



**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**SELECT COMMITTEE ON PRIVILEGES**

**Members:**

**MS A BRESNAN (The Chair)  
MR A BARR (The Deputy Chair)  
MR A COE**

**TRANSCRIPT OF EVIDENCE**

**CANBERRA**

**FRIDAY, 23 APRIL 2010**

**Secretary to the committee:  
Dr S Lilburn (Ph: 6205 0199)**

**By authority of the Legislative Assembly for the Australian Capital Territory**

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

**WITNESSES**

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## **Privilege statement**

The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings.

All witnesses making submissions or giving evidence to an Assembly committee are protected by parliamentary privilege.

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*Amended 21 January 2009*

## **The committee met at 9.34 am.**

**SULLIVAN, MR MARK**, Managing Director, Actew Corporation

**THE CHAIR:** I would like to welcome everyone to this public hearing of the Select Committee on Privileges. I remind members of the committee and anyone else who comes in to ask questions that the committee has been charged by the Assembly with examining 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. Can we ensure that any questions and comments relate strictly to the terms of reference of the committee.

Mr Sullivan, thank you for appearing before the committee today. Mr Mackay, I acknowledge that you are here, but I understand that you are here as an adviser to Mr Sullivan. We will make sure that questions are directed to Mr Sullivan.

Before we start, I draw your attention to the privilege statement which is on the desk in front of you, to make sure that you are aware of the privilege statement and everything that is in there. The proceedings today are public. However, if you do wish to give any statement or part of your evidence to the committee in camera, we can consider such a request. Also, there may be some documents which we quote from or refer to today. We have copies of those documents here today, so if there is anything that you do not have in front of you and we refer to it and you would like a copy of that, we have got those here, so we can have all of the information in front of everybody.

The committee has received a written statement from you, Mr Sullivan. Before we go to questions, I invite you to make a further statement to the committee.

**Mr Sullivan:** Thank you. I have certainly read the privilege statement and understand it. I only want to make a short opening statement. I cannot say that I am pleased to be here but I will say that I am pleased and satisfied with the composition of this committee. It is important for me, and I think the Assembly, that I receive a fair and impartial hearing.

I checked my records the other night and it is 25 years to the month since my first appearance before a parliamentary committee. I would hate to ask what most people in this room were doing 25 years ago, but I had my first hearing before a committee. Since then, I have had many hundreds of hours before them on a wide and diverse range of issues. I must say I never expected to have a hearing about me. In that 25 years, I have never had my integrity questioned. In fact, it has been the opposite, and I proudly wear my Order of Australia as a recognition of my service to government.

I will robustly defend myself in this hearing. In doing so, I want to make it clear that there is no personal animosity against anyone, and I hope the same applies to me. It is a process and system that I will question, not people. I have lodged a written submission. I am happy to answer questions. I must say I am disappointed that the committee is not here as a whole.

**THE CHAIR:** Likewise, Mr Sullivan.

**Mr Sullivan:** That is all I wish to say.

**THE CHAIR:** Given that I am the only committee member here who wishes to ask questions, I will go to questions first. Obviously, the whole privilege issue that we are discussing today has arisen in part, and probably mostly, from a question about the target out-turn cost, the TOC, for the Murrumbidgee to Googong pipeline and about the finalisation of that at the time of the estimates hearing in May last year.

There have been, in various documents and at the hearings, a number of terms used which give different impressions as to the progress regarding the finalised TOC. To quote some examples of that, the paper dated 6 May 2009 which was prepared for the Actew board meeting on 13 May states that the TOC has been developed in line with the project brief and that the TOC has been approved by the BWA alliance project management team and the alliance leadership group. However, the same document makes it clear that the TOC included two provisional sums which were still the subject of negotiation. Also, in an answer to a question on notice during the estimates process which was provided to Mr Rattenbury MLA on 28 May 2009, it states that “target out-turn costs have been finalised and will be available in mid-2009”. In written statements to the committee, you have also said that on one level the TOC is actually never complete. In terms of some of the confusion that has occurred around that, could you take us through the process of developing the TOC and just clarify the contradictions that may have arisen between various terms that have been used.

**Mr Sullivan:** I think “target out-turn cost” is a term which in May, when we had this first discussion in the estimates committee, not too many people understood fully. I think by the time September came around and we had the full discussion on the costs of the enlarged Cotter Dam many people understood more about target out-turn costs, in fact, than they did in May.

A target out-turn cost is developed by the alliance and becomes the price that the alliance agrees it will seek to deliver a project for in terms of direct costs. It is not the total project cost. The total project cost you add on to the total—onto the target out-turn cost you add things such as owners costs, you add the costs that have been incurred prior to the development of the TOC, or the target out-turn cost, and it goes from there.

The triple A contract between us and our alliance partners requires that a target out-turn cost goes through a number of mechanisms and that finalises in internal discussion about the TOC at an alliance leadership group. The alliance leadership group is a committee of people, which includes Actew and the alliance partners—GHD, John Holland and Abigroup. Before the board may consider a target out-turn cost, that alliance leadership group must approve it. That approval is not approval of a TOC. That is an approval by the ALG that the TOC as it stands is, in their view, ready to be approved.

That ALG did approve the target out-turn cost, and the target out-turn cost was \$116 million or so, and the matter went to the board. When it went to the board, the board had a long discussion. It had to satisfy itself that the elements of the budget,

including the target out-turn cost, were reasonable, that our diligence was there, that our governance was there and that we were committing to a budget, including a target out-turn cost, that fairly reflected the project as it wanted it to proceed.

