TAXATION LEGISLATION AMENDMENT BILL 2014

Second Reading

Resumed from 26 November.

HON SALLY TALBOT (South West) [12.34 pm]: I made my opening remarks last night and I do not intend to repeat those opening comments. I got to the point of remarking on the fact that this is a very unusual bill in the sense that it contains its own unintended consequences and so some very significant measures in the bill are actually directed specifically at resolving the problem created by those unintended consequences. Just very briefly, the way I explained it last night was that the government, having decided that the initial policy challenge of excluding the Chamber of Commerce and Industry of Western Australia and organisations like it from a range of tax exemptions was simply too complicated, rather than focus on the actual, concrete, practical problem, took a step back and cast a very wide net that ended up capturing a number of charities that were nothing like the Chamber of Commerce and Industry. As I informed the house last night, they were put on a list of relevant bodies denied taxation exemption that then have the option of seeking an appeal by way of ministerial determination from the Minister for Finance. Just to pick up on those remarks, we find in the bill an extraordinary move to introduce a distinction that does not exist in any sense in any way in the common law, and of course, common law is what has to be looked to when trying to understand the way the law relates to charities. It is expressed in a number of different ways, and the expression encountered most frequently when the bill and the material around it is examined, and it is the language used in the second reading speech, is that we are being asked to make a distinction between legitimate and illegitimate fourth-limb charities. That is not a form of words that has any meaning once it starts to be unpacked. There are plenty of sources to turn to and plenty of places to go to look for how this language might have originated; some of the obvious ones are the very lengthy judicial decisions and rulings that have been made when organisations and institutions have taken their case to court and applied for charitable status.

I have said that a lot of things to do with this bill are complicated, but there are a few obvious and relatively straightforward facts to do with charities law. It is simply a case of a body demonstrating to the court that it returns some kind of public benefit. That public benefit does not have to be to the public as the public would be understood in a commonsense way; it can be to a class of people in a community. Nevertheless, it relies on the return of a public benefit. For the government to suddenly start asking us to contemplate the distinction between legitimate and illegitimate fourth-limb charities introduces a concept that becomes very troubling when the onion skins begin to be peeled away from the bill to try to get to its policy intent, which is of course where we have to get to before we can start talking about unintended consequences. The other way this is expressed, again, in some of the documentation the government has provided such as the explanatory memorandum, is “appropriate” and “inappropriate”. We are led to a position in which it appears at first glance that the government has been able to identify a class of charities within the subset of fourth-limb charities that it wants to designate by some means and wishes to translate into statutory form as illegitimate fourth-limb charities or fourth-limb charities that have a tax exemption by virtue of their fourth-limb status that we are being asked to regard as “inappropriate”. This is where the ground begins to get somewhat shaky because the reality I want to put before this house is that what we are being asked to contemplate—the distinctions between “legitimate” and “illegitimate” and “appropriate” and “inappropriate”—is purely political language. It is not language that emanates from any kind of judicial basis. It has no meaning when we look at the common law, or case law, that applies to charities. Unfortunately, if we use political language in a way that masquerades as legal language, we actually engage in dog-whistle politics that creates an assumption that such an entity must exist—that is, there must be an entity such as an illegitimate fourth-limb charity for us to be even sitting in this place listening to a second reading speech that uses that language. In a sense it—to use a very quaint, old-fashioned term—queers the pitch for the debate we are about to embark on in this place.

I must admit that, coming from the left wing of a left-wing party, I have had to contemplate the possibility that the actual policy intention of the bill is wrong; and that if the Chamber of Commerce and Industry of Western Australia can demonstrate to the satisfaction of a judicial body such as the State Administrative Tribunal that it does indeed return a public benefit, perhaps it ought to be regarded as a legitimate fourth-limb charity. That is the problem that this language creates for us. We are therefore arguing on ground that is far from solid for establishing some kind of sound rationality for having this debate in the first place.

