IRON ORE PROCESSING (MINERALOGY PTY. LTD.) AGREEMENT AMENDMENT BILL 2020

Second Reading

Resumed from an earlier stage of the sitting.

HON SUE ELLERY (South Metropolitan — Leader of the House) [7.00 pm] — in reply: Before we broke for dinner, I had referred to the fact that modification of the freedom of information laws is usually done in one of four ways. Firstly, agencies are exempt under schedule 2 of the Freedom of Information Act, and there are some 22 agencies that are exempted and named in schedule 2 of that act. Secondly, by stating in another act that an agency is to be treated as if listed in schedule 2 of the FOI act. For example, this is the approach that was taken in section 77 of the Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Act 2015. Thirdly, by creating a specific exemption for documents that came into existence in a particular way and incorporating that exemption in clause 14 of schedule 1 of the Freedom of Information Act. These include matters of the kind mentioned in specific provisions of the Equal Opportunity Act 1984, the Legal Aid Commission Act 1976, the Parliamentary Commissioner Act 1971, or the Inspector of Custodial Services Act 2003; matters to which a direction under the provisions of the Parliamentary Commissioner Act 1971 or the Inspector of Custodial Services Act 2003 apply; or matters the disclosure of which would reveal anything said or admitted for the purposes of negotiating the settlement or conciliation of a complaint under the provisions of the Health and Disability Services (Complaints) Act 1995. Fourthly, by the inclusion of a specific modification clause in the act itself, as is specifically foreshadowed in section 8 of the Freedom of Information Act. This is the approach that is being taken in the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020. Similar provisions are section 13 of the High Risk Serious Offenders Act 2020, and section 5 of the Mandatory Testing (Infectious Diseases) Act 2014; they have similar modifications.

I thank Hon Aaron Stonehouse for his contribution. The honourable member, like many others, expressed concerns about the gravity of the measures to be taken in this bill. The government certainly recognises that the bill and some of the measures contained within it are unprecedented—the termination of arbitral awards, precluding further proceedings, and denying appeal, review and natural justice rights. These measures are not taken lightly; they are taken to maximise the chances of protecting the state from these massive claims, and from these claims being effectively rebadged based on different states' conduct and pursued as different actions against the state to get around the bill so that Mineralogy and Mr Palmer can achieve the same result. From the government's point of view, the measures taken in this bill are commensurate with the size of the claim and the risk it poses to the state.

The honourable member also highlighted media articles that referred to orders having been granted in Mr Palmer's favour in Queensland, and asked whether the bill remained urgent in light of those orders. The bill seeks to provide multiple protections against claims for damages by Mr Palmer and the Mineralogy parties. The bill seeks to invalidate any adverse outcomes for the state if the awards are registered or enforced by proceedings, including in courts outside WA, after the introduction date, which was 11 August 2020.

Mr Palmer has registered his 2014 and 2019 arbitral awards in the Queensland Supreme Court. He filed his application somewhat in stealth; his conduct in this matter highlights why the government is so concerned. Those orders were made without the application having been served on the state of Western Australia or the Queensland Court having heard from the Western Australian State Solicitor, which is most unusual. I am advised that the State Solicitor's Office is taking immediate steps to set aside those orders. I am also advised that those steps will likely involve an urgent hearing tomorrow morning.

In light of this, the urgency of the passing of the bill cannot be underestimated. It needs to receive royal assent today. The state and various lawyers acting on the state's behalf must be in a position to advise the court that there is legislation in place in WA that contains provisions that provide an answer to the claim. That argument needs to be available first thing tomorrow morning. I am also told that, in separate Federal Court proceedings filed in Queensland, Mr Palmer is seeking an order from the court to stop the passage of this bill. This is not a time to delay. This is not a time to risk the financial position of the state and Western Australians; it is a time to act, and act swiftly. The bill also establishes statutory indemnities that are designed to protect the state from awards whenever registered and enforced. Proceedings such as those in Queensland was one of the things that lawyers had prepared for when drafting the bill. The bill is designed to protect us from such an order, but we need the bill to be enforced in order to rely upon it.

I thank Hon Jacqui Boydell for her contribution and her support of the bill on behalf of the Nationals WA. She raised a number of issues around sovereign risk and the gravity of the measures on which I have already made some comment. I turn to three particular matters that the honourable member mentioned. She asked that the government specifically comment on the options that were open to it for dealing with this problem. Mr Palmer was successful in an arbitration before Mr McHugh in 2014. Mr Palmer and his companies commenced an arbitration in 2018 to

seek loss and damages arising from the matters underlying his 2014 award. The matters that led to the award were decisions made by the former Premier and Minister for State Development, Hon Colin Barnett, to reject a development proposal. The McGowan government does not disagree with, quibble with or criticise the former Premier's decision. In fact, the government has publicly declared support for Hon Colin Barnett's decision. It is just a fact that the government is now dealing with the fallout from that decision, and that fallout is the current arbitration. In that arbitration, Mr Palmer and his companies are claiming nearly $30 billion. The only other option available to the government apart from this bill is to proceed with the arbitration. The government has called on Mr Palmer to desist. Mr McHugh has ordered that the hearing will take place on 30 November 2020 for 15 days, and he will deliver his award in early 2021. The advice we have is that a successful defence cannot be guaranteed, notwithstanding the sound and respectable defences available to the state.

Secondly, the honourable member raised the risk of Mr Palmer utilising a free trade agreement. The state anticipates that Mineralogy, through its Singaporean parent company, may seek to bring a claim against the commonwealth on the basis that this bill affects the values and rights of its subsidiaries—Mineralogy and International Minerals. Mr Palmer has already threatened this type of challenge, based on a Singapore free trade agreement. The bill seeks to protect the state and the commonwealth through statutory indemnities and the capacity for the state indemnity to be assigned to the commonwealth to be set off against any free trade agreement liability, to avoid payment of any commonwealth liability that might be established.

The third matter raised by Hon Jacqui Boydell was around the powers to make subsidiary legislation. That certainly exists in no small form in the bill before us today. I will make two points. Firstly, the government accepts that the order-making power in the bill is unusually broad, but it is not unlimited. It is limited to the subject matter of the bill, so it cannot be used, for example, to deal with state agreements more generally. Secondly, the broad power is necessary to deal with an unusually large risk. The State Solicitor's Office, parliamentary counsel, State Counsel, the Solicitor-General and Clayton Utz have sought to indemnify all possible actions that Mr Palmer and his companies might seek to take to defeat the bill. We are expecting and anticipating that Mr Palmer and his companies will engage effectively a tsunami of lawyers to pore over the bill to develop arguments to get around it, and events in the last 24 hours indicate that is indeed the case. The orders provision is designed to deal with any action that, despite the best efforts of those lawyers, might not have been thought of or identified. That action might need to be taken very urgently, for the same reasons that this bill is urgent. We accept that this is an unusual provision. However, we are dealing with an unusual situation. Mr Palmer is prepared, it would appear, to go to extraordinary lengths. The state needs the fullest possible protections available, and the orders provision provides that protection.

I thank Hon Rick Mazza for his contribution. He raised a number of issues, such as sovereign risk, and the gravity of the bill's measures, which I have already touched on, but I wish to address two further issues that were raised by the member. First, the honourable member asked how we got here, and I think seeks to place the blame at the feet of various Labor governments. The honourable member suggests that the state agreement itself was obviously deficient. As I have mentioned, the dispute relates to the proposal provisions of this agreement. Those provisions are common across many state agreements adopted by both Labor and Liberal governments. Other state agreement proponents have to date worked cooperatively with the state, and, as a result, the proposal provisions have worked well and as they were intended. I also note that State Solicitor's Office provided advice to the government in late May 2014 recommending that the state appeal the arbitral award by Mr McHugh, AC, QC, of 20 May 2014. Secondly, the honourable member suggested that the economic risk might not be as real as the government suggests. The government has been advised by our legal advisers that there is a risk that the claim will succeed in whole or in part, and even a low fraction of $30 billion is potentially a very large amount. The government also notes that this arbitrator has decided against the state in his arbitration twice before, once in 2014 and once in 2019, and that our rights to appeal are very limited once an arbitration award is handed down. The economic risk is real.

I also thank Hon Robin Scott for his contribution.

I thank Hon Michael Mischin for his contribution. He raised a number of issues, such as the freedom of information provisions in the bill, and whether this sets a precedent. I have already dealt with that, but I will deal with two other comments of the honourable member. The honourable member suggested that cabinet had received notice of the bill before us after the Legislative Assembly. I wish to wish to clarify that cabinet was consulted at 4.00 pm on Tuesday, 11 August 2020, before the bill was introduced into the Legislative Assembly at 5.00 pm.

Hon Michael Mischin: I understand that it had not received advice. It would have had to have gone through cabinet.

Hon SUE ELLERY: I take the member's point. The honourable member queried how this bill sits with the state's model litigant obligations. The state is conducting, and will continue to conduct, litigation consistent with being a model litigant. That does not, however, preclude this legislature from enacting legislation such as the bill. It is appropriate that it do so, given the extraordinary circumstances of this matter, and the financial risk to the state, given the quantum of the claim.

I thank Hon Charles Smith for his support of the bill.

I thank Hon Robin Chapple for his contribution and his support, and his outlining of the history, not just of this particular state agreement, but state agreements more generally. The honourable member also raised free trade risks, which I have already addressed.

I thank Hon Nick Goiran for his contribution. He raised several matters, some of which I have addressed, including freedom of information, the state's model litigant policy, and the provisions of the bill that may be considered Henry VIII clauses. The honourable member asked me to confirm that Labor was in government and that Hon Geoff Gallop, AC, was Premier when the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act was initially passed. I absolutely confirm that. I want to address again the proposition that I think he put that somehow, because Hon Colin Barnett's name was used several times in a speech, I was seeking to attribute some sort of blame or criticism to Hon Colin Barnett. Nothing is further from the truth. The reference to him was a reference to the circumstances that arose when he took certain actions—actions that we are not critical of at all, and actions that we do not say are unreasonable, but as a result of those actions, Mr Palmer and Mineralogy et cetera took various actions in response.

There is nothing about the structure of this state agreement in relation to consideration of the project proposals that has given rise to Mineralogy's claim. The framework is standard and has been adopted in many state agreements ratified by both Labor and Liberal governments. The honourable member asked for legal advice documenting that there are reasonable prospects of success for Mr Palmer in his claim against the state. I think he was being a bit tongue in cheek in suggesting that somebody sign a document and provide a guarantee, because he knows that is not possible. The government has been advised by its legal advisers that there is a risk that his claim will succeed in whole or in part. As I said before, even a low fraction of $30 billion is a very large amount. As I also said, we already know that the arbitrator has decided against the state in his arbitration twice before. I also said that we know that our rights to appeal are very limited once an arbitration award is handed down, and the risk to the state is, unfortunately, very real.

The honourable member asked whether the introduction time, as a core element of the bill, is necessary to achieve the desired outcome. That is effectively an argument that if that of itself is enough, the passing of the bill within a specified time should not need to occur. The introduction time concept is an important element of the bill. However, that concept is not a solution or a basis for delaying the bill. The bill, like all bills, can come into operation only on royal assent. However, some elements, measures and protections in the bill apply to, in particular, proceedings that are commenced after the bill is introduced and might be completed during the period between introduction time and commencement on royal assent. If relevant proceedings against the state are in process or incomplete at royal assent, when the bill will commence, those proceedings will be terminated, even if started before the introduction time or after the introduction time.

The honourable member asked me to explain why this is not an intervention into the terms of the state agreement. This bill seeks to respect and affirm the Mineralogy state agreement, including the primary right of Mineralogy and International Minerals to submit new proposals for the Balmoral South project. However, the bill as legislation seeks to deal with two matters that might arise from and relate to the primary rights under the state agreement. First, it seeks to protect the state from, in particular, financial claims and litigation from the history of the Balmoral South proposal, and the minister and the state's consideration of those proposals. Second, it seeks to protect the state from any future damages claims in relation to the minister's consideration of any proposals submitted in the future under the state agreement.

