

STANDING COMMITTEE ON LEGISLATION

PILBARA PORT ASSETS (DISPOSAL) BILL 2015

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
TUESDAY, 3 MAY 2016**

Members

**Hon Robyn McSweeney (Chair)
Hon Ken Baston
Hon Dave Grills
Hon Robin Chapple (substituted member)
Hon Ken Travers (substituted member)**

Hearing commenced at 1.47 pm

Mr RICHARD MANN

Executive Director, Strategic Projects and Asset Sales, Department of Treasury, sworn and examined:

Mr JOHN TASOVAC

Project Director, Utah Point Asset Sale, Department of Treasury, sworn and examined:

Mr PETER JOHN ANDREW LUKE PARSONS

Partner, Major Capital Projects and Transactions, Deloitte Touche Tohmatsu, sworn and examined:

Ms FELICITY GREGORY

Senior Assistant State Solicitor, State Solicitor's Office, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or affirmation.

[Witnesses took the oath or affirmation.]

The CHAIR: You will have all signed a document entitled "Information for Witnesses". Have you all read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them. I sound like an old schoolmarm! I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee?

Mr Mann: Thank you, chair; very briefly. Treasury is of the view that our detailed submission provides a very holistic view not just of the purpose of the legislation but the underlying policy considerations and, indeed, the background behind those policy considerations. We do have some additional information that we provided in response to your letter received, I think, on 28 April, and that does include the tabling of some documents today, so I would like to deal with that process formally. We also propose to table some additional reports which were referenced in our submission. Those reports we are tabling on the basis of them being commercial-in-confidence because they do contain reference to specific contractual terms of third party contracts, so we would request that if those documents are tabled, they are maintained as confidential documents and not publicly disclosed.

The CHAIR: If you are going to table some documents you will have to tell us which ones you are going to table specifically and also the ones that you specifically would like us to keep private.

Mr Mann: We have a covering letter, chair, that outlines the additional reports that we propose to table today; and in our response to your letter of 28 April, which Treasury sent yesterday to the committee, we have identified the additional documents that we are tabling in response to your original request.

The CHAIR: I have not seen them. Can we get some copies of that?

Hon KEN TRAVERS: You said the reason for the need to keep them confidential is third party commercial-in-confidence issues. Is that the only reason they need to be kept confidential—the ones that are private?

Mr Mann: Yes; it refers to terms of user contracts—the third party user contracts that we would require to remain confidential.

Hon KEN TRAVERS: So have you consulted with those third parties as to whether or not they are happy for them to be made public; and, if they are, would there then be any reason for them not to be made public if those third parties are happy for their contractual terms to be made public?

Mr Mann: The third parties on the state side have requested that those terms be not disclosed.

Hon KEN TRAVERS: Right. So it is the state that wants them to be kept confidential, not third parties outside the state?

The CHAIR: Yes, because of commercial-in-confidence.

Mr Mann: To my knowledge, if I could check with the team, I do not believe we have checked with the private sector third parties, but the state parties have requested that those terms be maintained as confidential.

The CHAIR: And they are allowed to do that.

Hon KEN TRAVERS: Yes. I am just trying to clarify who it is that is requesting the confidentiality. I assume that by “third party states” we are talking about Pilbara ports. Are there other third parties involved?

The CHAIR: When you read the letter, you will see which two. We are taking the ones that you are tabling, but we are not taking the private ones because we have a bit more to discuss on those. You understand that if you want to make it private, it is up to the committee to then discuss whether that will be kept private. Obviously, we certainly defer to what you would want.

Mr Mann: I understand; thank you.

Hon ROBIN CHAPPLE: Obviously we cannot really deal much with these because we have not had time to review them.

The CHAIR: They will be tabled.

Hon ROBIN CHAPPLE: Whether we are going to have to come back and address these or not is a different matter.

Mr Mann: So what we have provided in response to the initial request is a consolidated view of relevant state agreements compiled by the Department of State Development.

Hon ROBIN CHAPPLE: How many are there in total?

Mr Mann: There are two state agreements of direct impact on the Utah Point facility—the Mount Goldsworthy state agreement and the Mount Newman state agreement. Their full titles are on the cover of that document. I will draw the committee’s attention to the disclaimer on the cover of that document if it could be used in that context.

The CHAIR: What I will do for now, making a Chair’s quick decision, is we will keep this letter private and we will keep your documents private until the committee has a chance to have a look through; so these and the letter will be kept private. Is everyone happy with that?

Hon KEN TRAVERS: Without going into the documents, in the documents that you have tabled today is there any indication of where there are relevant clauses that may impact on the sale?

Mr Mann: Not expressly. These are purely a consolidated version of the state agreements and any variations through their history to provide a convenient single point of reference.

Hon KEN TRAVERS: Is there a list of any particular clauses in these documents that may have an impact on the sale or the future operation of Utah Point?

Mr Mann: No; we have not identified the specific provisions of those agreements.

Hon KEN TRAVERS: I guess my question is: as part of your due diligence, have you done that yet in terms of identifying which clauses may have an impact on the sale?

Mr Mann: Yes, we have, although the legislation provides that those provisions—in fact, all provisions of state agreements—are unaffected by the sale.

The CHAIR: Perhaps we can get onto some questions. I am sure everyone has questions. Did you want to make any more statements to the committee before we ask you questions?

Mr Mann: Nothing further, thank you, chair.

Mr Tasovac: We also have these two documents as well, which relate to the —

The CHAIR: They are not private?

Mr Tasovac: These are the private ones, yes.

The CHAIR: They are the private ones? Okay. We have kept those private, and your letter.

What Pilbara Ports Authority assets will be included in the disposal?

Mr Mann: The Utah Point bulk handling facility assets are as described in the bill, as we outlined in our submission, by amendment in the Legislative Assembly. The definition of the assets contained in the bill was amended to include a more precise definition of those assets. Essentially, they comprise the berth, the stockyards and associated facilities known as the Utah Point facility, and they are as described in the schedule to the bill, which provides a diagrammatic representation of those assets; so they are now quite precisely defined, and those provisions are also described in our submission.

The CHAIR: What are the associated state assets and associated SC assets that are referred to in clause 4 of the bill? What processes will the minister undertake to form the opinion required in clauses 4(1) and 4(2) that these assets are associated with a port asset? I know there are a few questions here. Will the minister consult with any stakeholders prior to forming the opinion required by this clause? So, if we just get back to the first question: what are the associated state assets?

[2.00 pm]

Mr Mann: Thank you; a very logical question as a follow-up. Notwithstanding that we have sought to define the Utah Point assets as precisely as possible, we have allowed for a degree of flexibility in that there is potential through the divestment process that associated assets—for example, adjoining land parcels and other adjoining pieces or assets—might be required to be bundled up into the sale. To allow for that flexibility, that provision is contained within the bill. The exact definition of “assets” is ultimately defined by the minister by order. That order, when it is issued, will contain a precise listing of the final scope of the assets as ultimately forming the final divestment package. My colleague Felicity Gregory from the State Solicitor’s Office may wish to elaborate on that definition, but, essentially, I think that is the process. In respect of consultation, it is difficult to answer that at this point in that there may well be no associated assets and that they are contained within the existing definition. I guess the answer is that, depending on the nature of any associated

assets, then consultation by us and others would need to be commensurate with those and any impacts on any third parties that had interfaces with those associated assets if there are any.

Hon ROBIN CHAPPLE: There is significant land to the south of the area that is not defined at the moment—it is called port authority land at the moment. If that is expanded to create a new laydown area, would that be included in this asset sale?

Mr Mann: It is not our expectation that there will be any material change to the area as defined in the schedule to the bill.

Hon ROBIN CHAPPLE: You say it is not expected. If the area was enlarged, does that then get caught by the provisions of the bill?

Mr Mann: I think it does depend on the extent of the land area. Felicity, would you help me please?

Ms Gregory: It would not be included in the transfer order that we are about to make because the land is not included in the package.

Mr Mann: Yes, okay.

Hon ROBIN CHAPPLE: Sorry, I did not actually hear that passage of conversation.

Ms Gregory: Apologies. If the land is not currently included in the lease package then it will not be listed in the transfer order to be made by the minister. So if the question is will the lease area be subsequently expanded after the divestment process, that would not be covered by this bill but would be governed by the terms of the lease agreement, should that allow such an expansion.

Hon ROBIN CHAPPLE: Then that expansion would be a state asset not an asset.

The CHAIR: It is not in the bill.

Hon ROBIN CHAPPLE: It is not in the bill.

Ms Gregory: Correct. It is not part of the transfer order process.

Hon KEN TRAVERS: Would it require further legislation to allow that to occur, or could that just be simply a negotiation between the port authority and the minister and the purchaser of the port? Would they require further legislation to be able to expand their lease area or could they just do it by normal commercial negotiations after the passage of this bill?

The CHAIR: That is sort of speculating, is it not?

Hon KEN TRAVERS: No. It goes to the policy of the bill as to whether or not it limits it to that area or whether commercial negotiations can occur post the passage of the bill to expand the area.

The CHAIR: Okay.

