PILBARA PORT ASSETS (DISPOSAL) BILL 2015

Committee

Resumed from 9 November. The Deputy Chair of Committees (Hon Simon O'Brien) in the chair; Hon Michael Mischin (Attorney General) in charge of the bill.

Clause 46: Regulations for purposes of providing access to services —

Progress was reported on the following amendments moved by Hon Robin Chapple —

Page 33, after line 7 — To insert —

terms and conditions, in relation to an access arrangement, includes —

(a) prices and charges relating to the access arrangement; and

(b) any discounts, allowances, rebates or credits given or allowed in relation to the access arrangement; and

(c) any commissions or similar benefits (whether monetary or otherwise) payable or given in relation to the access arrangement; and

(d) the supply of other goods or services, where the other goods or services are supplied in connection with the first-mentioned goods or services; and

(e) the making of payments for such other goods or services.

Page 33, after line 9 — To insert —

(2A) Prior to executing any access arrangement under this section, the service provider shall publish standard form terms and conditions of access in the *Gazette*.

(2B) Any variation to the standard form terms and conditions of access referred to at (2A), shall be published by the service provider prior to them having any lawful force and effect.

(2C) The terms and conditions on which any access arrangement is agreed are —

(a) so far as the service provider and any party to the access arrangement agree on the terms and conditions — the agreed terms and conditions; and

(b) if the service provider and any party to the access arrangement do not agree on terms and conditions, but terms and conditions are set out in a standard form of agreement — the relevant standard form terms and conditions shall apply.

Hon KATE DOUST: I appreciate that Hon Robin Chapple has spoken and the minister has responded. On behalf of the opposition, I want to indicate that we support both of these amendments moved in Hon Robin Chapple's name. Extensive debate has articulated the concerns of the junior miners involved in Utah Point and, obviously, pricing access is at the hub of those concerns. I think Hon Robin Chapple's amendments on the notice paper will perhaps go some way to providing clarity on the information in the agreements and also go some way to addressing the concerns raised in the committee report's recommendations. The report states that the committee did not believe the regulations would apply sufficient or appropriate levels of parliamentary scrutiny. Hon Robin Chapple's second amendment in particular will deal with that. The member's first amendment to clause 46 sets out all the conditions and the level of detail that need to be provided and will make for a much more even playing field for those involved. We certainly support both of these amendments.

Hon ROBIN CHAPPLE: I would like to thank Hon Kate Doust and the Labor Party for their support for these amendments. Before we proceed, I am mindful of a couple of comments made in the debate and I seek some clarification, if I could. The Attorney General stated —

> … the terminal operator will need to ensure that at least 50 per cent of the capacity is available to be accessed by junior miners within 180 days.

Later on, the Attorney General then said —

> … even in circumstances in which no junior miner is in a position to contract capacity, up to 50 per cent of capacity will always be available …

Quite clearly, there is a difference of outcome in those two statements. I seek some clarification, if I could.

Hon MICHAEL MISCHIN: There is no inconsistency between them; it is a question of understanding the regime that will be put in place. The Treasurer in the other place tabled in Parliament on 24 February 2016 a document setting out the key features of the Utah Point bulk handling facility regime. Since then, that document has been updated to include the negotiate–arbitrate elements in that regime and also the reservation of

capacity for junior miners. A key feature is that there has to be availability for the junior miners to access the facility at a guaranteed level. That is outlined in paragraph 10 of the document, which states —

> ... the terminal operator must ensure that 50% of the facility's capacity can be made available within the prescribed period (180 days) to allow a junior miner the ability to access capacity (if sought) within the prescribed period or such later time as agreed with the non-junior miner.

Contracts to allow others to use the facility will be subject to the condition that if a junior miner requires access and that capacity is being used by someone else and not by a non-junior miner, within 180 days that capacity has to be made available; that is, 50 per cent of the capacity in the facility has to always be available at that reasonably short term. For the member's assistance, I table that two-page document titled "Key features of the proposed Utah Point Bulk Handling Facility regime". It has a reference number on the base to distinguish it from the one that was tabled in the other place—"Rec#00372396".

[See paper 4861.]

Hon ROBIN CHAPPLE: Following on from the second part of what the minister said, over what time frame is that capacity in the second application? It is within 180 days, but is there a time frame for the second component of that in terms of immediate availability? The minister indicated that 50 per cent would be available as needed immediately. What does "immediately" mean?

Hon MICHAEL MISCHIN: I do not think I said immediately. I said within 180 days, because there may be a need for the person who is using that capacity to clear their stockpile and make adjustments to their routine. A period of 180 days is not an unreasonable period of time to give notice that access is needed to that facility. There is capacity, of course, for an agreement of more than 180 days, and that is permitted, but there must be a guarantee that within 180 days of that desire to use that capacity, 50 per cent of the terminal's capacity will be made available. Whatever contracts are entered into would need to be subject to that.

Hon ROBIN CHAPPLE: I am trying to work out, with that 50 per cent capacity that always has to be available, is that the 180 days or is that another capacity?

Hon MICHAEL MISCHIN: Let us say that there is capacity and it is not all being used by junior miners and that others can come and use the capacity in order that the facility is not sitting idle and so they can do their business. If a junior miner comes in and says it wants access to the facility and it wants to use X amount, within 180 days that has to be provided for. That is, 50 per cent of the capacity of Utah Point has to be available at short notice—within 180 days—to facilitate access by junior miners. Not all of that 50 per cent may be required—it may be some small proportion—and it may not be for a particularly long period of time. It will depend on what the resources industry is doing, how it is travelling and what is needed, but there is a guarantee that within that short period of 180 days, which is not an unreasonable period of time to give notice, a junior miner has to get access to the capacity.

Hon ROBIN CHAPPLE: So, clarifying that position, it could be that at least 50 per cent capacity is not there, because it is up to 50 per cent capacity.

Hon MICHAEL MISCHIN: No. Let us say that the facility is sitting idle and a major player is using 25 per cent of its capacity; therefore, 75 per cent is free and there is not a problem. I am saying that if it is being occupied and fully utilised and a junior miner wants to get access and that is not available, the contracts that are entered into between the lessee of Utah Point and anyone using Utah Point have to provide that at least 50 per cent of that, or up to 50 per cent—however the member wants to frame it—has to always be available at short notice to allow access by junior miners.

Hon ROBIN CHAPPLE: I thank the minister for that. Basically, we can put the amendments standing in my name that were moved cognately.

The DEPUTY CHAIR (Hon Simon O'Brien): I will recap for the benefit of members, because this is a complex and protracted matter. The matters that we are considering in our consideration of clause 46 are the amendments that have been moved together at 3/46 and 4/46 on the supplementary notice paper. The question is that those words proposed to be inserted be inserted.

Division

Amendments put and a division taken, the Deputy Chair (Hon Simon O'Brien) casting his vote with the noes, with the following result —

Ayes (10)

Hon Robin Chapple	Hon Sue Ellery	Hon Martin Pritchard	Hon Samantha Rowe *(Teller)*
Hon Stephen Dawson	Hon Lynn MacLaren	Hon Sally Talbot	
Hon Kate Doust	Hon Laine McDonald	Hon Darren West	

Noes (19)

Hon Martin Aldridge	Hon Jim Chown	Hon Nigel Hallett	Hon Michael Mischin
Hon Ken Baston	Hon Peter Collier	Hon Peter Katsambanis	Hon Helen Morton
Hon Liz Behjat	Hon Donna Faragher	Hon Mark Lewis	Hon Simon O'Brien
Hon Jacqui Boydell	Hon Nick Goiran	Hon Rick Mazza	Hon Phil Edman *(Teller)*
Hon Paul Brown	Hon Dave Grills	Hon Robyn McSweeney	

Pairs

Hon Alanna Clohesy	Hon Brian Ellis
Hon Amber-Jade Sanderson	Hon Col Holt
Hon Adele Farina	Hon Alyssa Hayden

Amendments thus negatived.

Hon LYNN MacLAREN: I have an amendment on the notice paper that I would like to have a go at, on clause 46. May I speak to that amendment?

The DEPUTY CHAIR: If you would like to move the amendment standing in your name, now would be a good time to do so.

Hon LYNN MacLAREN: I would like to, because I have been listening intently!

Hon Michael Mischin interjected.

The DEPUTY CHAIR: Order! Hon Lynn MacLaren has the call.

Hon LYNN MacLAREN: Thank you, Mr Deputy Chair. I move —

> Page 33, lines 10 and 11 — To delete "may do any or all of the following —" and substitute —
>
> must do all of the following —

I make the point that, as has been recently noted, this debate has been protracted and we have been trying to clarify what is in the legislation for the benefit of the current users of the Pilbara port. Public benefit is the reason we have spent millions of dollars developing this facility, and there has been some ambiguity about what exactly the long-term intention is. This amendment would remove quite a bit of that ambiguity by requiring that the regulations must carry out the aspirational intent that proceeds from clause 46. We would insert, at the end of clause 46, a new clause, but we have not got to that yet. We would insert the words in this amendment to remove any ambiguity about what the regulations include. I probably do not have to repeat any of the reasons why there is ongoing uncertainty about what exactly the government intends. We have heard the Attorney General, on behalf of the Treasurer, explain it here in the chamber; however, we know that unless it is written in this Pilbara Port Assets (Disposal) Bill 2015, we cannot be certain that that is the law that will prevail for years to come. It is not enough to comment on what the intention is; it must actually be clearly articulated in the regulations. That is the purpose behind the amendment I have moved, and I urge members to support it. Of course, I would like to hear the government's view on this.