The honourable member also asked whether other state agreements have the same problem, and suggests that rather than pursue this course of action tonight, would it not be better that we develop a response that would allow the minister to reject a proposal if was found to be deficient. First, to directly answer the question about whether other state agreements have the same "problem", as the honourable member calls it, many other agreements are similarly drafted. However, as I have mentioned, other state agreement proponents have to date worked cooperatively with the state, and that is expected to continue into the future. However, of course the state has had to respond to the risk raised by the 2014 arbitration award. The most recent state agreement, the Railway (BBI Rail Aus Pty Ltd) Agreement Act 2017, which was negotiated under the previous government and ratified by this government, includes an express capacity for the minister to refuse to consider a proposal if he or she considers it to be noncompliant with the requirements of the state agreement. This effectively puts the onus on the proponent to work with the state in developing its proposals and to bear the risk of adopting an aggressive approach. We have taken steps to improve future agreements, but we have not taken the step of amending all existing state agreements given the cooperative approach of all other state agreement proponents. Secondly, the honourable member's proposed solution, if you like, to amend state agreements to retrospectively give the power to reject a proposal will not solve the problem that we are faced with—that is, the claim for $30 billion—unless it has the same basic effect as this bill. It would

need to deem that the 2012 and 2014 decisions were breaches of the state agreement and to invalidate the awards. That seems like a distinction without a difference.

The honourable member asked which members of cabinet were briefed prior to the introduction of the bill. I have already noted that the entire cabinet was briefed at 4.00 pm prior to the bill's introduction at 5.00 pm on Tuesday, 11 August 2020. The following ministers were advised prior to the matter being considered by all cabinet ministers: the Premier, the Attorney General, the Treasurer, Minister Templeman, Minister Dawson, Minister Cook, Minister Johnston, Minister Saffioti and me.

The honourable member asked me to outline the current proceedings. I have referred to some of these proceedings already. To be clear, they include the current arbitration seeking damages against the state for ministerial decisions relating to the August 2012 Balmoral South proposals. Until the introduction of this bill, there were no other proceedings on foot between Mineralogy parties and the state; however, the state has been named as a party in unrelated proceedings commenced against Mineralogy by CITIC, but no relief has been sought against the state in those proceedings. In the last 24 to 48 hours, Mr Palmer's companies have commenced proceedings against the state in New South Wales, in the Queensland Supreme Court and in the Federal Court. The New South Wales Supreme Court and Queensland Supreme Court proceedings are to enforce the 2014 and 2019 arbitral awards. In the Federal Court proceedings, Mr Palmer seeks to injunct this place and this Parliament from passing this bill.

The honourable member asked what would happen if the legislation were challenged and found invalid, and the decision was handed down while the government was in caretaker mode ahead of the 2020 election. Although the government does not anticipate that the substance of the bill will be found to be unconstitutional or in any other way invalid, the member asked what would occur if that decision were handed down during the caretaker period. The government would expect that during the caretaker period any such result and consideration of its implications in light of circumstances at that future point in time would be undertaken in consultation with the Leader of the Opposition, as is convention.

I thank Hon Colin Tincknell for his contribution as well. He questioned the veracity of the figure of $30 billion for the claim. The claim details various heads of loss and damage. Some claims are in US dollars and some are in Australian dollars. The total of the claims amounts to $AU27.75 billion based on the exchange rates of Monday, 10 August 2020. I set out those figures in my second reading speech and I will now table a comparative table of the approximate damages, including interest, being claimed.

[See paper 4101.]

Hon SUE ELLERY: That figure does not include costs or other unquantified damages; for example, what I referred to in my second reading speech as the "second claim". The total amount therefore is in the range of $30 billion. No-one is making up that number for the purposes of scaremongering, which is what Hon Colin Tincknell suggested.

I am advised that the claim says that interest accrues on a daily basis—that is what is in the claim. I am advised that the daily additional cost, because of the interest accruing, is $1.8 million per day. These are not the state government's figures; these are Mr Palmer's figures from 28 May 2020.

Madam President, I appreciate that we are dealing with unprecedented legislation in an unprecedented way. I thank members for their contribution. I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon PETER COLLIER: I do not want to labour this point, but I am still a little confused about the implications of this bill not getting through this evening. Can the Leader of the House explain to me, in the first instance, why it was necessary for the bill to be ready at a minute past five on Tuesday afternoon?

Hon SUE ELLERY: This matter has already been ventilated by the Attorney General, who made the point that we wanted to, if you like, do it at a time when we would limit the capacity of Mr Palmer and his associated companies to seek registration of the award. A specific time was chosen when it was deemed he would not be able to do that. This is not the legal explanation; this is my explanation. It marks the spot, the introduction time, that sets the point that provides us with a degree of protection as well.

Hon PETER COLLIER: Does that protection mean that it must pass through both houses or that the legislative process has to commence?

Hon SUE ELLERY: The time of day that it was introduced is not related to the government's view and the advice that we have that we need to progress this bill as quickly as possible to minimise the risk to the state and to provide the maximum protection possible given Mr Palmer's default position to litigate, litigate, litigate. There are two elements here, honourable member. One argument, if you like, is that we mark the spot from which we cannot go backwards, so we are protected from that spot. The second argument is that having done that, Parliament needs to proceed with the bill as quickly as possible to mitigate against any further actions by Mr Palmer to seek to register the awards or progress his claim against the state. There are two separate points.

Hon PETER COLLIER: I understand that. That is what I thought. I am not being difficult here; I just want to understand this in my own mind. When did we get from the point that we were going to be dealing with this bill next week, and that was fine, to the point at which this has to go through tonight and the Legislative Assembly is waiting for it and then the Governor is apparently waiting at Government House? At what point did we change, because that changed pretty much within a matter of hours?

Hon SUE ELLERY: Yesterday morning at about eight o'clock, I sent the honourable member a text saying that my understanding was that we could deal with this over the three sitting days of next week. However, it became clear to me following Mr Palmer's public statement and then discussions with the Premier and others that we needed to act much quicker than that, so that was my fault. It was abundantly clear to me, once Mr Palmer made his public statements yesterday morning, I think on radio, that he was going to continue to pursue his claims and that we did not have time to wait until next week.

Hon PETER COLLIER: Thank you; I am comfortable with that, if that is what it was. I wondered whether some mechanical or legal imperative emerged over that period, but there was not.

Hon Sue Ellery: By way of interjection, he made public comments but he also started proceedings in the court yesterday.

Hon PETER COLLIER: Okay; that brings me to my next point. The Leader of the House mentioned in the precis of the second reading speech that Mr Palmer has now taken action in the Queensland Federal Court. Is that correct?

Hon Sue Ellery: Yes.

Hon PETER COLLIER: Did I hear the Leader of the House correctly when she said that he is attempting to circumvent the processes of the Western Australian Parliament? How is that possible? Can the Leader of the House explain it?

Hon SUE ELLERY: I am advised that in the Federal Court proceedings, he seeks to injunct this place and the Parliament from passing this bill. The orders that he is seeking are orders for specific performance—alternatively, injunctions under section 232 of the Australian Consumer Law; alternatively, orders under sections 237 and 243 of the Australian Consumer Law; and, alternatively, injunctions under the general law—requiring the state to: withdraw the amendment bill from Parliament; seek to agree with Mineralogy and International Minerals in respect of any amendments to the state agreement; participate in the arbitration under clause 42 of the state agreement; cease purporting to amend the state agreement contrary to clause 32 of the state agreement; cease purporting to resume the property of Mineralogy contrary to clause 30 of the state agreement; and cease purporting to terminate an extant arbitration contrary to clause 42 of the state agreement. He also claims, further or alternatively, damages against the state for breach of contract et cetera.

Hon PETER COLLIER: I am absolutely staggered. I am not a legal mind but perhaps my colleagues might have a go at that one. I am staggered that a court action could be taken in another jurisdiction to overturn a piece of legislation from another state. I think that is absolutely extraordinary.

Hon Sue Ellery: That's the nature of the beast.

Hon PETER COLLIER: I am not asking you. I have another question: has the legislation been drafted so that it does not allow Mr Palmer to seek damages at any time out of the current process, or previous awards that have been registered?

Hon SUE ELLERY: I am advised yes.

Hon ROBIN CHAPPLE: I really appreciate the Leader of the House reading in what has just happened. Is there any chance we could get a copy of that at some stage?

Hon Sue Ellery: I will arrange for that to happen.

Hon ROBIN CHAPPLE: That would be great.

Hon MICHAEL MISCHIN: I want to pick up a few things that have been raised by the Leader of the Opposition. I, too, am a bit surprised that those proceedings can be taken in the Federal Court. I know that the Leader of the House

will say it is the nature of the beast, but I know a lot of constituents who always want to take the state to court, as well as the Australian Human Rights Commission and the United Nations, and just about anywhere they can think of. It does not mean there is any viability to their claims. What is the government's position on legal advice as to the viability of a private litigant trying to prevent the Parliament of Western Australia from passing legislation or the government taking action to pursue a legislative agenda in the Parliament of Western Australia through—whether it is the Federal Court or a state court of another jurisdiction?

Hon SUE ELLERY: We are confident that it will not succeed. I will make the point that I did not refer to it in my second reading speech. I did not make any claim about the likelihood it would succeed, I just noted that it had occurred. The legal advice we have is that we are confident it will not succeed. I am told the action has never been taken before in Australia. I am told it has been attempted twice in New Zealand, unsuccessfully.

Hon MICHAEL MISCHIN: In short, on the best advice that is available and I think probably consistent with our instinctive understanding—not only from the opposition but any member who has had any time in this place—we know it is not a realistic claim, so we can set that aside as a matter that would demand urgency from this Parliament and requirement that this Parliament set aside its responsibilities to scrutinise legislation of this character put before it. We can then come back to the registration of the award. As I understand it and as the Leader of the House said, Mr Palmer filed an application in stealth. He might say that the government has presented this bill in stealth. A couple of minutes after 5.00 pm, the Attorney General proudly said that he had out-chess-manoeuvred Mr Palmer and got the legislation to an emergency cabinet meeting at 4.00 pm that day. It was dealt with at 4.10 pm that day and introduced to Parliament. Mr Palmer and others might say that was unusual and with stealth. In talking about extraordinary lengths to get around the bill, we could say that the government has gone to extraordinary lengths to get around any consequences of an arbitration under its state awards. One of the features of that was to prevent him registering the awards under the arbitration that he had gained in the course of due process. What is the significance of getting this bill initiated, introduced and possibly passed before he has a chance to register the awards that he has been provided by the duly appointed arbitrator acting in this matter?

Hon SUE ELLERY: While the advisers scribble me a note about that, I will go back to the honourable member's original comment. He said that given the advice is that the Federal Court matter trying to injunct the Parliament is unlikely to succeed, we should set that aside as a reason for the urgency of the bill. I did not provide that reference in response to an answer about urgency of the bill. I was asked to outline any current proceedings, so that is what I did. That is the point I made.

The bill being operative before the registration of the awards maximises the state's capacity to defeat those awards and their not being recognised by other courts. It will essentially provide, if you like, another layer to our argument. Even if an award has been registered, the fact that the bill has been passed will assist in our defence. It will not be a silver bullet that stops everything, but it will assist in our defence and in defeating those awards.

Hon MICHAEL MISCHIN: I understand that the issues here are complex and I accept that the minister needs to take advice on the matter. I am not trying to trip up the minister here, but this is important stuff.

Hon Sue Ellery: I remember the day when I wanted to be parliamentary secretary to the Attorney General and I said, "Yes, that would be great."

Hon MICHAEL MISCHIN: I will not say any more about that. This is a complicated matter but it is an important one, as I understand the Leader of the House appreciates. In the urgency of trying to get all of this underway, one of the features was to try to avoid the registration of the award before the bill was introduced. However, it would not necessarily be fatal to what the government is proposing, is that correct?

Hon Sue Ellery: I think that is an accurate characterisation.

Hon MICHAEL MISCHIN: Now that that has happened and the government has managed to introduce the bill, which has passed the Legislative Assembly, and we are in the midst of dealing with it here, and it will be passed here, is it fair to say that the risk is also fairly low of what is proposed will be jeopardised by the registration of the award?

Hon SUE ELLERY: I will put it another way: the risk continues to be reduced if the bill is passed.