Honourable members on this side of the chamber will be relieved to know that I have not changed my position on the CCI on the basis of any political ideology; I have changed it on the basis of three very close readings of the SAT ruling that suggest to me that there is in fact plenty of wriggle room. In one paragraph in particular the commissioner makes it very clear that he is deliberating on very compelling arguments from both sides of the case. The commissioner makes it clear, at least to my satisfaction, that this was far from a clear-cut case, and that a different commissioner or a commissioner on a different day with a slightly different set of circumstances

might have brought down the opposite decision to the one that Commissioner Chaney brought down, which accorded tax exemptions to the Chamber of Commerce and Industry. I therefore think that there is a perfectly rational and sound argument to be made for excluding the CCI, and I think that can be done on the basis of the evidence that was considered by SAT. However, that is the problem we get into and it sets up the framework for these very complicated considerations that we have to bring to bear on this bill.

When we start this contemplation, in a sense we are left with a set of consequences, some of which appear to be unintended consequences that have been addressed by the government; I suppose we could call them intended unintended consequences. They are unintended consequences recognised by the government about which the government will claim that it has been able to devise a set of measures that will address the problem. I think that is arguable, and I will explain that in more detail later in my contribution.

I think honourable members would be aware that the committee made a raft of unanimous recommendations as well as several minority recommendations. I was therefore party to every single one of the unanimous recommendations—obviously by definition. The committee was able to identify a third category of consequences, which were the unintended unintended consequences. At the risk of straying fairly and squarely into George W. Bush's territory, I think that is a slightly tongue-in-cheek way of explaining to honourable members what we are looking at here: unintended consequences, intended unintended consequences and unintended unintended consequences. I think that creates the ground for what might be referred to as a pretty messy piece of legislation that we are looking at today. I have explained that confronted with the challenges of trying to devise legislation that simply excluded the CCI and other bodies that operate in the way the CCI operates, the government stepped back and applied, instead of a very narrow test, a very broad exclusion test. By the government's own admission, the consequence of applying a very broad exclusion test is that too many charities will be captured.

At this point I think it is worth making a few remarks about the CCI tax exemptions. I recommend to anybody who wants to become a little more familiar with some of these issues to go back and read the SAT determination. It is in fact extremely readable. As a non-lawyer, I often find it quite challenging to read legal judgements but I found this one quite accessible. It is only about 60 pages long and has about 110 paragraphs. A lot of the judgement is simply extracts from the CCI constitution and a strategic plan that was done by the CCI about 10 years ago. It is therefore not hard reading.

The conclusion of the commissioner, as I have already said, is that there is an argument, which he obviously found more compelling than the contrary argument put by the Commissioner of State Revenue, for the sense that the activities of the CCI are beneficial to the public. This, in itself, is a concept that many people in our community find challenging, not so much because it is a challenging concept in and of itself but because it is something that people have become a little uncomfortable talking about. The idea that there is such a thing as a public benefit or a public good is not often referred to in such direct terms. We have a double complication here, because I am suggesting that both the commonsense notion of a public good or a public benefit is something that non-technical people do not feel comfortable discussing. The notion of being beneficial to the public is also a legally complex term.

The government has identified for its own purposes the core policy of the bill. The prime intention of the bill is that an organisation ought to prove its charitable status on the basis of its public benefit. Of course there is a difficulty if we use "public benefit" in its commonsense usage. This is a well-canvassed topic and I do not think there is anything particularly controversial about what I am about to say. The whole public perception of governments and national institutions returning a public good is a problematic one for the community. There is an enormous amount of cynicism and disenchantment from people in the community about the activities of politics, big business and people who are perceived to be part of an elite that services only its own good; and people talk about a public good only in the most cynical sense of a public good that somehow advances a private interest.

Some members are already familiar with a groundbreaking study released recently by the Australian National University on the degree to which people now distrust the very processes of democracy itself. People no longer look to governments, let alone political parties, as a source of authority on any kind of moral goodness. When we start talking about the public good, therefore, we are entering another area of somewhat shaky ground for bringing commentary along with us when we consider these things.