Hon KATE DOUST: I rise on behalf of the opposition to express our support for the amendment moved by Hon Lynn MacLaren.

Hon MICHAEL MISCHIN: There are no surprises there!

With respect, the proposed amendment is misconceived. Subclause (2) provides the scope of what the regulations can cover, which is essentially the access to a service or the price regulation of a service, or both. Subclause (3) empowers the making of regulations on a variety of subject matters ancillary to or in support of that. Some of those regulations may never need to be drafted, let alone proclaimed. For example, they may provide for an access arrangement that would, as I have indicated, be a heavy-handed approach to this scheme, may not be required and would, in fact, be limiting and constraining to junior miners. What is being sought in this changing of the wording would require the making of regulations over a broad area of potential operations of the access and pricing regime that may be utterly unnecessary and that may, in fact, be more restrictive than is necessary. The empowerment to make regulations ought not to be made a mandatory requirement to make regulations on particular points that would require the government to anticipate problems that may never arise.

To require all that work to be done in advance to provide for regimes that may not be necessary would simply be wasted effort.

I will take just a couple of points at random. Currently, the regulations may allow for the provisions of clause 46(3)(p), which is to confer functions on the minister, the Economic Regulation Authority under the Economic Regulation Authority Act 2003, or any other person. Hon Lynn MacLaren would require us to confer those functions by way of regulation. Under clause 46(3)(m), regulations may provide for the manner in which an amount received by way of civil penalty is to be dealt with and applied. The government may create regulations to cover that, but Hon Lynn MacLaren would require us to make regulations to cover that. Clause 46(3)(h) provides for the arbitration of disputes in respect of an access arrangement, which may not be necessary and is not a path the government would prefer to go down. To agree to this amendment would create unnecessary work, be unnecessarily constraining because it would provide regulations that may not be crafted to deal with a particular problem that has arisen yet, and, hence, be too constraining and create more difficulties than they solve. Therefore, the government cannot support the proposed amendment and, with respect, I hope that Hon Lynn MacLaren will see some of the problems that such an amendment would create.

Hon LYNN MacLAREN: I thank the Attorney General for explaining the government's position. However, perhaps he could explain the purpose of clause 46(2), which states —

> (2) Regulations may provide for access to a service, or price regulation of a service, or both.

In my reading of that, I believe it states that there "may" be regulations. Subclause (3), which follows, states "Without limiting subsection (2), the regulations may" include these things. I understand the Attorney General has indicated that it may be misconceived, but my understanding of that is that the option to make regulations is contained in subclause (2), and that is not being amended. In subclause (3) we are attempting to specify that where regulations exist, they have to include all that detail. The amendment is not providing that the government has to pre-emptively make regulations for all the items stated in paragraphs (a) to (p); it is saying that in the event that there are regulations, they have to include all that detail. Perhaps the Attorney General can enlighten me on that. I know he will be able to provide some more information on his interpretation of the amendment.

Hon MICHAEL MISCHIN: The issue is one of statutory interpretation. Clause 47 is the regulation-making power under the act generally, by which the government may make regulations prescribing matters required or permitted to be prescribed by the act, or necessary or convenient to be prescribed for giving effect to the act. That is the empowering provision.

Clause 46 is more specific in its operation. It deals with access to services, and it specifically provides that regulations—hence, referring to the regulation-making power that is a more general one under clause 47—may provide for access to a service or price regulation of a service, or both. As part of the regulation-making power more generally, there is specific scope for some regulations that may be made to cover that particular point of access and pricing, and to identify the sorts of things that fall under that access and pricing regulation umbrella—those that are enumerated under subclause (3). For example, if a court were simply dealing with clause 47(2) and a set of regulations were made regarding an access arrangement, a court might have trouble seeing how that falls within the scope of the act generally. However, by specifically providing a particular subset of regulations that may be made or incorporated by subjects that can be incorporated by regulation, the amendment will remove that beyond doubt. Subclause (3) sets out the sorts of things that would fall within the regulation-making power. However, again, not all of those things may be necessary to be done. All it will do is empower the making of regulations to cover various subject matters that might not obviously fall within clause 47. To require those to be made in advance of there being a necessity to do so would create more problems than it would solve and would require an enormous amount of work to anticipate how one refines the regulations and what one prescribes when there may not be a necessity to do so; and, indeed, it may prescribe something to be done that may impede the operation of the access and pricing regime. The better approach is if they are necessary, they can be made.

Hon LYNN MacLAREN: I seek just one further clarification from the Attorney General. Another way of reading paragraphs (a) to (p) is that they are items or aspects of business for which the government may make regulations. Is there any potential for those aspects of business to occur without regulation if we leave it as regulations "may" be made to deal with these matters and we do not require that these matters need regulations and that we must have the regulations for them? Is it possible for these things to occur before regulations are made, for example, to provide for the manner in which an amount received by way of civil penalty is to be dealt with and applied? Could that happen if there were no regulations?

Hon MICHAEL MISCHIN: It would depend. Some of those things might very well be worked out between parties as part of a negotiation. Regulations would allow for refining how they go about that process as the need arises. If the problem arises that agreement cannot be reached or there is an impasse about how a problem can be resolved, there may be a need to regulate to determine the parameters of how that issue will be dealt with. Others cannot be done without regulation; for example, the prescription of the civil penalties that are provided for in

paragraphs (i) and (j). The empowerment, as I say—the power to make the regulations—is in clause 47, more generally, for the purposes of the act. Specific things may be necessary to give effect to the access and pricing regime that is contemplated and may not ordinarily be considered as part of the incidentals of the act. A specific ability to make regulations to create and govern an access and pricing regime can be and would be made, but the other features of it would be specific heads of areas that can be dealt with as part of those regulations as the need arises. However, to require the making of those regulations, if regulations are made, for an access and pricing regime to cover all of these heads of potential might necessitate having to look ahead 50 years for problems that may not arise.

Hon LYNN MacLAREN: Is there anything in the bill that would require regulations to be made by a certain time? Even if we said that regulations must be made to deal with these items, it does not state that they have to be done all at once, right now, before anything proceeds; it just requires that if any of these things are to occur, regulations must first be in place.

Hon MICHAEL MISCHIN: There may be a necessity to make some regulations for the act to come into effect and the like, but that is not the issue that is being raised by this amendment. The member is saying that without limiting proposed subsection (2), the regulations "must" do all of the following. Any regulations that are made to cover the access and pricing regime must prescribe all of those things. What I am saying is that that requires some anticipation of problems that may not arise and the need to draft regulations, at least perfunctorily, to cover these heads of regulation-making subjects, and that is an inappropriate and clumsy way of going about the exercise and is fraught with problems and unnecessary work for things that may not arise.

Hon ROBIN CHAPPLE: The Attorney General referred to paragraphs (i) and (j). Clause 46(3) provides that the regulations may do any or all of these things. If the regulations provide that a provision of the regulations that imposes an obligation on a person is a civil penalty provision, and the civil penalty is an amount not exceeding $500 000 and an additional amount not exceeding $20 000, can those figures be amended—the Attorney General has pointed out something else—at some stage in the future by regulation because they are stated within the legislation? I am trying to work out whether the penalties that are referred to are locked in and, notwithstanding that the subclause states "may", if we wanted to go down the path of paragraphs (i) or (j), we would be limited to those two figures.

Hon MICHAEL MISCHIN: Yes. The legislation is empowering the making of regulations that can provide for a civil penalty of an amount not exceeding $500 000 in the case of default of an obligation under paragraph (i) and for the contravention of a civil penalty provision. A regulation cannot prescribe an amount of $1 million as the default civil penalty. In order to do that, it would have to be brought back to Parliament so that the limit prescribed in paragraph (j)(i) could be raised.

Hon ROBIN CHAPPLE: The Attorney General has almost answered my question. My issue is that in 20 years' time we could still be constrained to those figures unless the legislation came back to the chamber and we altered it, not the regulations. In a way, bizarrely, it is quite limiting.

Hon MICHAEL MISCHIN: No, not really. The primary piece of legislation is the act. It allows for subordinate legislation to be made within certain bounds and allows for civil penalties in the same way as offences can be created under the Road Traffic Act that are contained in, say, the Road Traffic Code, which prescribes certain penalties, but a cap is placed on it. We cannot impose life imprisonment under the Road Traffic Code because that is not allowed under the Road Traffic Act. There would be a similar regime in this case. We have encountered some of the difficulties into the future if these things are not reviewed—for example, the civil liability cap under the Highways (Liability for Straying Animals) Act, which was amended recently by Parliament to increase the level. The only way to do it is by putting in a formula for some form of indexation or a review by way of ministerial instrument or regulation. That is not desirable in a case such as this. I would have thought that the penalties that are provided for in the bill are substantial and suitable to the circumstances, given that they are civil penalties under regulations. Ultimately, when Parliament reviews it in 10 years' time and there has been an increase in inflation that renders these amounts to be pocket money, we will have to deal with it then. At the moment, $500 000 is the cap for a civil penalty for breaching an obligation, for example, that is required under the regulations.

