ *Ibid.*.

¹⁴ Estimates Committee Transcript, p. 172

¹⁵ Note that as a Select Committee, the Estimates Committee was dissolved on presentation of its report to the Assembly. Its scheduled reporting date was 16 June 2009. See: Resolution of Appointment, 2 April 2009, para (5).

responded "That would be good".¹⁶

- 2.21 After some further general discussion on funding and costs of water-related projects, the committee returned specifically to the cost of the Murrumbidgee-Googong pipeline.
- 2.22 Mrs Dunne MLA noted that when first announced in the Future Water Options report of 2005, the proposal was costed at approximately \$35 to \$40 million. The public estimate of the cost, at March 2009, had escalated to some \$100 million. Mrs Dunne sought an explanation for the increase in estimated costs of the project.

Mrs Dunne: What have been the factors that seem to have caused this big blow out in cost [for the Murrumbidgee-Googong pipeline] between April 2005 and when the minister made his most recent announcements, which was March, I think, this year?

Mr Sullivan: I do not want to use the word "blow-out". I will have to go backwards in history. The number I was focusing on as a benchmark when I took over my responsibilities was that the ICRC, in its water regulation decisions of 2007, allowed \$96.5 million for the Murrumbidgee to Googong pipeline. That was after some detailed design work and the regulator running through that design work and applying some of his standards against that. That came in at \$96 million. In the report to government, we said that we expected that the final price would come in within about 30 per cent of that. I think I have said before here that I expected it to be up on the 96, and that is the number we are now moving towards.¹⁷

- 2.23 Subsequent to that hearing it emerged that the ACTEW Board had, on 13 May 2009 considered a paper dated 6 May 2009 which stated that 'The TOC has been approved by the BWA Alliance Project Management Team and the Alliance Leadership Group' and that the summary of decisions taken at that meeting included authorisation for Mr Sullivan to expend funds on the project up to a maximum of \$149.8 million.
- 2.24 The question before the committee is whether Mr Sullivan's answer to Mr

¹⁶ Estimates Committee transcript, 18 May 2009, p.173

¹⁷ Ibid., p.175

Smyth that there was not an agreed TOC and his answer to Mrs Dunne, that the cost of the project would be within 30% of \$96 million, were deliberate attempts to mislead the Assembly and thus constitute contempt.

3 FINDINGS

- 3.1 Mr Sullivan's answers to Mr Smyth and Mrs Dunne are the core of the matters being considered by the committee. At issue is whether:
- The answer to Mr Smyth, stating that a 'draft TOC' for the pipeline had been established but it was not yet an 'agreed TOC' was an accurate reflection of the situation as put to the ACTEW Corporation Board at its meeting of 13 May 2009 and of the decisions of the Board; and
 - In answering Mrs Dunne, and giving an estimate for the total cost of the project which was no longer current, having been superseded by a significantly higher figure accepted by the ACTEW Corporation Board decision of 13 May 2009, Mr Sullivan was deliberately misleading the committee.

Mr Sullivan's Answers re. the TOC.

- 3.2 As noted in the previous chapter at the Estimates Committee hearing of 18 May 2009 Mr Smyth asked Mr Sullivan when a final TOC for the project would be available. Mr Sullivan replied, "The Murrumbidgee to Googong pipeline is currently under consideration by the board. While we have got a draft TOC, it has got some process to go through before it is an agreed TOC. ..." Mr Sullivan also commented that "...I think they [the agreed TOCs] will be very public numbers as soon as they come out".¹⁸
- 3.3 In papers subsequently obtained from ACTEW under the Freedom of Information Act the process of developing an agreed TOC for the pipeline project is referred to in terms implying varying degrees of finality. This undoubtedly contributed to confusion about the actual status of the TOC at the time of the Estimates committee hearing.
- 3.4 In a Decision Paper dated 6 May 2009 prepared for the ACTEW Board meeting on 13 May 2009 it is stated that,

¹⁸ Estimates Committee Transcript, 18 May 2009, p.172

The TOC has been developed in line with the Project Brief and BWA program alliance Agreement ... The TOC has been approved by the BWA Alliance Project Management Team and the Alliance Leadership Group.¹⁹

- 3.5 An answer to a question on notice at the Estimates Committee strengthens the impression that a TOC for the pipeline project has in fact been agreed. In response to a question from Mr Rattenbury MLA with regard to the Water Security Projects, the Treasurer provided an answer, received by the Committee on 28 May 2009, which stated that "Target outturn costs have been finalised and will be available in mid 2009".²⁰
- 3.6 In contrast to the apparent finality of language that the TOC 'has been developed', 'has been approved' and has 'been finalised', the Board paper, in discussing the TOC, comments that,
- This cost does not include the upstream Burra Creek discharge option ... This option has the potential to save around \$2.5 million but may require ACTEW to commit to ongoing support of creek management activities. The mini hydro power generation facility is included as a \$7 million provisional item ...²¹
- 3.7 Table 1 in the Decision Paper detailing the TOC includes the two provisional items totalling \$9.3 million and a range of outcomes for the TOC from \$107.45 million to \$116.75 million. This, plus the reference to the Burra Creek option as apparently under active consideration, shows that the TOC was, at that stage, still subject to revision. The decisions of the Board from the 13 May meeting approve an upper limit of the total cost to ACTEW Corporation for the project, of which the TOC is the major component, but make no reference to a finalised TOC.²²
- 3.8 The provisional nature of the TOC is confirmed in a statement provided to the committee by the Chairman of the ACTEW Board, Mr John Mackay,
- The Board clearly understood that the TOC had not been completed and was comfortable and confident in approving the total budget for the project and in authorising Mr Sullivan to continue negotiations with the

¹⁹ ACTEW Corporation Ltd-Decision Paper, Meeting No. 178, 13 May 2009. Dated 6 May 2009. see Appendix I

²⁰ Select Committee on Estimates 2009-1010, Answer to Question Taken on Notice, 28 May 2009.

²¹ Ibid.

²² ACTEW Board Paper 3135, Murrumbidgee to Googong Water Transfer Project, Meeting No. 178, 13 May 2009.see Appendix II

Bulk Water Alliance (BWA) partners to resolve the outstanding issues, as there was still considerable work and negotiations before the matter could be concluded...²³

3.9 Mr Mackay also makes it clear that the Board understood that, "There was also a risk that if the outstanding issues could not be satisfactorily resolved, then the impact and implications for the M2G project were significant and changes would need to be considered".²⁴

3.10 At the committee's hearing Mr Sullivan also stressed that the variation in the TOC was conditional on the approval or otherwise of the mini hydro proposal which was, in accounting terms, a material amount and thus of considerable concern. There was significant doubt as to whether it would proceed and it had significant implications for ACTEW's overall greenhouse gas reduction strategy:

...to have a provisional sum which at that time you thought you could not deliver the project for was a major point of disagreement within the TOC.²⁵

3.11 Mr Sullivan also provided the committee with a written statement which *inter alia* clarifies the relationship between the TOC and the total cost.

The total project budget includes an estimate of the total cost to ACTEW of the Alliance and owner's costs. The TOC is a determined agreement between ACTEW and the Alliance and is the budget for agreed work that the alliance is to undertake. The relationship between the total project cost and the TOC is complex. On one level the TOC is never concluded until the construction work is completed. The agreed TOC sets formal boundaries of the impact of any change to the scope of the project and increases or decreases in costs.²⁶

3.12 Having reviewed the Board papers and the statements from Mr Mackay and Mr Sullivan, and spoken to Mr Sullivan, the committee accepts that Mr Sullivan's answer to Mr Smyth accurately reflected the actual position at the

²³ Statement by Mr John Mackay, AM, Chairman of ACTEW Corporation Ltd, 5 March 2010. see Appendix III

²⁴ Ibid.