The discussion was dominated by a number of issues. One was the provisional nature of two elements of the TOC that had been approved by the ALG. The most important of those was a provision for \$7 million for a mini-hydro scheme as part of the Murrumbidgee to Googong transfer. This was extraordinarily important to the board because that mini-hydro scheme was the centrepiece of the board's strategy to completely offset the greenhouse gas emissions involved in the construction of all of the major water security projects. The board had, and Actew had, I think justifiably, made a lot of the fact that it was seeking to completely offset the greenhouse gas emissions of its construction programs around the water security projects.

The provisional amount was \$7 million. The \$7 million was very important because we had determined that, unless the mini-hydro scheme could be delivered for \$7 million or less, the business case for the mini-hydro scheme was not there. At the time of the board meeting, my advice to the board was that the cost of the mini-hydro scheme at this time was estimated to be closer to \$9 million and that my confidence was not there that the mini-hydro scheme could proceed as part of the Murrumbidgee to Googong transfer, that this would markedly affect the total out-turn cost and the total project budget, it was material, it was over five per cent of the total budget and that, also, we would have to engage in finding a substitute project for the mini-hydro scheme to satisfy the board's desire that we fully offset the greenhouse gas emissions.

This worried me most because we had put a number of criteria around our greenhouse gas offset programs and among them had basically seen that most of our offset programs were in areas other than Canberra. We had decided that they had to be in Australia but we had at that stage taken preliminary commitments around forestry projects in other parts of Australia through a number of companies, including Greening Australia and others, and it was important to me that we had a significant greenhouse gas emission project within Canberra. I think we have discussed at various committees that we had considered a number of things, including wood burning systems to reduce waste and to offset our greenhouse gas, but this was the important issue.

So I was there saying: "We have a problem. I don't think the mini-hydro is going to proceed. This means we won't have a TOC of \$116 million; we will actually have a TOC of around \$109 million. We won't have a project cost of \$149 million; we will actually have a project cost of \$142 million, and I am not confident that we can deliver a mini-hydro scheme for \$7 million." The nature of the TOC, however, is that the declaration or when the alliance delivers the target out-turn cost is a very important stage in the development of a project. Up until then, the alliance carries a risk that, if the owners do not approve the target out-turn cost, the project ends and the alliance contractors are paid for their direct costs but receive no margin or profit on their direct costs and we cannot go forward.

What I said to the board was, "This project will go forward, regardless of whether or not we have the mini-hydro scheme; it is just that the mini-hydro scheme is a very critical element of it." The way we decided to go forward was for the board to

consider the total project budget of \$149 million and give me the authority through delegations to spend up to that budget in terms of proceeding with this project. What that resulted in was that I was able to tell the alliance that they could continue developing the project; I wanted a particular emphasis on the mini-hydro scheme but the project would not stall or pause.

I will be very open about this: does that constitute an approval of the TOC? In a very technical way, I think it probably did constitute an approval of the TOC by me—not by the board. Under my delegation to spend up to the total money, I certainly told the alliance that they could proceed—they had to proceed because I could not have realised the mini-hydro unless they proceeded. But did we have “agreement” on the TOC—and this is the word that we have to talk about? No, we did not have agreement on the TOC.

The elements of my answer to that question in May were: did the board consider the TOC? Yes, the board considered the TOC, and I said the board considered the TOC. I described the TOC as a draft TOC. Others have described the TOC as a TOC with provisional numbers in it. My dictionary has “provisional” equals “draft”. It is a draft. Did we have agreement? No, and the board were very aware that we did not have agreement on the TOC. Why can I say that we did not have agreement on the TOC? Because we then had to progress the mini-hydro scheme and a mini-hydro scheme was determined to come in at a budget of \$6.9 million in October 2009 and I notified the board in November 2009 that the TOC was now agreed because we had a mini-hydro scheme at that number.

That is the story. In respect of the question asked, my answer I think is clear: yes, the board did consider a TOC—no dispute about that. I described the TOC as a draft; others described the TOC as a TOC with provisional numbers in it. I said the TOC was not agreed. The TOC was not agreed. That is different from the ALG having approved it, because that is a process that must occur before the TOC is even presented to the board. Yes, there are a lot of technical ramifications as to how you must progress the TOC. Does that technically mean that I approved the TOC for it to proceed? I would say, yes, I probably did approve the TOC for it to proceed but that that did not indicate agreement, and the alliance, and the ALG, understood that clearly, which is why the mini-hydro scheme and therefore the TOC had to go all the way back through the process of approval by the ALG and referenced back to the board before it was announced.

In fact, it was probably in late July, early August, that my lack of confidence that we would proceed with a mini-hydro scheme had turned into confidence that we would proceed with a mini-hydro scheme. At that stage I thought that the mini-hydro scheme would come in between about \$6.8 million and \$7.2 million and I thought that was fine; that was close enough to achieve particularly that clear objective of greenhouse gas emission savings. It was not until October that it was all confirmed but there was sufficient certainty that when we released the details of the TOC and the total project costs of the enlarged Cotter Dam in the first week of September 2009 I was satisfied that we could then release the details of the TOC and the total project costs of the Murrumbidgee to Googong transfer.

So agreement I would say either occurred in September when I was comfortable

enough to say, “I think the TOC is right,” or it occurred in October when it was signed off or it occurred in November when I reported to the board that under my delegation I had now negotiated this process through.

Mr Smyth then went on to ask me when would it happen and I think again my comment was that I did not think it would happen before June, the way it was going, and I think that has been proven to be right. So I do not think in any of those answers to those questions did I mislead Mr Smyth or the Assembly.