Hon LYNN MacLAREN: I intend to proceed with this amendment, even having heard the various explanations from the Attorney General. I think it is a mixture of things that the government clearly intends to make regulations for and things that the government may make regulations for at some point should they become necessary. I understand the point that has been well made about the amount of effort that is required to make those regulations. However, there is ambiguity about whether a regulation will be made that includes some of the activities that are listed in this clause. Another way that the government could have gone forward would have been to specify those items for which regulations would definitely be made and those other items for which regulations would be optional if they were required according to the business of the port. It is important to clear

up that ambiguity. No-one should be under any misapprehension that this is a controversial piece of legislation that the people who use Pilbara port at the moment are concerned about. This amendment has been proposed to try to give them some certainty about exactly what will occur with business at Pilbara port. That is why, in spite of all the reasons the government would not support the amendment, I think it is very important that we take the opportunity to give them that clarity and that we require that, in this instance, the regulations must be made. So I have moved the amendment and I would like it put.

Division

Amendment put and a division taken, the Deputy Chair (Hon Simon O'Brien) casting his vote with the noes, with the following result —

Ayes (10)

Hon Robin Chapple	Hon Sue Ellery	Hon Martin Pritchard	Hon Samantha Rowe *(Teller)*
Hon Stephen Dawson	Hon Lynn MacLaren	Hon Sally Talbot	
Hon Kate Doust	Hon Laine McDonald	Hon Darren West	

Noes (19)

Hon Martin Aldridge	Hon Jim Chown	Hon Nigel Hallett	Hon Michael Mischin
Hon Ken Baston	Hon Peter Collier	Hon Peter Katsambanis	Hon Helen Morton
Hon Liz Behjat	Hon Donna Faragher	Hon Mark Lewis	Hon Simon O'Brien
Hon Jacqui Boydell	Hon Nick Goiran	Hon Rick Mazza	Hon Phil Edman *(Teller)*
Hon Paul Brown	Hon Dave Grills	Hon Robyn McSweeney	

Pairs

Hon Alanna Clohesy	Hon Brian Ellis
Hon Amber-Jade Sanderson	Hon Col Holt
Hon Adele Farina	Hon Alyssa Hayden

Amendment thus negatived.

Hon ROBIN CHAPPLE: I want to touch on some comments in *Hansard* that the minister made last night on clause 46, when he said —

> The existing contracts will continue—some of them until 2030, I believe. Those will not be altered.

I point out that this is uncorrected *Hansard*. It continues —

> Should the lessee choose to increase their return, it will be a matter for negotiation with whoever is entitled to access that facility. If negotiations break down, there will be a mechanism to arbitrate for a fair price under the auspices of the regulator.

Is this not in direct conflict with the earlier statement that the Economic Regulation Authority would be the price regulator and that the port will be able to set a price through careful negotiation only if the company takes it to the arbitrator and only then if the negotiations break down with the government through its agent the ERA?

Hon MICHAEL MISCHIN: I just want to clarify something. Hon Robin Chapple was referring to something I said last night and comparing it against something else that was said. When was that other stuff said?

Hon ROBIN CHAPPLE: Earlier on it was said that the ERA would be the price regulator—the port will be able to set a price through careful negotiation only if a company takes it to the arbitrator and only then if negotiations break down with the government through its agent the ERA.

Hon Michael Mischin: Did I say all that last night?

Hon ROBIN CHAPPLE: No, that was earlier.

Hon Michael Mischin: When?

Hon ROBIN CHAPPLE: When we were last dealing with it.

Hon Michael Mischin: Was that in February?

Hon ROBIN CHAPPLE: Yes.

Hon Michael Mischin: Things have changed since February.

Hon ROBIN CHAPPLE: So what is the current situation?

Hon Michael Mischin: The current situation, as I have outlined —

The DEPUTY CHAIR (Hon Simon O'Brien): Order! Just to clarify for members, I cannot have more than one member on their feet at any one time. Obviously some matters can be responded to briefly by interjection, but for more substantial contributions we need the member on their feet to sit down so that another member can rise. At this stage, I give the call to the minister in response to the member's question.

Hon MICHAEL MISCHIN: Thank you, Mr Deputy Chair. Hon Robin Chapple has taken two comments, one of which was made last night and which set out the position after this bill has been to a committee and after the government has introduced amendments to it in order to take into account the issues that have been raised since February. The current position is as I stated it. I think it is a little unfair to start looking at what may have been the position before the government moved to make refinements to the legislation to accommodate the problems that have been agitated over the last nine months or so.

Hon ROBIN CHAPPLE: Okay, I take that on board. If the minister is not going to use the return on assets or price of purchase as he stated last night, how will the regulator pick a price, given that the ROA is critical to determining a price, and what is an acceptable ROA?

Hon MICHAEL MISCHIN: I am sorry, Mr Deputy Chair; this is going round in circles. Back in February a system of price monitoring was proposed. Since then, what has been introduced, which I have repeatedly stated, is a negotiate–arbitrate regime. I indicated yesterday at length how that is going to operate. The government is not going to be doing anything of the sort. It will be a price that will be negotiated between the relevant parties, and if there is an impasse in respect of that, either by way of the price or the access, it will be arbitrated in accordance with ordinary arbitration principles. I am not going to go through it all again. If questions continue to be raised on that theme I am simply not going to respond, because I have been through all this, with respect.

Hon ROBIN CHAPPLE: Just finally, before we move on to the amendments standing in my name, when we are actually talking about the price, there are two tiers of pricing for the next 14 years. Is it true that the price will be, effectively, decided by how much someone can afford to spend on a legal team to argue with the port lessee? If we are actually going down a pathway where there will be two tiers of pricing for port users and the price will be, effectively, decided by arbitration, which will involve significant expense, that pricing may or may not reflect the two different tiers of pricing for port users. For the sake of clarification, the current situation at the Pilbara Ports Authority is that there is actually an improvement of possibilities, so we are seeking a reasonable price to access a facility. That is if this is an improvement, because the government will ultimately intervene if the price is too high.

Hon MICHAEL MISCHIN: I am sorry: what two tiers of pricing? I have no idea what the member is referring to. With respect, it seems that the member has a list of questions. I am not arguing with the legitimacy of putting those questions, but whoever has advised the member on these matters seems to not understand what is being proposed. I really have no idea what two tiers of pricing the member is referring to.

Hon ROBIN CHAPPLE: I will try to explain it a bit better. We are looking at the port as a whole. We are not just talking about Utah Point; we are talking about the port as a whole. There are different levels of pricing regime within that port at the moment.

Hon MICHAEL MISCHIN: We are not talking about the port as a whole; we are talking about the regulated services being provided by Utah Point. I understand that the concern has been that certain mining companies that have access to the facilities at Utah Point are worried that that access will be denied sometime in the future, either by way of action of the lessee, or that they will be priced out of access to that service. It has nothing to do with the services provided elsewhere in the Pilbara port; that will be under the authority of the Pilbara Ports Authority. It will be dealt with in the same manner as it has always been dealt with in the past and is being dealt with now and, if the Pilbara Port Assets (Disposal) Bill 2015 is not passed in respect of Utah Point, will be dealt with in the future, whereby there is no regulation of the pricing regime and the price is set by Pilbara port for that service.

Hon Robin Chapple: No worries.

Hon MICHAEL MISCHIN: What is proposed here is that the management of this facility will be by whoever puts in a suitable bid to manage it and take responsibility for it, with guarantees that its purpose will continue—that is primarily to provide the access to service that is currently being enjoyed by junior miners. Mechanisms are being put in place to ensure that. Whereas originally the price was to be monitored, since then the government has responded to the concerns to ensure a more flexible and more arm's length mechanism to ensure access and pricing by way of a negotiate–arbitrate regime, and with guarantees that certain amounts of the facility will be available at short notice should a junior miner need to have access to it and it is being used by someone else, in order to not waste the asset and avoid it sitting idle. It has nothing to do with two pricing regimes: there is no two-tier pricing regime. To clarify it for the umpteenth time: it will not be a price set by government; it will be one negotiated between the parties. If they cannot reach an agreement, it will be arbitrated

upon in the same manner as any other commercial agreement, in accordance with the general principles of the Commercial Arbitration Act or whatever other agreement they choose to reach.

Hon ROBIN CHAPPLE: In that regard then I will just go straight on to the amendments standing in my name.

Clause put and passed.

The DEPUTY CHAIR (Hon Simon O'Brien): There are several proposed new clauses on our supplementary notice paper, but the first is in the name of the Attorney General. However, I think you might want to be moving a motion, Attorney General.

Hon MICHAEL MISCHIN: Apropos the discussions yesterday at the commencement of the committee stage, I wish to postpone consideration of new clause 46A 5/NC46A until after consideration of new clause 46A 17/NC46 and new clause 46B. The purpose of that will be to allow Hon Lynn MacLaren to move her proposed amendments regarding the preservation of rights to future access in compliance with the Port Authorities Act 1999. If those amendments succeed, I will pursue the government's amendment. If they fail, I understand Hon Lynn MacLaren will be supportive of the government's proposed amendment although that is not her preference as to the manner in which the legislation should read.

New clause 46A (5/NC46A) postponed until after consideration of new clause 46A (17/NC46A) and new clause 46B, on motion by Hon Michael Mischin (Attorney General).

[See page 7828.]

The DEPUTY CHAIR: I give the call to Hon Lynn MacLaren so that she can move the amendment standing in her name.