²⁵ Privileges Committee transcript, proof, 23 April 2010, p.9

²⁶ Submission from Mr Mark Sullivan, managing Director ACTEW Corporation Limited, 4 March 2010, p.2. See appendix IV

time with regard to the TOC, and that there was no intention to mislead the committee. Nor was there any intention to withhold the details of the TOC from the Assembly and the public when it was concluded.

- 3.13 As Mr Sullivan noted at this committee's hearing, "I think "target out-turn cost" is a term which in May [2009], when we had this first discussion in the estimates committee, not too many people understood fully".²⁷ This limited understanding was compounded by the ambiguous and sometimes careless use of language by various people and in various settings and did contribute to understandable confusion about the status of the TOC.²⁸
- 3.14 Mr Sullivan has made it clear on a number of occasions since this matter first arose that "...it would probably have been more prudent to have used less direct language than I used".²⁹
- 3.15 The committee recognises that witnesses can't be required to answer questions that they have not been asked but a more comprehensive answer providing some context and explaining the relationship between the BWA partners, the process by which the TOC is developed and its relationship to total project cost might have avoided this confusion.

FINDING 1

- 3.16 The committee is satisfied that no issue of contempt of the Assembly arises in relation to Mr Sullivan's evidence to the Estimates Committee with regard to the total outturn cost (TOC) of the Murrumbidgee Googong pipeline project.

Mr Sullivan's Answers re. the total project cost

- 3.17 The second area in which it has been suggested that Mr Sullivan might have misled the Estimates Committee relates to an exchange with Mrs Dunne MLA. Mr Sullivan was asked,

²⁷ Privileges Committee transcript, proof, 23 April 2010, p.2

²⁸ For example, Mrs Dunne in the Public Accounts Committee on 18 February 2010,: "...why did you tell the committee that the TOC was only in final form when only three days before it had been approved, the board had recognized that it had been approved and it had authorized you to spend that money". PAC Transcript, p.234. On the same page Mrs Dunne refers to the TOC being \$149.8 million. These remarks have been corrected by Mrs Dunne. Similarly, in an interview on ABC radio on 19 February 2010, Mr Sullivan appears to conflate the TOC and the total project cost: "...we had taken the total outturn cost for the Murrumbidgee pipeline to the board a few days earlier than the hearing. The board had approved it and given me the delegation to spend the money." As stated above the Board had not approved the TOC and the delegation related to the upper limit of the total project cost.

²⁹ Public Accounts Committee, transcript, 18 February 2010, p.234

What have been the factors that seem to have caused this big blow out in cost [for the Murrumbidgee-Googong pipeline] between April 2005 and when the minister made his most recent announcements, which was March, I think, this year?³⁰

- 3.18 While not accepting the description of the cost increase as a blow out Mr Sullivan proceeded to comment on the overall cost estimates for the project:
...the ICRC, in its water regulation decisions of 2007,³¹ allowed \$96.5 million for the Murrumbidgee to Googong pipeline... In the report to government, we said that we expected that the final price would come in within about 30 per cent of that. I think I have said before here that I expected it to be up on the 96, and that is the number we are now moving towards.³²

These figures were already in the public domain.

- 3.19 This exchange took place on 18 May 2009. On 13 May 2009 the Board of ACTEW had "Approved a total budget of \$149.8 million for project implementation..." and "Delegated and Authorised, ACTEW's Managing Director to approve expenditure to an upper limit of \$149.8 for implementation of the Murrumbidgee to Googong Project..."³³
- 3.20 The issue before the committee is whether Mr Sullivan deliberately misled the Estimates Committee by appearing to confirm cost figures which he knew to have been superseded and, further, whether he had an obligation to give the committee the revised figure agreed to by the ACTEW board of \$149.8 million, particularly given that the approved figure was some 55% larger than \$96.5 million not 'about 30%'?
- 3.21 The question put to Mr Sullivan related to the factors which had contributed to the large increase in the cost of the project from approximately \$40 million in 2005. He had not been asked specifically about the costs but volunteered the information that the final cost would be in the range of the ICRC determination as background to a discussion of those factors. It should be

³⁰ Estimates Committee transcript, 18 May 2009, p.175

³¹ Independent Competition and Regulatory Commission, *Water & Wastewater Price Review, Final Report & Price Determination*, Report 1, April 2008, p.4. Note that the ICRC determination was \$96.5 million in 2006-2007 dollars.

³² Estimates Committee transcript, 18 May 2009, p.175

³³ ACTEW Board Paper 3135, Murrumbidgee to Googong Water Transfer Project, Meeting No. 178, 13 May 2009, see Appendix II

noted that the committee did not seek any further comment on those figures and at the completion of the answer moved on to consideration of the Cotter Dam project. It can be argued that the committee was clearly made aware that further significant increases in cost, within a publicly announced range, were foreshadowed, although the actual amount of the increase was not given to it.

- 3.22 The “\$96 million plus 30%” figure refers to the ICRC decision described in footnote 29. This committee sought clarification from ACTEW Corporation of the apparent discrepancy between the ICRC figure and the final outcome for the total cost of the pipeline project at its hearing on 23 April 2010 and in subsequent correspondence. Mr Sullivan stated at the hearing that,

I think it is important to say that the 96 million had already been added to in terms of the report to government of December 2008—that it was anticipated it would go up by 30 per cent... If you then normalise those dollars and add in the mini-hydro, the comparison between the 96, plus 30 million [sic]³⁴ and 149 million is within \$1 million. Even in saying that I am projecting this cost at the current available public estimate, it is an accurate statement.³⁵

- 3.23 The committee’s attention was directed to the ICRC allowed cost for the project in 2008-09, applying the Australian Bureau of Statistics Construction Index for Roads and Bridges which came out at \$109.2 million.³⁶ It is important also to remember that the \$149.8 m. figure agreed to at the 13 May 2009 Board meeting was an upper limit of expenditure. Until outstanding issues with regard to the TOC were resolved it was also subject to possible downward revision.

- 3.24 Mr Sullivan did not comment specifically on this aspect of his evidence in his statement to the committee. However it can be inferred from that statement and comments Mr Sullivan has made elsewhere that he viewed the Board decisions of 13 May 2009 as commercially confidential,
- ... these were critical and sensitive matters for the Board [which] required careful negotiations with the Alliance. I did not feel in a position

³⁴ Presumably Mr Sullivan means 30 per cent.