Ms Gregory: I think it would depend upon the area that you are describing, whether it is part of the PPA crown lease or a lease to PPA from the state and vested land or whether it is other land to be —

Hon ROBIN CHAPPLE: It is all port authority land.

Ms Gregory: You are saying it is vested land now. That would ultimately depend upon the transaction documents.

The CHAIR: It was a good question but it is just not in the package in the bill. What are the specific details that are required by clause 10(2) the bill? Why does clause 10(2) create secrecy around the details of the assets that may be the subject of the disposal?

Ms Gregory: Clause 10 is really a trigger for the rest of the bill to come into effect. Clause 10 enables the relevant minister to make an order published in the *Gazette* which says that the state is going to dispose of a particular asset; in this case, it would be the Utah Point bulk handling facility.

It would not create the level of detail that would be determined following the full due diligence process and will then be listed in the transfer orders to be made in subsequent provisions of the bill.

The CHAIR: We might come back to that later. What is the purpose of clause 11(5) of the bill and given the Treasurer's statements in the Legislative Assembly regarding the provision, why has the clause been included in the bill? Nahan states, "We have no intention of using this" of clause 11(5) of the bill.

Ms Gregory: Clause 11 is based on precedent legislation that has been used has been used for the disposal of the Dampier to Bunbury natural gas pipeline, the Alinta Gas privatisation and disaggregation of Western Power. It is a fairly standard provision in WA legislation which gives flexibility to the state to use the most appropriate corporate structure determined after the due diligence process has been completed. At the present time, it is not proposed to use such a corporate structure. It is envisaged to use a wholly owned subsidiary of the Pilbara Ports Authority, which will be governed by the Port Authorities Act as opposed to a corporation established under this provision.

Hon ROBIN CHAPPLE: If it is not needed, then why is it in there?

Mr Mann: Primarily to maintain the standardisation of the legislation so we are not having diversity in the nature of this divestment legislation so that they are consistent.

The CHAIR: What specific provisions in the Western Australian Land Authority Act 1992 and the Port Authorities Act 1999 will not be applicable by virtue of the protections created in clauses 18(3) and (4) of the bill?

Mr Mann: Unless Felicity has an excellent memory, we may need to take that on notice. We will provide you with more specific details of the impacts of those acts.

The CHAIR: Thank you. Why are the schedules that may be made under clause 20(3) of the bill not published in the *Government Gazette* or tabled in the Parliament? The clause states —

A transfer order may specify persons or things by reference to schedules that —

- (a) need not be published in the *Gazette*; but
- (b) must be available for public inspection on business days at the place and between the times specified in the transfer order for 6 months after the day on which the transfer order is published in the *Gazette*.

Ms Gregory: I think precedent and volume. For example, the schedules go to the level of detail of the make, model, year and registration of every vehicle. That applies for every asset, liability, obligation that has been transferred. It usually comprises several volumes of arch lever files, which is not appropriate to put in the *Government Gazette*. It is not a good use of resources.

Hon KEN TRAVERS: Is it tabled in Parliament?

The CHAIR: It reads "Or tabled in the Parliament"—no.

Ms Gregory: No, but they are publicly available schedules.

Hon KEN TRAVERS: Why could they not be tabled in Parliament? We get volumes of documents. I think Mr Mann would remember tabling lots of documents on the Mandurah railway line—boxes of them, if I remember correctly—or I am sure you provided them to the minister to table.

Mr Mann: I carried them.

Hon KEN TRAVERS: Is there any reason they could not be tabled in Parliament?

Mr Mann: There is no reason why they could not be, no. They are publicly available.

The CHAIR: All right; we will discuss that later. Why do clauses 34 and 35(2) leave the detail of how they will operate to regulations? Regulations are the bugbear of legislation committees.

[2.10 pm]

Ms Gregory: In this instance, the acquirer will be a subsidiary of the Pilbara Ports Authority, so it will be a wholly-owned corporation of PPA while this provision has effect. It is essentially because at the time the drafting instructions were done that analysis had not yet been undertaken as to whether we needed to separate the responsibilities and rights of the Pilbara Ports Authority and the subsidiary of the Pilbara Ports Authority to ensure the ongoing operation of the port during that transitional period.

The CHAIR: Very interesting.

What is the rationale for the eight statutes and one instrument of subsidiary legislation listed in clause 39(1) being included in the bill? Was any other legislation considered for inclusion in this clause? That is the Emergency Management Act 2005, the Marine Navigational Aids Act 1973, the Jetties Act 1926, the Pollution of Waters by Oil and Noxious Substances Act 1987, the Lights (Navigation Protection) Act 1938, the Port Authorities Act 1999, the Marine and Harbours Act 1981, and the Shipping and Pilotage Act 1967.

Ms Gregory: Those are the key pieces of existing legislation that apply to the operation of the Pilbara port and would need to be considered as part of a divestment of Utah Point.

Mr Mann: They would have been identified by analysis by the State Solicitor's Office —

Ms Gregory: — and external legal advice, with assistance from Parliamentary Counsel's Office.

The CHAIR: Do they actually state—pardon my ignorance—the instrument of subsidiary legislation listed in clause 39(1)? What was that one?

Ms Gregory: The regulations referred to in clause 39(1)(a).

The CHAIR: It is all right; I have answered my own question.

Can you please provide the details of any government agreements that fall within the definition in the Government Agreements Act 1979 that may be affected by clause 44 of the bill?

Mr Mann: They are the two state agreements that we have referenced in our response to your 28 April letter, and which are addressed in the tabled documents that we provided earlier—the Mount Newman and the Mount Goldsworthy state agreements.

The CHAIR: Thank you. I will now throw it open. Robin, you had a question about the Utah Point Road.

Hon ROBIN CHAPPLE: Thank you for your map. I might provide you, if I can, with some maps that we have done so that you can see what I am talking about. You referred to Utah Point Road, and I am trying to ascertain what Utah Point Road is, because my understanding, if you look at that particular map with a little black square in the middle, is that Utah Point Road is the gazetted new road that runs from the new flyover and joins onto Finucane Island Road, and Finucane Island Road runs out. You in your map have identified Finucane Island Road as being Utah Point Road. It is not. I am interested in how you are clarifying Utah Point Road.

Mr Mann: For the avoidance of doubt, it is the full length of the road from Great Northern Highway, including the Finucane Island Road portion that is maintained by the Pilbara Ports Authority.

Hon ROBIN CHAPPLE: Okay. You would be aware that there are two Finucane Island Roads. Does it include both of those Finucane Island Roads, or just one? If you look at another map, which is that one, you will see that halfway along Finucane Island Road, it splits into two roads. Are they both going to be covered, because one is actually the sole provider of infrastructure to BHP, and the

other is the provider of infrastructure to Hancock Roy Hill and then Utah Point? So, by absolving the responsibilities for that road, the impacts on that road are going to be on other parties as well as the Utah Point users. That is what I am trying to get to.

Mr Mann: I think the answer to the question is we are in fact maintaining the existing status quo, so that the current responsibility of the Pilbara Ports Authority to maintain its responsible section of Utah Point Road will remain as it is today—unaffected by the sale.

The CHAIR: And the ones that are using it now can continue after the sale?

Mr Mann: Correct.

Hon ROBIN CHAPPLE: So currently, where the government has the ownership of Utah Point, it offsets, to a large degree, its income or dividend from Utah Point by maintaining the road. If it is then sold into the private domain, does this mean indirectly that the government will be subsidising the 360 B-double trucks that are running down the road to facilitate Utah Point? So, we will sell off part of the port, but will we still maintain and service the infrastructure caused by the damage by what is now a private entity as opposed to a public entity?

Mr Mann: As outlined in our submission, it is intended that the maintenance costs for Utah Point Road will be recovered by a levy on users, as is the case today.

Hon KEN TRAVERS: I just want to clarify this. How will the money collected from the sale of this asset be used? What is the intention of how that money will be used—the proceeds of the sale?

Mr Mann: Without pre-empting policy decisions by government, the Treasurer certainly has indicated that the priority will be in retiring debt, including debt associated with the Utah facility itself, and potentially directed towards other capital investment, but the clear priority indicated by government has been that the priority purpose is to retire debt.

Hon KEN TRAVERS: As you know, we are looking at the policy of the bill as well as the detail. This is why I asked the question, because your submission would suggest that it is both retiring debt and then also using it to purchase other assets. In fact, I think in your submission you make reference to the ability to access some of the asset recycling funds of the federal government. Is that not correct?

Mr Mann: Correct. That is in the context, though, of the overall asset sales program, and a clear objective of the overall asset sales program is to achieve both of those things. Utah Point is a part of that asset sales program. Whether the Utah Point proceeds would be used specifically for both purposes or for one would be a matter for government.

Hon KEN TRAVERS: Right. I would have thought that we would need to have that fairly clear before we proceed to the next stage of agreeing to the sale, would we not? It is a significant issue as to whether you use it to pay down debt or whether you use it for some sort of asset recycling process. I would have thought that if we are selling this asset we should know what we are going to do with the proceeds.