New Clause 46A —

Hon LYNN MacLAREN: I move —

Page 35, after line 16 — To insert —

46A. Preservation of rights to future access

(1) In this section —

access means access to a service;

access capacity means the capacity to provide services of the person who owns, controls or operates a port facility;

available capacity means access capacity that is not contracted to a protected user or is not the subject of a request by a protected user to be so contracted;

eligible request for access means a request for access capacity when a prescribed user has access capacity at a port facility;

prescribed period for a request for access or an eligible request for access means 180 days after the day on which the request is made;

prescribed user means a person specified in regulations as a user or potential user of a service;

protected user means a user or potential user of a service other than a prescribed user;

service has the meaning given in section 46(1).

(2) It is a condition of the operation of a port facility that, subject to subsection (3), 100% of the access capacity must be reserved for protected users.

(3) Despite subsection (2), if a request for access is made by a prescribed user and there is available capacity at that time, the request may be granted to the extent of the available capacity as long as it is granted on terms that enable a protected user who subsequently makes an eligible request for access being provided with such access within the prescribed period or at a later time agreed to by the protected user.

The DEPUTY CHAIR: Do you want to move the other amendment and seek leave for it to be considered cognately?

Hon LYNN MacLAREN: No, Mr Chair. I think we might want to consider the other one separately, so we will do them one at a time in order to allow the debate to be concentrated on the matters that each of them propose.

The DEPUTY CHAIR: Very well; thanks for clarifying that. I give the call to Hon Lynn MacLaren or Hon Robin Chapple.

Hon ROBIN CHAPPLE: This is really almost the do-or-die clause in many regards, because it actually reflects findings 1 and 2 and recommendation 6 of the joint standing committee that reviewed the matter. Finding 1 states —

> **The Committee finds that the Utah Point Bulk Handling Facility's primary role is to facilitate and develop the junior mining industry in Western Australia and this role should continue, notwithstanding the divestment of the facility as proposed by the Pilbara Port Assets (Disposal) Bill 2015.**

It also deals with finding 2, which states —

> **The Committee finds that there are currently insufficient protections for junior miners in the proposed access regime under the Pilbara Port Assets (Disposal) Bill 2015.**

Recommendation 6 states —

> **The Committee recommends that the Pilbara Port Assets (Disposal) Bill 2015 be amended to improve access to the Utah Point Bulk Handling Facility for junior miners at all times in the future.**

I have to point out that they were not minority recommendations; they were majority recommendations of a committee made up of all political spectrums. The committee deliberated at great length on these matters. In the committee's view—I represent some members of that committee—this is crucial for the future of access in an effective way to the Utah Point facility for the mid-tier miners. Obviously, the amendment includes those statements. It gives the capacity to provide services to the person who owns, controls and operates the port facility. It provides that access to capacity is not contracted to a protected user or is not subject of a request by a protected user to be so contracted. It deals with many aspects that, indeed, were presented to the Standing Committee on Legislation by both the Association of Mining and Exploration Companies and the small-tier miners. The committee saw the deep concerns and passion that they expressed and this is certainly one area of concern when we talk about jobs in the Pilbara. Those junior miners need access to this port facility because they do not have access to rail lines. Associated with that are the jobs of hundreds of truck drivers who, in the main, are employed locally; they are not fly in, fly out workers, but are part of the local community. If protection is not provided within the act, the mid-tier miners and AMEC seriously believe that into the future the wherewithal of those miners to continue to operate in an economic manner might be disadvantaged to the point that we will see a lot of that available capacity going to other miners because they will not be able to fiscally afford to use the Utah Point facility. Proposed new clause 46A is an incredibly important addition to this bill and, in our view, should at least, in the whole gamut of the notion of the privatisation of this port, notwithstanding our philosophical views about it, look after what is a small mining sector that is already under significant stress due to the price of iron ore and many other aspects in that vicinity. We believe that without this protection afforded by new clause 46A, many of the problems outlined by representatives of mining companies to the Standing Committee on Legislation on its inquiry into the Pilbara Port Assets (Disposal) Bill 2015, which was a very extensive hearing, will come to fruition.

Hon MICHAEL MISCHIN: The government is also concerned to ensure that the interests of junior miners are protected in their use of the facility and, hence, will move in due course the insertion of new clause 46A to achieve just that. However, notwithstanding the objectives that Hon Robin Chapple has indicated, the government does not support the amendment before the Committee of the Whole at present. In the first place, the amendment does not take account of and is, in fact, inconsistent with the government's proposed comprehensive access and pricing regime as detailed in my response to the second reading debate; in particular, the amendment as drafted would allow access to prescribed users—that is, the major mining companies—much sooner than would be the case under the government's regime. The proposed access regime is designed to ensure a balance between the need for junior miners to have access to capacity by incorporating several protection measures to ensure priority for junior miners without sterilising or stranding capacity in the circumstance of legitimate demand from major miners. The proposed access regime also serves to ensure that the regime is consistent with the obligations of port authorities, as set out in the Port Authorities Act 1999, "to facilitate trade within and through the port" and the principles of efficient use of the facility. It should be acknowledged that the proposed access regime already prohibits negotiations with major miners unless capacity has first been offered to junior miners, with negotiations conducted in good faith, and the Economic Regulation Authority is subsequently satisfied with the process as a precondition to approving any potential negotiations with major miners. The government notes the committee's concerns, including comments and submissions from interested parties, and to this end the government has introduced a further layer of protection for junior miners in the form of the government's proposed clause 46A, as I have indicated, to address the hypothetical situation in which a junior miner is initially unable to use the capacity but subsequently seeks to recommence exports. In the circumstance in which the Economic Regulation Authority approves negotiations with major miners, the terminal operator will need to ensure that at least 50 per cent of the capacity is available to be accessed by junior miners within

180 days. The effect of this is that even in circumstances in which no junior miner is in a position to contract capacity, there will always be 50 per cent of capacity available at short notice at Utah Point for the terminal operator to offer to junior miners. That is the effect of what is proposed by the government's amendment, but it is not achieved in the same manner as proposed by Hon Lynn MacLaren, so the government cannot support the proposed amendment. I should add at this stage that I moved the deferral of the motion standing in my name to after proposed new clause 46B on the assumption that they were part of a package, but it may be convenient if we revert to dealing with the government's proposed clause 46A—I do not much mind—after the vote is taken on this one, if this vote does not succeed.

Hon KATE DOUST: The opposition will support the amendment moved in the name of Hon Lynn MacLaren. The member's amendment and the government's proposed amendment have three distinct differences. Hon Lynn MacLaren has detailed definitions around available capacities, eligible requests for access and prescribed periods. The member's amendment reflects the concerns articulated by the junior miners about access and would hopefully settle their concerns about whether it is up to 50 per cent or over 50 per cent. Given that Utah Point was indeed built in the first place to support junior miners, I would have thought their needs would have dominated the process in the transition to sale or lease, but that is not the case. I do not understand why the government could not have come part way and perhaps sought to include some, if not all, of these three additional terms that have been picked up in Hon Lynn MacLaren's amendment. The amendment the government is proposing is still deficient and will not allay the concerns of the junior miners once this bill is passed. The junior miners see the issues of access and pricing under a new regime as quite detrimental to their business and to their access in the future. On that basis, we support the amendment moved by Hon Lynn McLaren. The amendment is in the best interests of the junior miners that need to use this facility in the future.

Hon SIMON O'BRIEN: I have previously indicated to the house my special interest in the Pilbara Port Assets (Disposal) Bill 2015 because it relates to future access to the Utah Point bulk handling facility by what has come to be known as the junior miners. In contemplating proposed new clause 46A, I am pleased that everyone is singing from the same song sheet to the extent that they want to make sure that, in recognition of the majority recommendation in the report of the Standing Committee on Legislation, the bill is amended by inserting a proposed new clause 46A to ensure that the junior miners will have enduring access to the facility and it is not taken over at some stage by larger companies that already have their own facilities in the port. Apparently, we are all in furious agreement about that. It is now just a matter of massaging the actual statute to make sure that we achieve that end. That is what we are trying to achieve right now.

In the first instance, I want to ask a couple of questions as points of clarification before I deal with the substantive matter of the amendment. Proposed new clause 46A contains the term "prescribed user". When the term "prescribed user" is used in context, it is clear what it means. I apologise in advance if, during the lengthy consideration of this bill over months, the minister has already addressed this matter and I have missed something I should have picked up. I ask the minister, if he will indulge me, to explain what a "prescribed user" is, for the benefit of the record and in case I have presumed wrongly. I also crave the minister's indulgence to not stand and say, "A prescribed user would be one that is prescribed." That actually is, literally, the correct answer, but I think the minister knows what I mean by the question. What is meant by "prescribed user", and how will we know what a prescribed user is 10, 20 or 30 years down the track?

Hon MICHAEL MISCHIN: Prescribed users would be the non-junior miners. They will be named in the regulations. The prescribed users are currently BHP Billiton, Rio Tinto, Fortescue Metals Group, Roy Hill and Vale. I think that those were mentioned.

Hon SIMON O'BRIEN: I thank the minister for advising that; it is very useful. It occurs to me, though, that apart from the minister's advice, until that prescription is made by regulation, we do not actually know that that will be the case. I know that the minister is acting completely in good faith, and I am sure that what he has said is in fact what will come to pass; however, in the fullness of time, other entities may come into being. Rio Tinto, for example, might be broken up into half a dozen entities. I am not being flippant when I say this. Large corporations occasionally hive off a division or two when restructuring. Therefore, the parties that we think might be prescribed users now and in the future might actually be quite different. Members will see where I am leading with this. If the question is, "When does a prescribed user potentially morph into a protected user?", then the whole intent of what we all agreed on just now would be placed in jeopardy. I do not know whether the minister is able to comment any more about that or we need some other mechanism to bind this up.