³⁵ Privileges Committee Transcript, proof, 23 April 2010, p.17

³⁶ These figures were included in the Decision Paper of 6 May 2009 considered by the ACTEW Board at its meeting on 13 May 2009. See Appendix I, table 3.

to disclose that information when I attended the Select Committee on Estimates....³⁷

- 3.25 In Mr Sullivan's view outstanding matters with regard to the TOC for the pipeline had still to be negotiated with the BWA partners, the question of the inclusion of the mini hydro within the pipeline project had to be resolved before a final TOC and total cost for the project would be decided and before any public statement was made.
- 3.26 In evidence to the committee Mr Sullivan stated that,
It is clear that the public need to know. They need to know when we know. To speculate on a project's outcome in respect of its cost, when you have significant and material doubt as to whether you know it, I do not think adds to the knowledge of the public.³⁸
- 3.27 As with the issue of the TOC considered above, it would have avoided a great deal of misunderstanding if a fuller explanation of the process by which the final costs had been developed had been given to the committee. For example, to have drawn the Estimates committee's attention to the revised ICRC figure and explained that a final upper limit on the cost of the project had been agreed, that it was within the publicly announced range, but that it was commercially sensitive and should remain confidential until certain matters were resolved, would have given the committee a clearer impression of progress with the project while not compromising any commercially sensitive negotiations.
- 3.28 To what extent did Mr Sullivan's evidence meet the test of 'significant obstruction' of the legislature? He had not been asked to provide the most up to date cost figures for the pipeline project and had merely repeated the most recent published figures while making it clear that the figure would be superseded by a higher cost estimates which remained in line with publicly available information. Thus it was open to the Estimates committee to pursue the likely final cost figure. Nor, more generally had Mr Sullivan exhibited any intention to withhold publication of the costs beyond a period that he perceived to be necessary to finalise negotiations and meet various reporting obligations.

³⁷ Submission from Mr Mark Sullivan, Managing Director ACTEW Corporation Limited, 4 March 2010, p.6. See Appendix IV

³⁸ Privileges Committee Transcript, proof, 23 April 2010, p.18

FINDING 2

- 3.29 Having reviewed the evidence the committee has concluded that there was no deliberate intention of misleading the committee on Mr Sullivan's part and thus no contempt was committed.

Claiming immunity from answering questions.

- 3.30 The committee has made no findings of contempt against Mr Sullivan. However its inquiry does raise very serious issues with regard to the maintenance of the balance between proper accountability, a witness's obligations to answer questions and necessary confidentiality for some aspects of the conduct of public business.
- 3.31 The Chief Minister's *Handbook for ACT Government Officials on Participation in Legislative Assembly and Other Parliamentary Inquiries* makes quite clear what is expected of public officials appearing before Assembly committees:
- As stated earlier, it is intended, subject to the application of certain necessary principles, that there be the freest possible flow of information between the ACT Public Service, the Legislative Assembly and the public. To this end, officials should be open with committees and if unable to answer questions, provide information or **if is inappropriate to do so, should say so and give reasons.**³⁹ [Emphasis added]
- 3.32 While ACTEW is in a slightly different category from the mainstream of the ACT Public Service, it is a wholly-owned Territory entity and is accountable to the Assembly. Its officers are governed by the same rules and expectations when appearing before Assembly committees. The duties of the Managing Director under the Corporations law are certainly an added factor to be taken into account when considering claims of public interest immunity but they are, emphatically, not a reason unilaterally to exempt oneself from the rules regarding evidence given to committees.
- 3.33 It is an accepted principle that certain categories of information may be subject to public interest immunity and may be withheld from committees, for example cabinet papers and details of discussions in cabinet; matters relating to national security and "materials that might negatively affect the commercial interests in the market place if disclosed". This latter category might include information in possession of contractors dealing with ACTEW Corporation or

³⁹ Cabinet Office, Chief Minister's Department, *Handbook for ACT Government Officials on Participation in Legislative Assembly and Other Parliamentary Inquiries* (2004) p.10

information ACTEW may hold about its contractual partners.

- 3.34 The Chief Minister's *Handbook* makes the process for dealing with claims of public interest immunity, which includes claims based on commercial confidentiality, quite clear:

Under certain circumstances, a request to provide certain oral or documentary evidence may be declined on the grounds that disclosure to the committee would not be in the public interest. Claims that information should be withheld from disclosure on grounds of public interest (*public interest immunity*) should only be made by Ministers (normally the responsible Minister in consultation with the Attorney General and the Chief Minister).⁴⁰

- 3.35 This principle has been repeatedly asserted in the Commonwealth Parliament, particularly the Senate. *Australian Senate Practice* comments,

A resolution of 30 October 2003 declared that the Senate and its committees would not entertain claims of commercial confidentiality unless made by a minister and accompanied by a ministerial statement of the basis of the claim, including a statement of the commercial harm which might result from the disclosure of the information. **If a committee is satisfied that a statutory authority has such a degree of independence from ministerial direction that it would be inappropriate to have a minister make the claim, the committee may receive the claim from officers of the authority.**⁴¹ [emphasis added]

- 3.36 Mr Sullivan, when questioned about his understanding of claims of commercial in confidence, stated his belief to the committee that ACTEW is in a significantly different situation from a Department of State with regard to claims of public interest immunity:

No minister is responsible for signing off that we have contracted out to build the Murrumbidgee to Googong transfer. That puts us in a different

⁴⁰ Ibid., p.11-12

⁴¹ *Odger's Australian Senate Practice* <http://www.aph.gov.au/Senate/pubs/odgers/chap1910.htm> accessed 14 April 2010.

camp; it puts us in a different place from a department of state claiming commercial-in-confidence.⁴²

- 3.37 The committee does not see this distinction as of great importance. As the Senate has stated, in certain circumstances it may be appropriate for the Chief Executive of a statutory body to make such a claim rather than a minister but the underlying principle remains the same; that the grounds for the claim of immunity must be set out and the harm which may result from its release explained. The decision on whether to accept the claim or not rests with the committee or the legislature.
- 3.38 The corporitization of many public sector service providers and the proliferation of innovative contractual arrangements – public private partnerships; alliances, etc - between government and the private sector for the provision of a wide range of services, from the construction of major capital works to the operation of child-care centres does present challenges to ensuring accountability for the provision of services and the expenditure of public money. It does not diminish the imperative for such accountability.
- 3.39 Private businesses entering into contractual arrangements with public sector agencies should also be aware that their activities may be subject to a higher level of scrutiny than might apply to a business arrangement between private sector partners.
- 3.40 It is often not possible to follow the practice set out in the *Handbook* or *Odgers*. Matters arise during public hearings of committees without warning and have to be dealt with immediately. In these circumstances it is well established that the witness must advise the committee of the problem that the question poses and seek the committee's advice on how it wishes to proceed - at an *in camera* hearing for example or by reconsidering the matter at a later date when there has been time to consider the circumstances and either provide an answer or make a claim of immunity.
- 3.41 Mr Sullivan has emphasised his obligations under the Corporations Law as justification for his evidence:

I have statutory and common law duties as Managing Director of ACTEW which must be considered when disclosing information and details about the business and operational activities of ACTEW. I am required to exercise powers and discharge my duties with a degree of care and diligence, to act in good faith in the best interests of ACTEW

⁴² Privileges Committee transcript, proof, 23 April 2010, p.16

and not improperly use information obtained in my capacity as
Managing Director to cause detriment to ACTEW.⁴³

3.42 This committee has no issue with the above statement. However it should also be emphasised that Mr Sullivan has obligations as a public official and as a witness before an Assembly committee with regard to accountability. As discussed in chapter 2, ACTEW is a wholly Territory-owned entity and the legislation establishing such entities is very clear that they are fully accountable through the Legislative Assembly to the people of the ACT for their management of public resources.

3.43 In his evidence Mr Sullivan referred to the experience of the Commonwealth Parliament in dealing with corporatized public agencies in the 1980s and 1990s.

If you go back to the old Telstra, Qantas and Commonwealth Bank days, you will see many times those corporations not revealing their commercial-in-confidence material to the parliament of Australia.