Hon MICHAEL MISCHIN: There is an opportunity to scrutinise the bill in the way we are doing it. I can understand that the government would have liked it passed about an hour ago and the Governor to have signed it off and given it the royal assent, and so be it. However, the Parliament has a responsibility to examine the bill and if this matter did go to a committee for an early report, not much will have changed because registration of the award will have already occurred in another jurisdiction. Any consequences that flow from that would not be exacerbated or diminished by a committee of this Parliament examining this legislation before it is finally disposed of.

Hon Sue Ellery: Does the member mean by reference to a standing committee?

Hon MICHAEL MISCHIN: Yes.

Hon SUE ELLERY: I am not sure whether it would progress this bill to revisit that argument.

Hon MICHAEL MISCHIN: I understand that, but I am trying to understand why, if the award had been registered in another jurisdiction—it has happened—a committee could be dealing with this and it would not have made the slightest bit of difference to that fact and the legal consequences flowing from it.

Hon SUE ELLERY: Proceedings are underway. A hearing date of 28 August is set in New South Wales. It may well be that Clive Palmer is taking action as we speak to try to bring that forward. This state's strongest protection is to have the act in place. All the steps that lead to the act coming into place help—the preserving of that spot, for example, the fact that it has passed through the Legislative Assembly and that the parties here have indicated they will support it—but the best protection for the state is for the act to actually be in place.

Hon MICHAEL MISCHIN: Let us say Palmer comes to a hearing on 28 August and the bill passes on 29 August and gets royal assent. What orders could he obtain on 28 August that will make any difference to the legal effect of the legislation being passed immediately afterwards and, by its operation, disposing of any of his rights, obligations, avenues of appeal and the rest of it? What is the worst-case scenario?

Hon SUE ELLERY: What is the worst-case scenario? I am not sure that I can take it much further than I have, and I am not saying that to shut down the debate or to be difficult. Each of the steps we have taken thus far helps. But, as I said, the best protection is for the act to be in place as soon as possible. We may well take action tomorrow to bring the 28 August date forward. We do not know; so the strongest action we can take is for the act to be in place. The advisers might tell me otherwise, but I am not sure I can quantify what difference might be made if the hearing is on 28 August and the bill is assented to on 29 August. I think that is a moot point. It is about layering protections and the thickest layer we can have, if I can describe it that way, is to have the act in place.

Hon MICHAEL MISCHIN: Protection against what? What could actually happen that we are worried he will do before this bill passes?

Hon SUE ELLERY: I have been given a reverse analogy to my layers upon layers. It is like peeling the layers of an onion. The more layers we take off, the less protection we have. If the bill does not pass tonight and the act does not come into being, there is the prospect that what will happen in New South Wales would reflect what happened in Queensland. That will complicate matters. The advice I have is that if the bill is passed and the act is in place, there is more likelihood that the New South Wales court may indeed not register the award, taking into account what has happened in the Parliament of Western Australia.

Hon MICHAEL MISCHIN: It may be just me, but perhaps I did not express myself as well as I should have. What is the consequence if this bill is not in place when the award is registered? What are we protecting ourselves against? The award has been registered; a hearing to enforce it, presumably: what could happen that we need to try to prevent by the passage of this bill? Let us assume it passes and it all flows through. What is the worst that could happen?

Hon SUE ELLERY: We are seeking to eliminate the possibility of a chapter III constitutional challenge.

Hon NICK GOIRAN: We will get to the chapter III scenario because it seems to me that that opportunity has already passed. In the meantime, the minister mentioned that one of the government's concerns is that something is being done by stealth. Is there any requirement to give notice when registering an arbitration award for enforcement?

Hon SUE ELLERY: I am advised that Clayton Utz's advice to government is yes, there is a requirement, but we did not receive notice.

Hon NICK GOIRAN: To be clear, minister, that is notice prior to registering the award for enforcement, not notice once the award has been registered.

Hon SUE ELLERY: I think we might be talking about two different things. I am not sure if this is the question that the member is asking, but the advice that I have been given is that we would have expected to receive notice of the application. We did not. I think that the member's question may be: have we been advised of—no, well the member needs to ask his question again then.

Hon NICK GOIRAN: Let us be crystal clear about what I am discussing now so that the Leader of the House can get accurate advice. If a person wants to register their arbitration or award for enforcement, is there any requirement for them to give notice to the other party?

Hon SUE ELLERY: The advice I have is that the advice the government has been given is yes.

Hon NICK GOIRAN: I certainly hope that the government is getting good advice. I certainly hope so because the ordinary custom and practice when registering something for enforcement is that there is no obligation to give notice to the party. There is an obligation to give notice after the event, but not at the time of registering the award for enforcement. Nevertheless, if the government has advice that it wants to rely on, and then embark upon a mission to set aside a judgement on that basis, I wish it every success.

Can the minister confirm in which court the arbitration award has been registered? I know that she said it is in Queensland, but which court in Queensland?

Hon SUE ELLERY: The Queensland Supreme Court. While I am on my feet, if I may, I will table the document that I read out earlier to the chamber in response to Hon Peter Collier's line of questioning. This is a notice of filing a hearing in the Federal Court of Australia—file number QUD 257/2020.

[See paper 4102.]

Hon NICK GOIRAN: Minister, thank you for that. I think that for the purposes of expediting the consideration of this matter, it would be easiest for us, the minister and the adviser if we refer to things as the Supreme Court of Queensland matter and the Federal Court of Queensland matter, because they are two distinct actions. For the moment I just want to discuss the Supreme Court of Queensland matter, which in my view is the matter of the most seriousness to the state. Of all the matters on foot at the moment, it is the Supreme Court of Queensland matter that potentially poses the greatest risk to the state. Can the minister advise the chamber whether the Supreme Court of Queensland matter is a protected matter?

Hon SUE ELLERY: Yes.

Hon NICK GOIRAN: Does any clause in the bill extinguish protected matters?

Hon SUE ELLERY: The advice I have is that it is probably better characterised as a disputed matter.

Hon NICK GOIRAN: When I asked the Leader of the House earlier whether the Supreme Court of Queensland matter was a protected matter, her one-word response was yes. To be clear, are we now saying that it is not a protected matter?

Hon SUE ELLERY: I am advised that I need to correct the answer that I gave before. The advice that I am given now is that it is better characterised as a disputed matter. It is something that the bill is trying to prevent from happening.

Hon NICK GOIRAN: That is pretty significant and I wish I had been told that a lot earlier than right now. I will go back to my earlier question: does any clause in the bill seek to extinguish protected matters?

Hon SUE ELLERY: I am advised that clause 11 of the bill seeks to protect against disputed matters. Clause 19 of the bill —

Hon Nick Goiran: There is no clause 11 in the bill. There are only nine clauses in the bill.

Hon Michael Mischin: It is in clause 7, I think, minister—the proposed section.

Hon SUE ELLERY: It is all found within clause 7, which includes proposed new section 11, which is as I described—to protect against disputed matters—and proposed section 19, which seeks to prevent protected matters.

Hon NICK GOIRAN: Is the minister saying that the Supreme Court of Queensland matter is a disputed matter, not to be confused with a protected matter? But in any event, whether it is a disputed matter or a protected matter, the bill before us seeks to extinguish both disputed and protected matters.

Hon SUE ELLERY: I am advised yes.

Hon NICK GOIRAN: How is the Federal Court action in Queensland to be regarded? Is it a protected matter or a disputed matter?

Hon SUE ELLERY: A disputed matter.

Hon NICK GOIRAN: There was also talk about a New South Wales court action. Is that a disputed or a protected matter?

Hon SUE ELLERY: I am advised it is disputed.

Hon NICK GOIRAN: Is the government aware of any other court actions that it is involved in with respect to this matter that would be categorised as a disputed or protected matter other than the Supreme Court of Queensland matter, the Federal Court of Queensland matter and the New South Wales court matter?

Hon SUE ELLERY: None that we are aware of, although there is speculation in the media that Mr Palmer has said he intends to take the Attorney to the High Court for introducing a bill in the first place.

Hon NICK GOIRAN: Let us work on the basis of things that we know. We know that there is a Supreme Court of Queensland matter, there is a Federal Court of Queensland matter and there is a New South Wales court matter, all of which the government tells us are disputed matters, and the government tells us that all of these things will be extinguished courtesy of clause 7 in the bill, and in particular proposed section 11. In those circumstances, why then is the bill urgent, given that all of those court actions are disputed matters and they are all going to be extinguished?

Hon SUE ELLERY: There are two reasons. The absence of the act reduces the protections. We have already talked about that. Secondly, in the event that there are orders that cannot be put aside for whatever reason, it creates a risk of a chapter III matter in respect of the Constitution.

Hon NICK GOIRAN: The minister says that the absence of the act reduces the protections, but that would seem to suggest then that there is no confidence that proposed section 11 will have any effect. As the minister has explained to us, proposed section 11 found in clause 7 seeks to extinguish disputed matters. The minister has said that the three matters are disputed matters. Once they are in effect, irrespective of the time period, they become extinguished, so how does the absence of the act reduce that protection?

Hon SUE ELLERY: The timing of the orders is critical. If there are no orders in place, the underlying provisions of the application are extinguished. If orders are made, we have the capacity to say that they were made improperly, and, I think I have probably said it a couple of times now, remove layers of protection of the act or fail to put in place the protections of the provisions of the act. It increases the risk of chapter III.

Hon NICK GOIRAN: When we get to the heart of it, it all revolves around whether there are any court orders in place. In the three actions we have discussed, the Supreme Court of Queensland, the Federal Court of Queensland and New South Wales court —

Hon Sue Ellery: It is the timing of the orders. It is not necessarily whether they in place, it is the timing.

Hon NICK GOIRAN: I understand that. My question is: are any court orders in place in any of those three matters?

Hon SUE ELLERY: In the Queensland Supreme Court.

Hon NICK GOIRAN: If those Supreme Court of Queensland orders are already in place, does that not mean the bill has already been defeated?

Hon SUE ELLERY: No, for the reasons I have outlined already, whether it is my analogy of layer upon layer or the other analogy of removing layers of an onion, it goes to the level of protection that the state has.

Hon NICK GOIRAN: I will move off this topic. I am not at all satisfied with the explanation. Either proposed section 11, which seeks to extinguish disputed matters, is effective or it is not effective. If it is effective, it will capture what the minister has discussed and what we have described as the Supreme Court of Queensland matter, the Federal Court of Queensland matter and the New South Wales court matter. If section 11, as proposed by clause 7 of the bill, is not effective, this is all just an entire waste of time, and the fact that there are already orders in place may well mean that nothing we are going to do this evening is of any effect. I move off the line of questioning.

Before I move to my final questions about clause 1, I just thank Hon Robin Chapple for going out of his way to quite reasonably ask for this notice to be tabled, and I thank the minister for providing it. It goes to the heart of one of the questions that was asked by Hon Peter Collier about the proposal by Mr Palmer that he could somehow injunct the Parliament of Western Australia. Eight orders are being sought by Mr Palmer, via his lawyers, Alexander Law in Paddington, Queensland. Order 1 contains six different provisions, the first of which is total nonsense, because it is asking the state of Western Australia to withdraw the amendment bill from Parliament, as though somehow the Federal Court could order the state of Western Australia to withdraw a bill before the Parliament. That is never going to happen, and that is a frivolous claim by Mr Palmer and his associates. The lawyer from Alexander Law who thought it was appropriate to put that in should take a good, long look at themselves, because it is an embarrassment to the legal profession that somebody would try to seek an order for that. I hope that the state of Western Australia goes after Mr Palmer and his associates with respect to that matter with full force.

I am in no position to provide any comment on the remaining matters, which are substantial and include seeking the state to participate in the arbitration and various other things. For all I know, Mr Palmer and his associates may well have a case with regard to those matters, and that is a matter for the state and its advisers to work out, but I absolutely agree with Hon Peter Collier that there is no way in this world another court will tell any member of this place to withdraw any bills. Of course, it is another thing altogether for a court to deem a bill valid or not, but for it to withdraw a bill is absurd.

I move to my final questions. The Leader of the House might recall that in my contribution to the second reading debate I asked her about a few matters and I flagged that if she did not have the opportunity to deal with them in her reply, I would take them up at clause 1. Can the Leader of the House indicate to the chamber whether any of the clauses in the bill seek to confer immunity from proceedings?