Hon MICHAEL MISCHIN: The honourable member is quite right—circumstances may change over time. Hence, instead of an attempt to strike a prescriptive formula, the government of the day has the flexibility to determine the factual situations on the empirical evidence available. The government of the day can determine whether a company ought to be classed as a protected user or a prescribed user. It may be that the corporate structures will change but the entities that emerge out of those changed corporate structures are still major operators and have access, through some agreements, to the sorts of facilities that are currently available to the

original operator. For example, as the honourable member has suggested—this is speculation, of course—Rio Tinto might be broken up into a variety of other entities, but those entities, for their own benefit, have access to Rio Tinto's current facilities. The government may then choose, on the basis of its knowledge, not to protect them, or to prescribe them. That decision would be made on the merits of the case, and it can be made very quickly because it would allow prescription by way of regulation.

Hon SIMON O'BRIEN: I thank the minister very much for his response. I think the minister, by his demeanour, appreciates the importance of making this clear to those who are following this debate, whether they be within or out of this chamber. A prescribed user will be just what we thought a prescribed user would be—it will be one of the big operators that already has access to substantial export facilities; and, let us face it, we do not want one of those big operators to push out junior operators by monopolising the capacity of Utah Point. That is as we thought it would be, and we have just heard that is as it is. My second question now falls away because, by definition, if we know and understand what a prescribed user is, we then know, by default, what a protected user is. That is another term that, for posterity, is not amplified except within the context of this debate. This is not a second reading speech by the sponsor of the bill, which might be relied upon in a future court of law; no, this is the committee stage of the bill. We need to clarify that so that we know what we potentially are getting ourselves into by supporting new clause 46A, or some variation of it, and what we are not doing. The minister makes the very pertinent point that the prescribed user will be determined by the government of the day, having regard to its stance on such matters, the issues of the day and so on. Heaven knows how this might morph over the next generation or two. Do we not live in times of very rapid change, if we contemplate where we were just a few years ago? I am starting to sound like my grandfather now, but I have started, so I had better finish!

Hon Michael Mischin: You're starting to look like your grandfather!

Hon SIMON O'BRIEN: You are too kind! For those who did not get that unruly interjection, the minister suggested that at least I looked the part!

When I started in this place, I recall that the newest technology was the mobile phone and members did not have PCs and laptops; it just shows how the technologies of the day —

Hon Sally Talbot: Lucky you're an early adopter!

Hon SIMON O'BRIEN: I am like a 12-year-old kid, I am that receptive to change, as Hon Sally Talbot knows!

Let us get back, at least in passing, to the Pilbara Port Assets (Disposal) Bill 2015 before us. We do not know what a future government will do in this regard. I think it is very likely that any future government's view of "prescribed user" will be just like the view we heard expressed from the committee table just now. Even if we have changes—we have seen it almost happen—and one of the mining company's iron ore divisions becomes a separate entity, it will still be pretty obvious what is meant by "prescribed user" and what is intended by "protected user". For the government of the day to have the power to regulate those matters and to change the regulations is absolutely fundamental to protecting the juniors, who are the ones we are trying to ensure will have access into the future. Firstly, there is no question that we need proposed new clause 46A—no question at all—and I will certainly be supporting that. The question of prescribed users is one that I have just discussed at length, and I think it was important to clarify that, but members need to understand that the world changes. As different entities in the corporate world change hands, things can evolve in this space. We have seen it before with the former government-owned railway, Westrail. After it went into private hands, we saw it pass through a number of different owners and, in due course, the above and below–rail operations, which were always intended to be separate, became integrated into the one entity. That then operated in a way designed to keep third parties out, which was the exact opposite of the original intention.

In this situation, one of the intentions—there are several motivating this bill—is to ensure that the status quo of access is maintained. We have heard from the government, in different ways, that perhaps the capacity of this infrastructure could be used better and that more could be sweated out of it, perhaps by allowing so-called prescribed users, the big guys, to use unused portions of the port capacity from time to time. Frankly, that is fair enough, as long as it does not impact on the access enjoyed by the juniors.

That takes us to the other point I want to discuss about proposed new clause 46A, in either of its iterations. The proposed new clause before us now is the one moved by Hon Lynn MacLaren, which seeks to provide that, subject to proposed subclause (3), 100 per cent of the access capacity of Utah Point is reserved for protected users. In effect, that is saying that 100 per cent of the capacity is to be reserved for junior miners, and that will be our starting point, although we will come to some exceptions. Proposed subclause (3) provides one such exception—that if there is available capacity and one of the big companies applies to use that capacity, they may in fact do so, as long as the terms under which they do so enables any of the juniors

that subsequently make a request for access to get that access within a certain period, which I think is 180 days after the request is made. That, in a nutshell, is what this bit is all about.

We can also fairly contemplate the government's equivalent new clause 46A. In the government's version of proposed new clause 46A(2), it is a condition of the operation of the port facility that, subject to proposed subclause (3), 50 per cent of the access capacity must be reserved for protected users. At face value, that looks less attractive to those who are in the juniors' corner. I can tell members that I am in the juniors' corner, and have been the whole way through. I have been on the side of the juniors since before a stone was turned on the construction of Utah Point, and I have described that in detail before. I still am on their side, so no-one should have any doubts about where I am coming from, and I will threaten to tell them again if they do! The government's alternative provision is that it is a condition of the operation of the port facility that, subject to proposed subclause (3), 50 per cent of the access capacity must be reserved for protected users.

From a casual read of that provision, one might think, "Well, hang on; that's not much of a deal. On one hand we have Hon Lynn MacLaren—the true champion of the junior miners, prominent and sincere green activist and well-known supporter of mining companies, particularly little mining companies—championing the juniors in this place and in this amendment. She wants 100 per cent of it reserved for protected users, while reasonably recognising that if there is unused capacity, let's see if we can free it up. But the mean old government says, "No, we're only going to let them have half'."

At first glance, for many people, that is what this provision actually says; however, I am not so sure that it says any such thing. Looking at it another way, let us contemplate the proposed amendment before us before contrasting it with the one that has been foreshadowed by the government. If the starting point of 100 per cent is reserved for protected users, that sounds pretty good. However, on page 5 of the supplementary notice paper it states that if spare capacity is available, it can be taken up by the big guys, and that is all right. If there is 10 per cent capacity, we can let them have that too. It would not be much, but we could let them have that. If it is 20 per cent, we could let them have that. If it is 50 per cent, which is on par with what the government's proposed new clause provides for, then, yes, I think we can let them have that. But what if the spare capacity was 80 per cent or 100 per cent? Yes, I think we could let them have that too. In effect, 100 per cent of the capacity could be taken over by large miners for their export facility, and if any junior wanted access, they would have to wait at least 180 days for any part of that capacity to be freed up. That is what Hon Lynn MacLaren's proposed new clause 46A provides for. I am not being judgemental; I am just trying to make it absolutely clear what the proposed new clause will mean.

I now turn to the government's proposed new clause 46A, which was the original, but is now the foreshadowed, amendment, and the government's position would seem to be—I will ask the Attorney General to concur if I am reading this correctly—that regardless of any excess capacity, at least 50 per cent of the capacity will be given over to the juniors' bottom line, and even though some of that capacity might not be taken up by the junior miners, no more than 50 per cent of available excess capacity can be taken up by the large companies. We could then think, "Hang on, if that's the case, perhaps the government's foreshadowed amendment does not actually mean what it at first appears to mean"—the Attorney General will confirm that I am correct—"and that it does not mean only 50 per cent is going to be guaranteed for the juniors; it means that a minimum of 50 per cent will always be reserved for the juniors." What is more, they will be able to gain access to the next 50 per cent in the prescribed manner within 180 days.

Hon Robin Chapple: That is if you drop from 23 million tonnes per annum to 11 million tonnes per annum.

Hon SIMON O'BRIEN: That is total throughput. Hon Robin Chapple, by interjection, indicates one possible scenario and that mitigates the fully efficient, fully sweated use of the Utah Point facility. Nonetheless, I think it is important that members examine this particular matter and what it means. Perhaps the Attorney General will take a moment to respond to my proposition, in which I and other members are struggling to identify which of these alternatives is the best. We are agreed that one of the new clauses needs to be in the bill, but we are trying to work out which is the best one, what the real implications of the respective amendments are and which one will provide juniors the best access.

Sitting suspended from 1.00 to 2.00 pm

Visitors — Carnamah District High School

THE DEPUTY CHAIR (Hon Brian Ellis): Before we start I would like to welcome to the gallery students from Carnamah District High School. They come from a very special part of the state—part of our electorate, the Agricultural Region. I hope you enjoy your tour of Parliament.

Debate Resumed

Hon MICHAEL MISCHIN: I will address the matters raised by Hon Simon O'Brien. He is not quite right. The government's proposed amendment will not leave 50 per cent of the facility vacant. The proposed access regime is designed to ensure a balance between the need to ensure that junior miners are given priority access to capacity by incorporating several protective measures, without stranding the asset—Utah Point—by allowing it to stay idle when there is a need for export capacity through that facility. When there is a legitimate demand from prescribed operators—as is intended by both the government's proposed amendment and the amendment moved by Hon Lynn MacLaren—a process will be prescribed that will make it difficult for the prescribed operators to simply take up that access capacity. The purpose of the regime is to ensure that this important asset is not idle and that its operation is consistent with the obligations of port authorities as set out in the Port Authorities Act 1999, namely to facilitate trade within and through the port, and the principle of efficient use of the port. The foreshadowed regime is the subject of the document that I tabled earlier, which sets out the process that will be translated into regulations in due course.