**THE CHAIR:** Thank you. You have probably already answered this question for me. Are the various TOCs for each component of the water security program to an extent interdependent? I think you have already alluded to that but perhaps you could expand on that a bit more. Is it also true to say that the final TOCs for each component of the program could only be completed when all the issues for all three parts of the program were also settled and in agreement?

**Mr Sullivan:** They are independent in a sense but they are also interdependent. We had a TOC for the Googong Dam spillway resolved well before we had TOCs on either the Murrumbidgee to Googong transfer or the enlarged Cotter Dam. It is required that you have a TOC on the Murrumbidgee to Googong transfer independent of the TOC on the enlarged Cotter Dam but clearly they are developed by the same parties, they are part of the Bulk Water Alliance, which is all of the projects, and there are some interdependencies in respect of negotiation of elements of all TOCs together. This is probably a secondary thing. In May, we are at the start of, I guess, the hard part of the development of the TOC for the dam. That process was scheduled to be finished in June-July; it did not finish until August because we ran into significant issues in terms of the TOC development for the ECD, as has been canvassed in many committees.

The issue with this TOC was that it played into the discussion in respect of the dam. Most importantly, you will have amounts within your target out-turn cost which are not completely agreed. The question is materiality. So we would have elements in our target out-turn cost for the enlarged Cotter Dam which are largely agreed today but they were not agreed in terms of September 2009 when we released the TOC for the dam. The TOC has not varied in total. This is largely because the unagreed items are not material. There is no unagreed item in the dam which would represent anything like one per cent of the total TOC of the dam.

This one was different in that the issue around it was material. This was an issue of \$7 million in \$116 million—so over five per cent. It passes all accounting standards for a material difference. Knowing that the provision at the time that it was put in the TOC bore no resemblance to the current estimate for developing a mini-hydro scheme, it was impossible to agree. It would have been not right to say, “We’ll agree that,” knowing that there was a 30 per cent or more difference between the provisional sum and the current estimate for delivering that part of the project.

**THE CHAIR:** Can I go back to something which I brought up in my original question to you, regarding the answer to a question on notice which was put up during the estimates process from Mr Rattenbury. That was on 28 May, and it stated that “target out-turn costs have been finalised and will be available in mid-2009”. Given

what you have explained to me, and that it does present a different answer in terms of what you have just said—and I appreciate if you cannot tell me this, if this is something in confidence—who actually prepared the answer to that question on notice?

**Mr Sullivan:** It is an answer given by, of course, the Treasurer, and she is advised by her department, who take advice from us. And it is consistent. In May, I anticipated—I hoped that the TOC would be resolved by mid-2009. I did not hope, and in fact I thought the probable way it would be resolved would be that we would not be proceeding with the mini-hydro scheme and we would therefore have a very quickly agreed TOC. That was, delete \$7 million from the TOC, turn out a TOC which is \$109 million, turn out a TOC which was a total project cost of \$142 million, and we have got the answer. That was an expectation and that probably is what drove the advice we gave to Treasury to incorporate in the answer that the Treasurer gave to that. So I think it was a consistent and honest answer at that time.

What happened was that during June and July it became increasingly evident that there was, first, a possibility, turning into a probability, that the mini-hydro scheme could be delivered for the \$7 million. The fact that that turnaround occurred is probably what saw an even further delay in the TOC being agreed, because when we gave that answer, or when that answer was provided through Treasury and the Treasurer, the expectation that I had was that this would be resolved quickly because the advice from my colleagues would be that the mini-hydro scheme was going to cost you between \$8 million and \$9 million, and at that level the business case does not stack up, you cannot proceed with it, delete it from the TOC and then we have an agreed TOC.

The other provisional amount, being the approvals amount, by its nature had to be provisional, because it was an educated estimate. Until we went through the approvals process, we would not know what the approvals cost. It did not worry me, and it was also not material. It was well under five per cent of the total cost. So, by any accounting standard, it was fine.

That is the confidence of saying that we can conclude the TOC by June; it was driven by a view that I had that the TOC would be concluded, it would be concluded at a number well below \$116 million, and that as soon as it was concluded we would be able to release it. So with respect to the fact that that turned around, which is a very positive thing for us and for everyone, I think, it took longer.

**THE CHAIR:** Just to clarify, when the answer, and it was obviously a written answer to a question, came in—

**Mr Sullivan:** Yes.

**THE CHAIR:** stating that it had been finalised, it was based on advice from Actew that you expected it would be finalised in June, even though actually at the time it had not been. So it was based on an anticipated—

**Mr Sullivan:** It was based on an anticipation.

**MR COE:** Going on from that, that process that you used for advising and regarding the questions on notice, is that exactly the same process that you use for all other relevant questions on notice?

**Mr Sullivan:** Depending on the question.

**MR COE:** How might it differ from other questions, for instance?

**Mr Sullivan:** It depends who asks the question and what it relates to. If it does not relate to the Treasurer, it does not go through the Treasurer. But the process is that a minister who is required to answer a question of a committee can seek advice of their department, and their department may seek advice from Actew in terms of providing input to the answer to that question. Sometimes they do not, and sometimes Actew will say, "This is for you, not for us." But I cannot give a general answer which says that the same process for every question occurs. That would be misleading.

**MR COE:** Regarding the administrative process in terms of when the question gets lodged, and its drafting, checking and approvals, is it the same for each question?