Hon SUE ELLERY: I am asked to seek further information about what it is that the member is seeking. We are not sure that we understand exactly what the member is asking.

Hon NICK GOIRAN: One of the fundamental legislative principles asks whether legislation is sufficient with regard to the rights and liberties of individuals and depends on, for example, whether the legislation contains a number of

things. One of those things is: does it confer immunity from proceedings or prosecution without adequate justification? I do not want a response from government, "Yes, it's got that and it's got adequate justification." I want to know if there is a clause anywhere in this bill that seeks to confer immunity on the state from proceedings.

Hon SUE ELLERY: The relevant provisions in the bill are proposed section 11(1) to (9), "State to have no liability connected with disputed matters"; proposed section 12(1) to (9), "No appeal or review in respect of disputed matters"; proposed section 13(1) to (9), "Documents"; proposed section 18(1) to (8), "Protected matters not to have certain effects and related provisions"; proposed section 19(1) to (8), "State to have no liability connected with protected matters"; proposed section 20(1) to (10), "No appeal or review or criminal liability in respect of protected matters"; and proposed section 21(1) to (9), "Documents".

Hon NICK GOIRAN: I thank the Leader of the House. We will take them up when we get to clause 7, which I understand contains all of the seven provisions the Leader of the House referred to, which would normally attract the interest of the Standing Committee on Legislation. I have two final matters. Does the bill adversely affect anyone's rights and liberties, or impose obligations in a retrospective fashion?

Hon SUE ELLERY: Yes, it certainly affects Mineralogy's entitlements.

Hon NICK GOIRAN: We will take that up at clause 7, then. Lastly, is there any provision in the bill that is a Henry VIII clause?

Hon SUE ELLERY: Yes, proposed sections 30 and 31.

Hon AARON STONEHOUSE: I have a few questions surrounding the letter the Attorney General tabled in the other place yesterday. I refer to the letter dated 2 August 2020 from Mineralogy Pty Ltd and signed by a Mr Thomas Browning. It was addressed to the senior assistant State Solicitor, Ms Tania Jeyamohan; I apologise if I have pronounced that name incorrectly. With regard to the letter, I will first of all pick up on what the Attorney General said in other place, because I think it was actually somewhat misleading. The Attorney General made some claims that it was an offer of settlement; I am not so sure that it is. The advice I have received is that it is something more akin to an offer of treat rather than an offer of settlement, but that is okay. I think we are used to some loose language like that from the Attorney General. The Attorney General also said that it was a letter from Clive Palmer. I think we should be clear that it was not a letter from Clive Palmer; it was a letter from Mineralogy Pty Ltd, or at least the legal counsel for Mineralogy Pty Ltd. I would have thought that the Attorney General, as an experienced lawyer, would understand the difference between an individual person and a company. My question is around this letter and whether the Attorney General or state government has, at any time, entertained the offer that was being proffered in that letter. The offer was that if the mediation that is, I think, referred to in clause 2, were to take place somewhere other than in Western Australia—which at that time Mr Palmer was not able to enter—and if such an agreement were reached, Mineralogy Pty Ltd might consider dropping its constitutional challenge against the state for the hard border closure.

Hon SUE ELLERY: I do not have a copy of that letter, but in any event, I can disabuse you of the notion that the Attorney General said something incorrect by referring to Mr Palmer. The member will be aware, of course, that Mr Palmer is the sole director of Mineralogy.

Hon Aaron Stonehouse: Of course.

Hon SUE ELLERY: So who does the member think the letter is from, if it is from Mineralogy?

Hon Aaron Stonehouse interjected.

Hon SUE ELLERY: Yes, and I am just trying to make sure that the member understands that Mr Palmer is the sole director of Mineralogy.

I think the member's question was: did the government entertain the notion that it should participate in some kind of trade about that? Yes? The answer to that is no. I think the member then made a point about Mr Palmer being unable to enter Western Australia. Of course, the member is aware that he never actually applied. That has been well ventilated already.

Hon AARON STONEHOUSE: It is going to take a while if we both assume that the other is an idiot and is not familiar with the details of the case. I would rather not do that. I am aware that Mr Palmer did not apply for an exemption. I do not want to ventilate all the details of his challenge to the border claim. All I want to know is whether, at any time, serious consideration was given to what has been proffered here. If that is not the case, I am wondering why that is. I understand that this is a separate issue, and that we are not here to debate the border challenge. However, it would seem to me that at least at some point, despite how frustrating it must be for the Attorney General and the Premier to have to deal with Mr Palmer and Mineralogy Pty Ltd and the various legal challenges, this offer is not necessarily a bad offer. As a layperson looking at this, the idea is that we might move the mediation to another state. I understand that the counsel the state has been engaging on the matter of the arbitration for the Balmoral project are Sydney-based counsel. I am not

sure who the counsel for the state border challenge have been. Perhaps that can be clarified. I am not sure who that is at this stage. Perhaps it would be in the state's interests to seriously consider an offer like that. Who knows what kind of chaos we might have if a High Court ruling on the constitutional challenge were to be in favour of Mr Palmer or Mineralogy Pty Ltd. That would potentially be a disaster. There has been a bit of speculation about what we might do and how we might react to such a ruling. I find it remarkable that the government was willing to reject such an offer outright, without giving it serious consideration. I find that quite remarkable if that was the case.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Just before you answer that, Leader of the House, as you said yourself, member, the issues that you have raised are outside the purview of the bill before the chamber. I have given you a little leeway on that, but that will not continue. I will allow the Leader of the House to —

Hon SUE ELLERY: I was just going to make that point. I am happy to debate our position on the border at any time and in any place, but not in a debate about this bill. That matter is not canvassed within the bill.

Clause put and passed.

Clause 2: Commencement —

Hon NICK GOIRAN: This is quite an unusual clause. It states —

> This Act comes into operation on the day on which it receives the Royal Assent.

I understand the government would like that to happen today. I have been at pains over several years on multiple bills to get the Leader of the House and other ministers to agree to a similar clause as is currently sitting here as clause 2, and every minister who has sat in that chair has told me that it is not possible to do exactly what we are doing right now in clause 2 because it defies all the conventions of this Parliament. The Leader of the House and others have repeatedly told me that only the first two clauses can be expressed to commence in this fashion, and at best all the other clauses have to commence the day after the act receives royal assent. Why is that not the case in this instance?

Hon SUE ELLERY: The honourable member is quite correct. I have sat at this table and had that argument with the honourable member on more occasions than I care to remember. The member is absolutely right. The government's position has been, and will be for the next bill that comes before the chamber, that that is parliamentary counsel's drafting convention for how the commencement clauses of bills should be set out. We are in an extraordinary situation, and we have an extraordinary response to that situation. I understand very well the point that the honourable member is making. I do not want him to think that every bill before the house will look like this. This is an extraordinary piece of legislation.

Hon NICK GOIRAN: Obviously that convention must be there for a reason. What is the reason?

Hon SUE ELLERY: I do not want to debate the convention that applies to a commencement clause that is not actually before us.

Hon Nick Goiran: That is exactly what is before us.

Hon SUE ELLERY: The member is talking about why we have the convention that we do it the other way.

Hon Nick Goiran: You could have chosen to do that. You could have said from clause 3 onwards, as you do in every other bill.

Hon SUE ELLERY: Chair, we have debated on many occasions the structure and various elements of the preferred commencement clause of parliamentary counsel. The argument put by Hon Nick Goiran on many occasions is that that convention is not appropriate and we should adopt a commencement clause that is structured in the way it is at this moment. We have had that argument. I do not know that it helps us to go back to that argument, other than for me to acknowledge that the member is right—this is not an ordinary commencement clause—and to make the point that we are dealing with extraordinary circumstances.

The DEPUTY CHAIR: Leader of the House, if that is the case, then I suggest that if there are further questions along the same lines, you simply indicate that you will not be answering them, and they will then come to the point that they will be repetitive and not accepted. In this case, I give Hon Nick Goiran the call.

Hon NICK GOIRAN: What is the risk with us proceeding with clause 2 in its current fashion rather than in the conventional fashion?

Hon SUE ELLERY: We have canvassed all those reasons.

Hon Nick Goiran: No, you have not. You have not said that in all of the debate tonight, so do not say you have done it when you have not done it.

Hon SUE ELLERY: I am standing, and I have the call. I am not able to take the honourable member's question any further.

Hon NICK GOIRAN: In other words, for the public record, the Leader of the House does not know, and none of the advisers before her know. So we are left with the situation that the Leader of the House is expecting us to pass a bill tonight that she says is urgent, but she will not tell us whether there is a risk associated with clause 2. I hope that there is no problem with clause 2 as it is currently drafted, and that the Leader of the House has absolute confidence that there will not be any risk. The Leader of the House will not even tell us what the risk is. Plainly, there must be something; otherwise, the convention would not be there in the first place.

My only other question on clause 2 is: are there any provisions that will have application prior to assent?

Hon SUE ELLERY: There are provisions in the bill that are retrospective, if you like. However, they will come into effect only once the bill receives assent.

Hon MICHAEL MISCHIN: I do not want to labour this point, but I am curious to ensure that this bill will do what it is intended to do. Clause 2 states —

> This Act comes into operation on the day on which it receives the Royal Assent.

I do not recall now whether it is in the Interpretation Act, but does the law have cognisance of part of a day, or will it take effect from midnight? Let us say that if the bill gets royal assent at one minute before midnight tonight, it will have taken effect, by operation of clause 2, from midnight last night.

Hon SUE ELLERY: The honourable member's characterisation is correct.

Clause put and passed.

Clauses 3 to 6 put and passed.

Clause 7: Part 3 inserted —

Hon NICK GOIRAN: The first new section contained in clause 7 is proposed section 7, "Terms used". I have a number of questions about the terms used. The first is about the term "adjudicator". Why is there no reference to this in the explanatory memorandum, and what should the explanatory memorandum say?

Hon SUE ELLERY: The explanatory memorandum states —

> **Proposed section 7 — Terms used**
>
> Proposed section 7 defines the terms used in Part 3, including the following key terms.

The explanatory memorandum does not set out every term; it sets out key terms.

Hon NICK GOIRAN: Minister, one of the terms used is "arrangement". Obviously, the government considers that "arrangement" is not a key term. The bill at page 4, line 6, paragraph (c) refers to an "instrument". What is intended or considered to be an instrument that is not a contract, deed or agreement?

Hon SUE ELLERY: It is the honourable member's favourite; it is a catch-all and could include, for example, a conflict deed. It is intended to capture a range of matters rather than a list of every single one.

Hon NICK GOIRAN: Below that, at paragraph (d), there is a reference to "an understanding". I have not seen a definition of "an understanding". What is intended to be the difference between an understanding and an agreement?

Hon SUE ELLERY: I start by making the point that many of the provisions in the bill before us are deliberately broad. An understanding is something less formal than an agreement. It is more informal. Mr Palmer say that he relied on an exchange of letters and it was his understanding that the intent was X or the result was Y. It is less formal terminology.

Hon NICK GOIRAN: Another term used is "civil wrong". What sanctions and civil types other than those listed at paragraph (f) are intended to be captured under civil wrong?

Hon SUE ELLERY: One of the lessons learnt out of the Bell Group experience was that it may be the case that litigants lodge complaints with, for example, professional bodies like the Law Society of Western Australia or others about the professional conduct of those exercising their responsibilities on behalf of the government on the litigation. It is drafted broadly to try to capture any of those complaints, as a consequence, as I said, of lessons learnt in the Bell experience and I guess from the Mr Palmer's history as a litigant.

Hon NICK GOIRAN: Is the reference to "other civil type" intended to be read as a sanction of another civil type?

Hon SUE ELLERY: The bill states —

> ***civil wrong*** includes (without limitation) the following —

I cannot give the member an example of what might be captured under "other civil type". It is a catch-all. The clause is drafted in such a way that it is broad enough to capture anything that might happen.

Hon NICK GOIRAN: I understand that, minister, but paragraph (f) refers to maladministration, an adverse finding and a penalty. It then goes on to say —

> … or other sanction of a disciplinary, regulatory or other civil type;

Is it intended to be read as another sanction of a civil type?

Hon SUE ELLERY: It is a qualifying term. It is meant to qualify that the sanction is of a civil nature.