Mr Mann: I reiterate that I can outline the overarching policy position of government. A future decision on how government will actually choose to deal with any divestment proceeds I cannot comment on.

Hon KEN TRAVERS: Then why do we even have a section in your submission that talks about what the proceeds can be used for if no decision has been made? Is it not completely speculative, on that basis?

The CHAIR: He has to deal with cabinet, do not forget; he is the Treasurer, and cabinet makes the decisions on what they want to do.

Hon KEN TRAVERS: That is what I am asking—what has cabinet decided? What have you been told by cabinet that the proceeds will go to?

[2.20 pm]

Mr Mann: What Treasury has sought to do is outline the underlying policy considerations for the proposed Utah Point divestment, which go to the broader policy objectives of the overall asset sales program; and that is what we have sought to do in our submission.

Hon KEN TRAVERS: If the only direction you have at the moment is the overall asset sales program, then it is fair to say that, with this asset, the proceeds will be used for both retiring debt and asset recycling?

Mr Mann: I think I can safely say, in the context of the overall program, yes. Whether it specifically applies to this asset at the end of the day at the point in time when those proceeds are received by government, the government will make that call. That may well depend on timing relative to other divestments under the program.

Hon KEN TRAVERS: And whether other investments are approved by the Parliament.

Mr Mann: Precisely.

Hon ROBIN CHAPPLE: When it actually came to the establishment of Utah Point berth project stage B, which was the initial project, a lot of that derived from a process referred to as “inquiry by design” in Port Hedland. Now, one of the fundamental reasons for the establishment of Utah Point B was to enable the manganese that was currently being stockpiled adjacent to Wedge Street to be moved over to the other side of the harbour to minimise dust in Port Hedland. As you will be aware, the current manganese proponent is not using that facility. Obviously, if the facility is not used within a timely manner that lay-down area and that facility can be then offered to a third party or to another party. Should that be the case would the manganese then, if it resumed, have to go to another location?

Mr Mann: In respect of the Utah Point facility—it is difficult for me to answer from a broader perspective given that our responsibility is limited to the Utah Point divestment—our ability to talk about future development whereby manganese or any other commodity might be exported from a different location is difficult for us to answer. But in respect of the Utah facility, if capacity was available and manganese, in future—so not under the terms of existing contracts—then any manganese producer would be free to apply for that access under the access regime that is proposed and outlined in our submission.

Hon ROBIN CHAPPLE: Just for committee’s edification again, how long can that manganese stockpile area remain fallow before it is offered to a third party?

Mr Mann: Without speaking for existing contractual arrangements, which vary and which remain at large and are not impacted by divestment—first and foremost, existing provisions for abandonment or failure to use the facility will remain on foot until those contracts expire, as long as those contracts remain in place—but following the expiry of existing contracts, then under the proposed access regime, in the first instance, the lessee of the facility is required to advertise the availability of that capacity. That is for a minimum three-month period. During that time, if any user seeking to make use of that capacity makes application, those applications then are considered by the lessee. There is a minimum six-month negotiation period, during which time the lessee is obliged to negotiate with any user seeking to take up that capacity, which could include manganese. Either party may extend that six-month negotiation period by a further three months, so that negotiation period can extend up to nine months. At the end of that period, then the parties either agree to a user agreement and the capacity is taken up or the matter can be referred to binding arbitration, which has a notional three-month time limit as well. So three-month initial notice period, six-month negotiation period, which may be extended by agreement of either party, and then, potentially, a binding arbitration period of three months following that.

Hon ROBIN CHAPPLE: So one year three months, potentially?

Mr Mann: Yes.

Hon KEN TRAVERS: When you get to arbitration, what will be the basis upon which the arbitrator will determine the appropriate price for this facility?

Mr Mann: We are talking access in the first instance and terms on price will be one consideration, but, in particular, the arbitrator—it is difficult to foreshadow what an arbitrator might be looking at given we are guessing on the circumstances leading to that dispute or potential dispute and arbitration—but we would expect that the arbitrator would be looking at compliance with the access policy that the lessee will be obliged to comply with and would be looking at ensuring that the lessee has complied with its obligation not to discriminate against users and not to unreasonably deny any access to any user seeking access and also compliance with the capacity allocation policy, which the lessee is also required to publish and comply with.

Hon ROBIN CHAPPLE: Just quickly, going back to that process of the manganese, were you particularly aware that part of the development of Utah Point was to mitigate dust in the Port Hedland area?

Mr Mann: I defer to the advisory team, but we are certainly aware of manganese as a driver in terms of the original commodities to be exported through to the facility, absolutely. In terms of the environmental impacts—have we looked at that?

Mr Parsons: We are not aware of a regional specific driver in relation to manganese, but obviously in relation to Utah Point, environmental management is a critical priority for that facility.

Hon ROBIN CHAPPLE: I should most probably refer you to a government submission to the EPA for EPA Bulletin 131, where that was the driver. I have a problem when you are going to privatise a facility that actually had a social development parameter as well as an economic parameter. I am just surprised that you were not particularly aware of that.

Mr Mann: Perhaps we will take that on notice also and just review our material and see if that is an issue we have looked at.

The CHAIR: Can I just clarify a few things? Utah Point is one of four berths owned by Pilbara Ports Authority for the export of bulk products, iron ore and manganese, constructed in 2010 as an export facility for junior miners in the Pilbara region. The junior miners put some \$50 million into that port, did they, of their own money, or thereabouts?

Mr Mann: There were two components. There were prepaid contributions made by the foundation junior mining users of Utah Point. Those prepaid contributions comprise the noninterest bearing component, capital component and interest bearing component. I think, from memory, \$38.5 million or thereabouts in capital contribution, interest bearing contribution, and \$11 million and some in non-interest bearing component, so around about \$38 million interest bearing and \$50.8 million, I think, total. The details are provided in the Pilbara Ports Authority's submission. Those prepayments were acquitted, in the main, through offsetting against the facilities fees that were agreed with the original users, and in one case Molly Mines, which was not earning facilities fees and therefore could not acquit against those facilities fees, a separate prepayment was made. But, in the main, those prepayments were acquitted via offsetting against the original facility fees for the use of Utah.

[2.30 pm]

The CHAIR: Okay. When this sale goes through, or this lease goes through, now the junior miners—of which there are probably four junior miners?

Mr Mann: There are currently three users, including Consolidated Minerals, which has currently suspended its operations.

The CHAIR: Okay, so when this lease goes through, someone buys it. Obviously the government is going to put some conditions and limitations on it, but in the future, can that be used by anyone or is it going to be limited to the junior miners? Is that the guarantee that the government is going to give, that Utah will still only be used for junior miners, or is it open slather for all miners in the Pilbara to use?

Mr Mann: Somewhere in between, if I could characterise it that way. That is prescribed in the access regime, as we have described in our submission. The government's policy is that it is preferential treatment for junior miners, but if at the end of the process—which I will go through shortly—if there is no junior miner available to take up capacity, then that capacity is available to non-junior miners, but only under the terms of the access provision, which provides that initial negotiations for capacity must be with a junior miner.

The CHAIR: Is that going to be in the bill or in the regulations? Is it going to be detailed in the bill, because I cannot see it?

Mr Mann: The current proposal is that is contained within regulations.

The CHAIR: Within regulations. The bill is going to go through without having any regulations, so we are going on blind faith really, is what I am coming to.

Mr Mann: Except for the details that have been previously tabled by the Treasurer and as elaborated in our submission where we provide a fairly significant amount of detail on how the regime works.

The CHAIR: You do provide a lot of detail, and I thank you for that, but I was just concerned because it did start in 2010 for junior miners and we do not know who is going to pick up the lease on this. We know that the government will put terms and conditions on it but what those terms and conditions will be, apart from what is in the bill, will be in regulations. I was just concerned to see that. Is everybody going to be able to use it? You have just said that if it has not been taken up, then the bigger ones can. I have no problem with that, I just want to know.

Mr Mann: I do point out, though, that the ability for the lessee to negotiate with a non-junior miner is subject to ministerial approval on the recommendation of the regulator.

Hon KEN TRAVERS: Surely, the access regime and the pricing regime run in tandem, though, don't they? Because the ability for someone to negotiate an access agreement will very much be dependent upon the pricing regime that they can obtain from the future owner of the port facility. Is that not correct?

Mr Mann: It is correct. When an arbitrator or indeed the regulator and potentially the minister is having regard to denial of access or considering an access application, part of their consideration of whether the lessee has acted reasonably will be pricing implications.

Hon KEN TRAVERS: Will the pricing regime have a guarantee that they cannot force the users into take-or-pay contracts?

Mr Mann: No. The pricing regime is a price monitoring regime. The price monitoring regime will apply to the regulated services that are provided by the lessee; currently, those services provided by Pilbara Ports Authority, again as identified in our submission. There will be an initial pricing instrument issued by the minister, which will set the initial basis for price monitoring and that will be the existing prices with increases limited to CPI. Any increases over and above the CPI increase will require justification which will be considered by the regulator. The regulator will then periodically and regularly review that regime for validity, which is one of the key drivers for having it prescribed in regulations rather than legislation because it provides for the flexibility to amend the regime if found to be deficient in the future.