**Mr Sullivan:** No.

**MR COE:** The ones that come before you?

**Mr Sullivan:** No. If you get the point, I will answer it. But it is not the same. These are responsibilities of the minister required to answer the question. Their process is their process. What I know is that, in respect of some questions, and questions which you would expect Actew to provide advice on, our advice is sought. We do not approve the answer. The answer is the answer of the minister responsible. So there is no way that Actew will approve what a minister will say. Actew provides, on request, advice in respect of material that will contribute to the answer. The minister then takes advice from their department and the minister signs off an answer to a committee. That is how I understand your process works. But I do not provide answers to a committee. I provide input when requested.

**MR COE:** I am more interested in the information when it leaves your organisation. I am more interested in the processes that are in place—

**Mr Sullivan:** You would have to ask a minister that. If I am requested for input, I give input. That is it.

**MR COE:** And that is the process that I am asking about. I am not asking about how it gets signed off by the minister. I am more interested in when information leaves Actew, what the checks are, what the processes are, before it goes on to any external body, and what systems are in place before it leaves your desk, to get ticked off.

**Mr Sullivan:** Sorry. In terms of the material that we provide another agency, it goes through the experts in our department, in our agency, in our corporation. It then generally will go through the company secretary, and it will come to me to sign off. I sign off that information and it then goes to the department.

**MR COE:** Regarding the relevant questions on notice—

**Mr Sullivan:** Which questions?

**MR COE:** The questions on notice regarding the costings, which we have seen: are you happy with the process that was implemented from your end, in terms of no information—

**Mr Sullivan:** Can you be more specific?

**MR COE:** We just heard Ms Bresnan—

**THE CHAIR:** Referring to the actual question from—

**MR COE:** That is right.

**Mr Sullivan:** You are referring to the one question that has been raised by the chair?

**MR COE:** The question that was just asked by—

**Mr Sullivan:** You said “questions”. I just want to make it clear that it is one question that has been raised.

**MR COE:** Sorry; I was referring to the question that Mr Rattenbury asked and Ms Bresnan referred to.

**Mr Sullivan:** Yes, I am satisfied with the input that Actew gave to that question at the time.

**MR COE:** And the process through which it was derived; you are happy with that?

**Mr Sullivan:** I do not know what you mean by that. I am happy with the input that I provided to the question.

**MR COE:** But I am referring to—

**Mr Sullivan:** You are asking me whether I am happy with the answer. That is not relevant to me.

**MR COE:** No, I am asking whether the process it went through within Actew was one that you are satisfied was appropriate?

**Mr Sullivan:** Yes.

**MR COE:** On another issue, the unagreed items: you referred to the unagreed items within—

**Mr Sullivan:** Provisional ones, I think we called them.

**MR COE:** Well, you referred to unagreed items.

**Mr Sullivan:** No, I said the TOC was unagreed.

**MR COE:** With respect to unagreed items or provisional items, would you please talk this through for the committee because, as you are well aware, we are not experts when it comes to dam construction. Would you please talk through what some of the unagreed items were at the time of the TOC being approximately \$96 million?

**Mr Sullivan:** So I will repeat what I have said earlier in this hearing, will I?

**THE CHAIR:** Mr Sullivan did actually go through this earlier.

**Mr Sullivan:** I have gone through that in detail. You were not here.

**MR COE:** Okay. Would you please give me a brief overview?

**Mr Sullivan:** There were two issues in the TOC for the Murrumbidgee to Googong transfer. The first was a mini-hydro system. The mini-hydro system was in the TOC as \$7 million as a provisional sum. The mini-hydro system is important to Actew in that (1) it is a material element of the transfer scheme and (2) it is one of the centrepieces of the board's desire to offset greenhouse gas emissions from the entire Bulk Water Alliance projects.

The advice that I had from the engineers and others within Actew was that the current costings of the mini-hydro scheme were between \$8 million and \$9 million. The other advice I had was that, unless the mini-hydro scheme could be delivered for \$7 million, the business case around the mini-hydro scheme was unsound and, therefore, we would not be able to incorporate the mini-hydro scheme into the project. This would result in the TOC being materially lower than the TOC that had been approved by the alliance leadership group and would reduce the total project cost but would also require Actew to provide further advice to the board as to how it would compensate for the loss of the mini-hydro scheme in terms of a greenhouse gas emissions strategy.

This was a significant item, material in that it constituted and represented more than five per cent of the total value of the TOC, and that gave it a very formal status of material in terms of accounting within the TOC. It had at that time significant doubt as to whether it would progress and, in my mind, 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.

The other amount within the TOC that was provisional was for approvals. It was \$2.3 million. I had no great concerns about the provisional amount set out for approvals. This was an estimate and it was an estimate that could only be proven by experience. So I was happy with the rigour around the development of the estimate for the approvals process. I would have been confident and comfortable in progressing the TOC with that element in it if it was the only disagreed item. So there was no disagreement about the provisional item called approvals. The disagreement was about the material item called the mini-hydro scheme. This was a very significant issue for the board.

**MR COE:** Thank you.

**THE CHAIR:** Do you have anything further on this?

**MR COE:** No, that is fine, thanks.

**THE CHAIR:** I understand you are not asking questions, Mr Barr.

**MR BARR:** No. Committee members are aware of my view in relation to even having this hearing, so I have no further comment.

**THE CHAIR:** Thank you. I might go to a question then. It is in relation to what you told the estimates committee, or what you were prepared to tell the estimates committee, on 18 May in relation to the costs of the Murrumbidgee to Googong pipeline. You stated to the public accounts hearing on 18 February this year:

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.

