

PERSONAL PROPERTY SECURITIES (COMMONWEALTH LAWS) BILL 2011

Committee

The Chairman of Committees (Hon Matt Benson-Lidholm) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

Clause 1: Short title —

Hon ADELE FARINA: This is probably the only opportunity we will have for a bit of a discussion about the referral of power over personal property securities over fixtures and water rights. It is spread throughout the bills, so it is a bit hard to pinpoint it for any other time. I think it is worthwhile putting on the record, if and when power is referred in relation to those matters, exactly what powers will be referred. What are the government's reasons for not referring that power at this point in time?

Hon SIMON O'BRIEN: I agree; I think it is the only appropriate time to deal with it and, hopefully, we can deal with it quite quickly. I should have done so during my reply to the second reading debate, but I thank the honourable member for her very kind remarks. Members made some other remarks about my responsiveness as a minister to some of these concerns, and that is well said.

Hon Sue Ellery: Don't get carried away!

Hon SIMON O'BRIEN: Hang on! I want to make it quite clear that when a motion of no confidence has been moved, these matters will be dragged out and regurgitated, so members opposite have all dobbed themselves in!

Flippancy aside, we are involved in fixing up legislation, or making it better. That is why we do it. I want to make sure that any bill I sponsor is in good nick because it will stand in our statute book for some time. In relation to the referral of water and fixtures, the states are not prepared to refer this power at this time. That is explicitly in the bill. If the converse were the case, I guess we would be asking: why are we going to do it? The point is: it is not part of it. The question of why it is excluded is not one we need to exercise our minds on too much today, except to say that the states did not wish to refer these particular matters to the federal jurisdiction at this time.

The mechanism proposed is one that the committee found to be unacceptable; that is, although the jurisdiction in these matters will not be referred at this time, it may be, at some time later. It is a pretty important matter, so the government has agreed with the view that the committee has put forward, that this should not be a matter for discretion by some government to make in the future; it should be referred to Parliament. The amendment we will deal with in a little while provides a device to do that. We will talk about whether that device is adequate when we come to it. In relation to whether fixtures and water will be referred, it is my balanced, private view that it is rather unlikely that we will see that referral come to this house at any stage in the future, certainly not in the near future. That is my gut feeling, but I think I could make a case for that. However, the several governments appreciate between them that this aspect of personal property had to be recognised. It has to be, and is, explicitly stated that fixtures and water rights are not considered personal property for the purposes of this bill.

Hon ADELE FARINA: I do not want to labour this point. The concern I have is that if we do not have a clear explanation for why the government has decided not to refer the powers for fixtures and water rights at this time, if and when the government comes to do so by proclamation, the process outlined by the amendment will not necessarily afford a lot of time to review the referral. The mechanism by which the house will give positive affirmation at that point is not clear to me in terms of the debate we have in this house and whether it will be referred to a committee. I am not asking for a detailed explanation. The commonwealth act envisages the referral of those powers. The states have decided not to refer the powers at this point in time. If the states are proposing to never refer that power, why was it included in the commonwealth legislation at all? By definition, "personal property securities" could simply have been deleted. The very fact that it remains there indicates at least hopefulness by the commonwealth that at some point in time the states will refer the power. I do not think it is unreasonable for us to get an understanding of what that referral power will mean and why it is not being referred at this time. If, as the minister suggests, it is unlikely to ever be referred, why will it remain in the commonwealth act?

Hon SIMON O'BRIEN: The simple reason it has not been dealt with beyond the point it is now is because of the complexities that arise in considering fixtures and water as personal property items. It is as simple as that. To progress the matter, the governments have put it to one side for further examination. I think it is desirable—the bills are constructed in this way—that the referral power be not silent over this matter. I think it is protection for Western Australians who have interests in whether fixtures and water rights be treated as collateral. In some other states, it is probably of much greater importance. This bill is not silent on that. It tells us explicitly that these matters are not referred to the commonwealth at this time, although it does leave the door open for some

future referral, but that is most explicitly not happening now. The processes are probably best dealt with under clause 2.

Sitting suspended from 1.00 to 2.00 pm

Clause put and passed.

Clause 2: Commencement —

Hon SIMON O'BRIEN: I move —

Page 2, after line 15 — To insert —

- (2) A proclamation cannot be made under subsection (1)(d) unless a draft of the proclamation has first been approved by each House of Parliament.

The effect of this amendment is to ensure that if and when section 8(2) and 8(3) are exercised, the matter will be brought to Parliament for its concurrence before any effect is achieved. Section 8(2) and 8(3) refer to referring PPS matters in relation to fixtures, and to transferable water rights respectively. This is a matter that has been of some discussion during the course of debate. It was raised, or identified, as an issue by the Standing Committee on Uniform Legislation and Statutes Review, and I have previously indicated that I will address the concerns of the committee by inserting the provision that I now propose. This will ensure that the proclamation contemplated under section 8(2) and 8(3) cannot lawfully be made unless the draft of the proclamation has been first approved by each of our houses of Parliament. This is not the first time that this provision has been employed; I can recall it being introduced into this house a couple of Parliaments ago. It is the concept of a positive assertion by a house being a necessary mechanism before an executive action can be taken. This way, a motion to be passed in this house, and also separately debated and passed in the Legislative Assembly, would be required before such a proclamation can be made. That would then provide the vehicle for debate, and, obviously, refusal of the permission if either house was so inclined.