3.44 Those debates did in fact serve to clarify and harden the Senate's position with regard to the obligations of officers of statutory authorities when appearing before committees:

Officers of statutory authorities, therefore, so far as the Senate is concerned, are in the same position as other witnesses, and have no particular immunity in respect of giving evidence before the Senate and its committees.⁴⁴

3.45 Mr Sullivan appears to have held the view that because he considered matters to be confidential to the Board or subject to continuing negotiation between commercial partners or that the release of information might create confusion or uncertainty in the public mind, he was justified in not disclosing certain matters to the committee.

3.46 This is at the core of all discussions of the application of the various immunities which may be claimed as a reason for not giving an answer in public – they are simply claims which must be advanced formally by the witness, by the relevant officer of a statutory authority or a Minister on the witness's behalf. It is the committee's – or the legislature's – decision whether to accept a claim or

⁴³ Submission from Mr Mark Sullivan, managing Director ACTEW Corporation Limited, 4 March 2010, p.6. See Appendix IV

⁴⁴ *Odgers*, op cit. <http://www.aph.gov.au/Senate/pubs/odgers/chap1911.htm> accessed 27 April 2010.

not. There may be a competing and greater public interest in getting the information on the public record. Witnesses must not decide for themselves that a piece of information falls into a category which might attract immunity and on that basis withhold it from a committee of the legislature.

RECOMMENDATION 1

The committee recommends that the Speaker write to the Chief Executive Officers of all ACT government departments and Territory-owned corporations and remind them of the obligations of witnesses before Assembly committees particularly with regard to matters relating to claims of public interest immunity and that Chief Executive Officers ensure that their staff are properly informed of their obligations.

RECOMMENDATION 2

The committee recommends that the Legislative Assembly adopt a resolution clarifying its position with regard to claims of immunity from answering questions or providing documents made by witnesses, stating that claims of immunity must be made by ministers or the appropriate senior officer of other public agencies and territory owned corporations and that details of the harm that might be caused by providing the information must be included in the claim.

Question on Notice

- 3.47 The committee notes that the answer to the Question on Notice dated 28 May 2009 referred to above, in stating that the TOC has 'been finalised' does not reflect the position as stated in the Board minutes and is contradicted by the subsequent written statement of Mr Sullivan, "...neither the TOC for the Murrumbidgee to Googong nor the enlarged Cotter Dam were expected to be finalised by June *and they were not...*"[emphasis added].
- 3.48 The committee finds this to be of real concern. The written answer, prepared within Treasury with advice from ACTEW, should have given a clear and accurate statement free of the slips of the tongue or careless use of language which might occur during robust discussion in a public hearing. Given the various interpretations of the TOC which were circulating, the written answer would have been an ideal medium to provide sufficient detail and context to ensure that both the process of developing the TOC and the stage of development reached were clearly explained.

The committee process

- 3.49 The evidence considered by this committee indicates that the issues which it has been charged with resolving arose, to a significant extent, from the failure to clarify the matters in dispute in earlier proceedings.
- 3.50 The decision to treat Mr Sullivan's answers to the Estimates committee as a potential contempt of the Assembly came after a hearing of the Public Accounts Committee (PAC) on 18 February 2010. That committee was considering the annual report of ACTEW Corporation. Mr Sullivan has stated in evidence to this committee that he had no reason to expect questions on the detail of the pipeline project at that hearing and was unprepared for them:⁴⁵
- Murrumbidgee to Googong went off the map in terms of committees until much later. We had another committee hearing in August or September and another one in December [2009] and the Murrumbidgee to Googong did not even rate a mention. It had certainly gone off some agendas.⁴⁶
- 3.51 Unfortunately during the Public Accounts Committee hearing Mr Sullivan did not seek, and the committee did not provide, copies of documents being quoted in questions so that he could refresh his memory as to their contents. In addition some of the questions put to Mr Sullivan at that hearing contained errors confusing total project cost and the TOC, which have subsequently been corrected, but which tended to compound the confusion around this matter rather than clarify it.
- 3.52 Mr Sullivan, in response to media reports that his evidence to the Public Accounts Committee might be referred to a privileges inquiry, did in fact write to the Speaker of the Assembly on 23 February 2010, explaining the uncertainty surrounding the TOC for the pipeline at the time of the Estimates hearing in 2009 and acknowledging, as he had before the PAC that his choice of words may have been imprudent. Taken together with Mrs Dunne's correction of the PAC transcript in March 2010⁴⁷ it is arguable that this matter need not have been pursued as it has.
- 3.53 While the processes of referring a matter to a privileges committee were followed correctly it is unfortunate that these issues were not resolved through the ordinary processes of the Public Accounts Committee.

⁴⁵ Privileges Committee transcript, proof, 23 April 2010, pp.12-13

⁴⁶ *Ibid.*, p.19

⁴⁷ See Appendix V

- 3.54 This committee does not suggest that standing committees should be charged with conducting preliminary inquiries into possible breaches of privilege or contempt. However, given that raising an issue of breach of privilege or contempt is a serious matter, potentially reflecting adversely on the reputation of the persons involved, it is desirable that facts in dispute are clearly established through ordinary committee processes before any further action is taken.

Amanda Bresnan MLA

Chair

**Appendix I – ACTEW Corp. Board Decision Paper,
Meeting No. 178, 6 May 2009**

ACTEW CORPORATION LIMITED – DECISION PAPER

Meeting No: 178	Date: 13 May 2009	File No
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SUBJECT: Murrumbidgee to Googong Water Transfer Project

PURPOSE: To inform the Board of progress during April 2009; seek approval of the budget to proceed to construction of the project; and seek agreement to the Quality Pool for the Bulk Water Alliance.

BACKGROUND/ISSUES:

The Murrumbidgee to Googong (M2G) Water Transfer project is being implemented through the Bulk Water Alliance (BWA). The objective is to transfer up to 100 ML of water per day from the Murrumbidgee River to Googong Reservoir. The 100 ML per day will be sourced from natural river flows in excess of ACT environmental flow requirements. Water purchased from NSW and transferred via Tantangara Dam to the ACT would supplement the transfer of natural flows.

Key Issues

The colour of each of the four headings indicates:

- **Green** = on target
- **Amber** = movement away from target
- **Red** = significant issues under active management

A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE	
EXHIBIT	/
DATE RECEIVED	18/2/2010
INQUIRY	ANNUAL REPORTS 08-09

Costs
Cost compares to ICRC allowances compared on a "like-for-like" basis.

6 May 2009

BOARD IN CONFIDENCE

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COST:

The TOC has been developed in line with the Project Brief and BWA Program Alliance Agreement requirements. Development has involved owner representatives, designers, constructors, the owner's independent estimator and industry experts.

The TOC has been approved by the BWA Alliance Project Management Team and the Alliance Leadership Group.

6 May 2009

BOARD IN CONFIDENCE

2/15

The TOC (see Table 1 below) is underpinned by competitive tender pricing, 30% design drawings and specifications, and agreed construction and rehabilitation methodologies. A detailed TOC report presents the design basis, construction and rehabilitation methodologies, resourcing plans, escalation allowances, and contingency risk pricing.

The TOC is based on two pump stations (low-level and high-level) and 13 km of underground pipeline. The proposed pipeline is a 1.0 m diameter mild steel cement lined pipe with an earth cover of at least 600mm. Around 1 km of the pipeline excavation will require blasting, and tunnelling is proposed under the Monaro Highway. A 15 m wide operational easement will be acquired and all disturbed areas will be reinstated to existing condition or better.