There are a couple of things in the case of the CCI's SAT determination that I want to bring to the house's attention, because I think they are absolutely central to the process of forming an opinion about whether the measures outlined in this bill will actually work. I make the assumption here that I have correctly identified the central policy intent of the bill as the removal of the tax exemptions of the CCI. One of the things that the bill does not change is the definition of the CCI as a fourth-limb charity. That in itself is extremely problematic, and

takes us down the same path—I suggest, without wanting to second-guess anybody's intellectual processes—as the government's legal and economic advisers went down when they were given what might have appeared initially to be the relatively straightforward task of removing the tax exemptions from the CCI. I think the government might have tried to change the charitable status of the CCI. I could not begin to venture any suggestions about the mechanisms that might have been used. That is not quite true; I can talk about the very broad mechanisms, but I am not skilled or experienced enough to come anywhere near drafting the provisions that specifically would have done that. Something that was pointed out to us very graphically by Co-operative Bulk Handling Ltd in its submission and in the evidence it gave to the committee is that obtaining charitable status in the first place is often a very complicated, lengthy and expensive process. The CCI spent many years establishing the ground for the legal argument that it eventually took to the State Administrative Tribunal and successfully prosecuted. CBH, from memory—I will refer to this in more detail later in my contribution—spent years in the highest courts of Australia arguing its case. Nobody should start with the presumption that fourth-limb charity status can be obtained by ticking a few boxes on a piece of paper and whipping it into the local Department of Commerce office. That is simply not how it is done. These are lengthy and complex legal arguments.

My suggestion that the government might have gone down the road of trying to remove or change the charitable status of the CCI is based in general terms on the fact that the government could have gone back to some of those original decisions and the arguments that supported them, and try to make some kind of statutory amendment that would have changed the outcome for the CCI's charitable status. Of course, it is not doing that, and that in itself is interesting, and points to another area of potential unintended consequences. These are not unintended consequences that were specifically considered in the committee report because, as I have already said, the committee report was done very quickly. It is a quality piece of work, so its limitations are in the breadth of its considerations rather than the depth of the way that those narrower considerations were done. It is reasonable to say that the identification of a whole other subset of unintended consequences would be in the operation of other jurisdictions and their application of charity laws as they relate to tax exemptions. Because the CCI is going to retain its charitable status, it will still be a fourth-limb charity and therefore it will still be eligible for a range of other tax exemptions, for instance, from the commonwealth government.

I have some specific data that I will refer to later in relation to CBH, because CBH actually made a submission to the committee and then came and gave evidence. Its evidence gave us some indication about what its charitable exemption means for it, and I can refer to that later in the debate. Interestingly, we did not receive a submission from the CCI. I guess it probably assumed, quite correctly in my view, that enough material was already on the public record for us to construct that argument. I am not talking specifically about particular tax exemptions that the CCI gets. As honourable members would know, one of the things that has dogged this legislation and the committee inquiry process was the lack of concrete information available to the Parliament, on which we might base some of these decisions. We do not have information from the CCI about its specific tax exemptions. Nevertheless, I make the general point that if an organisation is a fourth-limb charity, as is the CCI, it is eligible for a range of tax exemptions over and above the tax exemptions it receives from the state. I want everybody contributing to this debate, particularly those on the other side of the house, to understand clearly that, whether this bill is enacted or not, the CCI is still a fourth-limb charity. I would be interested to hear comments on that from anybody who thinks, as I do, that that is an interesting proposition.

For those who would like to have a look at the SAT determination, I will offer a couple of paragraphs, in case they do not have time to read the whole thing. Paragraph 98 is the key paragraph. I want to read this paragraph in full—it is only a couple of sentences long, albeit legal sentences without many full stops—because it conveys nicely the open questions that remain even once this determination has been given. It reads as follows —

> There can be no doubt that service provision to members has played a major part in the planning and activities of CCI from at least November 2000 when the Corporate Planning Background Paper was produced. In my view, however, the focus on building the membership base and achieving a strong financial position, which necessarily required the development of the service activities of the organisation, must be seen in the context of a view that strength through membership numbers and resources better enables the achievement of the primary object of the organisation, namely the promotion of trade commerce and industry and the development generally. I draw that conclusion from the statement of vision in the November 2000 background paper, statements in that paper such as 'CCI's change of focus should not undervalue the benefits to West Australian industry from CCI's unique policy role', the statement of vision in the strategic plans published since that time, and the focus on the policy role of the organisation as the key point of differentiation from other organisations which provide employment related services.