Hon KEN TRAVERS: Within that pricing regime, will there be any provisions that exclude the owner, including a requirement for a take-or-pay contract at that price rate?

Mr Mann: No; the users and the lessee are free to negotiate agreed terms as is the case today.

Hon KEN TRAVERS: If you look at the submissions we have received and clearly the issue, and if you go back to the history of this port, the whole issue around take-or-pay contracts, the whole point of the Utah Point facility was to allow junior players to get in there and to get going and to build themselves into larger operations and that they were not required to have take-or-pay contracts. And without take-or-pay contracts, there is an argument and in fact your own reports—I am only referring to the bits you put in your submission, in terms of the public, from the Incenta report and the HoustonKemp—both make reference to the importance of take-or-pay contracts being part of any renegotiation. Can we then expect that if the port is sold, it is highly likely that the future purchaser will want take-or-pay contracts so that they transfer the risk back to the junior miners rather than carrying it themselves?

Mr Mann: As the Pilbara Ports Authority has identified, any owner of the facility or a facility of this nature will be looking for security and risk mitigation through take-or-pay or similar arrangements. But the important take-out is that if those arrangements are not in place and therefore the owner is required to take additional risks, the pricing structure associated with that risk is regulated by the price monitoring regime. If on the other hand, the lessee and future users are able to come to terms on, say, take-or-pay arrangements with a different pricing structure commensurate with that risk profile, then they are free to do so.

Hon KEN TRAVERS: But if they cannot, that then opens it up to other players to come in and take that capacity, is that not correct? If they cannot get agreement, the future purchaser says, “It is take or pay, or walk out the door. We have other people waiting; we know we can negotiate a take-or-pay contract with a large company which has a stronger balance sheet than you.”

Mr Mann: Not a large company.

Hon KEN TRAVERS: What?

Mr Mann: If a junior miner is able to take capacity, then that junior miner or junior miners receive preferential treatment under the access regime.

Hon KEN TRAVERS: No, but if it is on a take or pay, they may not have the balance sheet to take —

Mr Mann: A more favourable—in determining whether a non-junior, an application to negotiate with a non-junior miner, is valid, the regulator, as the submission identifies, cannot have regard to a more favourable commercial arrangement.

Hon KEN TRAVERS: No, but if the regulator says take or pay is a reasonable assumption to be included in the pricing regime, and then by having that take-or-pay contract as part of the conditions of the pricing regime excludes the junior miner from being able to enter into a contract, then it opens it up for a larger player to come in and take that capacity, after they have gone through the whole arbitration process.

Mr Mann: If the junior miner was prepared to accept terms in line with the access and pricing regime and, in particular, the price monitoring regime, then irrespective of whether a non-junior miner was able to offer a better commercial deal, that junior is still afforded the protections under the access regime.

Hon KEN TRAVERS: I must say I hate calling a group of people who employ directly 2 500 people “junior”, by the way, but that is the term that is given to them, so we will stick with it for now. It still fundamentally comes back that in the pricing and access regime, in any measurement of it, unless you have some process that guarantees a non-take-or-pay agreement at a reasonable rate, it is not beyond the realms of possibility that you price the juniors out of the market, that then frees up the capacity for a larger player to come in with a balance sheet, they enter into a take-or-pay contract that then closes Utah Point as an opportunity for juniors to go in, when

the whole point of Utah Point was to actually get up and running. My understanding is that Utah Point would fit beautifully within section 30 of the Port Authorities Act, which makes it clear that port authorities are about trade facilitation, not profit-making. In fact, section 30(2)(aa) makes it even clearer that profit cannot be at the exclusion of trade facilitation. So surely you need to have something in your pricing and access regime that ensures —

[2.40 pm]

Mr Mann: And we do.

Hon KEN TRAVERS: —trade facilitation for those juniors, because it is about getting those juniors up and running so that they can build a balance sheet to then open up whether it is the North West Infrastructure berths or to go to Anketell or to the other opportunities that may present themselves in the Pilbara in the future.

Mr Mann: Which is precisely why the heavy preference for juniors in respect of access is included; but, on top of that, if a junior does not or is unable to take up access, that is a trigger event that automatically triggers a review by the regulator.

Hon KEN TRAVERS: What market sounding have you done of the juniors in terms of their capacity to enter into take-or-pay contracts? As part of the due diligence for this sale, what work have you done with the juniors on their capacity to enter into take-or-pay contracts?

Mr Mann: Again, as we outlined in our submission, we have spoken to all of the juniors —

Hon KEN TRAVERS: After the bill was introduced, in terms of the detail.

Mr Mann: —and their capacity and/or willingness to enter into take-or-pay agreements has been made very clear, as it was to Pilbara Ports Authority previously, which is understandable.

Hon KEN TRAVERS: What is their position—that they are able to enter into take-or-pay contracts?

Mr Mann: They have conveyed that historically they have been very reluctant to enter into those forms of contracts. The history is well articulated in the Pilbara Ports Authority's submission to the committee, and they have certainly confirmed that that remains the case, and the Pilbara Ports Authority has provided similar evidence. That is understandable, given their circumstances and the supporting balance sheets.

Hon KEN TRAVERS: So unless you had some provision that excluded take-or-pay contracts in your pricing regime, are you not by that admitting that you are potentially pricing the juniors out of the operations of Utah Point? I mean, even the price—we have not even got onto whether the current price is appropriate or not and the risk that is assumed. Without anything that requires the purchaser to offer a price that does not include take or pay, does not that potentially exclude, based on what you have just told us, all of the juniors from the ongoing operation and allow someone else to come in and enter into a long-term agreement on a take-or-pay basis that then locks them out of Utah Point forever and a day?

Mr Mann: Yes, except that we have expressly excluded preferential commercial deals for a non-junior as being part of a consideration as to whether the lessee should be allowed to negotiate with a non-junior; and, prior to that being invoked, if a junior is available to take up capacity, then the lessee must negotiate with that junior.

Hon KEN TRAVERS: And take up capacity at the price that has been offered.

Mr Mann: Then, further to that, if that junior is then unable to take up that capacity, that then triggers a review by the regulator that would clearly focus on price, which may in turn trigger a recommendation to the minister for a different form of regulation, which again is one of the reasons why we have proposed that the pricing regime be prescribed in regulations to provide the flexibility to deal with exactly that eventuality.

Hon KEN TRAVERS: It ultimately comes down to the lobbying capacity of the potential users to convince the minister or otherwise of what they should do. My problem is, if I can use the footy analogy, that football players are often bound by their contracts and they cannot enter into negotiations until after the season, and we see footballers regularly stand out of the market and wait until they become free agents so that they can negotiate because they know get a higher deal. I would have thought that the same opportunity can happen here. If the purchaser says, “We are going to skit out well in advance; we are not going to have any loss; we will set the price at this time; we want take-or-pay contracts”, they can go through the negotiation knowing that when the juniors say they cannot come in at that price, it just flips over and there is a senior waiting to come in and take the contract.

Mr Mann: Again, as I have articulated here and in the submission, the Treasury view is that there are very strong preferential protections for the juniors under the prescribed regime, and we think that it is a very appropriate balance between ensuring that they enjoy those protections and that the asset is properly utilised over the long term and does not lay idle.

The CHAIR: So when it does go up for sale, is there anything to stop Fortescue or BHP or any of the major players from actually purchasing that lease?

Mr Mann: There are no express restrictions on any bidders, no.

The CHAIR: There are no restrictions?

Mr Mann: No.

The CHAIR: I do not mind the big miners having a go either, or the junior miners, but the fact that it was built for junior miners and the fact that there is nothing excluding the bigger miners from purchasing Utah Point gives them a bit of an advantage, does it not, if the junior miners do not take up the—as you said, there are going to be rules and regulations.

Mr Mann: Yes; any purchaser is obliged to comply with the access and pricing regime.

Hon KEN TRAVERS: Will the purchaser be required to comply with section 30(2)(aa) of the Port Authorities Act?

Mr Mann: I would have thought not, no.

Hon KEN TRAVERS: So this excludes it from that requirement, so it can become a profit-making venture, not a trade-facilitation venture? Effectively what section 30(2)(aa) says is that —

Mr Mann: The answer is that under the provisions of that section of the act, no, it will not apply.

Hon KEN TRAVERS: Section 30(1)(a) says that ports are there to facilitate trade, and Utah Point has definitely done that—it has generated not just trade but lots of revenue to the state over last five years. Then section 30(2)(aa) says you can make a profit but it cannot be at the exclusion of section 30(1)(a), which says that it should be about trade facilitation—so they can make profit. So we are excluding that section in effect for Utah Point?

Mr Mann: Yes; that obligation under the ports act will not be an obligation for the lessee.

Hon ROBIN CHAPPLE: In your submission to us, under 1.3.3, “Access and Pricing”, in the very last dot point you say, “the state through possible intervention”. When do you see that “the state through possible intervention” might come into play? It is on page 4.