This cost does not include the upstream Burra Creek discharge option strongly favoured by many of the local community and affected landholders. This option has the potential to save around \$2.5 million but may require ACTEW to commit to ongoing support of creek management activities.

The mini-hydro power generation facility is included as a \$7 million provisional item in the TOC. The proposed facility will be subjected to a multi-criteria assessment before a recommendation to proceed is made

Table 1: Target Outturn Cost (TOC)

Cost Description	Total
Direct & Indirect Costs	
Escalation	
Risk Allocation	
Management Fee	
Target Outturn Cost	
TOC Project Fee	
Quality Pool	
Total (excludes Provisional Sums)	\$107,448,000
Provisional Sum - Mini Hydro	\$7,000,000
Provisional Sum - Approvals	\$2,300,000
Total (includes Provisional Sums)	\$116,748,000

The total project cost to ACTEW is shown in Table 2 below. The total cost includes additional items such as planning expenditures incurred before the BWA was established, the purchase of a water access entitlement at Angle Crossing, the preparation of environmental assessments and planning submissions, and an ecological monitoring program for the Murrumbidgee River and Burra Creek to 20011/12. The yearly expenditure estimates shown in Table 2 are based on the current project work plans and schedules. It is expected these will be further refined as the project begins construction phase and some movement in expenditure between financial years may occur.

Ongoing stakeholder management, land access and easement expenses are also required to safeguard ACTEW's reputation and to facilitate planning approvals.

Table 2: Total Cost

	2007/08	2008/09	2009/10	2010/11	2011/12	TOTAL PROJECT
	\$	\$	\$	\$	\$	
Project Initiation						\$ \$
Preliminary Design & TOC Development						\$ \$
Detailed Design, Construction & Commissioning						
ACTEW		2,854,000	6,540,000	6,921,000	1,104,000	\$ 17,419,000
BWA		1,358,000	33,899,000	76,324,000	5,167,000	\$ 116,748,000
Close out					269,000	\$ 269,000
Total Expenditure	1,629,000	17,940,000	40,439,000	83,245,000	6,540,000	\$ 149,793,000

Table 3 below shows the cost escalation of the project cost from the original \$96.5 million allowed by the ICRC to the current total cost of \$149.5 million.

Table 3: Cost Escalation of ICRC Allowed Project Expenditure for M2G

Costs	Estimate (\$000)	Comment
ICRC allowed estimate of project cost in 2006/07	\$96.5	As per ICRC determination following the initial proposal by ACTEW in April 2008
ICRC allowed estimate of project cost in 2008/09	\$109.2	Applying the Australian Bureau of Statistics Construction Index for Roads and Bridges escalates
ACTEW indicated increase of resource cost of 15-30% in December 2008 report.	\$141.9*	Applying the top of the range cost increase as per December 2008 report to the ACT Government.

*The mini hydro could add a further \$7 million to bring the ICRC equivalent total to \$149 million.

This cost increase is also in line with that forecast by ACTEW to the ACT Government in the December 2008 report.

Approval of the budget will enable early procurement of long lead time equipment to progress without impact on the Project schedule. Major pumps, for example, will take between 12 to 14 months from ordering to delivery.

BOARD IN CONFIDENCE

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THE BOARD RESOLVES:

1. To note progress on the Murrumbidgee to Googong Water Transfer Project,
2. To approve a total budget of \$149.8 million for Project implementation (inclusive of \$2 million Quality Pool),
3. To approve a Quality Pool of 2% for all BWA projects (which will be included in each TOC report), and
4. To delegate and authorise ACTEW's Managing Director to approve expenditure to an upper limit of \$149.8 million for implementation of the Murrumbidgee to Googong Project.

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**Appendix II – ACTEW Corp. Board Paper 3135, 13
May 2009**

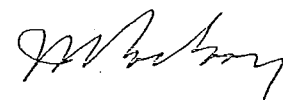
3135 Murrumbidgee to Googong Water Transfer Project

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
EXHIBIT	2
DATE RECEIVED	18/2/2010
INQUIRY ANNUAL REPORTS 08-09	

The Board:

- **Noted** progress on the Murrumbidgee to Googong Water Transfer Project;
- **Approved** a total budget of \$149.8 million for project implementation (inclusive of \$2 million Quality Pool);
- **Approved** a Quality Pool of 2% for all BWA projects (which will be included in each TOC report);
- **Delegated** and **authorised**, ACTEW's Managing Director to approve expenditure to an upper limit of \$149.8 million for implementation of the Murrumbidgee to Googong Project; and
- **Requested** the Managing Director and Chief Finance Officer to consider the regulatory implications of the project costs and report back to the Board.

Signed



Chairman

BOARD IN CONFIDENCE

**Appendix III – Statement by Mr John Mackay AM,
Chairman, ACTEW Corp.**

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**STATEMENT BY MR JOHN MACKAY, AM,
CHAIRMAN OF ACTEW CORPORATION LIMITED**

The ACTEW Board considered a paper on the Murrumbidgee to Googong Transfer project (M2G) at its meeting on 13 May 2009. The paper outlined progress of the project and sought approval of the total budget to proceed to construction. This totalled \$149.8m which included a target outturn cost (TOC) of \$116.7m. The TOC had not been completed and included two provisional amounts for a mini hydro (\$7m) and approvals (\$2.3m).

Mr Sullivan provided a detailed overview of the project and the robust discussions which were continuing in relation to the cost of the mini hydro. He advised the Board that the cost of the mini hydro was still considerably higher than acceptable to support and sustain the business case.

The Board was mindful of ACTEW's obligations in relation to its greenhouse gas abatement strategy and that if the mini hydro was not delivered as part of the M2G project, ACTEW's ability to deliver sustainable outcomes associated with the construction and operation of the project, would be at risk. There was also a risk that if the outstanding issues could not be satisfactorily resolved, then the impact and implications for the M2G project were significant and changes would need to be considered.

The Board clearly understood that the TOC had not been completed and was comfortable and confident in approving the total budget for the project and in authorising Mr Sullivan to continue negotiations with the Bulk Water Alliance (BWA) partners to resolve the outstanding issues, as there was still considerable work and negotiations before the matter could be concluded. These negotiations were to be conducted in confidence as other commercial matters were subject to discussion in relation to the development of the TOC for the Enlarged Cotter Dam project.

ACTEW's shareholders were informed of the Board's approval of the total budget for the project on 22 May 2009. It is normal practice for the Corporation to advise its shareholders of any key and important matters and decisions taken at board meetings. However it does not necessarily follow that any decisions are required to be made public. That is a matter for ACTEW as a public company and its shareholders.

The Board was subsequently informed at its meeting on 4 November 2009 that the TOC included a mini hydro power generation facility at a cost of \$6.9m, within the \$7m provisional amount allowed.

To review the questions put to Mr Sullivan and his responses some nine months later, provides an opportunity to reflect on the discussion at that time and to question his

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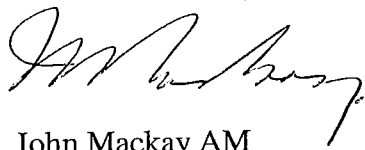
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chosen words. I consider that any alternative response from Mr Sullivan most probably would have led to allegations and accusations of him being uncooperative and refusing to answer questions.