In short, the only way in which a prescribed operator can get access is if there is spare capacity—because if there is no spare capacity, it means it is being occupied by junior miners—and only up to that spare capacity. The proposed process when capacity becomes free is quite stringent. If a junior miner ceases shipping or indicates an intention to cease shipping, it is proposed that the lessor be given three months' notification. After that three-month period has elapsed, the lessor may issue to the protected user a show cause notice—I will try to use the terminology foreshadowed in the legislation—for why that capacity ought not to be reallocated. The protected user will then have three months to respond. If the junior miner is still not shipping at that time, the lessor can advertise the available capacity and that advertising will go on for three months. If a junior miner, including the same junior miner or another protected user, applies for that capacity, there must be negotiation over that spare capacity, and that can take six months and be extended. If no protected users apply, the lessee may apply to the Economic Regulation Authority for approval to negotiate with non-juniors—that is, prescribed users—and there is advertising again. Juniors can apply, subject to ministerial approval, and then go back through the negotiation process. It is only if a prescribed user is available and a deal is reached that there can be a contract for the use of that spare capacity. If that amounts to more than 50 per cent of the available capacity, and at some point a protected user has a requirement to use the Utah Point capacity, that capacity used by the prescribed user may have to be forfeited to allow up to 50 per cent of Utah Point to be utilised by a protected user, and the three-month or 180-day period will apply and so forth.

There had to be a balancing exercise about whether it would be a 50 per cent or a 100 per cent reservation. One of the things the government is hoping to avoid is that any unutilised capacity at Utah Point stands idle. It is of no benefit to the lessee of the facility and to companies that require that exporting capacity if a facility is not being used, and it is of no benefit to Western Australia's revenue or royalties—its trade. If we reserve 100 per cent, it may very well be that no company will take up that capacity, even if it is only 10 per cent of it, because 100 per cent of it is to be reserved and must be relinquished if a protected user wants to take it. It may deter an operator from entering into some arrangement to use that capacity if they know they may be kicked out within 180 days. Therefore, there had to be a balancing exercise around what would be an appropriate amount of reservation. However, there are a number of preconditions to a major operator—a prescribed user—being able to occupy any of the capacity, certainly more than 50 per cent, because they need to go through this process. One of the problems with the way Hon Lynn MacLaren's amendment has been drafted is that it assumes that a prescribed user is already operating out of Utah Point. That may not necessarily be the case. That is not a problem with the government's amendment. Therefore, it is the government's preference that its amendment be adopted into the legislation to provide the protection that I have foreshadowed.

Hon SIMON O'BRIEN: I thank the minister for his explanation of those matters. It helps members understand. It has certainly helped my understanding of how the proposed regime will work under the two options we are contemplating, so I thank him for that.

I will be brief and I will stand corrected if I have this wrong: what it seems to boil down to is how much of Utah Point is contemplated to be given over exclusively to junior miners—or not. The point that the minister made about ensuring that this infrastructure and capacity does not sit idle is a point very well made. He spoke about revenues flowing to not only the port, but also the state, and the contribution of cargo going over the wharf contributing to the local economy in so many different ways. That point is well made. However, what we were primarily on about with Utah Point is providing an export facility for non-majors where previously there was not one. When we contemplate it that way, that is how Utah Point has really provided revenue for the state—through the growth of industry in the mining sector and local jobs for people operating transport mechanisms. This is of course for companies that do not have railway lines and rely on road transport to get big bulk cargoes concentrated to or adjacent to the port so that they can be shipped off via Utah Point to their customers overseas. That primarily is what the Utah Point facility is all about.

With that in mind, I am having a little difficulty with the position of maximising the throughput, because of course the majors are voracious. If any capacity is going, they will pick it up. Do not worry that they might be

shipping 500 million tonnes per annum through the other capacity of the port—if they can get any or all of this 23 million notional tonnes at Utah Point, they will take it. We will have no trouble sweating this infrastructure. What concerns me is that if we have juniors that need capacities, will they have access? To bring it to the point, under the present proposal put forward by Hon Lynn MacLaren that states that the starting point is 100 per cent reservation for the juniors, we achieve the best we can. Sure, I can see that the capacity of the facility could be maximised under Hon Lynn MacLaren's amendment, because if juniors do not want to take up 100 per cent of the capacity, I will bet London Bridge to a brick that others will—that is, the so-called prescribed users. This amendment will achieve maximising the infrastructure, but it will also preserve the rights of the juniors, who come in all shapes and sizes as well, to have access to the facility. If we in effect restrict the rights of the juniors to claw back more than 50 per cent in a scenario in which the whole lot was given out to majors in a time of downturn, why would we restrict the use of Utah Point for miners to only 50 per cent? It does not make sense. If there is a contrary argument, I would like to hear it, but it is only an argument based on something other than meeting the needs of the would-be shippers from Port Hedland.

Hon ROBIN CHAPPLE: I thank Hon Simon O'Brien for the contribution, as it highlights a very salient point. We currently know that the manganese miner at Utah Point is not operating, but still has access to the area. The price of manganese is going back up again, and we are likely to see the miner come back into the market shortly. We also have the advent of the new lithium miners coming onstream, and without this facility being 100 per cent available to small miners and emerging miners, where do they go? The government has not been able to tell us. The Pilbara majors have about a 500 million-tonne capacity and a further 350 million running out through Cape Lambert. This facility is only 23 million tonnes per annum. It is really small. If we halve that at some stage, the whole of the Pilbara will end up with 11 million-tonne capacity for the junior miners; and they have no other option–there is no other option. As Hon Simon O'Brien said, when this place was established, it was done for the very reason of enabling those small miners to utilise a facility somewhere in the Pilbara. The minister at the time most probably did a sterling job in establishing the Utah Point facility. As we have already talked about, he also took the significant dust problems associated with manganese mining out of the town and put them over at Utah Point.

In support of the amendment moved by my colleague, the process that the minister has explained, even if his amendments go through, would potentially make only 50 per cent of that current 23 million tonnes per annum capacity available to the juniors. It will be sort of bizarre. Let us assume, for example, that company A is currently allocated 20 million tonnes throughput per annum, and company B is allocated nine million tonnes per annum. If company A suspends operations for a period and then recommences operations, what allocation would that company get back in that scenario? I would like the minister to try to explain what would happen if company A has a contract that provides a minimum of 10 million tonnes per annum; what would be the eventual outcome in that case? It is quite clear to me that a diminution of access to that facility would be seen over time, purely based on the fact that the 50 per cent at some stage can be lost and cannot be regained.

Hon MICHAEL MISCHIN: A number of assumptions are based on the worst-case scenario and need to be addressed. Firstly, as I indicated, it is only when there is a relinquishment or failure to obtain a protected user to use the capacity that it could possibly be reallocated to a prescribed user. It is only some six months of failing to ship before we even get to the stage of advertising more broadly for someone to take up that capacity that is being surrendered. Three months after, there is an obligation to negotiate with any protected user that comes forward, including the original protected user. It is only when that negotiation breaks down, and even after arbitration if no agreement is reached, that an approach can be made to the Economic Regulation Authority to seek permission from the minister to advertise and bring in a prescribed user. We are looking at a period of something like a year before anything can be done. Even in the economically straitened times that are being encountered, Utah Point is at 100 per cent capacity. At the moment, if I understand it correctly, if an operator that is regarded as a protected user says it does not want to ship anymore and its operation is going to be mothballed for the next six months or so, assuming that it is not breaching the contract that it currently holds with the Pilbara Ports Authority, and assuming that it is not held to account for that breach and that loss of revenue—let us assume that it just simply gives it away—the Pilbara port can assign that capacity to what would otherwise be considered a prescribed user. There are no inhibitions in that regard. It has been pointed out to me that the port is probably obligated to do so under the Port Authorities Act to maximise the use of the port facilities. If all the junior miners that are currently operating out of Utah Point suddenly said that because times are tough they were giving it away for the next six months or a year or whatever, the Pilbara port could enter into a long-term contract with any of the major users and the facility would not be accessed by the junior miners. That is what the port can do now. This bill sets aside at least 50 per cent of that facility, and I am told that even may be fraught if times are so bad that 50 per cent of that facility has to be taken over by others because the junior operators are not prepared to use it. If things are that bad, the potential exists for that facility to gather dust with no-one using it. To reserve 100 per cent of the facility on the off-chance that someone might take that up means that we would be effectively precluding any sensible commercial arrangement for any period that might be attractive to someone filling that void. In the end, it is a matter of judgement. I am informed that the balance that has been struck is reasonable. It would arise in only very extreme circumstances anyway when there was

such a downturn that the only people who might be willing to operate or use this facility would be some of the major operators. A stringent process must be gone through before even one of them can become involved.