The reason we are going down this path, rather than bringing an amending bill in, is because of the nature of the exercise that we are involved in at the moment, which is a referral of powers in this matter to the commonwealth. This way, we preserve all of Western Australia's prerogatives in this matter with respect to fixtures and transferable water rights for a decision, if we are asked for one, at a later stage.

Hon LJILJANNA RAVLICH: I rise to say that this amendment is acceptable to us. Section 8(2) specifically deals with PPS matters in relation to fixtures, and section 8(3) deals with PPS matters in relation to transferable water rights. I think it is in the best interests of the state to ensure that a proclamation under clause 2 is not made until such time as it is approved by both houses of this Parliament.

Can I just say that I think the minister was quite correct when he made the comment earlier on that the committee really got to the heart of this particular issue. I also want to put on the public record my appreciation for that work, because I have mentioned in this place how much easier it makes it for members of Parliament when that forensic work has been done by the uniform legislation committee, and this really is a case in point. This may not have been picked up; it now has been picked up, and we can proceed with this legislation with confidence and in the full knowledge that we will as a state, through our two houses, get the final say.

Hon ADELE FARINA: As I stated earlier, the committee supports the minister's actions in addressing the concerns raised by the committee by introducing this amendment. However, I would like some clarification from the minister as to the mechanism that will be used to actually implement this amendment. It is not clear to me whether the intention, in terms of both houses of Parliament considering the draft proclamation and providing affirmative assent to it, will actually involve some referral back to committee to consider that and examine it in detail, and whether there will be a minimum period of time that the draft proclamation will lay on the table so that members will get an opportunity to consider it, or whether it will be simply delivered to the house by motion one day and put.

Hon SIMON O'BRIEN: Some of the actions of the house at the material time will be a matter for the house at that time. However, I would envisage that the normal procedures that we have established would continue to apply. They would include notice being given of an intention to move a motion to assent to a proclamation being made that would allow time for that motion to lie upon the table for consideration before it is brought on for debate. I think that would be the case now. I have no reason to doubt that it would not be the case in the future, and so it should be. The prerogative of the house to conduct other inquiries, including referrals to a committee, is always available to it. We do not know what form the standing orders will take in the future. If such a proposal was put to the house next week, standing order 230A would clearly apply.

Hon Adele Farina: I think 230A refers only to bills and, arguably, this would not be a bill; it's a proclamation.

Hon SIMON O'BRIEN: Without wishing to get bogged down on that, I would have thought that if this came in next week or next year, it would be referred to a committee such as the Standing Committee on Uniform Legislation and Statutes Review. If it was not automatically referred to a committee under a standing order, it would be referred for examination and report. Who knows what will happen in the future. I cannot imagine this Parliament referring these powers relating to transferable water rights or fixtures to the commonwealth without looking at the matter pretty long and hard. I think we would all agree with that.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 3: Terms used —

Leave granted for the following amendments to be considered together.

Hon SIMON O'BRIEN: I move —

Page 3, lines 10 to 12 — To delete “(Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth),” and insert —

(Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011*,

Page 5, lines 1 and 2 — To delete “the text of”.

Page 5, lines 5 to 7 — To delete “(Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth);” and insert —

(Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2011*;

The reason I am moving these amendments was alluded to during my remarks when I replied to the second reading debate. They are necessary to insert reference to the 2011 commonwealth act into the definitions of the commonwealth PPS act and the definitions of the relevant version of the commonwealth PPS act. There is also the tidying up amendment to remove “the text of” in part of that clause. I think I have already explained how this has come about; it is because the commonwealth had a bill to amend its principal act that we are now proposing to adopt. Obviously our adoption and referral bill has to also include that amendment. This is the device to achieve that.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 4 to 6 put and passed.

Clause 7: Termination of adoption —

Hon SIMON O'BRIEN: I move —

Page 8, after line 22 — To insert —

(6) A proclamation cannot be made under subsection (1) unless a draft of the proclamation has first been approved by each House of Parliament.

The reason I am moving this amendment is as a result of concerns raised by the Standing Committee on Uniform Legislation and Statutes Review about so-called Henry VIII clauses. This is an undertaking that I gave in my letter to the committee in response to its report and also in my brief ministerial statement on Tuesday of last week. The Henry VIII clause appears in various forms in the statutes of this and other jurisdictions. It derives from the Tudor era when parliamentary procedures were still evolving and were somewhat shy of where they are now. It refers specifically to a phenomenon whereby a power is given to some authority other than Parliament to amend an act of Parliament. Even though there are times when this could be argued to be administratively convenient, Parliaments, including this one, frequently and rightly complain that there is a usurpation of their role. The red-hot committee found a couple of examples of this in its report—as I have undertaken, I think it has found them all—and we are proposing to deal with them in a couple of ways. One of those ways, which applies to clause 7, to avoid Parliament being circumvented, inserts a positive affirmation requirement by the words “A proclamation cannot be made under subsection (1) unless a draft of the proclamation has first been approved by each House of Parliament”.