That was the statement made. Also, you reaffirmed the intention, or having no intention to reveal the TOC at the hearing, when you spoke on ABC radio on 19 February. I want to clarify—and in relation to what you have already told us this morning—whether it was something that was discussed with Actew management at all prior to the hearing date about what you would be prepared to reveal to the committee or to the hearing.

**Mr Sullivan:** This is the May hearing?

**THE CHAIR:** Yes.

**Mr Sullivan:** I think there was discussion and certainly I was saying that the TOC is not agreed; we are not going to release TOCs. I think that is consistent with the answer I gave to Mr Smyth. In respect of February—and I too want to make a couple of comments about February—I have learnt a lesson out of this; I have learnt a great lesson out of the February hearing. Remember that the February hearing was a sitting of the public accounts committee standing as a reviewer of annual reports. It was a follow-on to a hearing that had been conducted in December which, I guess, as is the nature of these things, asked very few questions about the annual report. It asked a lot of questions about the enlarged Cotter Dam. I remember the chair saying, “We hope to be able to resume this hearing early in the new year when we can concentrate on the dam.”

So I came to that hearing not expecting questions about the Murrumbidgee to Googong transfer. The lessons I have learnt are: (1) I believe I have got a good memory, a very good memory, but I will never rely on my memory again to go back nine months and say, “This is what I was thinking,” and (2) if someone quotes documents at me I will not answer questions ever again until I see the documents.

I accepted—and *Hansard* records the fact that I accepted—the words that were stated

at that hearing as being contained in those documents. I accepted it and I must say it threw me because I was suddenly being told that I had advised the shareholders post the board meeting that the TOC had been agreed when the TOC had never been agreed. Only the total project budget had been agreed.

I do not get *Hansard* for these things until a few days afterwards. I do not know whether members of the Assembly get *Hansard* earlier than members of the public do; they might see a draft. But that night I was facing a press release which said that I acknowledged or admitted in that hearing that I had misled the committee. Next morning I spoke to Mr Solly. I make a point of not refusing to speak to Ross Solly. It is basically the radio station that most of Canberra gets to and if Ross Solly wants to talk to me about an issue—unless I have a very good reason—I talk to Mr Solly. Again, a lesson I have learnt is that I should not have talked about this issue until I had actually satisfied myself as to what I had said in May, what had been said in *Hansard* in the committee hearing of the previous Thursday, and I had checked the documents.

I am very pleased that the member who asked those questions realised that she had made mistakes and wrote to the secretary of the committee and apologised “if the terminology I used caused confusion in any way”. All I will say is the terminology used caused great confusion to me. These were not minor errors. So I would basically ask that you look at my evidence in terms of February and my recollection as something that has taught a wizened bureaucrat a lot about how they should address these matters.

I do not withdraw from the statement that, on reflection, at the May hearings of the estimates committee I could have used other language. I could have been more open about what was worrying me and why was it not agreed. But in saying that, that is a very, very different statement from saying that I said, “The draft TOC has been to the board, it has a considerable way to go, it is not agreed.” I think that is fair.

As I say, I will not retract from what I said at the hearings of February, nor what I said to Mr Solly in his interview. The fact is that I was heading to Sydney for a funeral and was sitting by the edge of Lake George talking to Ross Solly about a dam, about a Murrumbidgee to Googong transfer, based on the information which I still at that stage thought was true, as contained in the questions asked, and my response was based very much around the truth and accuracy of the material presented to me at the hearing.

The admission of the member involved that it was not accurate, and the apology as to whether it caused confusion, I accept fully. I am not claiming maliciousness; I am not claiming anything like that. But it is a fact that that entire hearing was tarnished—badly tarnished—by basically an unfortunate mistake. I think it was called “mis-speak”. It was tarnished badly and it affected my responses at that hearing and it certainly affected my interview with Ross Solly.

When I had collected the material, I took then the first opportunity to write to the Speaker and put my view and that view was (1) that I had discovered there were inaccuracies in the material presented at the hearing in February and (2) that I had reflected on the statement in a press release that I had admitted misleading the

committee in that hearing and I refuted that and I pointed out the mistakes that had been made. From then on, of course, having seen the privileges committee formed, I made no further public comments ever again about this matter, which was very important, I think, because one of the things you should consider as a privileges committee is how much public comment was made once this committee was formed. If this was the justice system, of course people would have been held in contempt; you are not allowed to comment on a matter before the justice system. With the commonwealth parliament there is an unwritten law that once a committee is formed parliamentarians do not make comment. But comments were abounding—comments and assessments were abounding in this process.

I really do hope that coming out of this you consider whether as a committee you should be making recommendations to the Assembly around some guidelines around public comments during privileges committee hearings.

**THE CHAIR:** We might move on. Mr Coe?

**MR COE:** I have quite a broad question and I am really quite genuine about this: how do you think the committee process, whether it be public accounts, a select committee or a privileges committee, can be improved to get better and more accurate information and more free-flowing information?

**Mr Sullivan:** I will tell you one way, and I will use this committee as an example. When it was clearly evident to this committee that material contained in the Solly interview and the question on notice from Mr Rattenbury may be discussed at this hearing, this committee, through its secretary, provided me that material to be able to review it in advance of this committee hearing. That is very good practice. I am absolutely certain that there was a clear and reasonable strategy that the questions concerning Murrumbidgee to Googong transfer were going to be asked at that February hearing of the public accounts committee standing as an annual reports committee. I think it would have made the process of the committee, and the role of the committee in basically attempting to educe evidence and material, a whole lot better had I been provided that material—not told what questions I was going to be asked, but basically provided the material and told, “We want to examine this issue with you.” I know it was predetermined that it was going to be asked. People have told me that; I accept that they knew.