I consider Mr Sullivan's responses to questions put to him at the hearing on 18 May 2009 to be appropriate and within the context of various negotiations at that time. He was not in a position to disclose any information or details about the TOC for the M2G project as it had not been completed and he had been asked by the Board to continue and finalise commercially sensitive negotiations. To do so would have had serious implications for ACTEW and been a breach of his corporations law duties and obligations to the Corporation.

I, and the Board, have unquestionable confidence in Mr Sullivan's abilities as Managing Director and to manage and deliver, not only the range of water security major projects, but all of ACTEW's activities and operations and hold him in the highest regard in relation to his integrity and professionalism.



John Mackay AM
Chairman

5 March 2010

**Appendix IV – Submission by Mr Mark Sullivan
AO, Managing Director, ACTEW Corp.**

CONFIDENTIAL**SELECT COMMITTEE ON PRIVILEGES**

**SUBMISSION FROM MARK SULLIVAN, MANAGING DIRECTOR
ACTEW CORPORATION LIMITED**

I provide this submission to the Committee for its consideration and trust that it provides helpful background and relevant information in relation to its examination of whether a breach of privilege or contempt of the Assembly was committed.

Background

The Murrumbidgee to Googong (M2G) project is one of a number of projects developed by ACTEW as part of its water security program and involves the construction of a pipeline to transfer up to 100 megalitres (ML) of water a day from the Murrumbidgee River to Googong Reservoir. Details of the projects are available in various published studies and reports on the ACTEW website.

The Independent Competition and Regulatory Commission (ICRC) allowed \$96.5m for the project in its 2008-09 to 2012-13 pricing determination. In a progress report on the water security major projects to the ACT Government in December 2008, ACTEW advised that it expected that the cost would increase by a further 15% - 30% due to significant cost increases for materials and labour. This report is also available on ACTEW's website.

The project is being delivered by the Bulk Water Alliance (BWA), an alliance comprising ACTEW, Abigroup Contractors Pty Limited, GHD Pty Limited and John Holland Pty Limited. The Alliance members are parties to the Program Alliance Agreement (PAA). A copy of the PAA was provided to Members of the Legislative Assembly on 27 October 2009 in response to an Assembly Motion on 15 October 2009.

The project was formally approved by the Government and announced on 25 March 2009 by Simon Corbell MLA, Minister for the Environment, Climate Change and Water.

At its meeting on 13 May 2009, the ACTEW Board considered a detailed paper on the project. The total budget was \$149.8m which included the target outturn cost (TOC) of \$116.7m. Two provisional sums, \$7m for a mini hydro and \$2.3m for approvals, were included in the TOC.

The Board engaged in detailed discussions at the meeting and understood that the TOC had not been concluded. However they agreed that the proposed total budget was appropriate and needed to be approved to allow the design work to proceed. I informed the Board that the mini hydro was still being finalised.

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The mini hydro is an important part of the ACTEW greenhouse gas abatement strategy. Earlier estimates at different stages of design ranged up to \$9m. However at that cost, it was not a sustainable business case. It was important that the cost of the mini hydro could be delivered for \$7m, however I was not convinced at the time of Board consideration of the total project budget that it could be. If this was not achievable, then ACTEW's greenhouse abatement strategy was at risk. The BWA Alliance Leadership Group (ALG) subsequently approved \$6.9m for the mini hydro on 13 October 2009 and the Board was informed in a paper dated 4 November 2009.

In approving the total budget for the project, the Board was aware, and had been informed, that the TOC was not finalised but accepted the figures provided were the upper limit costs.

The Board was satisfied there was sufficient information available to approve a total budget of \$149.8m. The Board therefore made the following resolutions:

- Noted progress on the Murrumbidgee to Googong Water Transfer Project;
- Approved a total budget of \$149.8 million for project implementation (inclusive of \$2 million Quality Pool);
- Approved a Quality Pool of 2% for all BWA projects (which will be included in each TOC report);
- Delegated and authorised, ACTEW's Managing Director to approve expenditure to an upper limit of \$149.8 million for implementation of the Murrumbidgee to Googong Project; and
- Requested the Managing Director and Chief Finance Officer to consider the regulatory implications of the project costs and report back to the Board.

The Board delegated and authorised me to approve expenditure for the project. I was also authorised to conclude negotiations relating to the mini hydro and to accept the final costs.

The total project budget includes an estimate of the total cost to ACTEW of the Alliance and owner's costs. The TOC is a determined agreement between ACTEW and the Alliance and is the budget for agreed work that the Alliance is to undertake. The relationship between the total project cost and the TOC is complex. On one level the TOC is never concluded until the construction work is completed. The agreed TOC sets the formal boundaries of the impact of any change to the scope of the project and increases or decreases in costs.

A report on the 13 May 2009 Board meeting was provided to the shareholders on 22 May 2009 informing them that the Board had approved a total budget of \$149.8m for project implementation.

At the time of approval of the total budget, in addition to ongoing discussions in relation to the mini hydro and approvals, complex, commercial discussions and negotiations were continuing with ACTEW's alliance partners in relation to the development of the Enlarged Cotter Dam (ECD) project including the TOC for that project. These negotiations were confidential.

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The Board subsequently approved the ECD project including the TOC of \$299m and total project cost of \$363m on 1 September 2009, resolving to:

1. Note the presentation to Cabinet on progress of the Enlarged Cotter Dam project by the Chairman John Mackay and Managing Director Mark Sullivan on Monday 31 August 2009;
2. Approve a total budget of \$327 million, comprising :
 - a. Construction of the Enlarged Cotter Dam with a total project cost of \$299 million.
 - b. Additional mitigation activities covering fish studies and habitat and precinct works of \$13.128 million.
 - c. A quality pool of a maximum of \$4 million.
 - d. ACTEW costs of \$10.415 million associated with the completion of the Enlarged Cotter Dam.
3. Note that the total project cost of \$362.3 million; and
4. Delegate to, and authorise, ACTEW's Managing Director to approve expenditure as outlined in resolutions 2 (a), (b), (c) and (d) above.

ACTEW announced the total costs for all three water security major projects ie ECD, M2G and Tantangara Transfer on 3 September 2009.

Evidence to Legislative Assembly Committees

In relation to the specific issues surrounding the establishment of the Select Committee and the terms of reference, I provide the following comments and information.

I will deal with a number of specific questions and statements which were put to me during committee hearings and which form the basis of the allegations against me, and my responses.

Select Committee on Estimates 18 May 2009

Mr Smyth:

Obviously the budget went to bed before you got the TOC. However, it says there that they will be determined late in 2008-09. We are getting fairly late in 2008-09. Have they been determined?

My response:

Some of them have, some of them have not. The dam has not been determined. That is the largest one. The Murrumbidgee to Googong pipeline is currently under consideration by the board. While we have got a draft TOC, it has got some process to go through before it is an agreed TOC. We of course had a TOC in place for the Googong dam spillway construction and we are also winding up the TOC in respect of the water purification demonstration plant. Even though it has been deferred as a project, it went to the TOC stage. They are all about to come out.

Comment:

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The question was whether the TOCs for various water security projects had been determined, not whether the total budgets for the projects had been determined or approved. The Board had approved the total budget for the project but the TOC was not concluded.

As detailed elsewhere in this submission, the TOC contained two provisional amounts, one for a mini hydro and one for approvals. It would have been incorrect and misleading if I had responded to Mr Smyth that the TOC had been finalised.

Mr Smyth:

If they are available before this committee reports, can you make them available?

My response:

When is that?

Mr Smyth:

First sitting day in June.