Hon MICHAEL MISCHIN: I refer the minister to proposed section 7(1) and the definition of the term "introduction time" at the bottom of page 7, which is —

> … the beginning of the day on which the Bill for the amending Act is introduced into the Legislative Assembly;

Presumably, this bill is the amending legislation. Am I right in thinking that the only two references to the term "introduction time" apart from that in proposed section 7 are in proposed sections 11(5)(a) and 12(5)(a)?

Hon SUE ELLERY: I am advised that it also appears in proposed sections 13(6), 19(5), 20(5) and 21(6).

Hon MICHAEL MISCHIN: Given that by operation of clause 2 and proposed section 7(1) the bill comes into operation on the day it receives royal assent and that the purpose of these clauses is to cover matters that are integral to the operation of the legislation, why is introduction time necessary?

Hon SUE ELLERY: It seeks to cover the kinds of events that might occur between "introduction time" and the time of assent.

Hon PETER COLLIER: In that instance, I understand the introduction time is to do with the significance of reading it into the Legislative Assembly and that royal assent could potentially be this evening. I assume the court action in New South Wales is an example of that; has there been anything else?

Hon SUE ELLERY: There are the two Queensland elements: Queensland supreme and Queensland federal.

Hon ROBIN CHAPPLE: I have a question on clause 7. I refer to the terms used and "first Balmoral South proposal means". Is it specifically defined? If it either changes its name, or, as Mr Palmer has done quite regularly, he hives it off to a third party and then gets it back, does it change any of these situations?

Hon SUE ELLERY: It is a historic document, so it is the name that was given to the specific project, which cannot be changed. The document exists in that name. It is a reference to a historical document, the name of which cannot be changed.

Hon NICK GOIRAN: I am looking at clause 7, proposed section 7, and the definition of "disputed matter". Reference is made to the "Minister's refusal or purported refusal, on or around 4 September 2012". Why is the date uncertain?

Hon SUE ELLERY: With no disrespect to any lawyer in the room, I am advised it is a drafting nicety. A letter was signed on that date. We assume it was on or around that date when the relevant minister made the decision but the letter was signed on that date.

Hon NICK GOIRAN: Is the Leader of the House in a position to table that letter?

Hon SUE ELLERY: I do not have it with me, but I can give the honourable member an undertaking that I will table it when I am able to.

Hon NICK GOIRAN: That is fine. While the Leader of the House is getting a copy of that letter could I also ask her whether she is in a position to table the table the "Minister's requirement" which was on or around 22 July 2014, which is in paragraph (c), as well as the "Minister's refusal or purported refusal, on or around 22 August 2013"? Are we in a position to obtain those documents at some stage this evening?

Hon SUE ELLERY: Honourable member, that might be harder to do because some of the documents are quite detailed and they are specific to that particular project. Tabling them here and now would make them public and the government does not normally reveal the specific elements of respective projects that are part of state agreements. That is not normally the case, so I do not think that I can table them. However, I may be able to table the letter from 4 September 2012. We are trying to find the letter. Let us move on and I will try to get the letter.

Hon NICK GOIRAN: To be clear, it seems like —

Hon SUE ELLERY: Can the honourable member name the documents he is seeking so that it is clear and we do not have to run around?

Hon NICK GOIRAN: I totally agree. From what I understand from my interpretation of what the Leader of the House said, there is a potential capacity this evening to table the minister's refusal that was said to have occurred on or around 4 September 2012. There is also the potential of being able to table the minister's refusal, which was

said to have happened on or around 22 August 2013. However, what is unlikely to be able to be tabled is the minister's requirement, which was said to have occurred on or around 22 July 2014.

Hon Sue Ellery: By interjection, that is correct.

Hon NICK GOIRAN: Lastly, regarding these potential documents to be tabled, reference is made to the proposal itself, which is said to have been submitted on or around 8 August 2012. What is the government's position on that document?

Hon SUE ELLERY: I am not able to table that because it would include commercially sensitive information.

I have, in my hot little hand, a letter to Mr Sharma, managing director of Mineralogy Pty Ltd, headed "Project Proposal Submission for the Balmoral South Iron Ore Project". It was signed by Colin Barnett, MLA, Premier; Minister for State Development on 4 September 2012.

[See paper 4103.]

Hon NICK GOIRAN: Is the Leader of the House still working on the second one?

Hon SUE ELLERY: I am trying. I will just get some advice. I am sorry, honourable member; I may have jumped the gun. Regarding the second letter he seeks, dated 22 August 2013, I am advised it has commercially sensitive material attached to it so I am not in a position to table it.

Hon NICK GOIRAN: Far be it from me to advise the government what it may or may not want to do in due course, but I suggest that it may want to comply with its requirements under the Financial Management Act with regard to the non-provision of the information tonight, because the last thing the government wants to do is to find that Mr Palmer launches some kind of action that says that the government has not complied with that particular provision. Anyway, I leave that in the capable hands of the Leader of the House.

I would like to move to the issue of the introduction time, which my learned friend Hon Michael Mischin kindly drew to our attention. Would there be any benefit or improvement to the bill if the introduction time actually specified the date on which the bill was introduced into the Legislative Assembly, rather than staying in its current form?

Hon SUE ELLERY: I am advised that there is no material benefit.

Hon MICHAEL MISCHIN: I have nothing further to deal with under proposed section 7. Perhaps I will let Hon Nick Goiran deal with a matter on that proposed section.

Hon NICK GOIRAN: I thank my colleague for the courtesy. I have one final question on proposed section 7 under clause 7, and that is about the definition of "legal costs". Is the definition that is outlined on page 8 of the bill consistent with the definition of "legal costs" otherwise used in Western Australian statute law?

Hon SUE ELLERY: Without checking all the other pieces of legislation in which legal costs might be referred to, I cannot answer that question directly. I can tell the member what I have said before; that is, broadly speaking, these provisions were deliberately drafted to be broad. However, I am not able to answer the member specifically about whether this definition of "legal costs" is broader than what appears in any other legislation.

Hon ROBIN CHAPPLE: I refer to paragraph (a) at line 15 on page 7 of the bill. The government cannot actually provide a copy of those concerns because they are commercial-in-confidence. Can the Leader of the House broadly identify what those issues were? I understand there were 46 conditions.

Hon SUE ELLERY: The primary reason given by Colin Barnett was that the proposal proposed to undertake works that were already approved to be undertaken pursuant to another project under the same state agreement, and that the proposal failed to provide sufficient detail, clarity and firm commitments.

Hon MICHAEL MISCHIN: Just touching on the matter that Hon Nick Goiran raised about legal costs—this will be covered by a later proposed section, but it is part of the same clause—I take it that the idea is that once this legislation comes into operation, the state will have no liability for any of the costs incurred by Mr Palmer or any of the costs to which he would ordinarily be entitled by way of being a successful party to an arbitration and for which an order has been given in his favour. Would that be right?

Hon SUE ELLERY: The short answer is yes, but a slightly longer answer is that there are some extant costs. They are orders. They are preserved, and the state will honour those.

Hon MICHAEL MISCHIN: I thank the Leader of the House for that. I stress that I do not burn a candle for Mr Palmer and the like, but it does seem a little unreasonable if, as a successful party to litigation, at least so far, he would be denied entitlement to cover his legal costs. Where are those costs orders preserved in the bill?

Hon SUE ELLERY: Proposed section 26(4) preserves the costs that have been awarded in the Supreme Court matter.

Hon MICHAEL MISCHIN: Is he entitled to any costs as a result of the two successful awards from the arbitrator to date?

Hon SUE ELLERY: I do not have advice here about 2014, although we think that if there were, they would have been paid by now. I am advised that for the 2019 action, the costs would be captured in the orders that I referred to in respect of the Supreme Court.

Hon NICK GOIRAN: What if they have not been paid? Will the state still pay them?

Hon SUE ELLERY: If they are the extant orders, as I described in my earlier answer, they will be paid. If they are not, they will not be paid.

Hon ROBIN CHAPPLE: I go back to the point I was raising before. One of the things that is required of state agreement acts, when putting something forward, is that Joint Ore Reserves Committee data be provided on anticipated reserves. Is that one of the problems that was encountered?

Hon SUE ELLERY: I do not want to try to make the advisers find something that they may not have with them now. I will give the member an undertaking that if we are able to find it and we are able to provide the member with more information, we will. It just may not be this evening.

The DEPUTY CHAIR (Hon Martin Aldridge): Just before I give the call to Hon Michael Mischin, this is an extraordinarily long clause, and probably the easiest way for us to work through it methodically is by proposed section. It does not mean that we cannot jump around the clause, because the question before the Chair will remain that clause 7 do stand as printed. But if we can maybe work through it that way, that will expedite debate in an orderly way.

Hon MICHAEL MISCHIN: That is what I was endeavouring to do, because some of these provisions are fairly interrelated and there may be a little toing and froing. I take the Leader of the House back to the answer that she gave Hon Nick Goiran about the costs. I think the Leader of the House said that if they are extant orders, the costs will be paid, and if they are not, they will not be paid. Let us take the 2019 arbitration award. I do not know the content of that, what the arbitrator said about it and how it was concluded, but let us say that the arbitrator said, "Okay, Mr Palmer, you have succeeded in this", but made no comment about costs on the basis that it would be something that would be dealt with further down the track. By extinguishing the effect of that award and so forth, and pretending that it never happened, will the state be prepared to cover Mr Palmer's reasonable costs of having succeeded in obtaining an arbitration award in his favour, even though the question of costs has not yet been ruled on or determined by the arbitrator?

Hon SUE ELLERY: There are two parts to this answer. I take the member back to proposed section 26(4). That is the only commitment that the state has given. It is worth noting, though, that if any costs were awarded out of the 2014 matter, Mr Palmer has not sought them.

Hon Nick Goiran: He probably does not need it.

Hon SUE ELLERY: I guarantee that he does not need it. The state is not going to facilitate that.

Hon MICHAEL MISCHIN: Since we are dealing with proposed section 26, subsection (4) deals with —

> … a liability that the State has to any person under an order of a court made before commencement to pay any of the person's legal costs connected with any proceedings before the court that are completed before commencement.

Unless I have missed something, that would not cover the costs that he has incurred in successfully mounting the arbitration that led to an award. Is the minister saying that, notwithstanding that he was successful to that point and got an award from the arbitrator and has incurred legal costs in securing that award, the state will not have a liability and it will not indemnify him for the costs that he has legitimately incurred?

Hon SUE ELLERY: He will not be indemnified.

Hon MICHAEL MISCHIN: So would it be fair to say that we are not only taking away all the success that he has achieved so far, but also having him pay for it?

Hon Sue Ellery interjected.

Hon MICHAEL MISCHIN: Whether it worries him in the future or worries him at all is beside the point; that is the case. I will take that as a yes. So far as the awards themselves are concerned, we were told at a briefing this morning that no-one can be privy to those—that they are confidential. Does that confidentiality arise out of the commercial arbitration legislation or out of the provisions of the state agreement?

Hon SUE ELLERY: I am advised that it is both.

Hon MICHAEL MISCHIN: With this bill coming into operation and extinguishing those proceedings as if they never happened, will those awards then be able to be perused or tabled in the Parliament or otherwise available for members to consider; and, if not, why not?

Hon SUE ELLERY: Confidentiality will still apply. It is not the intention that once these matters are dealt with, those documents will be made public.

Hon MICHAEL MISCHIN: If a member of this place were to request the minister to table those documents so that members could see the reasons Mr McHugh favoured Mineralogy in two of the arbitrations held to date and made awards in Mineralogy's favour, would we or would we not be able to find out or dig behind it?

Hon SUE ELLERY: I think the appropriate answer to that is that it is not the intent of the legislation. The member, as a member of Parliament, can ask any question he wants. I cannot say to him that at some point in the future he will never get the answer, or that there will be no circumstances in which he will ever get them. I can tell him that it is not the intent of this legislation to make them public, but that does not stop the member or anyone else from asking at some point in the future.

Hon MICHAEL MISCHIN: Just to clarify: there is no prohibition then, at some appropriate time, from asking the Attorney General to table those award determinations?