Rather than a trap, we would have had a considered discussion at the hearing. If a committee, whatever it is, is about educing information from witnesses to assist in a better governance of these projects, it would have seemed to me a very simple matter to say, “I want to ask you questions about this.” They knew I was not expecting questions about Murrumbidgee to Googong. My preparation for that day was about the enlarged Cotter Dam, because that is what I had been put on notice that we were going to talk about. It would have been a lot better had it been actually said.

The only answer otherwise is that everything will be taken on notice if anything new is introduced into a committee hearing. I have made a mistake in that I attempt to be extraordinarily open—sometimes robust, but open—in my discussion in committees. I do rely on, as I say, what I regarded to be a very good memory and a very good grasp of the subject matters that I am responsible for. But I think, after this, that, if any new

topic ever comes into a committee that I am not expecting, the answer will be very simple: put it on notice so that I can properly consider it.

If it is going to be properly considered, take the lead of this committee. I like the fact that I got that material yesterday which said, “You may be questioned.” It did not say, “These are going to be the questions” but “it would be good for you to refresh your memory about the transcript of the interview with Ross Solly, it would be good for you to understand the answer to the question from Shane Rattenbury and what the answer was.” In the time permitted, I could then do a considered review about what that meant.

That is how I would improve it. I would encourage committees to do that. These committees have names, but the names tend to be irrelevant. As I said, this was a public accounts committee standing as an annual reports committee and we were talking about what I said at an estimates committee, which had nothing to do with the estimates, back in May 2009 about a Bulk Water Alliance project. So the name of the committee does not telegraph to me any more what we are going to talk about. I do not bring the annual report to the committee any more.

So (1) if you are going to name committees, follow them. But (2) if you are going to raise other matters—and I have no problem with any matter being raised at any committee—if it is different, if it is new and you may have a view that something is wrong there, I think the fair thing to do, and the thing that will get the information you most need, would be basically to provide the witnesses—and they knew who the witness was going to be; I do the talking and the listening—with “the material on which we wish to examine you next week. Would you please come prepared to be able to answer these questions.”

The material in my written submission to this committee would have then been the material that that committee would have seen and we would not have this committee; this committee would not be on.

**THE CHAIR:** Can I interrupt? We are talking about the information that was given to the committee and you are talking about what sort of answers you would probably provide. One of the issues that have come up through this whole process is in relation to what information was given to the committee that was commercial-in-confidence; that has been discussed as well. I want to get from you what is your understanding of the process by which commercial-in-confidence or other such categories of information are subject to confidentiality considerations and how that should be dealt with before parliamentary committees.

**Mr Sullivan:** I think this is an issue that needs a lot of discussion in some form within the Assembly or a committee. We are a unique organisation. We are a corporation and we are governed by commonwealth corporations legislation, not ACT corporations legislation. We enter into the most significant commercial arrangements on infrastructure that have been entered into in this territory for a long, long time. We are engaged in very, very complex commercial discussions and negotiations and, in terms of the nature of an alliance where you are asking a series of large contractors to provide you with an open book on their commercial dealings, it presents a range of material which is extraordinarily commercial-in-confidence—not to us.

This is one of the distinctions I would like to draw: I do not think there is much where you would say, “This is commercial-in-confidence because ‘we’ don’t want this released.” Commercial-in-confidence is when it will harm the commercial operations of your commercial partners because you are driven in openness in terms of the material to be provided; you have to know that you have a good deal but it basically reveals to us the inner workings of large commercial organisations. When a committee seeks to see those inner workings, it is not what the commercial partners anticipated and I think it is a question of how we see those inner workings. There has to be confidence both ways. I do understand that there is potentially a way to seek to trade with information in-house but it transfers the security of that information from a contracted party, being Actew, into a non-contracted party, being the Assembly, who can decide to do what they like; I no longer can have a control over it.

I really think in those circumstances, as I say, the onus is that the commercial-in-confidence is around the contractor, not around us as a corporation. For me as a corporation, with respect to revealing for how much John Holland and Abigroup can construct an element of a dam like a crushing plant, I do not care. If I was allowed to reveal that, I would. But to have us reveal on behalf of Abigroup and John Holland that information which is extraordinarily valuable to their competitors is not right. It is commercial-in-confidence. That is what I think we have to work through. I was disappointed that, in the first exchange of material, which I regarded as private between us and the Assembly, it was delivered to the Assembly at 5 pm on one night and it was in the *Canberra Times* the next morning. That disappointed me. It gave me little faith in saying, “We can actually deal with the Assembly in a private and confidential way.”

I think this question is a very difficult one. As I say, my emphasis is not on saying there are things that are that commercial-in-confidence to me. There are things. Actew deals in possibilities. It was raised at a recent hearing, “Will you release your risk register?” My answer was, “No, I will not release my risk register.” That is something no corporation would ever do. But this is something that really requires a lot of thought and it cannot be caught up in buzz words and platitudes like, “They’re refusing to give us information which the committee decides we should hear.”

**THE CHAIR:** In relation to the federal parliament, and talking about your understanding of how committees deal with it, federally there has been a resolution by the Senate that they will not entertain any claims of commercial-in-confidence unless they are actually made by a minister and there has been a statement that accompanies that. It is then up to the committee to decide whether or not the claim of commercial-in-confidence is legitimate as such. So there are processes, and there are also processes in the Chief Minister’s handbook in terms of what information is tabled before the Assembly, and a minister deciding. So there are those processes about how that is handled.