That is the key paragraph out of the 100-odd paragraphs that make up this judgement, because in the middle of that paragraph we read the reference to the primary object of the organisation. This is what caused the problem

and provided the challenge for the government. I will read that part again. Referring to other aspects of the organisation, it states —

> … must be seen in the context of a view that strength through membership numbers and resources better enables the achievement of the primary object of the organisation, namely the promotion of trade commerce and industry and the development generally.

It is very important to keep that phrase at the front of our minds when we are considering what the government went on to do with this bill. It would have been thought the initial move that the drafters of this bill might have made was to go straight to that phrase about promoting trade, industry and commerce, take that paragraph and write a piece of legal construction that went straight to the problem of an organisation whose dominant purpose was the promotion of trade, industry and commerce. The problem arises because although, in a commonsense framework, that looks like a relatively straightforward thing to do, there is a problem when we start looking at the technical meanings of some of these words. If I can just give the conclusion before giving the arguments that lead to it, to give some signposting along this slightly tortuous way, the problem is that once we start looking at charities that promote trade, industry and commerce we find a range of charities that clearly, as I said before, are nothing like the Chamber of Commerce and Industry of Western Australia, and in fact return a benefit to the community that not only fits within the legal technical definition of a charity but is also something that the man on the Clapham omnibus would regard as a charitable purpose.

Sitting suspended from 1.00 to 2.00 pm

Hon SALLY TALBOT: Before we got up for the lunchbreak, I was pointing out to honourable members that it is quite important to be aware that the measures contained in the Taxation Legislation Amendment Bill do not remove the Chamber of Commerce and Industry of Western Australia's charitable status. It is an extremely limited application of the measures that we are contemplating which, again, point us back to the original proposition that I made that the initial approach that we can assume government drafters took was the very narrow focus of looking at excluding the very small range of organisations consisting of either the CCI or organisations that are similar to the CCI. I talked about the fact that one of the complicating factors is that we have to look at a couple of different ways of understanding the definition of a "charity". Just before the lunchbreak, I was pointing out that one of the problems for the government in casting a wide net is that the measures in the bill have inevitably captured charities that are not meant to be captured. It captures what the government is proposing to label illegitimate fourth-limb charities receiving what the government calls inappropriate tax exceptions. Clearly the broad measure in clause 6(d) of the bill will capture a range of other charities.

I refer to the legal technical meaning of "charitable". By the way, during the lunchbreak it was pointed that the updated southern hemisphere appropriate translation of the man on the Clapham omnibus is the man on the Bondi tram. I am happy to correct my comments in that sense. We are moving away from the definition that the man on the Bondi tram would give to the notion of charity or being charitable and we are looking at a definition that has a legal and technical meaning. For that I refer honourable members to paragraph 14 in the State Administrative Tribunal's determination. The key here is that we have to go to the spirit and intendment of the preamble. We are getting into some archaic language here simply because our modern day charities law as it exists in 2014 is based on common law that goes back to 1601. Those members who studied history at school would remember that 1601 is famous for the Act of Settlement. One of the acts contemplated in that great reform of the British legislative system during the Elizabethan period was the law relating to charities, which was not part of the Act of Settlement but one of the measures of that momentous year. I will go through the list in the 1601 act to give honourable members a flavour of what the modern case law is based on, but I also want to talk about what is in paragraph 10. Paragraph 14 contains the list of 10 things that come into the definition of a "charitable organisation". First is the relief of aged, impotent or poor people; second, is the maintenance of sick and maimed soldiers and mariners; third, the maintenance of schools of learning, free schools and scholars in universities; fourth, the repair of bridges, ports, havens, causeways, churches, sea banks and highways; fifth, the education and preferment of orphans; sixth, the relief stock or maintenance of houses or correction. I wonder whether that is supposed to be "houses of correction". Seventh on the list is marriages of poor maids; eighth, is the suppletation, aid and help for young tradesmen, handicraftsmen and persons decayed; ninth, the relief of redemption of prisoners or captives; and, tenth, the aid and ease of any poor inhabitants concerning payment of fifteens, setting out soldiers and other taxes. The reason that I have drawn attention to the 10 things is because that gave me my first insight that when we use "charitable" in the sense of faith, hope and charity in the popular sense, we mean something quite different from the legal technical term, because the legal technical term is based on a range of activities that clearly now in 2014 we would not consider to be charitable. I draw your attention, Madam Acting Deputy President—or is it Madam Acting President —