Mr Mann: The “state through possible intervention” is the minister at the end of that chain that I described previously. So you have in the first instance the Pilbara Ports Authority as the lessor and manager of the lease, who would ensure that the lessee complies with its obligations under its lease, which includes effectively repeating the obligations under the access and pricing regime; you then have the regulator, whose role is also described in the submission, so the regulator has its own powers as prescribed in regulations; and then finally there is the minister, who has the ability to intervene and direct a different regime.

Hon ROBIN CHAPPLE: At what stage could he intervene?

Mr Mann: The minister can intervene at any time.

Hon ROBIN CHAPPLE: So he could intervene right up-front?

Mr Mann: That is correct.

Ms Gregory: Intervention through changing the regulations to go to a more heavy-handed regime.

Mr Mann: Yes.

Hon ROBIN CHAPPLE: So he actually has quite a significant role in determining that process if he or she sees fit?

Mr Mann: Correct.

Hon ROBIN CHAPPLE: Surely that is not necessarily in the interests of any stakeholders that may have a lease there.

Mr Mann: It is not for us to second-guess the views the government of the day that would seek to intervene, but that ability for a minister to change the regime, via a change in regulations, is there.

Hon ROBIN CHAPPLE: That would seem less than clear for anybody who is establishing on Utah Point in the future.

Mr Mann: With our view being that provided the lessee complies with the access and pricing regime, the need for any government to intervene and impose a heavier-handed form of regulation, certainly based on precedent in eastern states' transactions, will be minimal. In fact, it has not happened.

[2.50 pm]

Hon ROBIN CHAPPLE: But it does not say it cannot happen?

Mr Mann: It does not say it cannot happen, correct, which is two-edged of course. The clear intention is that if in future there is a need to amend the regime because of deficiencies, the government has the ability to amend that deficiency.

Hon ROBIN CHAPPLE: But it then leaves it open to amend anything that it may see fit into the future?

Mr Mann: Potentially. But any government has the ability to do that via legislation.

Hon ROBIN CHAPPLE: But under the state agreement acts you have tabled here—Goldsworthy and BHP—they do not have that ability.

Mr Mann: We do not have the ability to impact on those agreements; correct, yes.

Hon ROBIN CHAPPLE: So you have a different role for the big end of town and a different role for the small end of town?

The CHAIR: That is subjective.

Mr Mann: Look, I would probably be venturing into the realms of opinion. I am not quite sure that there is a connection.

Hon KEN TRAVERS: We talked a bit earlier about two areas, but as to the original cost of construction we talked about the \$50.8 million that was contributed in a couple of ways by the juniors. Who else contributed to the original cost of construction of the Utah Point facility?

Mr Mann: I note that the Pilbara Ports Authority's submission identifies a contribution from BHP Billiton of \$70 million. The remainder of the cost of the facility was met by the state.

Hon KEN TRAVERS: You say “note” because I noticed you did not mention it in your submission. Is there a reason you did not mention it in your submission if they did contribute \$70 million towards the cost of construction?

Mr Mann: The Pilbara Ports Authority’s submission also notes that that contribution was made in accordance with the Harriet Point agreement. Another question we have been asked, and as we note in our submission, the state is not a party to that agreement. It is a confidential agreement between Pilbara Ports Authority and BHP, and my advice is that it is not appropriate for us to discuss the details of that agreement.

Hon KEN TRAVERS: Not even if we went into private session?

Mr Mann: We would have to seek an adjournment and seek the agreement of the parties.

Hon KEN TRAVERS: I will throw some questions up, and you can say whether we can go into private session or come back. If BHP has made a contribution of \$70 million, is there any requirement for them to be refunded that \$70 million should the port be sold?

Mr Mann: I cannot answer that.

Hon KEN TRAVERS: Okay. Do we know why BHP was contributing \$70 million towards the Utah Point facility? Can you confirm that they did? Your language was a bit vague there, so can you confirm that \$70 million was funded through the Harriet Point agreement for Utah Point?

Mr Mann: I can confirm that I have seen it in the Pilbara Ports Authority submission.

Hon KEN TRAVERS: As part of the due diligence, surely you must have done some work on all this, I assume?

Mr Mann: Yes. As part of the due diligence I can state that our team has sought, and received permission to have, access to the Harriet Point agreement so that we understand its impacts on the divestment; however, that is on the basis of strict confidentiality and so on the terms of that agreement we cannot enter into any detail.

Hon KEN TRAVERS: In your submission you talk about that at some point in the sale process there may be a need for confidential documents to be shown to the potential purchasers. Would that include the Harriet Point agreement being shown?

Mr Mann: Again, subject to the agreement of the parties to that agreement.

Hon KEN TRAVERS: If they withhold that agreement?

Mr Mann: If they withhold that, it would be difficult for us to disclose that.

Hon KEN TRAVERS: So, you would be asking them to buy it with, potentially, an implication and they may never know what that implication is?

The CHAIR: That is speculating.

Hon KEN TRAVERS: My point is that if you are asking them to purchase it not knowing what the implications are, how do you ask Parliament to agree to the sale of it without knowing what all the facts surrounding the circumstances are?

The CHAIR: That is for cabinet to come back to us on.

Hon KEN TRAVERS: I am asking for a technical answer, not a policy answer. I am just wanting to work out how this, technically, will all come together.

Mr Mann: It is not a technical answer, it is really a legal answer that at this point, because of the nature of that agreement, we are unable to disclose those specific provisions.

The CHAIR: He has said that three times, so I think that is fair enough.

Hon KEN TRAVERS: I made the point that I am happy to put the questions and then when they can be answered, they are answered; when they cannot I accept that you are limited in what you can

and cannot answer. I accept that they will be taken potentially on notice maybe, and come back to us with answers.

In terms of Harriet Point, in a sense, if they deny you the ability to show the agreement, it may be an effect of veto on the sale anyway. But does BHP, as a result of any agreements they have with the state, have any effect of veto over the sale of the Utah Point facility; either directly or indirectly?

Mr Mann: No, I am not aware of any such ability.

Hon KEN TRAVERS: Other than if they withhold the capacity that could be an effect of veto. If a potential purchaser cannot see an agreement, that may or may not have an impact on the sale?

Mr Mann: I would describe that as a risk that would need to be evaluated by potential bidders, as distinct from a veto.

Hon KEN TRAVERS: A risk where you cannot quantify what the risk is?

The CHAIR: No, it says it has been acquitted in one of the submissions. It says the money that was put into the port was acquitted.

Hon KEN TRAVERS: Yes, but it is whether or not that money carries some obligation on the port authority, the port or the state?

Mr Mann: Further to that, though, the bill itself provides protections to the state in respect of the disclosure of confidential information, which would include Harriet Point, and, importantly, imposes penalties on any parties who breach that confidentiality. One of the important provisions of the bill is that it enables us to disclose that information to bidders.

Hon KEN TRAVERS: Without the permission of BHP? So, we are legislating to override the Harriet Point agreement; is that what we are saying?

Ms Gregory: The bill enables us to disclose confidential information to bidders; correct.

Hon KEN TRAVERS: So we are overriding the confidentiality clauses? I think, as Mr Mann described it, it is not an obligation on the state, so it is an obligation on another entity. So we are legislating to override the confidentiality provisions of that agreement to enable us to provide it to a potential bidder?

Ms Gregory: We have the power to do so. Whether the state chooses to exercise that power, I think, is a separate question.

Hon KEN TRAVERS: If you give yourself the power, you are legislating to override it, are you not?

Ms Gregory: To clarify my comment: that does not preclude the state seeking BHP's consent to a disclosure, nor BHP entering into a confidentiality agreement with the short-listed bidders to keep it confidential in addition to the protections in the bill.

Hon KEN TRAVERS: Sounds like the negotiating tactics of the Bell Group, but anyway we will not go there for today. It is an interesting new regime we live in in this state, but anyway.

Hon ROBIN CHAPPLE: I just want to go back and cover some really simple basics. The cost of developing the port was \$300 million-odd, of which you got \$70 million from BHP. Can you give me the figures around that?

Mr Mann: So, asset value of around \$305 million, and we referred to the \$70 million early on.

Hon ROBIN CHAPPLE: In terms of paying down the debt or the capital investment, where are we at currently?

Mr Mann: I think we are at about \$164 million outstanding.

Hon ROBIN CHAPPLE: What has been the level of dividend paid to the state from the asset so far?

Mr Mann: We have global dividends from the Pilbara Ports Authority, but we do not have the specific dividend attributable to Utah Point, and we can provide some —

Hon ROBIN CHAPPLE: Why not?

[3.00 pm]

Mr Mann: My understanding is that the Pilbara Ports Authority has not provided that specific information previously.

Mr Parsons: The PPA pays a dividend as an entity as opposed to in respect of its individual assets.

Hon ROBIN CHAPPLE: I understand that. So that is Lumsden, that is the Wedge Street facility and that is the tugboat harbour—all of those. Why do we not have that breakdown? That is really incredibly important in terms of if Treasury is in receipt of a dividend from the port, that dividend should surely articulate where it is coming from.