The federal parliament is probably a good example of where committees decide whether or not that claim that comes from a minister is legitimate. In terms of what you were saying, essentially you were saying that the claim was there because any information that would have been given to the committee may have harmed those negotiations in dealing with what was going on in relation to the project. You have

done this, in essence, but can you give us more of an indication of how releasing the costs of the TOC at those estimates hearings in May would have affected the negotiations with the Bulk Water Alliance? Given that you mentioned earlier as well that with the total budget, the \$149.8 million, you had been given delegation essentially to go and negotiate—

**Mr Sullivan:** Up to.

**THE CHAIR:** Up to that price, yes. How would releasing that TOC in May have actually affected the dealings within the Bulk Water Alliance?

**Mr Sullivan:** My biggest concern about the TOC in that time was that the TOC was not going to be the TOC. It was not agreed. My anticipation at that time was that the TOC of \$116 million would turn into a TOC of \$109 million and it would reveal a piece of unfinished work, and that would be that we were searching for a substitute for the mini-hydro in terms of our greenhouse gas abatement strategy. There was nothing in particular. We had commercial negotiations going on. Commercial negotiations must, I think, progress to their end. If I am in a commercial negotiation and I am saying to someone, “Well, I don’t want to pay more than \$100 million for this,” and they are saying, “We want you to pay \$120 million,” and we know the answer is going to be somewhere in between those two numbers, it is critical that I do not release to the public my negotiating position of where I am going to. What has to be released to the public is what I have achieved and what accountability there is about what I have achieved. That is very, very important.

I will remind you of something else, and I think some of the best references to this were in the old days when the commonwealth had corporations under their wing. You saw this discussion a lot in the commonwealth. It is one thing to say that the Senate requires a minister to basically put a case; there is no minister responsible for Actew. The board is responsible for Actew, and me as managing director. There are two shareholding ministers. You will see this in terms of the legislation concerning political campaign advertising. You have had to work through that legislation because you ran into the same issue in requiring in that legislation that the minister responsible endorse and take forward issues concerning a political campaign. In respect of Actew, you discovered there was not a minister. So you had to address that legislation by saying that, in the case of Actew, it is the managing director who will do that.

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. It is quite different from a department of state through a minister saying, “This is commercial-in-confidence.” This is a corporation, and a corporation contracts. No minister is responsible for those contracts. No minister is responsible for signing off that we are building the Cotter Dam. 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 camp; it puts us in a different place from a department of state claiming commercial-in-confidence.

Going back to your question, it was really around the fact that we did not have a TOC. I did not believe that we had a TOC to release.

**THE CHAIR:** You are saying basically that revealing the TOC would have damaged those negotiations that are going on within the budget that you have got for those—

**Mr Sullivan:** No, we did not have a TOC to reveal.

**THE CHAIR:** But there was a total approved expenditure for the project, which was—

**Mr Sullivan:** But I was not asked that.

**THE CHAIR:** I know, but there were actually questions around the final project, the total price.

**Mr Sullivan:** No, not at those hearings, I don't think. Mr Smyth asked me two questions. The questions were around the TOC.

**THE CHAIR:** But there were questions around the 20 to 30 per cent and what the actual increase would be.

**Mr Sullivan:** Yes.

**THE CHAIR:** So there were questions around it. In relation to revealing that total expenditure for the project, do you feel that would have impacted on any negotiations that were going on with the Bulk Water Alliance?

**Mr Sullivan:** Just by a direct progression, if I was not certain about the TOC, I was not certain about the total project cost.

**THE CHAIR:** Even though you had been given delegation by your board to go and do that?

**Mr Sullivan:** I had been given delegation up to. The board basically said, "Look, if all this goes well and you get the mini-hydro for \$7 million, you need \$149 million to spend on this project. So here's your delegation, Mark. You've got \$149 million to deliver this project," knowing that my view at that stage was that I would need \$142 million and the TOC would turn into \$109 million, because it was not going to include—but until there is agreement on a TOC, I do not think there is anything to release, really.

**THE CHAIR:** Even though, on that date in May, you have been told by your board that you are going to spend up to that amount, and that had essentially been approved and finalised?

**Mr Sullivan:** That had been approved, yes. But I would have had to have been sitting in a committee saying, "Well, I don't think the mini-hydro scheme is going to go ahead. That means my greenhouse gas emissions strategy has gone, that means I'm going to have to find a new one of those and, in fact, rather than the approval of 149, I really only need 142." That is premature to me. What I wanted to say was, "When I know what the project cost is and when I know what the TOC is, clearly I have to

release it.”

If I can use the example of the dam: we have got into some fairly good discussion at times in the estimates about the progress of that TOC—what was TOC 1, what was TOC X, what was TOC Y and what was the final TOC? I always made a point of never ever having a number on progressing the TOC forward. My interest was the final TOC and the agreed TOC. I did not have an agreed TOC in respect of Murrumbidgee to Googong so I did not believe I could release it.

**THE CHAIR:** So in the hearing too there was a discussion about the 96 million, about that being the total project cost, essentially, even though before that time the 149.8 million had been essentially signed off as the final project cost.

**Mr Sullivan:** 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. I can take anyone through the arithmetic. If you then normalise those dollars and add in the mini-hydro, the comparison between the 96, plus 30 million 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. The 126—Mrs Dunne pointed out exactly what it was—was in dollar terms prior to 2009. That escalated up to about 141.4, and then you added \$7 million for the mini-hydro, which took it up to \$148.4 million. Actually, our project estimate was tracking very much in line. That was asked of me, except it was quoted as being “the price is in accord with what we had advised the government”, rather than it was the price increase that was in accord. It was a mistake. It was not fully there, but it was in accord.