The ACTING PRESIDENT (Hon Liz Behjat): Hon Adele Farina is the Deputy President and everyone else is an Acting President.

Hon SALLY TALBOT: Thank you, very much, Madam Acting President.

I draw your attention, Madam Acting President, to the fourth item—the repair of bridges, ports, havens, causeways, churches, sea banks and highways. The interesting thing, of course, is that what we are talking about are things that we would now regard quite clearly and unequivocally as being not the provision of charity but a central part of the delivery of services by government. Members can see that we have centuries of case law that we have go back to in order to see where understandings began to change, if indeed they did begin to change, and what distance there is today between the popular understanding of "charitable" and the legal, technical understanding of "charitable".

The SAT judgement goes into more detail because, as I just said, the commissioner quotes Lord Macnaghten who now, of course, has made it into the bill by name. I am sure they will want to update all the *Who's Who* references to Lord Macnaghten on that basis. It is not often that our Western Australian statutes refer to English lords, but he has made it by name in the government's amendment. This is a question about the reference to the spirit and intendment of the preamble of the statute of Charitable Uses Act 1601.

Things get more complicated because in 1971, in the case that is referred to as Incorporated Council of Law Reporting for the State of Queensland v Federal Commissioner Of Taxation (1971) 125 CLR 659, Chief Justice Barwick introduces another consideration. I am straying into very archaic territory, but I am trying to furnish members with a background to understand the complexity of trying to tease out some of these definitions. Barwick refers to the Elizabethan sense of a charity. He says —

> Out of certain instances given in the preamble —

That is the list of 10 things I just referred to —

> to the Act of 1601 a broad concept emerges of the kind of object of public utility which will satisfy the quality of charity. Any notion that that concept is of an eleemosynary —

That, Hon Donna Faragher, is my new favourite word.

Hon Donna Faragher: I missed that.

Hon SALLY TALBOT: Eleemosynary. It is an adjective that means charitable; benevolent.

Hon Donna Faragher: That is the new word from Hon Sally Talbot—great!

Hon SALLY TALBOT: I think "eleemosynary" is a splendid word—there we go.

Hon Donna Faragher: I will keep a tally of how many times Hon Sally Talbot refers to it.

Hon SALLY TALBOT: Yes; thank you very much. I actually do not intend to use it very often. I think it is a fantastic word to keep up our sleeves.

Hon Donna Faragher: We were tallying "extraordinary"!

Hon SALLY TALBOT: I will start the sentence again —

> Any notion that that concept is of an eleemosynary nature is seen to be untenable by some of the very instances themselves, eg the repair of bridges, havens, causeways, seabanks and highways and the setting out of soldiers. Further, these instances seem to regard the provision of some of the indispensables of a settled community as charitable. The ability to move from place to place and to do so without let of rivers and streams, protection of the land from the ravages of the sea, security against enemies, are fundamentals of the society seen to be within the concept of charitable public benefit as much as assistance to the needy and as education of the generations' …

These learned opinions are drawing attention to the fact that the definition of "charity" is not a static thing. It is dynamic; it evolves in an organic sense with changed perceptions about how society functions.