Hon SUE ELLERY: I will take the honourable member to proposed section 10(3) in clause 7. It states —

> The following provisions of the *Commercial Arbitration Act 2012* continue to apply in relation to a relevant arbitration terminated under subsection (1) —

It then refers to proposed paragraphs (a), (b) and (c). Paragraph (a) in particular refers to section 27E, which is the section that goes to confidentiality. I do not want to mislead the member: that is where the confidentiality provisions, referred to by this bill, are contained.

Hon Michael Mischin: So it will continue apply, subject to the same restrictions that are currently in place.

Hon SUE ELLERY: Yes.

Hon MICHAEL MISCHIN: I thank the Leader of the House. Turning now to proposed section 8, what is the purpose of proposed subsection (7)? Let me put it another way. I know what its purpose is, but I would like to know why it is necessary.

Hon SUE ELLERY: I am advised that that provision facilitates courts in other jurisdictions having regard to this bill when they are considering proceedings connected with disputed or protected matters, which includes arbitration awards.

Hon ROBIN CHAPPLE: I am having trouble following where we are, because we seem to be running around all over the place, but I do take the point of trying to work through this chronology. It might be easier if I refer to a term used in clause 7, page 9, which states —

> ***Mineralogy*** means Mineralogy Pty Ltd …
>
> ***Mr Palmer*** —
>
> (a) means the individual who, on 10 August 2020, is named Clive Frederick Palmer and is a director of Mineralogy;

Through doing a company search, I found that Mr Clive Palmer ceased to be a director on 27 February 2019.

Hon SUE ELLERY: That is not the advice available to me.

Hon Robin Chapple: It is a company search as of today.

Hon SUE ELLERY: As at 10 August 2020, 10.36 am Australian Eastern Standard Time, Mr Clive Frederick Palmer is listed as a director and the appointment date is 27 February 2019.

Hon NICK GOIRAN: Let us make sure that we get this absolutely right, Leader of the House. Is the way that lines 23 to 25 on page 9 are listed at the moment intended to be read that Mr Palmer is a director of that company, or is it intended to be read that he was a director on 10 August 2020? Clearly, it is intended to be read that that is his name, Clive Frederick Palmer, on 10 August 2020. I want to make sure that there is no way it can be interpreted in any other way. I assume that the government's intent is that he was a director on that day.

Hon SUE ELLERY: Correct.

Hon MICHAEL MISCHIN: We better hope that the records are correct, otherwise we might have a bit of a problem!

Unless anyone has got anything before page 18, which is what I was dealing with, just getting back to proposed section 8(7)—I appreciate what the minister was saying there—I am just curious about page 10 of the explanatory memorandum that was tabled consequential upon the second reading speech. The minister will see that under

"Proposed section 8 — Other preliminary provisions", the penultimate paragraph on page 10 deals with proposed subsection (7), but another paragraph at the end deals with proposed subsection (7). I am not sure which one that is, given that it does not seem to have anything to do with the proposed subsection (7) that we are dealing with and there are only seven subsections in proposed section 8. Can the minister help me out as to whether it deals with another clause in the bill?

Hon SUE ELLERY: Both paragraphs refer to the same proposed subsection.

Hon NICK GOIRAN: If there are no other questions about proposed section 8—still, obviously, operating under clause 7—I have some questions about "Division 2 — Main provisions", which lead into proposed section 9. Which of the three matters that the minister has referred to today—that is, the Queensland Supreme Court matter, the Federal Court matter and the New South Wales matter—deal with this claim that the minister tabled in the form of a comparative table, totalling some $27 billion? Is that the New South Wales matter?

Hon SUE ELLERY: Can we make sure that we absolutely understand what the member is asking. Is the member asking: why are they —

Hon Nick Goiran: Which of the three court actions is dealing with the so-called $27 billion? Is it the New South Wales matter?

Hon SUE ELLERY: Thank you, member. They are the Queensland Supreme Court matter and the New South Wales application to register.

Hon NICK GOIRAN: Is the New South Wales application to register a duplicate of the Queensland Supreme Court matter?

Hon SUE ELLERY: I am advised that we understand it to be similar.

Hon NICK GOIRAN: But the Queensland one is more advanced than the New South Wales one, insofar as I understand from our discussion earlier that there is an order of the court in the Queensland Supreme Court matter. I understand the minister indicated that it is the intention of the state to try to set aside those orders. They are all then matters that the minister has indicated are considered to be disputed matters that will be dealt with in proposed section 11, so we will get to that in a moment. In the meantime, proposed section 10, found on page 19, deals with any relevant arbitrations and awards. Is there a convenient list of the relevant arbitrations and awards that would be terminated as a result of proposed section 10?

Hon SUE ELLERY: "Relevant arbitration arrangement" is a defined term on page 14. There is not a list. I cannot give the member a printed list, but it would capture the first arbitration, the May 2014 award; the second arbitration, the 2019 award; and the current arbitration. If I can use a colloquialism, it is intended to kill any arbitration.

Hon NICK GOIRAN: All right. That sounds like a list to me.

Hon Sue Ellery: I don't have a written one.

Hon NICK GOIRAN: Okay, sorry. Not in documentary form, but —

Hon SUE ELLERY: Sorry, I might just draw something else to the honourable member's attention. Just for completeness, I take the member to proposed section 10(4), which refers to the arbitral award dated 20 May 2014, and over the page, proposed section 10(6) refers to the award dated 11 October 2019. That is just for completeness.

Hon NICK GOIRAN: Yes. It is my understanding that the award dated 20 May 2014, referred to in proposed section 10(4), has now been registered in the Queensland Supreme Court matter, but that the award dated 11 October 2019, referred to in proposed section 10(6), is yet to be registered. Is that right?

Hon SUE ELLERY: No. I have the order from the Supreme Court of Queensland of 13 August 2020. It states —

> **THE ORDER OF THE COURT IS THAT:**
>
> 1. Under section 35 of the *Commercial Arbitration Act 2013*, the following awards made by the Hon Michael McHugh dated:
>
>   a. 20 May 2014; and
>
>   b. 11 October2019,
>
>   be enforced;
>
> 2. The affidavit of Shane Robert Bosma be marked as confidential and not be opened without order of the Court.

Hon NICK GOIRAN: Both those awards—the one dated 20 May 2014 and the one dated 11 October 2019—are currently registered as orders of the Supreme Court of Queensland. Both proposed section 10(4) and proposed

section 10(6) state that the awards are of no effect and are taken never to have had any effect. Would that have any impact on the registered court order in the Supreme Court of Queensland?

Hon SUE ELLERY: We would say that any attempt to consider those awards needs to be cognisant of the provisions of this bill when it becomes an act, and that those awards will then be taken to have never had effect.

Hon NICK GOIRAN: All right; well, good luck with that. If an order has already been made in another jurisdiction—not even a Western Australian court, but another jurisdiction's court—I do not see how proposed section 10(4) and 10(6) can have any bearing on a court in Queensland. Even if it did, I would have thought that that would absolutely be interference with the court. Nevertheless, as I say, I wish the state every success and the best of luck in its endeavours.

That said, my further questions are on proposed section 11, so it is appropriate to check whether other members want to ask a question on proposed section 10, other than this final one from me. Proposed section 10(3) goes out of its way to specify certain sections of the Commercial Arbitration Act 2012 that need to continue to apply. Why have we chosen those particular sections to continue to apply, notwithstanding everything else?

Hon SUE ELLERY: I am not sure whether the member was out of the chamber on urgent parliamentary business —

Hon Nick Goiran: I think I was.

Hon SUE ELLERY: We talked about this before. It is to preserve the confidentiality provisions.

Hon Nick Goiran: Sorry, yes.

The DEPUTY CHAIR: Members, we are going to move to proposed section 11, unless there are any takers on proposed sections 9 or 10.

Hon MICHAEL MISCHIN: Proposed section 11 will do. Just to wrap this up in a bundle, I take it that the operation of this provision is that when there are simply applications for orders to enforce the awards, the state is hoping that by operation of the act, the foundation for obtaining those orders will fall way because, as a matter of law, there will no longer be an arbitration award upon which that order can be made. The Leader of the House is nodding, just for the record, so I am on the right track there. The difficulty, however, is that the government had hoped to avoid any order being made in respect of those awards before this legislation had passed. Am I right in saying that there is a two-pronged attack on that, or two strategies? One of them is that, by operation of, say, proposed section 11(6), the order itself would be extinguished; would that be correct? The Leader of the House is indicating agreement. The difficulty, however, is that if the order is made by a court outside the Western Australian jurisdiction and territorial boundaries and the like, the legislation may not be able to operate outside our boundaries. The government is hoping that the extinguishment of the award will provide an opportunity to have those orders rescinded in that court of another jurisdiction; would that be right? I will put it another way. An order has been made in Queensland, on the application of Mineralogy or Mr Palmer. The Leader of the House is hoping that by the operation of the bill, the foundation or basis for obtaining that order will be extinguished, and to the extent that an order has been made that he is relying upon in that other jurisdiction, the Leader of the House will be able by some mechanism to say that that is not a valid order because there is no foundation for it as a matter of law here. If it becomes necessary to make an application in that court and for the Leader of the House to say, "Yes, you have issued an order, but as a matter of fact there is no basis for it", the Leader of the House will end up doing that.

Hon SUE ELLERY: That is correct.

Hon MICHAEL MISCHIN: Thank you, minister. Mention has been made of chapter III and the problems that might arise there. Can the Leader of the House clarify for the benefit of the chamber that we are talking about chapter III of the Commonwealth Constitution; is that right?

Hon SUE ELLERY: Yes.

Hon MICHAEL MISCHIN: Can the Leader of the House tell us how that presents a difficulty, so that we can understand what problem the state is facing and how it hopes to overcome that problem?

Hon SUE ELLERY: To the extent that there is a chapter III issue, we rely on the indemnities that are set out in the provisions, the set-offs, and the provision that relates to the state not being able to appropriate for the purposes of damages.

Hon MICHAEL MISCHIN: Can the Leader of the House explain what the indemnities are, and we might then have a better idea of how the government proposes to address that and the complications that we are trying to overcome by getting this bill through as quickly as possible?

Hon SUE ELLERY: We are talking about chapter III to the extent that legislation cannot interfere with an order of a court. So, to the extent that there is an order that we cannot deal with and the court orders against the state,

we will rely upon those things that I have just set out—namely, the indemnities, the set-offs, and the provision that prevents the state from being able to make appropriations for the purpose of damages.

The DEPUTY CHAIR: Members, we are dealing with clause 7, and we are up to what will be new section 11 of the act. Can members indicate to me the next section that they would like to speak to?

Hon NICK GOIRAN: To assist members, proposed sections 11 and 12 deal with disputed matters, and proposed section 13 deals with documents and freedom of information, so it is probably best to deal with proposed sections 11 and 12 cognately. Dealing with disputed matters, is it a risk that if an order from another jurisdiction is seen to have full force and effect, the state will not be able to rely upon the indemnity provisions?

Hon SUE ELLERY: If we cannot rely on the indemnities, we will seek to rely on the set-off provisions. If we cannot rely on the set-off provisions, we will seek to rely on those provisions that prevent us from appropriating for the purpose of damages.

Hon NICK GOIRAN: Would it be fair to say that if the indemnity provisions are not able to be relied upon, there is little prospect that the set-off provisions would be able to be relied upon?

Hon SUE ELLERY: I am not sure that it would be fair to say that. We are trying to build a series of protections. Time will tell whether they are successful or not. We are acting on the best possible advice to try to put together a series of layers of protection for the state of Western Australia, and we will give it our best shot.

Hon MICHAEL MISCHIN: I have a couple of questions on the freedom of information matter. The minister identified four means by which the operation of the Freedom of Information Act can be excluded, but why do we need an exclusion in this case? Mr Palmer and Mineralogy are presumably able to get access to these materials now, if they do not have them already. Why are we saying that following the passage of this bill and its coming into operation, certain things will be denied access through freedom of information?

Hon SUE ELLERY: There is a theme here, which is that this litigant is seen to have form in trying to use his vast resources to tie up the resources of those who in this case have fewer resources than him in order to get his way. In the first instance, we do not want our officers tied up in having to deal with freedom of information requests for information that we do not want to share with someone who is taking action against us. That is, I guess, the broad theme. The member would be aware, as a former Attorney General, that much of the material he may be seeking may well be material that is commercial in confidence or legal professional privilege in any event, so he is unlikely to be looking for something that he could access in any event.