Mr Mann: Treasury has undertaken, as part of this process, its own analysis of the contribution of Utah effectively towards that dividend, but it is couched in a different form to the way that the dividend for the overall port is calculated. We have provided some background of that analysis in our submission.

Hon ROBIN CHAPPLE: We have been able, over this period of time—what are we looking at now, about 15 years?—to pay off almost half of the capital cost and we have been receiving a dividend from that facility. Surely we must know why we were receiving a dividend from that facility if we maybe should have been paying off more of the principal debt anyway. I am just surprised that we actually do not know if that facility was providing a dividend.

Mr Mann: From our analysis, we have a very good understanding of the returns from that facility over its life.

Hon ROBIN CHAPPLE: Okay. So what are they?

Mr Mann: We provided that information in our submission and they are also contained in one of the reports that we propose to table today as well. That information will be provided today as confidential information.

Hon ROBIN CHAPPLE: That is what we are going to classify as confidential. I would have thought that that certainly needs to be in the public domain. So it would be really good if you could answer that, not necessarily within the context —

Hon KEN TRAVERS: Robin, can I just interrupt —

Mr Mann: We can deal with that in two parts. We have previously provided information on Utah to a different committee. We can provide that information again as supplementary information. It is also detailed to a large extent in one of the reports that we intend to table today, in fact if not in both. There is other contractual information in those reports that should remain confidential. But in respect of some of the financial detail relating to Utah, Treasury has previously requested that, particularly, current and previous financial year details remain confidential because they do not reflect the breakdown of costs that would apply to the facility under private ownership, and we do not wish to adversely impact on a potential sale by providing misleading information. We do note that some more current information has been provided by the Pilbara Ports Authority, so that that is now publicly available. In the context of all of that, if I could ask that we please consider what we can provide as supplementary information to clarify —

Hon KEN TRAVERS: With all due respect, Mr Mann, once you go into the data room with potential purchasers, they will have access to far more detail than what we are asking here today. The sort of people you are talking about selling it to are sophisticated purchasers. They are not

going to be misled because the Pilbara port includes the cost of berthings and wharfage, whereas they will still be collected by Pilbara Ports, not by the Utah Point facility.

Mr Mann: It is not that particular aspect that we are concerned about; it is the distribution of overheads, as we have noted and as in fact Pilbara Ports Authority has noted. Certainly once we get to that point in the process, I think as I have said in another committee previously, then, yes, the commercial sensitivity will drop away.

Hon KEN TRAVERS: The corporate overheads, are you expecting the potential purchaser to make a contribution to the overheads of the port authority?

Mr Mann: What we are saying is that the current distribution of overheads in particular, and in fact a number of other cost components, will be significantly different under private ownership.

Hon KEN TRAVERS: So they will be making a contribution to the overheads of the port authority, by some sort of annual lease payment?

Mr Mann: They will have their own overhead structure, which we would expect will be significantly different from what is currently applied.

Hon KEN TRAVERS: Significantly lower, probably.

Hon ROBIN CHAPPLE: I have a bit of a hypothetical question. Quite a lot of dredging has been done there over a number of years, and we are most probably due for another major dredge coming up shortly. There will be costs associated with that. Will that be amortised across to the new owners of Utah Point?

Mr Mann: That responsibility will remain with the ports authority as it is today. The existing marine-side functions —

Hon ROBIN CHAPPLE: My issue is that obviously the Utah Point facility has only a very shallow capacity and therefore would not benefit in any way, shape or form from further dredging of the channel. I am interested in how the port authority might operate in terms of charges to a private facility of something that necessarily does not impact them but impacts the general port.

Mr Mann: Without understanding what the Pilbara Ports Authority might or might not do, I can note that the Pilbara Ports Authority currently applies a port improvement levy to all users. The expectation is that it certainly will retain the responsibility for applying such levies in future. I think the assumption is that it would continue to do so and would continue to do so in respect of potential future improvements.

Hon KEN TRAVERS: Following on from those points: you must have made some calculation even to get to this point. I accept there will be a further process in terms of developing a retention value for comparing the bids against. But to get to this point to spend—what is it?—the \$6 million or \$8 million that you are spending on the sale process, you must have done some calculation of what you believe is the retention value versus the purchase value, and that must have included a calculation of what the return to the state to date has been on Utah Point. Am I correct or not?

Mr Mann: Correct.

Hon KEN TRAVERS: Are we able to get what that value is that you have calculated to date has been the return to the state?

Mr Mann: The historical return to the state, yes, when I talked about the supplementary—we have provided some of that information previously, I think up to last financial year.

The CHAIR: Yes, \$146 million in revenue.

Mr Mann: There is some additional, more recent information that is included in the Pilbara Ports Authority submission. Taking into account all of that, we will provide, as a supplementary response, current information providing as much as we can.

Hon KEN TRAVERS: This is an interesting thing that I am trying to work out, and we asked you the question and you are saying it is too early and you do not want to disclose how you would do it. However, in broad terms, how will you calculate the retention value? I assume that one simple way is current charges at full tonnage of 23 million tonnes a year for the life of the lease of 50 years, with a net present value attached to it. That would be your maximum retention value—am I right?

Mr Mann: Yes, essentially, with due regard to various forecasts et cetera.

Hon KEN TRAVERS: But that is the absolute maximum. I assume your retention value will be done on a business-as-usual basis; it will not be done on any future charging regime. It will be purely on a business as usual—that is what you have told us in other committees.

Mr Mann: Yes.

Hon KEN TRAVERS: So you will not be making an assessment about what might be charged; you will be doing it on the current charging regime, which would include the 250 —

Mr Mann: The assessment of the most likely scenario if the asset was to be retained in state hands.

Hon KEN TRAVERS: You have previously described that as business as usual. That would be the current contractual charging regimes with the rise-and-fall contracts; a maximum tonnage of 23 million tonnes a year?

Mr Mann: With regard to forecasts, volumes —

Hon KEN TRAVERS: That is what I was going to come to. That is your starting point; then you have to factor in some sort of risk analysis to what you believe to be the risk.

Mr Mann: Correct.

Hon KEN TRAVERS: Fundamentally, how you measure risk is going to be the real question about what you arrive at as the final retention value, is it not?

Mr Mann: Correct, as is exactly the case in similar processes—for example, public sector comparators—where you are effectively estimating costs over a period of time.

[3.10 pm]

Hon KEN TRAVERS: What is the process for identifying and measuring the risk that you will apply to the retention value?

Mr Mann: In particular, the discount rate will be cognisant of the risk associated with that cash flow over time so the application of discount rate is key in net present cost analysis and that is the same here.

Hon KEN TRAVERS: So you will actually put it into the discount rate; you will try to do a calculation that gives you a discount rate to carry that risk?

Mr Mann: On the base of our advisers and with Treasury review and Treasury Corporation review, again, very similar to processes that we have used on similar transactions, we will agree on an appropriate discount rate, which is reflective of the risk profile of the asset in coming to a net present cost.

Hon KEN TRAVERS: But of course that would require seeking to maximise profit out of the facility, or would it be operating under the existing Port Authorities Act, where profit is not a motivator?

Mr Mann: The short answer is that the retention value will reflect that business-as-usual scenario where the asset is retained in state hands, so it must include reasonable assumptions around pricing structure and forecast volumes and a discount rate which is recognising the risk that the state would be taking, again with a view to existing contractual arrangements.

Hon KEN TRAVERS: One of the interesting things about risk in terms of this facility is that it was never built to be a profit-making venture; it was built to return its capital and then get a reasonable rate of return. When it was built, I think that rate of return was between five and eight per cent, subsequently increased to a rate of return of 12 per cent on, I think, depreciated asset value, if I remember correctly.

Mr Mann: The overarching Pilbara Ports Authority's target rate of return is 12 per cent.

Hon KEN TRAVERS: Yes, but the assets within that are expected to help contribute to that, so if you are looking at that as the case, then I would have thought most businesses running a high-risk venture like this, and certainly most small to medium enterprises, what they would do is get it up and running. The first thing they would do is they would not take a dividend out of the facility; they would use the cash flow that they get to pay down debt as quickly as possible to get to a point where they have minimal risk in terms of capital on their books and then it is just operating costs that are the risks that they deal with. Would you accept that, in a perfect world, that is how most people would operate? The port authority and the state has been trying to get a dividend out of it from day one of its construction of 65 per cent of net profits plus contribution do overheads.

Mr Mann: Luke, do you want to elaborate?

Mr Parsons: The private sector lessee of the asset will determine the best way of establishing its capital structure for the asset. Debt is generally cheaper than equity, so having a level of debt, if that is possible in relation to the asset, is something that would be considered. So that is part of the optimisation of the capital structure, and therefore ideally the lessee would be seeking to lower its cost of capital in acquiring the asset.

Hon KEN TRAVERS: But the submission from the government keeps talking about how this is a high-risk asset, so you then have to balance equity versus debt in terms of how you factor that in. But then ironically, somewhere else in the submission, the government says they have very optimistic—the government is confident in the long-term outlook for the facility, so the two seem to be at odds with each other. You say that there is a high risk in the facility, but then you have a confidence in the long-term outlook of the facility. I am trying to rationalise two —

Mr Mann: A confidence in the private sector, or there being private sector parties who would be prepared to manage that risk and accept it over the longer term.