Another legal opinion referred to is that of Lockhart J in Cronulla Sutherland Leagues Club Limited v Federal Commissioner of Taxation. His Honour said —

> A society, association or club is not a stationary entity. It may change its activities and perhaps its purposes during its life which together make up the body itself and enable the questions posed by the subparagraph to be answered in the year of income, namely, the identification of the objects or purposes for which the body is established.

There we have very clearly the legal injunction to look at the context in which the decision is being made. I draw attention to the fact that I have gone no further for these references than the State Administrative Tribunal decision that is central to the consideration of this bill. I have not spent hours perusing legal databases. I have not sent a research officer off to collect archaic definitions of charities. These are all absolutely central to our

consideration of this bill, because they are the considerations that the SAT commissioner brought to bear in forming his judgement.

Another thing that is notable about the bill, particularly the proposed amendment, is that it cites by name an English peer. It refers to Pemsel, which is "the" definitive case according to which we organise our modern understanding of charitable functions. Pemsel sets out the four kinds of charities that we might be contemplating. Honourable members will know—particularly if they have seen the correspondence that was widely distributed from the Western Australian Council of Social Service expressing its concerns about this bill, and the second reading speech itself—that we are referring to fourth-limb charities. Members will understand that fourth-limb charities operate alongside first, second and third-limb charities. I found in the literature that I came across that they are not necessarily called "limbs"; they might be called "heads" or "categories". It is probably easier to get our heads around it if we think of them as categories. Pemsel made it quite clear what these categories were. They were in the bill at clause 6, but members will find them in the bill and also in the proposed amendment standing in Hon Peter Collier's name. The four limbs are for the relief of poverty; the advancement of education; or the advancement of religion; and then this category that has become problematic in consideration of this bill, which in a sense is anything else. Remember, the first limb, or the first category of charities, is charities that are focused on the relief of poverty. The second category is charities that are focused on the advancement of education. The third charity is for the advancement of religion. The fourth limb, or the fourth category, is for other purposes beneficial to the community. In a sense that is a catch-all category of charity. If an organisation does not fit under a simple, unequivocal definition of relieving poverty, advancing education or advancing religious purposes, it is likely to be forced into the fourth limb when trying to demonstrate that its purposes are beneficial to the community.

I wish, in contemplating that explanation in the SAT determination—which has clearly formed a kind of jumping-off point for the government's drafters—that somebody in the government had actually read to the end of paragraph 11 because it sets out what the four limbs are. There is a crucial sentence at the end of paragraph 11. Having established that the Chamber of Commerce and Industry of Western Australia does not fit under limbs one, two or three, the SAT commissioner says —

> The question is thus, whether CCI is 'established or carried on for charitable purposes'.

That is as a fourth-limb charity.

The commissioner refers to some case law, including Pemsel. His final sentence in paragraph 11 states —

> They also made it clear —

"They" refers to Their Honours —

> … that there is no general doctrine in Australian law that excludes 'political objects' from charitable purposes.

That takes me into another area that I will devote specific remarks to. One of the things the government has done—which is clearly within the policy of the bill but certainly not outlined in the narrow policy intention of it; if honourable members can make sense of the distinction that I am drawing—is to broaden the mechanisms of the bill so that political parties and trade unions are also placed on the "relevant body" list. They are clearly not eligible for charitable tax exemptions. I found that last sentence quite interesting —

> They also made it clear … that there is no general doctrine in Australian law that excludes 'political objects' from charitable purposes.

When I read it I thought it was a very important legal opinion to cite in questioning the government about why it has so specifically included political parties and trade union organisations, or I think that has been amended to "industrial organisations". I would like to hear from the government where they have found a contrary opinion that there is a general doctrine in Australian law that excludes political objects from charitable purposes. It is far from clear to me, having spent a few more hours than most members in this chamber thinking about these things, that that can be the case. While that initially appears to be quite a revelatory statement, when one thinks about it any number of charities clearly serve political objects. Part of the richness of living in a society like ours—which operates according to the rule of law and has a strong set of administrative, well-established legal principles at all sorts of levels of government—is that we have learned to tolerate the pursuit of political objects that are contrary to our own through the charities law. For instance, we would find charities that are pursuing ends that might be different from others in several highly contentious areas, such as areas of religion and different kinds of education that might be provided in the definition of second-limb charities. Sorry, religion is a third-limb charity. Clearly the second and third-limb charity status would contain "competing"—perhaps that is the word I need, to express this idea of the tension in pursuing different political objects.