The theme or ribbon running through the bill, if I can describe it that way, is that we are casting the net as broadly as possible to try to stop him trying to undermine the state's attempts to preserve the rights of Western Australians. That is what we are trying to do. It is not unusual. I identified those four provisions that the state has relied upon to exempt freedom of information. It is not unusual. Straight up, some 22 agencies are exempted, and then there are a range of provisions across other legislation whereby either particular documents or, indeed, agencies are exempted from having to comply with freedom of information provisions.

The DEPUTY CHAIR (Hon Matthew Swinbourn): Members, the question is that clause 7 stands as printed. I think we have worked through to proposed section 13 on page 25, so it would be helpful if members could keep progressing through the clause and, if possible, indicate which particular proposed section they wish to speak to if they are not speaking to proposed section 13.

Hon NICK GOIRAN: Thank you, Mr Deputy Chair. For my part, I am talking to proposed section 14, which deals with indemnity. Is there any precedent that we can rely on that indicates that it is possible to force another person or entity to indemnify the state?

Hon SUE ELLERY: We are not aware of any precedent.

Hon MICHAEL MISCHIN: Moving on, unless anyone has anything to ask about any proposed section before proposed section 20 on page 43 —

The DEPUTY CHAIR: Honourable member, just proceed with your question; other members can indicate whether they feel we have jumped too far ahead after you have given up the call.

Hon MICHAEL MISCHIN: I direct the attention of the Leader of the House to page 45 and proposed section 20(8), which states —

> Any conduct of the State that occurs or arises before, on or after commencement, and that is, or is connected with, a protected matter does not constitute an offence and is taken never to have constituted an offence.

"State" includes a state agent. Does that indemnity from offences include any servant of the state?

Hon SUE ELLERY: Yes, it does.

Hon MICHAEL MISCHIN: Is the minister saying that if someone connected with this commits a fraud, or is stealing, or is even a murderer, I suppose—if Mr Palmer comes over and one of the Attorney General's heavy boys decides to terminate him with extreme prejudice to get rid of the problem —

Hon Sue Ellery: Honourable member, I think you can withdraw that.

Hon MICHAEL MISCHIN: I was being facetious —

Hon Sue Ellery: *Hansard* does not pick that up.

Hon MICHAEL MISCHIN: Okay; I will tell Hansard that I am being facetious.

To what extent are we talking about an offence? Is it any offence under the Criminal Code, and why is that necessary? What is the concern here—that a state agent or someone acting on behalf of the state might have or has committed an offence and we are absolving them from and rendering harmless the processes of the law? It seems very strange indeed—fraud, forgery, stealing, destruction of documents.

Hon SUE ELLERY: I will take the honourable member to a couple of documents. Page 23 of the explanatory memorandum states —

> For clarity, the Bill does not suggest that anything done by a State authority or agent connected with a protected matter would give rise to an offence if not for subsection (8). However, subsection (8) seeks to protect State authorities and agents from complaints that the Project Proponents, or any other person, may make.

That takes us back to the definition of "protected matter" set out on page 13 of the bill. It is a specifically defined matter. Proposed subsection (8) on page 45 of the bill, which the honourable member is talking about, requires that the matter be connected with a protected matter. That is set out in the definition of "protected matter", and that is the starting point.

Hon NICK GOIRAN: Proposed section 16 deals with matters relating to the commonwealth, and there is a like provision under proposed section 24. What is the concern that gives rise to the need to list these matters relating to the commonwealth?

Hon SUE ELLERY: A member, perhaps even two members, in their second reading contribution asked me about free trade agreements, and I responded to them in my second reading reply. That is what it relates to.

Hon NICK GOIRAN: Is the only concern about matters with the commonwealth free trade agreements? Are there other matters that might enliven commonwealth jurisdiction that we are concerned about?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: Proposed section 17 deals with a number of matters under the heading "Further provisions about liability of State". In particular, proposed subsection (2) states —

> No amount can be charged to, or paid out of, the Consolidated Account to meet the liability.

Is there any precedent for that?

Hon SUE ELLERY: No.

Hon NICK GOIRAN: Is it effectively the case that the "break glass in case of emergency" position on these matters is that if all else fails, the state will rely on proposed section 17(2) to say, "Despite the fact that we owe money, we can't pay it because we can't knock on the door of the consolidated account and make any payment"?

Hon SUE ELLERY: The honourable member made that point about 10 minutes ago. It is the indemnities and the set-offs and then the provisions that would restrict the government from appropriating funds for that purpose.

Hon MICHAEL MISCHIN: Unless there is something else, I am interested now in the Henry VIII clauses, of which there are several. I will leave it there, because Hon Nick Goiran wants to ask a question about proposed section 29.

Hon NICK GOIRAN: Before we move to proposed sections 30 and 31, which the Leader of the House identified in her second reading reply speech as Henry VIII clauses, I have a question on proposed section 29. What is expected to be prescribed?

Hon SUE ELLERY: I cannot give a specific regulation that the government knows that it is going to make. I know the member does not like it, but this is a catch-all to give us the head of power to do that.

Hon MICHAEL MISCHIN: Proposed section 30, which provides for ministerial orders, states —

> Subsection (2) applies if the Minister is of the opinion, having regard to the purposes and subject matter of this Part, that 1 or more of the following circumstances exist or may exist —

It goes on to state that the part of the act in which this section is contained, part 3, does or does not deal adequately or appropriately with a matter or thing. Indeed, proposed section 30(1)(c) states —

> this Part applies to a matter or thing to which it is not appropriate for this Part to apply;

What is the test of appropriateness in order to be able to contain the operation of a section that allows the minister to recommend to the Governor to make an order that changes the application of the act in such a fashion? This is short of something that gives executive power to the Premier and ministers to overturn provisions in other laws. This is quite an extraordinarily broad ability to make or subvert the law that is going to be passed by this Parliament.

Hon SUE ELLERY: There is not a defined text of appropriate or not appropriate. As a Legislative Council legislator for some 19 years, I understand the significance of that and I understand the significance of these two proposed sections; they are not small matters. However, the purpose of the provision is to provide a broad, but not unlimited, power to the Governor on the recommendation of the minister to amend part 3 or introduce new provisions to address specified circumstances and, thereby, further protect the state and state agents from action by Mineralogy, International Minerals, Mr Palmer or other persons. This power may be used by the Governor to amend the provisional provisions of part 3 or to introduce a new provision or provisions. Proposed subsection (1) provides that proposed subsection (2) applies if the minister is of the opinion, having regard to the purposes and subject matter of this part, that one or more of the circumstances specified in proposed subsections (1)(a) to (e) exist.

Proposed subsection (2) provides that the Governor may, on the minister's recommendation, by order amend part 3 to address the circumstances, make any other provision necessary or convenient to address the circumstances, or both. Proposed subsection (3) provides that the matters or things in respect of which an order can be made under this proposed section include matters or things occurring or arising before commencement and proposed subsection (4) provides that an order under this proposed section is subsidiary legislation for the purposes of the Interpretation Act 1984.

Hon MICHAEL MISCHIN: I am glad that the government is not taking it lightly, but the reality is that the explanatory memorandum did not mention any of this. It did not identify these as Henry VIII clauses or offer an explanation —

Hon Sue Ellery: I read them again.

Hon MICHAEL MISCHIN: Right—that reflects only what the proposed section says. That does not specifically identify for the benefit of a reader that these are Henry VIII clauses. The second reading speech did not draw the attention of the house to it and it does not contain any rationale for why there ought to be Henry VIII clauses in this legislation that allow the Governor, on the recommendation of the minister, to add to the legislation anything the minister thinks is necessary or convenient, let alone take things away. That is probably the most extraordinary Henry VIII clause we have had proffered to this place. The minister knows how reluctant members here are to engage and approve of Henry VIII clauses, even in the most benign way. The principles have been long argued, including by the minister, when she was on this side of the chamber about how unacceptable they are, even in limited circumstances, and yet she says that a minister can now tell the Governor, "This is what I want. We forgot a bit that takes away someone's property rights", which would be a nice thing to do. It could impose a penalty, perhaps, on Mr Palmer or one of his servants or agents, or do something to that effect because it is necessary to keep him out of the state or it is convenient to cause him problems, and on the recommendation of the minister, the Governor will make orders supplementing this legislation. Is there any legal impediment to a minister doing that, having regard to proposed section 30(2)?

Hon SUE ELLERY: I draw the member's attention to what I said about proposed section 30(4). One of the points the honourable member makes is that the explanatory memorandum does not say "Henry VIII clause". It does not use those words but it certainly states —

> … an order under this section is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

I am not sure that saying that something is a Henry VIII clause is going to make any difference. There is no question that these are extraordinary powers that the Parliament is being asked to endorse—there is no question about that. However, I have given the explanation when I gave my second reading speech and when I gave my reply to the second reading debate that this is an extraordinary resolution to an extraordinary problem. It is an extreme measure for an extreme problem. I do not back away from that at all. I have just made the point that in my 19 years here, it is an extraordinary measure; there is no question about that. I understand what is being asked of the Legislative Council; I understand that. I understand the history and the conventions of this place in respect of a Henry VIII clause. We find ourselves in an extraordinary position. I know how unpalatable it is to the Legislative Council. We are in an extreme position and this is an extreme response to it.

Hon NICK GOIRAN: I have been provided, not by the government but by the hardworking staff here in the Legislative Council, with a copy of the blue bill. It will interest members to know that the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002 as it will be amended contains three parts and one schedule. In total it is

some 136 pages. An enormous Henry VIII clause and power is being granted under proposed sections 30 and 31. What elements in the act will be able to be changed without reference to the Parliament?

Hon SUE ELLERY: No element is excluded from the capture of this provision.

Hon NICK GOIRAN: To be clear on this, because I know that we are coming to the end of what has been a long day and a long night, and that other people are interested in watching the proceedings: at this point the Legislative Council is about to agree; because I have no doubt that no-one will have the courage to stand up and make sure we delete these offensive provisions at proposed sections 30 and 31. Again, for those who have not been following, we are dealing with a 64-page bill and, buried at the end of the bill and making sure we pass it at 10 o'clock at night while everyone is asleep, too tired to do their work as legislators any more, we are saying, "Here we go; we have the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Act 2002." It is one of numerous statutes in Western Australia, and we are saying, "Here you go, Mr McGowan; you're the minister, you and your friend the Governor, between the two of you, do whatever you like with this statute; we have abrogated our responsibility; we are no longer interested as a Parliament, as a Legislative Council, in having any interest in this statute; you do whatever you like." This particular agreement act has been in place since 2002—for 18 years. We are saying, "Off you go and do whatever you like." I hope that the next cartoon of the Premier, Mr McGowan, shows him dressed up as Henry VIII. That is basically what we are doing.

A government member interjected.

Hon NICK GOIRAN: Don't even think about it! If a member wants to cry out —

Hon Alannah MacTiernan interjected.

Hon NICK GOIRAN: Don't even think about it! That is exactly what is going on here. Do not pretend anything else. We would not agree to it in any other circumstances but that is what is occurring here. We are vacating the space.

Some people might say that we do not need to worry about that because, remember, we are dealing with this menace. All members in this place have said that none of us has any interest in the state paying one cent to Clive Palmer. We have no interest in that. But does anyone here have an interest in the institution of the Parliament and the fact that there is a separation between the executive, the Parliament and the judiciary? I would have thought that most members would think that was a fundamental pillar to our Westminster system of democracy. As I said earlier today, whether it was this morning or this afternoon, what is going on here is a shameful charade for a democracy. There are plenty of heinous provisions in this bill, much of which I suspect will be ineffective. I suspect that much of what we have done over the course of today will have no force and effect. However, at the end of the day we will have made a statement because we will have said that we as legislators in the Legislative Council are not interested in this statute anymore. "Mr Henry VIII—you, member for Rockingham—take over responsibility for that. We are washing our hands of it at this time."