Clause 7 is a rather important clause—they are all important clauses—because it provides for the Governor, who would act on advice from the executive of the day, to at any time, by proclamation, terminate this adoption of

laws. It is a very significant power. There are reasons why it is proposed to do so in the manner laid out in clause 7. Recognising what the committee reported and recommended, we are still going to make this subject to a positive motion from the Parliament before that power can be exercised because this bill is an act of Parliament that makes the adoption. Therefore, the principle is that there must be an action of this Parliament to undo that; it should not be undone by some other person. That is one way of fixing it. Why are we doing it in this way and not, for example, just getting rid of this clause? The reason for that is twofold. Firstly, we want to preserve the structure of our involvement and the means by which we might extract ourselves if we found it necessary to do so. Secondly, and most importantly, we think it is important to have provisions in there that provide for termination, otherwise we might find that it is far more difficult if we ever did want to do that in the future.

I commend this amendment to the committee and hope it agrees, as I do, with the recommendation of the committee.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 8 put and passed.

Hon Kate Doust interjected.

The DEPUTY CHAIRMAN (Hon Jon Ford): I am sorry; I was just a bit startled then about where the eyes were coming from.

Hon Kate Doust: From the opposition; not from the government. The minister might want to encourage his colleagues to vote for his bill.

Hon Ljiljanna Ravlich: Yes—on target!

The DEPUTY CHAIRMAN: It obviously shows that the chamber is in agreement!

Hon Simon O'Brien: Indeed, it does.

Clause 9: Termination of references —

Hon SIMON O'BRIEN: I move —

Page 10, after line 17 — To insert —

- (6) A proclamation cannot be made under subsection(1) unless a draft of the proclamation has first been approved by each House of Parliament.

This amendment is very similar to the recent amendment to clause 7 and most of the observations made then apply, the only difference being that this clause relates to the termination of amendment references. Again, the standing committee thinks that such decisions and actions should not be taken without the authority of Parliament, but should be taken upon the authority of Parliament. We concur and this amendment will make it thus.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 10 to 16 put and passed.

Clause 17: Enforcement of and other dealings with PPS security interests restricted in certain circumstances —

Hon SIMON O'BRIEN: With the Deputy Chairman's permission, I will move amendments 7/17 and 8/17 together. I think it would be convenient to do that.

The DEPUTY CHAIRMAN: That is okay.

Hon SIMON O'BRIEN: Thank you, Mr Deputy Chairman. I move —

Page 16, lines 14 and 15 — To delete the lines.

Page 17, line 27 to page 18, line 3 — To delete the lines.

I am moving amendments to this clause as a result, again, of concerns raised by the Standing Committee on Uniform Legislation and Statutes Review about Henry VIII clauses. In this case, the device I am putting forward as the remedy to the committee's concerns is the deletion of the offending words. Therefore, if these matters need to be considered in the national scheme, an amending bill will need to be brought to this place and the

Parliament can make its decision as to how this will apply. I can offer voluminous further background if anyone wishes to request it. However, I think it is consistent with my statement from last Tuesday.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 18 and 19 put and passed.

Clause 20: Regulations —

Hon SIMON O'BRIEN: Clause 20 provides for a regulation-making power, which is not unusual, and I do not think that anyone has any problems with subclause (1). However, I think it is fair to say that subclause (2) would be absolute meat and potatoes for the Standing Committee on Uniform Legislation and Statutes Review, and it did not completely surprise me when the committee reported in the way that it did. The government agrees and is prepared to tap the mat. Therefore, in this quite blatant Henry VIII clause, I move —

Page 20, lines 14 to 26 — To delete the lines.

If we need to refer to these again, we will have an amending bill that we can look at at our leisure after the committee has had another look at it.

Amendment put and passed.

Clause, as amended, put and passed.

Title —

Hon SIMON O'BRIEN: Normally members might see this question as a formality in every bill, but of course on this occasion I have an amendment standing in my name that I will move to make the very necessary change to the long title to reflect that this bill will adopt a 2011 act of the commonwealth, in addition to the 2010 act. Therefore, I move —

Page 1, lines 8 to 10 — to delete “**(Commonwealth) and the *Personal Property Securities (Corporations and Other Amendments) Act 2010 (Commonwealth)***,” and insert —

(Commonwealth), the *Personal Property Securities (Corporations and Other Amendments) Act 2010 (Commonwealth)* and the *Personal Property Securities (Corporations and Other Amendments) Act 2011*,

Amendment put and passed.

Title, as amended, put and passed.