Hon KEN TRAVERS: But I am asking it from a state government perspective where the purpose of building the facility was to facilitate trade, and it has done that; it has created lots of jobs in Western Australia by stimulating a sector of the market that, I suspect, on per tonne of iron ore produced employs more people than the majors do and the need for that to continue into the future.

Mr Mann: As we have identified, that remains a very strong policy objective of government, but another policy objective of government is that it embarks on a structured program of asset sales for the reasons articulated earlier and our role is to develop a structure that, to the best of our ability, balances those objectives. So we have, through the access and pricing regimes, sought to protect the industry that the facility was predominantly built for in the first place, but at the same time we have also sought to create a risk environment that the private sector is going to be accepting of and one that, at the end of the day, should the government proceed with the divestment, will, through we hope a significantly higher sale value than retention value, demonstrate that we can achieve the primary objective of being able to retire debt but at the same time doing so with an access and pricing regime that continues to protect the junior mining industry.

Hon KEN TRAVERS: But fundamentally—I do not want to re-cover this ground—the way in which you can get a higher purchase price over the retention value fundamentally stems back to the fact that you have that sitting in the backdrop; you can increase your prices to a point where you can actually know that you can go to a large player on a take-or-pay contract if the juniors do not come up to that point in terms of the price and access regime.

Mr Mann: From a —

Hon KEN TRAVERS: That is the fundamental difference between state ownership as it is currently structured with the policies of government and the potential future purchaser.

Mr Mann: Well, in fact, there is no such —

Hon KEN TRAVERS: That is why they can manage their risk.

Mr Mann: There are no restrictions on the existing asset. There is no access and pricing regime on the existing asset. There is no exclusion from the government negotiating with a non-junior miner now.

Hon KEN TRAVERS: Have you ever taken on miners as a politician? I know my side has and we did not go too well out of it.

Mr Mann: That is the reality.

Hon KEN TRAVERS: That is the protection they have, the political protection. Once it is privatised—as we have seen with Brookfield Rail, which I note you claim as a success story in your submission—once it is outside the direct hands of a minister, those protections are gone. So the policy at the moment is very clear: it is about junior miners, access to junior miners and junior miners going and using it on a use-it-or-lose-it basis. If they do not use it, another junior miner—we know there are other junior miners sitting in there behind it. Under this regime, there will be a new regime where fundamentally there is not that political protection. That political risk factor is taken out. It is simply up to negotiation between a couple of private sector parties knowing that sitting behind it is always a potential major to come in on a long-term take-or-pay contract.

Mr Mann: Yes, except I repeat that we continue to argue —

Hon KEN TRAVERS: Well, no. We agree to disagree on —

Mr Mann: — that the regime we have introduced offers very strong protections against that eventuality.

The CHAIR: Say BHP buys it and it is restricted to those conditions and the small junior miners do not meet the requirements, so because BHP has bought it, BHP can use it, or can the other major players use it as well? So BHP buys the port, Utah, and it adheres to all the conditions that the government says so—and I do not see how this would happen because there are only 18 million tonnes or something that go out through that port, and they have millions of tonnes that go out through their ports—but the junior miners say it is a really bad year and there is only, say, 12 million tonnes going out, can BHP, because it bought Utah, then use that for their tonnage?

Mr Mann: First, it has to comply with the same access and pricing regime. So, step 1, it has to advertise that the capacity is available; step 2, if any junior miner is available to take up the capacity, it must negotiate with the junior miner in good faith in the first instance. It cannot discriminate against an access user, including on the basis of price. It has an obligation not to discriminate in respect of access either, so it must negotiate for a minimum period of six months, which can be extended, and only at the end of that period, if there is no junior miner wishing to take up capacity, can it then apply to the regulator to commence negotiation with a non-junior and then it can only commence those negotiations on the minister's approval, subject to the recommendation of the regulator.

[3.20 pm]

The CHAIR: Why would BHP buy it in the first place if it has to meet all those conditions so it can use it? I just think it is interesting that a buyer of the lease—the lessee—would have to meet all those conditions to be able to use the facility that they have paid out for. It is an interesting one.

Hon DAVE GRILLS: Where does it state what you just said? Where in the legislation is that?

Mr Mann: That is spelt out in the access and pricing regime. The details are contained in our submission and that will be contained in the regulations.

Hon DAVE GRILLS: And the regulations are not out yet?

Mr Mann: No, the regulations require the passage of the bill. That then empowers the making of those regulations. We are, though, in the process of completing our detailed drafting instructions to Parliamentary Counsel for those regulations.

Hon DAVE GRILLS: That was going to be my next question; we have jumped one ahead. When will that be? Do you know, roughly? Do you have an idea?

The CHAIR: I will just point out that the Treasurer did say that he was going to table the draft access regime regulations in Parliament but I do not know —

Hon DAVE GRILLS: Do you have any idea?

Hon KEN TRAVERS: Whether it is before or after the passage of the bill.

Mr Mann: Again, that has pre-empted the response to an extent. The Treasurer has indicated that they will be tabled as early as possible. We need to ask the Attorney General to request Parliamentary Counsel to draft those regulations ahead of the passage of the legislation to allow that to happen, which we need to do.

Hon DAVE GRILLS: It is not the cart before the horse then?

The CHAIR: It certainly is.

Mr Mann: The usual process is that regulations are drafted after the legislation. We actually have to ask the Attorney General to direct Parliamentary Counsel to reverse the order.

The CHAIR: It is the usual order and, as I said at the start, it is always politicians on the legislative committee going in the dark sometimes and regulations come afterwards, but that is not your problem.

Hon KEN TRAVERS: Chair, it does not have to be that way because, as I understand it, in one of your other template bills, the Fremantle Port Authority sale bill, you are actually now redrafting that bill to include the pricing and access regime within the legislation, are you not? Why could this bill not be amended to include the pricing and access regime as part of the legislation?

Mr Mann: The answer is: it could be. The reason, as we indicated earlier, that this structure has been proposed is, in particular, to provide flexibility should that regime need to be amended in the future. But as was the case with the Fremantle bill, as you point out, that was originally the structure proposed for Fremantle and the government has elected to take a different path.

Hon ROBIN CHAPPLE: I want to go back to junior miners. Junior miner A has an access regime; he has got his stockpiles there; he is bought out by Rio Tinto or BHP. What happens?

Mr Parsons: If they are operating under an existing contract, that existing contract is not affected by the access and pricing regime proposed. At the end of that contract term, the access and pricing regime here, as set out, applies. Again, priority would be given to junior miners.

Hon ROBIN CHAPPLE: It was a junior miner; it is now part of a major miner. That junior miner, having been bought by a major, would then lose its access?

Mr Parsons: It loses its priority as a junior miner in relation to the access and pricing regime.

The CHAIR: It ceases to be.

Hon ROBIN CHAPPLE: My point was going to be that if, say, one of the junior miners along the Newman Road currently trucks material in, it is still going to truck material in. It is not going to go on rail, it is not going to be blended, it is not going to be doing anything else but it is now bought by a major. They cannot use a rail access; they cannot use anything else other than the roading system.

I am intrigued that suddenly what was essentially a junior miner, having been bought by a major using the roading facility in there, would be excluded. Surely that would be anti-competitive?

The CHAIR: Not really. He is excluded because he ceases to exist because he has been bought by a major. Even though he is trucking it in, he is trucking it in under contract of a major or trucking it in for the major so he ceases to be the miner, does he not?

Mr Mann: That is correct.

The CHAIR: I think —

Hon ROBIN CHAPPLE: I was really wanting to hear their answer, not the Chair's.

The CHAIR: Sorry.

Mr Mann: That is correct.

Hon ROBIN CHAPPLE: Okay; fine. Another component of this —

Mr Mann: Sorry, just to clarify, it is not until the expiry of an existing contract.

Hon ROBIN CHAPPLE: And that contract is how many years?

Mr Mann: It would depend on the terms of the contract that were agreed.

Hon ROBIN CHAPPLE: Okay; what could it be? What is the length of the contract envisaged?

Mr Mann: Existing contracts vary significantly in term; it could be very short-term or could be significantly longer.

Hon ROBIN CHAPPLE: Significant being what: 10, 15, 20 years?

Mr Mann: Potentially.

Hon ROBIN CHAPPLE: Okay.

Mr Mann: But unlikely, given the nature of those contracts with those users. They would typically be of shorter terms with extension options.

Hon KEN TRAVERS: My understanding—correct me if I am wrong—is that for Utah Point, the 23 million tonnes is pretty much the maximum it is ever going to be able to produce. Even if you could get more efficient ship loaders, you still have to get channel space available to you, so you are pretty much limited to the 23 million tonnes and the depth cannot be changed. Is that correct?

Mr Mann: Yes. There will be an allocation to Utah of 23 million tonnes. Any usage above that would need to be through D-class shipping which is utterly dependent on channel scheduling.