Well done, Legislative Council; that is what we are doing. I blame myself as much as I blame any other member about that. I know what will happen now. None of us will move this provision because we know there is no prospect of there being any success. There is no prospect of a majority of members agreeing to do that, even though we all know in our heart of hearts that that is what we should be doing. We all know that, but that is what will go on here. Frankly, there is only one person to be blamed for that, and that is Mr McGowan, the Premier. He has decided on this course of action; he has to take responsibility for it. As I have said several times this evening, I wish the state the very best of luck with its court action with regard to Mr Palmer. I genuinely wish the government the very best of luck. I think it will be battling a very, very difficult task, but the government has chosen this course of action. I have taken extra time to set that out because, as I said earlier today, I distance myself entirely from this fiasco. What is happening here is not proper process. When we try to short-circuit things, it never works. Nevertheless, that is what will happen. So long as everybody is aware, that is exactly what we are going to agree to here.

Hon ROBIN CHAPPLE: With regard to proposed section 30 on pages 60 to 63, we have never, ever liked Henry VIII clauses. They are a bit of an affront to the parliamentary process. I would like to hear from the minister why exactly we need to go down this path.

Hon SUE ELLERY: I made the point in my second reading speech and I made the point again in my second reading reply: this is an extraordinary measure to deal with an extraordinary situation and that is why we are moving this.

Hon ROBIN CHAPPLE: That is not quite what I was trying to get to. I know it is an extraordinary measure in an extraordinary time. I am trying to tease out what it is trying, physically, to stop. Is it about third parties moving in and those sorts of things? That is what I need to know.

Hon SUE ELLERY: I cannot give the honourable member a specific list, specific action or specific set of circumstances, but this is broadly cast deliberately, as is every other element of the bill, to try to ensure that there is nothing Mr Palmer, Mineralogy or International Minerals can do that cannot be addressed if we need to. I would like to be able to give the member a list of things that it is intended to capture but it is deliberately broadly cast in the event that something with respect to the specifics of the bill needs to be responded to quickly.

Hon MICHAEL MISCHIN: I want to make these points. The minister knows the attitude of this chamber towards Henry VIII clauses. It does not stop the government from introducing them every chance it gets, despite all the large talk we heard over the eight years that we were in government, over a variety of circumstances, including the sale of the metropolitan markets and transitional provisions and finely tuned Henry VIII clauses to deal with particular problems. Here we have one about which the government has been so arrogant that it does not even identify in the second reading speech how it can be used or the potential extent of it. No. Instead, the Attorney General in the other place wants to bang on about how little babies in hospital will have to pay $12 000 even before they leave the maternity ward if this action succeeds, and pat himself on the back for the robust action he has taken. But no, will it come to actually identifying that there is a Henry VIII clause? No; not on your life. There is the explanatory memorandum. Committees of this place have identified these things time after time. The committee I am chairing, of which Hon Pierre Yang, Hon Laurie Graham and Hon Robin Scott are members, has said on numerous occasions, the very least the government ought to identify in the second reading speech is that the legislation has a Henry VIII clause in it, so that people can pick up on it and identify it. No; not in this case. The Attorney General is a serial offender in that regard. The explanatory memorandum does not touch on it. Thank you very much for reading out the explanatory memorandum, which tells us no more than what the proposed section says and offers not the slightest explanation about its metes and bounds or its dangers to the legislation if it were to be excluded. No; it is a convenience. It is so broad that it will allow the minister of the day—we know how humble the Premier is; we know how measured he has been in declaring war on this litigant—to go to the Governor and say, "Look, this is not working as we want; let's stick it to Clive Palmer and we'll play around with some of the property interests he has in WA and amend that so that we can recover some of the costs the state has been put to or anyone connected with him, or we can modify provisions in the act or modify the state agreement that we have told the public will continue to be preserved."

The only protection against a minister going feral and behaving like Henry VIII under these, of course, extraordinary circumstances—I am sure his majesty thought that they were pretty extraordinary circumstances back in the day as well, as does every government—and the only check will be subsidiary legislation for the purposes of subsection (4) of the Interpretation Act 1984, and he can change that too if it is not convenient, can he not, minister? Can he not, minister? He can even repeal subsection (4) to ensure that there will not be subsidiary legislation for the purposes of the Interpretation Act. If a Liberal government ever uses a Henry VIII clause, I never want to hear any of the Labor people on the other side of this chamber whining about Henry VIII clauses. They will have no right to complain about exigencies that might require a government in the future to deal with something by way of a Henry VIII clause when they are allowing one as broad as this, which allows the Premier to go to his friend the Governor and say, "Let's change the state agreement; let's change the entire legislation", without the government offering one instance, not one potential example, of why that may be necessary. It is a disgrace. The only thing that saves anyone in this state is that it is limited to the purposes of the bill, and who knows whether those will be constrained or whether they will be thrown open by the Premier. It is appalling. This government ought to be ashamed and everyone on the other side of this chamber who has ever complained in the past about Henry VIII clauses ought to be equally ashamed and contrite. This bill is the most extreme of bills since the days of Henry VIII, but this is what the government wants as its legacy in order to win a case and say, "These are tough measures and we are in tough and extraordinary times so we are doing something extraordinary." That does not wash. Every time a Henry VIII clause is introduced, that argument can be used.

Hon JACQUI BOYDELL: Minister, as I said in my second reading contribution, this clause is one of the most difficult clauses of the bill before the chamber. I know that every member has raised concerns about it either during debate or in consultation with other members. Given how dexterous the Parliament has been recently in having to deal with bills in a very flexible and collegiate manner, in the interests of not only the government, but also the Parliament of Western Australia on behalf of the people, when citing this very serious situation in which the government finds itself, did it consider the requirement and good governance of having the support of Parliament? Did it consider going to Parliament to address any issues that may arise? Surely, it would have given the government some strength to have both sides of Parliament stand behind the decisions made by this Parliament, and that would have dispensed with the need for these clauses. As the minister said herself, this sets a precedent and the situation in which the Governor and the Premier will potentially find themselves is not a position that any member would want to be in given the amount of responsibility given to and pressure on just two people delivering in the interests of the state. That is the concern about the Henry VIII clause. The government has not utilised the processes of

Parliament to give it some confidence in the decision-making so that it is not only the Premier and the Governor standing alone. Did the government consider that?

Hon SUE ELLERY: I thank the honourable member for the question. I am advised that consideration was given as to how to cast these particular provisions, but, ultimately, the decision was made that the degree of flexibility and breadth required was such that that constituted a risk as well. I think Mr Palmer's actions over the last 24 to 48 hours have demonstrated that when he moves, he moves very quickly, and we needed to be able to respond to that very quickly. I appreciate the question. I am advised—I was not a part of those considerations nor the drafting of the bill—that consideration was given to that and how to frame the provisions, but, ultimately, the decision was reached to pursue it in the terms that are before us for the reasons that I have outlined.

Hon JACQUI BOYDELL: In relation to any decisions that may be made—we do not know what those decisions might be—is it the intention of the government to make those public? How will the government justify those decisions and make the public and the Parliament aware of those decisions?

Hon SUE ELLERY: They will be published in the *Government Gazette*.

Hon AARON STONEHOUSE: I want to point something out and make it very clear for everyone here. In the second reading speech, it was said by the Leader of the House in this chamber and the Attorney General in the other place that in relation to the Mineralogy state agreement —

> I also wish to make clear that this bill does not override the primary provisions and primary rights of Mineralogy and International Minerals under the state agreement. This bill affirms the terms of the state agreement and leaves open to Mineralogy and International Minerals the right to submit proposals for the Balmoral South Iron Ore project should they wish to do so.

That sounds all good and well, but a plain reading of subdivision 2 and proposed sections 29, 30 and 31 make it very clear that the state agreement is not worth the paper it is written on. It is worth nothing and is completely useless. Although the statement in the second reading speech is technically true at this very moment, it is very misleading because it is clear with those proposed sections that the agreement is not worth anything. With the stroke of a pen, the Premier and the Governor can amend, change, repeal or modify any part of that state agreement. Anybody who holds the rights to this agreement in the future will not see it as having any value. The uncertainty with it is ridiculous. We may as well just repeal the agreement. It is pointless having it on the statute book.

Clause put and passed.

Clauses 8 and 9 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.19 pm]: I move —

> That the bill be now read a third time.

HON AARON STONEHOUSE (South Metropolitan) [10.20 pm]: I will be brief, as I have been throughout the day. We have been at this for more than 12 hours; I am sure that everyone would like to get out of here. I just could not let the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020 pass without giving a final summary of my thoughts on it. This is perhaps the most offensive, repugnant piece of legislation that I have seen. It is offensive to the fundamental principles of our parliamentary democracy because of its delegation of legislation-making powers, its Henry VIII clauses, its interference in an ongoing legal dispute, its interference in and breakdown of the separation of powers and its trampling of someone's rights to natural justice and procedural fairness. What also makes this legislation so bad and offensive is its undermining of the rule of the law. The passage of this bill will be a signal to everybody that the government is above the law; that the law does not apply to the government and if the government does something illegal, it will pass a law that says it is not illegal. That is an incredibly dangerous idea.

I am sure that a bunch of people will be patting themselves on the back right now because they think they have done a great thing. I think that they do not understand the real implications of something like this. I am not talking about the financial implications, because we know this will be litigated and that there will be constitutional challenges from here to kingdom come. This thing will be battled out in the court and the state may very well lose, but it will not be the government that loses in that case, of course. In a few years, if a ruling is handed down in favour of Clive Palmer, no-one will care or remember the debate that happened in Parliament over the last two days.

It will be the taxpayer who suffers and it will be the taxpayer who has to pick up the tab for whatever disastrous result this leads to. But the real danger here is setting a precedent that the government is above the law: "What a silly idea, the rule of law! We've had it for only a few hundred years. It only took a civil war to enshrine that concept in our Westminster parliamentary democracy, but that's okay, we'll legislate it away because it's expedient and quick. Never mind having an opportunity to properly scrutinise this legislation. It's far too important and too urgent. You have to rubberstamp it; you can't ask any questions. If you ask any questions, you'll be shamed into rushing it through." That is what we are seeing right now, unfortunately, and I think that is very, very sad.

But do members know what? As another member said earlier—quite passionately, I thought—when they criticised the Henry VIII clause, I am washing my hands of this. I have said what I can and I have done what I can. I accept that I am in the minority and I understand that other members are in a very difficult situation right now, caught between a rock and a hard place, but, ultimately, this is on the government's head. It is the government's responsibility. The government wrote this bill and rushed it through, so it is ultimately responsible for this, and when it backfires, it will be on the government. Those of us who are critical of this bill have done everything that we can; we cannot do anything more. It is on the government now. When this backfires, it will be on the government, and I hope that people remember that. I doubt that they will, but, ultimately, this is the government's bill and it is the government's responsibility.

HON COLIN TINCKNELL (South West) [10.23 pm]: Thank you, fellow member. That was very good. It reminds everyone that this is one of the worst days in Parliament that I have seen. Like the honourable member mentioned, there will be repercussions from the passing of the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill. It is very disappointing that not enough people stood up when it counted and that this bill will unfortunately be passed and Western Australia will be worse off for it. I am very disappointed. Given just a little bit more time we could have worked our way through this bill and possibly made sure that we were doing the right thing. We will not know now for maybe years, but we do know we have compromised our beliefs, our system of justice and our system of democracy, and it is a bad day for this Parliament.

HON ROBIN CHAPPLE (Mining and Pastoral) [10.25 pm]: One observation I take out of this debate on the Iron Ore Processing (Mineralogy Pty. Ltd.) Agreement Amendment Bill 2020 is where we should be going in the future with state agreements. This has been an absolute debacle. The letter that was provided to me, which is to Mr Vimal Sharma, managing director of Mineralogy, from Hon Colin Barnett, talks about the proposals to undertake works and the decisions about how that may or may not occur after passage of legislation this place. I would have thought that if the government entered into a state agreement act with anybody, it would establish the terms and conditions of that state agreement act before it brought it to this chamber. I think that needs to be taken on board in the future. Members know that we do not like state agreement acts. They are anti-competitive and they do all sorts of things that we are not happy with.

I also think there needs to be better due diligence. We would not be here tonight going through all of this had there been proper due diligence at the time of entering into negotiations with this gentleman. I hope that this will be a wake-up call to the state, whether it pursues state agreement acts in the future or whether it allows a state agreement acts to be monitored by a committee of this Parliament. Certainly, we must learn from this experience.

Question put and passed.

Bill read a third time and passed.