We will have to agree to differ. At the end of the day, the government entirely appreciates and respects the importance of having junior operators in the field and being able to export the resources that they have taken the time and trouble to obtain, and that is encapsulated in this access and pricing regime to the extent that one can predict the future. At the moment there is no access and pricing regime and the Pilbara port can do whatever it likes. It will fulfil its obligations under the Port Authorities Act and that may be exactly the opposite of what is currently in place and what members are hoping to preserve through this amendment. We will have to agree to differ on it. Certainly, if it turns out that the government is wrong about this, it will be held to account for it, but Hon Lynn MacLaren's proposed amendment is, with respect, not effective; it is defective in at least one respect.

Hon SIMON O'BRIEN: One of the things I like about this place is that we can have a proper debate about this sort of matter. I thank the minister for again indulging us with his remarks just now. The points he makes are all valid, including his point that perhaps some involved in this debate may ultimately have to agree to disagree, and that is what it comes down to because there is also a need for us to bring this matter to a head. In so doing, I will just point out a couple of things. I note the minister has advised us that it is probably a bit of a moot point at this time to debate this because the facility, as I understand it, is pretty well fully subscribed anyway despite any economic downturn—it is all running quite well; thank you. That is the first point. Of course, we do not have a crystal ball, certainly not one with a 20 or 30-year horizon. That is the sort of thing that we need to get right now if we can.

Hon Robin Chapple: By way of interjection, the issue then becomes whether the increased rentals go up dramatically, which may not be for some time after.

Hon SIMON O'BRIEN: There are all sorts of unknowns, are there not, Mr Deputy Chairman? In response to the minister saying that the management of Utah Point could turn around now and allocate all the Utah Point throughput to the majors, I say that might be true but I bet that it will not try to do that because the government, I would hope, would be the first to say, "Oh no, you're not doing that." Admittedly, the management is outsourced, but government policy still prevails and at the moment it protects the juniors at the Utah Point facility. That is what will be at risk in the future. The attitude suggested by the Attorney General just now that at the moment that could happen without this bill—the capacity of Utah Point could be given over to a major—technically might be true but it is not going to happen. If it is simply a matter of efficiently utilising infrastructure, that is cool, that is fine and there is nothing wrong with that. The point is whether the juniors can claw back the capacity when they actually need it. Can they get access to it when they need to start up again to respond to a change in economic circumstances and so on? That is what we are talking about. From what I can see, what is on offer before the chamber right now guarantees that, versus the alternative fall-back position that guarantees only 50 per cent. I do not know why the figure is 50 per cent. I do not know why it is not 87 per cent or 33.3 per cent recurring. Maybe there is some science in it. I do not know whether 50 per cent is an arbitrary figure. We have been advised that the government has attempted to strike the right balance amongst the several considerations that we are looking at.

With all I have now heard, I am reassured that the place is being properly used in the normal course of events of the not very buoyant economic circumstances at the moment, so the issue will probably not arise—but it could, maybe decades down the track. When that happens, I want to make sure that this infrastructure is available to those it was meant to be available for, not to a maximum of 50 per cent availability. That is what I want to make sure. With all that in mind, I am strongly inclined to support the amendment that is currently before the Chair. I rise to inform the minister and my leader that that is what I think should happen. I am also telling other members on both sides of the chamber that that is what I think should happen. Perhaps, we might have to disagree, but I have not heard anybody come up with an argument in support of the junior miners that would countermine the arguments I have put up today. There may be other priorities—perhaps there are—but I stand foursquare for the future of up-and-coming miners in the Pilbara. I think we should support this amendment and I urge other members to do so.

Hon ROBIN CHAPPLE: I have a couple of further questions on this. We have a position between what we refer to as "protected users" and "prescribed users". The prescribed users will be identified—the BHPs and others. We already know that a number of corporations have joint ventures with other minor corporations. What will stop Mr Forrest or a big corporation from entering into an agreement with a small miner and putting in an application to take on some of the port's spare capacity? How will it be determined whether they are a protected user or a prescribed user? The regulations will state the names of companies A, B, C and D—and D may have a joint venture with a goldmining corporation or a lithium company, for example, and make an application. Indirectly, that would give the major corporation another foothold in the area. To a degree, I am a bit concerned about what a prescribed user might be. By a change in corporate structure, can a prescribed user become a protected user?

Hon MICHAEL MISCHIN: Firstly, it is intended that the regulations will embrace associates of prescribed users. Secondly, the minister can identify prescribed users either by name or by description—for example, Fortescue Metals Group plus such-and-such joint venture. Thirdly, if there is a partnership between a prescribed user and a protected user, why would the protected user not be using the prescribed user's facilities? I think there are a number of possibilities there.

Hon Robin Chapple: We're talking about corporate ethics here.

Hon MICHAEL MISCHIN: No, we are speculating pretty wildly about possibilities.

Hon Robin Chapple: I do not think it is speculation.

Hon MICHAEL MISCHIN: It is speculation, with respect, because, at the moment, the member is asking whether this sort of arrangement could occur. I am telling him that it could be accommodated in a number of ways within the regulations that are being proposed and the fact that the minister is able to make regulations to prescribe who a prescribed user will be will identify the user. If in fact Rio Tinto suddenly collapses and shrinks in size to something the same size as Atlas Iron and it loses its facilities, it too may become a protected user one of these centuries, but that is not likely to happen. The point of it all is that there is flexibility in the legislation to allow for that and to accommodate new prescribed users coming on to the scene or any sort of corporate structure that they choose that might want to disguise the realities of their situation.

Hon LYNN MacLAREN: First of all, I want to welcome the support expressed by Hon Simon O'Brien on the other side. I think he has carefully examined what we have before us and I welcome his support, as I do the support of Hon Kate Doust. I think it is evident to most people who are listening that this has not all been agreed upon by the players at Utah Point. The assertion has repeatedly been made that everybody is happy with the way that the government is going forward; clearly, they are not. With this amendment, we are trying to specify that this is a public facility that Western Australians paid for for the purpose of supporting junior miners in a very uneven playing field with huge corporations that benefit from their size and ability to export from other facilities. As a state, we recognised that it was really important to facilitate the development of the junior miners, so we rightly built Utah Point. The financial troubles that the state government currently finds itself in will not be addressed by the bill before us. However, we do risk a future for junior miners in the Pilbara because we are permitting the use of this public facility by those large players. That was not intended by building Utah Point. My amendment intends to retain that preferred status of junior miners for 100 per cent capacity of the port. If they cannot fill the 100 per cent capacity, it will be available to other, larger miners. The government should see that this is a sensible approach. The only thing it does not do, which the government wants to do, is cap the junior miners at only 50 per cent of the port's capacity. I think the fact that there are two amendments on the notice paper to clause 46A—one by us and one by the Attorney General—indicates that there has finally been a recognition that it is not clear enough how access for junior miners will be protected. Unfortunately, the Attorney General's amendment is explicit that actually only 50 per cent of the capacity of the port will ever be reserved for junior miners. That is his intention and he thinks it will attract the prescribed users—the big players; the large miners—to use the facilities at the port because they will be able to access 50 per cent of the facility. Hon Robin Chapple made it clear how much of the tonnage and economic value of that is. Some members have commented that it is unusual for me to put these amendments on the notice, as a Greens activist. However, I want to press the point that I am doing this out of fairness and to support the small players and the diversification of the state economy. None of that is contrary to my politics. The Greens encourage other members in this chamber to acknowledge that that is the purpose of this amendment and to maybe come on board and support it. My amendment has been supported reasonably by one of the government backbenchers who has a lot of respect in this sector and who knows a lot about what we are talking about regarding exports from the Pilbara and exactly why we set up that facility. My amendment, versus the others on the supplementary notice paper and the suggestions that have been mooted, is a way forward to guarantee that fairness for the junior miners. The government should be happy with it as well because, as it has said, it has a mechanism for allowing the port's facilities to be used by the larger players if they are not being used by the junior miners. It is a win-win situation. There is no reason that the amendment in my name cannot be accepted and the government proceed on its path of allowing major players to take excess capacity that is not being used by the junior players. That is why I think members should support this amendment. It is clear that although the committee did its work diligently over a long period and prepared a report with very reasonable recommendations in consultation with a wide group of stakeholders, the legislation before us does not reflect that intelligence or the wisdom and the values that were originally established when Utah Point was created. I urge members to reconsider the committee's recommendations and look at what we have learnt throughout this debate about the government's intentions and at how we need to protect those junior miners. I urge members also to support my amendment to insert a section that specifies how access can be assured and regulated. It is a win-win situation. I am not saying that big players cannot use that facility. I am just saying that the junior miners have to be protected in this sense; that is the purpose of Utah Point. I have heard the Attorney General but we still differ.

Hon MICHAEL MISCHIN: We could go around this for hours, but I make one point that I think is important. Many of the arguments that have been raised keep going back to the suggestion that historically the purpose of this facility was that it was set up for the junior miners. It was not; it was built to facilitate trade for the junior miners, but it was not exclusively for the junior miners. The report of the Standing Committee on Legislation identifies that. Paragraph 2.59 points out that it was not all built with taxpayers' money. Of the $314.5 million to build the facility, the Western Australian Treasury Corporation contributed $193.7 million, the junior operators contributed $50.8 million, and BHP contributed $70 million and was allocated use of the facility for a period until it relinquished it, so let us get the history of this correct if we are going to be relying on that. The importance of it is that there is a facility there to achieve an end. It is not just to look after junior miners; it is there as an export facility for the state's resources with a bias towards assisting those that may not be able to afford their own facilities. It was never intended from the beginning to be simply sequestered and quarantined for a group of miners, as opposed to any others, and the BHP contribution is an indication of that. I do not want to get into arguments as to the balance that needs to be struck, but if we are going to start referring to the history of this facility as a support for the arguments as to what ought to be done into the future, we need to get that straight.