Hon ROBIN CHAPPLE: Channel scheduling and also the depth and the contract between BHP in relation to the tunnel.

Hon KEN TRAVERS: There is very limited capacity to go beyond that 23 million tonnes. It is not an asset where, say, down at Kwinana Bulk Terminal —

Mr Mann: Considerable uncertainty is the best way —

Hon KEN TRAVERS: At Kwinana Bulk Terminal, you could do some significant investment down there that could dramatically increase the capacity and therefore get a greater return on your investment by investing some money.

Mr Mann: The best answer is that there is a designated 23 million tonne C-class allocation for Utah. Anything over and above that carries a high degree of uncertainty.

Hon KEN TRAVERS: If you know that it is pretty much a regulated, fixed asset, why could you not set up a pricing regime when you have the initial cost of capital that you want to pay down. You allow, as the state has done, some fairly high charges to occur on the asset and then once the majority of the asset borrowings are paid down so that you have reduced the risk, you go to some

sort of block charging system for the pricing regime of the asset? That is probably, if these companies could afford it on their balance sheet to do themselves, how they would operate.

Mr Mann: Potentially, if that was appropriate at the time, you could.

Hon KEN TRAVERS: How do you measure at what point it is a reasonable point to have paid down unless you have a requirement that they use that funding to manage their risk, whether it is in capital or equity?

Mr Mann: Firstly, as a starting point, we would disagree with the notion that the state has been charging high fees for Utah. We have two independent reviews that say otherwise. With regard to the risk we are carrying —

Hon KEN TRAVERS: Sorry, I am happy to accept that the rate has been set about managing the risk—high in so far as to manage the risk is the point I am trying to make. I think we are not disagreeing on that point.

Mr Mann: Okay.

Hon KEN TRAVERS: Why can you not, once you have collected enough out of that asset to bring down the risk, then go to a block charging process where it is just a fixed rate of return on the investment allowing for depreciation and the like?

Mr Parsons: It is all fundamentally reflected by the rate of return. It might seem as though it could be broken up like that but fundamentally it is the risk associated with the asset with the investment which is reflected in the target rate of return which is sought to be generated on that capital investment. What you do with your cash flow after you receive it—whether you choose to pay down debt or return it as dividends—is a separate matter.

[3.30 pm]

Hon KEN BASTON: Just a hypothetical question, I guess, but I was thinking about it. Is there anything to stop one or all of the junior miners from buying the asset?

Mr Mann: Absolutely not. The junior miners were contacted as part of our market sounding process, as we have identified.

Hon KEN BASTON: So is it purely a lack of capital that voids that possibility?

Mr Mann: You would need to speak to them, but, potentially, yes and, as Luke points out, the process has not started, so if they were a viable bidder, then they would be more than encouraged to participate, either singularly or collectively.

The CHAIR: Are there any last questions, because we are running out of time?

Hon ROBIN CHAPPLE: I have basically got three. Firstly, once the facility has been sold, what guarantees does the state have to ensure that access to that facility will be maintained, by roadage or whatever?

Mr Mann: Physical transport links?

Hon ROBIN CHAPPLE: Yes.

Mr Mann: That is a good question. Felicity?

Ms Gregory: I assume you are not talking about the Pilbara Ports Authority—managed assets, but the roads within the leased area?

Hon ROBIN CHAPPLE: I mean the roads to the area.

Mr Mann: Does the state have an obligation to maintain transport links, the road in particular?

Ms Gregory: Within the PPA leased area—the vested area?

Hon ROBIN CHAPPLE: Let us say the Finucane Island Road.

Ms Gregory: Finucane Island Road, from what I recall, is partially within the PPA reserve and partially not, so the state is always able to direct the Pilbara Ports Authority to maintain access to the road should the Pilbara Ports Authority, for some reason, choose to close it, assuming you are talking about that scenario.

Hon ROBIN CHAPPLE: Let us go to another. That road washed out for three months in 1988. Is there a liability back to the PPA or, indeed, to the government, for that facility washing out?

Ms Gregory: I assume that would be covered by the transaction documents, that there will be obligations on both the PPA and Terminal Co, or the PPA will give warranties to Terminal Co that it will endeavour to keep that road open. Obviously, that will have to have exclusions for incidents of emergency and maintenance where it is required to close it.

Hon ROBIN CHAPPLE: I go back to the point that that road, if you go to the Main Roads report, is designed to be sacrificial. It needs to be sacrificial, because if it is not, then South Hedland goes underwater. Main Roads have covered all that, and in fact the recommendation was that a bridge needed to be built over the south west creek, not to design the road as a sacrificial. So, would there be a liability to the state—I am assuming that bit of the road would actually be state responsibility, not PPA.

Ms Gregory: The answer to that question has not yet been determined. I expect that the transaction documents would exclude any liability on the state for that eventuality.

Hon ROBIN CHAPPLE: So, if there was an eventuality to the state, then it would be loss of earnings by export from the private contractor who had bought the port.

Ms Gregory: It would depend upon what caused the issue. If it is an event of force majeure, an act of God, I think that is one thing. If it is contributed to by the negligence of the state or PPA, that would have a different regime.

Hon ROBIN CHAPPLE: If the state has designed the road to be sacrificial, as opposed to actually being able to create a bridge, then the state would be liable?

Ms Gregory: I am sorry, I am not aware of what you mean by “sacrificial”, and I need to defer to Treasury’s GHD engineering advisers.

Hon ROBIN CHAPPLE: If you have a quick look at that map there.

Ms Gregory: It means it is not a designated road?

Hon KEN TRAVERS: It means that when there is a flood incident, the road will wash away.

Mr Mann: I think our expectation would be, based on a typical risk allocation for precedent transactions, that such an event—that risk—would be borne by the lessee, unless, as Felicity indicates, there was a demonstrable negligence or some other failure to act on the part of the state. Typically, for force majeure events such as that, irrespective of whether the road—it would be deemed that the parties had knowledge of the purpose and nature of the road when the transaction was entered into. That event and the consequences of that event would be the responsibility of the lessee, not the state.

Hon ROBIN CHAPPLE: My second question is: in relation to the BHP conveyor tunnel that goes under the southern part of the facility, what caveats exist around that tunnel as part of BHP’s agreement with PPA in relation to area or zoning, or ability to access the tunnel, repair it or whatever, and its impacts on the facility?

Mr Mann: It is protected under the Goldsworthy —

Hon ROBIN CHAPPLE: It is a joint BHP–Goldsworthy tunnel.

Mr Mann: It is protected under the Mount Goldsworthy state agreement, and the lease under that agreement, so the protections that BHP currently enjoys under that agreement and the associated lease remain in force. They are not affected by the bill.

Hon ROBIN CHAPPLE: I understand that. Again, if the tunnel, as it has in the past, needed repair and significant work, and that inhibited the ability of Utah Point to continue operating, because the tunnel actually goes right underneath, but also the conveyor systems transact the roadage down there, who would be liable if BHP had to maintain or service or rebuild or reconstruct part of that facility, and that action stopped the operation of Utah Point?

Mr Mann: Without being able to answer that specific circumstance, what I can say is that any of BHP's current obligations and abilities under its agreement would be preserved, and our expectation would be that the lessee would be responsible for taking the risk associated with BHP maintaining those obligations.

Hon ROBIN CHAPPLE: So, BHP has got quite a large area for that tunnel. If the tunnel was to be upgraded, or rebuilt, or a dual tunnel capacity was put in there for greater transfer of fines ore across the facility, and that impeded the operations of Utah Point, that would be just stiff bickies for Utah Point?

Mr Mann: It would depend on exactly what the state agreement allows. We would have to take the couple of examples that you have raised and go back and look at the state agreement in more detail to determine what, if any, impact there might be. Could we take that as supplementary and provide some further information in response to those scenarios.

The CHAIR: Yes, you can.

Mr Mann: Thank you.

Hon KEN TRAVERS: Between now and the sale, if the bill does go through, what role do you see the juniors having in terms of the sale process? Will they have a role in the sale process, and in negotiating the terms? Will there be any role for them once the bill goes through?

Mr Mann: It is my expectation, given the significant recent feedback to government generally, that that interaction would continue, and certainly be taken on board. As indicated earlier, there is the potential for those entities to be directly involved as bidders. Otherwise, other than as stakeholders, who are more than welcome to provide input throughout the process, I do not envisage any other role.

[3.40 pm]

The CHAIR: We have got some questions that we will send to you in writing.

Hon DAVE GRILLS: This is probably not a question, but I want to thank you for your time and all your answers today. In regard to consultation and what have you, I think what was said before, and as the Chair pointed out about our role and how it goes, you have had to answer a lot of questions, some of which may seem to be a bit obvious. I would like to think that maybe the process we go through with our consultation might be taken into that consultation process, where we look towards a better outcome. That is about all I would say.

The CHAIR: I would like to thank you all for attending today. A transcript of this hearing will be forwarded to you for correction. If you believe that any correction should be made because of typographical or transcription errors, please indicate these corrections on the transcript. On behalf of myself and the committee, we thank you for your input today.

Hearing concluded at 3.40 pm