My response:

I doubt they will be. I think they will be very public as soon as they come out.

Comment:

My response to this question was correct, neither the TOC for Murrumbidgee to Googong nor Enlarged Cotter Dam were expected to be finalised by June and they were not. ACTEW announced the total costs for the ECD, M2G and Tantangara Transfer projects on 3 September 2009.

I reviewed the proof transcript of evidence following the hearing and had no reason to believe that I had misled the Committee or that clarification or correction of my evidence was required. I considered the words that I had used reflected the facts and the commercial situation and arrangements at that time.

Public Accounts Committee 2 December 2009

There were no questions put to me about the M2G TOC or total budget at the hearing despite the public announcement of the total costs for the project on 3 September 2009.

Public Accounts Committee 18 February 2010

I will not detail the questions put to me at the hearing, but attach a copy of the proof transcript of evidence.

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I note a number of inaccurate statements or factual errors in statements put to me by Mrs Dunne. In particular I draw your attention to the following:

Mrs Dunne:

Does the paper further state the costs are "in line with the forecasts by Actew to the ACT government in December 2008"?

Comment:

The board paper dated 13 May 2009 stated "*This cost increase is also in line with that forecast by ACTEW to the ACT Government in the December 2008 report.*" Mrs Dunne's statement is incorrect as it refers to costs, not the cost increase.

Mrs Dunne:

Madam Chair, I note with interest that 30 percent on top of 96 is \$124.8 million. Mr Sullivan, why did you tell the Committee that the TOC was only in final form when only three days before it had been approved, the board had recognised that it had been approved and it had authorised you to spend that money?

Comment:

The TOC had not been concluded and discussions were continuing. I assume from Mrs Dunne's comment that she is suggesting the TOC was \$124.8m. The TOC is \$116.7m.

Mrs Dunne:

Thank you for that. You wrote to the shareholders, Minister Gallagher and Mr Stanhope on 22 May and told them that you had been authorised to spend \$149 million and that the TOC was \$149.8 million.

Comment:

My letter to the shareholders made no mention of my authorisation to spend \$149m. The TOC is not \$149.8m, it is \$116.7m. My letter to the shareholders stated:

The Board approved a total budget of \$149.8 million for project implementation and requested the Managing Director and Chief Finance Officer consider the regulatory implications of the project costs and report back to the Board. I will write to you separately with more details of the approved budget.

In hindsight, it would have been more prudent of me to request to see the documents from which Mrs Dunne was reading prior to responding to her questions so that my answers were given in proper context and I could have corrected her erroneous statements rather than agree or accept them. However just as witnesses are required to tell the truth and not give false or misleading evidence, the same responsibilities

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and obligations must apply to Members of the Assembly in putting questions to witnesses.

Mrs Dunne has acknowledged in the Legislative Assembly that she made incorrect statements and stated she will seek to correct the transcript.

Other Matters

A matter which I wish to draw to the Committee's attention is a comment by Mrs Dunne in relation to various documents and information she has acquired.

On 16 September 2009 the Legislative Assembly passed a motion requesting Mr Corbell provide various documents relating to costs for the ECD and M2G projects. Included in the documents and information tabled in response to the motion on 17 September 2009 was a timeline and chronology of events relating to the two projects, copy attached.

You will see the document clearly states ACTEW Board approval of the total cost of the M2G project. Mrs Dunne stated in the Legislative Assembly on 23 February 2010:

Mr Sullivan was taken through a timeline of events. A timeline of events which only became apparent because I made a number of freedom of information requests ...

That statement is incorrect and implies that the timeline of events only became evident because of a freedom of information request.

In a freedom of information request dated 23 September 2009 from Mrs Dunne, she attached to her request the timeline and chronology of events which Mr Corbell had tabled on 17 September 2009, and highlighted the documents she required. The ACTEW Board paper of 13 May 2009, the minutes of that meeting and the letter to the shareholders dated 22 May 2009 were amongst the documents requested. Mrs Dunne received relevant extracts from these documents, together with other documents, on 19 November 2009.

It is obvious both from the tabling of information in the Legislative Assembly on 17 September 2009 and through the provision of documents requested under freedom of information legislation that at no time has ACTEW withheld or sought to keep secret information about the M2G project.

I have statutory and common law duties as Managing Director of ACTEW which must be considered when disclosing information and details about the business and operational activities of ACTEW. I am required to exercise powers and discharge my duties with a degree of care and diligence, to act in good faith in the best interests of ACTEW and not improperly use information obtained in my capacity as Managing Director to cause detriment to ACTEW.

There were significant outstanding issues with the TOC and these were critical and sensitive matters for the Board and required careful negotiations with the Alliance. I

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did not feel in a position to disclose that information when I attended the Select Committee on Estimates hearing on 18 May 2009. In answering questions from Mr Smyth, and in later reviewing the transcript, I considered that I had covered the fact the TOC had not been adequately concluded and that I could not reveal all the circumstances behind the ongoing negotiations which were necessary to conclude the TOC.

Conclusion

I have said a number of times it would probably have been more prudent for me to have used less direct language when responding to Mr Smyth's questions on 18 May 2009.

I did not mislead the Select Committee on Estimates or the Public Accounts Committee and have not committed a breach of privilege or contempt of the Legislative Assembly.

I look forward to the opportunity to resolve this matter at the earliest opportunity.



Mark Sullivan
Managing Director

4 March 2010

Appendix V – Letter to the committee from Mrs Vicki Dunne MLA



Vicki Dunne MLA

Legislative Assembly for the
Australian Capital Territory

Member for Ginninderra

Shadow Attorney-General
Shadow Minister for Family and Community Services; Nature
Conservation and Water; Industrial Relations; Women; and the Arts
Manager of Opposition Business

31 March 2010

Ms Amanda Bresnan MLA
Chair
Select Committee on Privileges
Legislative Assembly for the ACT
GPO Box 2010
CANBERRA ACT 2601



Dear Ms Bresnan,

I understand your Committee is soon to begin its inquiry into the matters constituted under its terms of reference, agreed in the Assembly on 23 February 2010.

My purpose in writing is to advise that my office holds a number of documents relevant to the inquiry, which I am willing to make available to your Committee should it so require. I am also available to present evidence before the Committee should it so require.

I also refer to the Assembly debate on the motion to establish the Committee.

You will recall that, prior to debate on that matter, Mr Speaker tabled a letter dated 23 February 2010 that Mr Sullivan had written to him. I attach a copy.

In the letter, Mr Sullivan stated, "Mrs Dunne advised the committee that I had informed shareholders in writing that I had been authorised to spend \$149m and that the TOC was \$149.8m."

He went on to say, "That statement is incorrect. I advised the shareholders of the approval by the board of the total budget of \$149.8m. Documents which Mrs Dunne tabled at the Committee hearing will confirm this. The TOC is \$116.7m."

During the debate, I undertook to check Hansard for my use of the various terminologies during the hearing of the Standing Committee on Public Accounts on 18 February, at which Mr Sullivan gave evidence.

On 30 March I reviewed the Hansard transcript of the Committee hearing of 18 February and I wrote to the Committee Chair, Ms Le Couteur, to advise her of my conclusions.