**THE CHAIR:** Just to get clarification about particular figures being quoted in the hearing, are you essentially saying the 96 million was quoted as the figure rather than the 149.8, which was the approved figure at the time?

**Mr Sullivan:** Up to.

**THE CHAIR:** Up to, at the time, because there were concerns about commercial-in-confidence in relation to that?

**Mr Sullivan:** No, because it was consistent with that figure. It was not 96. It was 96 plus the 30 per cent escalation—

**THE CHAIR:** No, I read that—

**Mr Sullivan:** It was not 96 versus 149.

**THE CHAIR:** You did make that clear.

**Mr Sullivan:** Yes. The last publicly available information, which is what I used, was actually consistent with what the final total project cost was, as revealed when it was available. There was no real difference in talking about what was last publicly available on the basis that we did not yet have an agreed TOC or project cost. I have budget ceilings all over the place. The board expects that I will not spend them, or

hopes that I will not spend them. The board expectation was very clear here. It did not expect I was going to spend \$149 million because its expectation was that I would come back and say, “We’re not doing the mini-hydro.”

**THE CHAIR:** Mr Coe?

**MR COE:** No, thanks.

**THE CHAIR:** You do not have any further questions?

**MR COE:** No.

**THE CHAIR:** I did have another question. It relates to that discussion we have had about commercial-in-confidence. I mentioned the federal process that is used around commercial-in-confidence. There is also an understanding within that that, if a committee is satisfied that a statutory authority has the degree of independence that it has from ministerial direction, they will accept a statement from the head of the organisation. We have talked about what information was given to the public and what was not. Obviously reports are tabled before the Assembly so that information is made public. As we have mentioned, annual reports come before committees. Actew has a responsibility to provide information to the public as taxpayers’ money goes towards various projects. In attending that estimates committee in May and answering the questions about the Murrumbidgee to Googong project, if you did give any thought about what was in the public interest, what information should have been given to the public in relation to that project?

**Mr Sullivan:** I was concerned. 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. It creates an impression—I think a reasonable impression—in terms of: do these guys know what they are talking about? They are saying it might be 109, it might be 116 or it might be this.

I was most concerned that we release it when we could. In fact, I released it prior to formal sign-off that I could get the mini-hydro for less than \$7 million. I released it once I understood and once I was convinced as managing director that, yes, the mini-hydro would no longer be a material impact on the top of the project cost. So it was then released.

I think Actew has no desire to hide material. I really think that an objective review of the materials provided and the discussions conducted around the Bulk Water Alliance and the major water security projects would reveal a degree of information exchange that rarely would occur around construction processes of this size. To date I think there has been an honest attempt to exchange, to discuss this—I have said more than once—sometimes robustly. I will not back away from that; sometimes it is robust.

As I said, since I went into that hearing in February I have learnt lessons. On the basis of what was said, I immediately expressed my regret that maybe I could have said more in May. That is one part of that hearing that I do not walk away from—that is, there is a lesson for me there in terms of maybe not taking the question literally. I

think that if you look at the question literally and look at my answer there is no possible assertion that I did not honestly answer the question. But maybe I could have elaborated on the sorts of things that were worrying me.

Implicit in a TOC being considered by the board was that the TOC had been approved by the ALG. I knew that. At that stage I doubt anyone on that committee understood that linkage. They do now, but not then. Certainly, members of the public would not have understood that for a TOC to get to the board, to be considered by the board, implicit in that conversation is that the ALG has approved it. It will not go to the board otherwise. There was certainly room there where I could have said what I meant by saying, "Well, a TOC has got to the board and we haven't got agreement and there's a fair way to go to get agreement."

**THE CHAIR:** As you said, a literal discussion had occurred around the TOC. You had firm information with regard to other issues that the public had not been made aware of at that stage, and that was most of the costs associated with the TOC were known. You knew that the Actew board had approved the final budget for the project. You knew what the total budget was, what the total project cost was, and also that the cost of the project was going to be—we have had some discussion about that—outside that 96 million, plus the 30 per cent range which you have talked about. Did you think it might have been prudent—and you have probably already answered this question for me—to share some of this information with the committee, even if you considered you were not able to give specific information about the TOC itself?

**Mr Sullivan:** I think this goes back to Alistair Coe's question of how committees can perhaps operate better. I tend to go to a committee and answer the questions asked, and they were the two questions asked on Murrumbidgee to Googong. There was some discussion around the 96-plus.

**THE CHAIR:** Yes, I have got the transcript here about that.

**Mr Sullivan:** There was some discussion. Then, of course, 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 and the Murrumbidgee to Googong did not even rate a mention. It had certainly gone off some agendas. It may be that I need to take an opportunity in a committee, rather than answer questions, to engage in a discussion. When you go to committees as a public servant—when I used to go to committees—a "yes" or "no" suffices. That is what you say. I think we are getting into a discussion, and it is a good discussion, about maybe you say "yes" or "no" but you can say, "You might also be interested in this because it might be good for you to know." I am happy to engage in that sort of discussion—it would make committees better—but it will be interesting to see how it works.

**THE CHAIR:** Mr Coe, did you have any further questions?

**MR COE:** No, thank you.

**THE CHAIR:** It looks like we have got to the end of questions. Thank you, Mr Sullivan, for giving us your time today. There will be a transcript of today's hearing sent to you for accuracy, so you will be able to look at that. Thank you,

Mr Mackay, for coming here and sitting as an adviser today. Thank you, committee members and the secretary.

**Mr Sullivan:** Thank you.

**The committee adjourned at 10.47 am.**