Hon LYNN MacLAREN: Since we are in the mood to be specific and accurate, perhaps the Attorney General could, for the record, tell us how the government arrived at the figure of 50 per cent. That would help us to know what the rationale is for the 50 per cent cap for junior miners.

Hon MICHAEL MISCHIN: I have already done that. I have said it was a balancing exercise as to what would be a viable quarantining of the facility.

Hon ROBIN CHAPPLE: I would like to add to the minister's comments about the establishment of that area. As a consultant who worked on what we called Hedland by design, Hon Alannah MacTiernan, the then minister, identified that it was untenable to keep the manganese on wharf 3. As a result, when that operation was moved from wharf 3 to Utah Point, all the documents, including the Environmental Protection Authority report, specifically mentioned and identified the value of establishing Utah Point for the very purpose of the junior miners to get the dust that was then emanating from wharf 3 over the north end of the town, and Wedge Street more specifically, onto the other side of the port. Although the minister of the day might have made a number of statements, they were predicated on work that had been done by the former minister, Hon Alannah MacTiernan, in Hedland, by design, to remove some of the carcinogens and dust that was emanating from the manganese operation to the other side of the harbour. I just wanted to correct the minister a little.

Hon LYNN MacLAREN: Will the Attorney General table the business case that explains that balancing act that arrived at 50 per cent?

Hon Michael Mischin: No.

Division

New clause put and a division taken, the Deputy Chair (Hon Brian Ellis) casting his vote with the noes, with the following result —

Ayes (11)

Hon Robin Chapple	Hon Sue Ellery	Hon Simon O'Brien	Hon Darren West
Hon Stephen Dawson	Hon Lynn MacLaren	Hon Martin Pritchard	Hon Samantha Rowe *(Teller)*
Hon Kate Doust	Hon Laine McDonald	Hon Sally Talbot	

Noes (16)

Hon Martin Aldridge	Hon Paul Brown	Hon Donna Faragher	Hon Robyn McSweeney
Hon Ken Baston	Hon Jim Chown	Hon Nick Goiran	Hon Michael Mischin
Hon Liz Behjat	Hon Peter Collier	Hon Dave Grills	Hon Helen Morton
Hon Jacqui Boydell	Hon Brian Ellis	Hon Peter Katsambanis	Hon Phil Edman *(Teller)*

Pairs

Hon Alanna Clohesy	Hon Mark Lewis
Hon Amber-Jade Sanderson	Hon Col Holt
Hon Adele Farina	Hon Alyssa Hayden

New clause thus negatived.

The DEPUTY CHAIR (Hon Brian Ellis): Before we proceed to the next amendment in the name of Hon Lynn MacLaren, I point out, on advice, that her amendment for the insertion of new clause 46B is dependent on new clause 46A because, without the definitions in 46A, the proposed new clause has no meaning. The option, therefore, is for Hon Lynn MacLaren to amend an amendment, if it is successful, moved by the Attorney General, to achieve what she wishes. The next amendment she was going to move has fallen away, so she will have to amend the Attorney General's amendment, if it is successful.

New clause 46A —

Hon MICHAEL MISCHIN: I move —

Page 35, after line 16 — To insert —

(1) In this section —

access means access to a service;

access capacity means the capacity to provide services of the person who owns, controls or operates a port facility;

eligible request for access means a request for access that would not, if granted, result in the proportion of the access capacity taken up by protected users exceeding 50%;

prescribed period for a request for access means 180 days, or such other period as is specified in regulations, after the day on which the request is made;

prescribed user means a person specified in regulations as a user or potential user of a service;

protected user means a user or potential user of a service other than a prescribed user;

service has the meaning given in section 46(1).

(2) It is a condition of the operation of a port facility that, subject to subsection (3), 50% of the access capacity must be reserved for protected users.

(3) Despite subsection (2) if a request for access made by a prescribed user would, if granted, result in the proportion of the access capacity taken up by prescribed users exceeding 50%, the request may be granted as long as it is granted on terms that would not prevent a protected user who subsequently makes an eligible request for access from being provided with access within the prescribed period or at a later time agreed to by the protected user.

We have canvassed the reasons for this amendment to preserve the rights of future access to the degree that is specified and has been discussed.

Hon ROBIN CHAPPLE: I am just clarifying that we are dealing with the Attorney General's new clause 46A.

The DEPUTY CHAIR: We are dealing with the amendment just moved by the Attorney General.

Hon ROBIN CHAPPLE: We covered a large part of this in the comments Hon Simon O'Brien and my colleague Hon Lynn MacLaren made on this issue. We spoke earlier about the contracts that are in place for the duration of post-divestment. Will proposed new clause 46A take precedence over these contracts and can the Attorney General elaborate on how that will work? Are there terms for the existing contracts?

Hon MICHAEL MISCHIN: No, it will not, and I have already indicated at length that the current contracts will continue and be part of the asset or liability, as the case may be, that the lessee will assume upon taking control of the facility, and that is enshrined in legislation.

Hon ROBIN CHAPPLE: In the definition, eligible request for access means a request that, if granted, will not take the access granted to juniors above 50 per cent of capacity. Does this not therefore mean that if at some time in the future, due to economic reasons, all juniors cease exporting for a minimum of six months, and the operator seeks and gains approval to let non-majors in, and non-majors subsequently occupy more than 50 per cent, but the most the juniors could ever claw back is 50 per cent, which is 11.5 million tonnes per annum? It is really that figure. We are looking at the potential for the 23 million tonnes per annum being reduced to 11.5 million. I just want the Attorney to clarify that that could be the case.

Hon MICHAEL MISCHIN: In effect, yes, but only in the event that there are no juniors using that capacity, and a major takes up that capacity, and it will be subject to the terms of any agreement with that major. I have already gone through the process, and it is in the key features of the proposed Utah Point bulk handling facility access and pricing regime that I tabled.

New clause put and passed.

Clause 47: Regulations —

Hon ROBIN CHAPPLE: I am sorry, but my understanding is that we are doing some drafting at the moment around new clause 46B to amend that in the light —

The DEPUTY CHAIR: I am sorry; the question has already been put. I did explain that you had the option to amend, but there was no amendment.

Hon ROBIN CHAPPLE: We are actually doing those amendments right now.

The DEPUTY CHAIR: I am advised to ask the Attorney General whether he wishes to allow time for an amendment to be presented. New clause 46A would have to be recommitted to be amended because the question has already been put.

Hon MICHAEL MISCHIN: I understood that new clauses 46A and 46B foreshadowed by Hon Lynn MacLaren were to be put as a package. I was told subsequently by Hon Robin Chapple that they are actually standalone clauses. I had assumed that they were part of a package of proposed amendments; hence my agreement to defer consideration of my new clause 46A until after the consideration of new clause 46B. As it happens, it has been exposed that they are dependent on each other and that they stand and fall together. I do not propose to delay the progress of this bill because of a failure by those moving these amendments to appreciate the consequences of one or other of them failing. There was always a prospect that new clause 46A proposed by Hon Lynn MacLaren would fall away, in which case there should have been some provision made for either new clause 46B being withdrawn or lapsing, or some appropriate framing of it so it can stand on its own legs. But it does not have any legs and we should proceed with the bill.

The DEPUTY CHAIR: I will explain. The Attorney General is correct: I did point out at the time that if the proposed amendment to new clause 46A fell away, new clause 46B would also fall away and that there was an opportunity for amendment after the Attorney General's amendment. There was none. Now the question is that clause 47 stand as printed.

Hon LYNN MacLAREN: I was away on urgent parliamentary business. Did the Deputy Chair move the Attorney General's amendment at new clause 46A?

The DEPUTY CHAIR: Yes, it has been moved and agreed to. There is no opportunity to amend the Attorney General's new clause 46A unless he is prepared to do so. The question now is that clause 47 stand as printed.

Hon LYNN MacLAREN: Thank you, Mr Chair. Has clause 46B fallen away because we did not amend 46A to refer to 46B?

The DEPUTY CHAIR: The only option available to Hon Lynn MacLaren is to recommit the bill after it has been agreed to. Standing order 136(4) states —

> When required, a Bill shall be recommitted in Committee of the Whole House for the purpose of considering an amendment recommended by a Committee.

Hon Lynn MacLaren would have to have the approval of the committee to recommit the bill.

Hon LYNN MacLAREN: In speaking to clause 47, I reflect upon the fact that we have missed an opportunity to specifically require compliance with the Port Authorities Act. That could have been done had new clause 46A mentioned new clause 46B. The reason we did not is that the proposed new clause 46B included terms that are defined in new clause 46A. We had to go through that first before we could discuss my new clause 46B. Unfortunately it brings us now to the stage of looking at whether regulations can be made for this bill. I have argued against the ad hoc approach the government has taken with regulations. However, at this stage of the bill it looks as though this is the only power we can refer to that will give some certainty to exactly how operations at Utah Point will be regulated. I will not oppose the regulating power of the bill, but I state that it is still unclear. Even though the committee recommended compliance under the Port Authorities Act, the bill before us will still fall foul of not explicitly requiring that compliance.

Clause put and passed.

Schedule 1 put and passed.

Title put and passed.

Bill reported, with an amendment.