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Phone: 02 6205 0283 Fax: 02 6205 3106 Email: vicki.dunne@parliament.act.gov.au

I advised Ms Le Couteur of the following:

- As transcribed on page 234, I asked Mr Sullivan, "why did you tell the committee that the TOC was only in final form". The word "final" should have been "draft".
- Also on page 234, I stated, "and that the TOC was \$149.8 million." The word "TOC" should have read "total project cost". I note that I described the figure as such on page 233.
- I also note on page 253 that, during the hearing, I tabled a number of documents. I left it as a matter for the committee as to whether those documents should be published. Those documents made it clear as to the various terminologies and their associated costs.

I apologised to the Committee for any confusion that was caused by my use of these terminologies. I have written to Mr Speaker in similar terms.

In writing to Mr Speaker, I also took the opportunity to respond to Mr Sullivan's particular comments, which I quoted above. I advised Mr Speaker as follows.

In essence, my use of the word "TOC" instead of the phrase "total project cost" was a slip of the tongue.

No doubt a slip of the tongue, too, was behind Mr Sullivan's use of the word "TOC" instead of the phrase "total project cost" during an interview on 2CC on 19 February when he said, "we had agreed at our end to a TOC of \$150 million."

There perhaps was another slip of his tongue when he gave a similar impression during an interview on ABC Radio the same morning.


He said, "we had taken the total out turn cost for the Murrumbidgee pipeline to the board a few days earlier than the hearing, the board had approved it and given me the delegation to spend the money."

In fact, Mr Sullivan took the total project budget of \$149.793 million to the board. That cost included the TOC of \$116.7 million and a number of other cost components such as owner costs. The board approved the total project cost of \$149.793 million.

It also delegated and authorised Mr Sullivan to approve expenditure to an upper limit of \$149.8 million for implementation of the Murrumbidgee to Googong Project.

I trust this will assist your Committee.

Yours sincerely



Vicki Dunne
Vicki Dunne MLA

Appendix VI – Dissenting and additional comments from Mr Alistair Coe MLA

SELECT COMMITTEE ON PRIVILEGES 2010

MAY 2010

Volume 2 - Dissenting and additional comments

Alistair Coe MLA

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1. DISSENT

- 1.1 I dissent from the second finding of the Select Committee on Privileges that:

With regard to Mr Sullivan's answer to Mrs Dunne on the costs of the Murrumbidgee to Googong pipeline project the committee has concluded that, although the figures provided had been superceded, there was no deliberate intention to mislead the committee on Mr Sullivan's part and thus no contempt was committed.

2. CONCLUSION

- 2.1 I conclude that:

- Mr Sullivan deliberately withheld contemporary information from the Select Committee on Estimates 2009-10, albeit for good reasons; and
- He failed at all times to correct the record, acknowledging only that he should have used "less direct language".

3. ADDITIONAL COMMENTS

- 3.1 An ACTEW Corporation "Decision Paper", which was dated 6 May 2009, and which records the Board's resolutions made at its meeting held on 13 May 2009¹, states that the total project budget for the Murrumbidgee to Googong pipeline is \$149.793m. This budget comprises:

- Target out-turn cost (TOC) – \$116.748m;
- Owner costs – \$17.419m;
- Close out costs – \$0.269m; and
- Unspecified costs for project initiation; and preliminary design and TOC development.

- 3.2 The TOC includes provisional sums for two items totalling \$9.3 million. These comprise:

- Mini Hydro – \$7m; and
- Approvals – \$2.3m.

- 3.3 The Paper notes that:

The TOC has been developed in line with the Project Brief and BWA Program Alliance Agreement requirements. Development has involved owner representatives, designers, constructors, the owner's independent estimator and industry experts.

¹ See Appendix 1

The TOC has been approved by the BWA Alliance Project Management Team and the Alliance Leadership Group.

- 3.4 The Paper continues with narrative about the development of the TOC and the underlying works.
- 3.5 The Paper also notes the increases in the total project budget from the project estimate of \$96.5m allowed by the ICRC in 2006/07 to the figure of \$141.9m disclosed in ACTEW's report to the ACT Government in December 2008. The Paper notes that the Mini Hydro could add a further \$7m to that figure, "to bring the ICRC equivalent total to \$149 million."
- 3.6 On 13 May 2009, on the basis of the information disclosed in the "Decision Paper", the ACTEW Corporation Board approved a total project budget of \$149.8 million for the Murrumbidgee-to-Googong pipeline. This budget includes a Quality Pool of \$2m.
- 3.7 In doing so, the ACTEW Corporation Board also authorised and delegated Mr Sullivan to approve expenditure for implementation of the project up to the total project budget of \$149.8m.
- 3.8 It again is worth noting that the total project budget of \$149.8m, approved by the ACTEW Corporation Board included provisional sums totalling \$9.3m. Further the authorisation and delegation the Board gave to Mr Sullivan for that total project budget included the provisional sums.
- 3.9 This was a significant decision of the board, because it enabled Mr Sullivan to proceed with implementation of the Murrumbidgee to Googong pipeline, including approving expenditure on the project up to the total project budget of \$149.8m.
- 3.10 Five days later, on 18 May 2009, knowing that his board had made these decisions, Mr Sullivan appeared before the Estimates Committee.
- 3.11 He told the Estimates Committee:

The Murrumbidgee to Googong pipeline is currently under consideration by the board. While we have got a draft TOC, it has got some process to go through before it is an agreed TOC.
- 3.12 This statement clearly is at odds with the facts that led the ACTEW Corporation board to its decisions on 13 May 2010.
- 3.13 Indeed, Mr Sullivan himself acknowledged that when, on 18 February 2010 before the Standing Committee on Public Accounts², the following exchange occurred between Mrs Dunne and Mr Sullivan:

Mrs Dunne: Madam Chair, I note for interest that 30 per cent on top of 96 is \$124.8 million. Mr Sullivan,

² Transcript of Evidence 18 February 2010, Standing Committee on Public Accounts, p234

why did you tell the committee that the TOC was only in final [sic] form when only three days before it had been approved, the board had recognised that it had been approved and it had authorised you to spend that money?

Mr Sullivan: Largely because we had not revealed the TOC and we were using it. There were still some negotiations with the Bulk Water Alliance in respect of the TOC for the dam versus the TOC for the Googong to Murrumbidgee transfer. So we decided there would be no release of the fact of the TOC on the Murrumbidgee to Googong transfer until we had resolved the full TOC issues between the water security projects.

- 3.14 It might also be suggested that Mr Sullivan deliberately withheld from the Estimates Committee about the status of the TOC component of the total project budget when he told the Standing Committee on Public Accounts³:

So we decided there would be no release of ***the fact of the TOC*** on the Murrumbidgee to Googong transfer until we had resolved the full TOC issues between the water security projects [emphasis added].

- 3.15 In an interview on ABC radio on 19 February 2010, Mr Sullivan said:

I agreed with the last publicly available number ... even though I knew it had been updated.

- 3.16 It also is worth noting that, in the same interview, when asked if the Minister [Treasurer] knew of the updated figure at the time of the Estimates hearing on 18 May 2009, Mr Sullivan answered in the negative. This appears to be at odds with the Treasurer's answer to supplementary question on notice number 45 in the Standing Committee on Public Accounts given on 16 April 2010:

Updates are also provided with each set of board papers, which are provided to the Voting Shareholders in advance of each board meeting.

- 3.17 At no point after 18 May 2009 did Mr Sullivan seek to correct the record in relation to his statements on the total project budget of the Murrumbidgee-to-Googong pipeline, including the TOC component of that budget. He merely acknowledged that "it would probably have been more prudent to have used less direct language"⁴.

³ Ibid, p234

⁴ Ibid