There are also organisations that devote themselves to curing diseases such as AIDS and providing services for pregnancy terminations that may not accord with the political objects of a modern section of the community; nevertheless, that tolerance is part of what makes our system strong. It is worth drawing attention to that at this early stage in the debate. We end up with a technical–legal meaning of "charitable" and a better sense, perhaps, of teasing out the differences between the four different categories of charity.

There have been a number of forums at which the difficulties besetting this bill have been canvassed. One was the lengthy debate in the other place. There are also numerous recommendations from various stakeholders, including the very comprehensive submission sent to all members by the Western Australian Council of Social Service. For me, all of the concerns were neatly summarised by Assistant Professor Ian Murray, from whom the committee called for some expert opinion. It is always a matter of some debate or conjecture about how committees use expert evidence, but I do not think anybody on the committee would be offended if I said that the committee became aware very early in its inquiry that some expert input, apart from the expert input available from the staff of the committee office, which I have already indicated was quite extensive, from an expert in this particular narrow area of charities law would be a great advantage to the committee. The committee called on Assistant Professor Ian Murray from the University of Western Australia very early in the proceedings. Indeed, Assistant Professor Murray was the first witness the committee called, and it had a lengthy session with him. Again, if members are looking for some background material to inform their contribution to the debate, they probably do not need to go further—I see Hon Sue Ellery nodding—than both submissions from Assistant Professor Murray. There were a series of submissions by Professor Ian Murray as well as his transcript of evidence to the committee, which was all held in a public hearing. The committee had to go back to Assistant Professor Murray several times to clarify various points and he was very prompt in responding to us, to the extent that we will indeed come out with a better bill as a result of the process the bill has been through with its referral to the committee. Tribute needs to be paid to Assistant Professor Murray for his part in making it a better law, and I thank him for his time.

He provided at the beginning of his submission a very clear outline of what he saw as five problematic areas for the bill, and I will explain them. Again, I am not suggesting that these five things were brought to the attention of the committee by only Assistant Professor Ian Murray; I am referring to him only because it seemed to me that he expressed them in a particularly succinct way. His first point was lack of information. His question was: were the drafters of the bill, the executive government and the Parliament itself equipped with enough information to make the decisions that they were being called upon to make in the challenge of trying to implement this policy direction? His second point raised questions about the government's repeated references to only a small number of charities being captured. His third point was the extent to which the measures in the bill would introduce a degree of uncertainty and, indeed, financial cost to organisations that can ill-afford the time and the expense of preparing complicated legal cases or submissions to government. Of course, that assumes that if any individual organisation were successful in appealing to the government, there is always a residual fear that some charities might be caught up in the legislation and, for reasons I will come to later, will not have their charitable status reinstated, in which case, of course, the cost to them could potentially be immense. The fourth point he raised was a whole series of questions about the ministerial determination—that is, the re-inclusion mechanism. The fifth point he raised was about the scope of the bill, which so clearly goes beyond that narrow policy intention of excluding the Chamber of Commerce and Industry of Western Australia and like bodies from tax exemptions.

Assistant Professor Murray said that even if only a small proportion of those concerns could be shown to be valid, a Parliament ought to, in the sense of choosing from a range of legislative options available to it, choose the sensible option of proceeding with caution and take what might be referred to as a minimalist approach to change—that charities laws have been operating since 1601 and that we might not be able to solve this problem in the next six months; we may have to do something that means we have to watch the situation for six months and if the situation is not rectified, we will have to come back to the Parliament and look at another range of options. He argued very strongly and compellingly that that minimalist approach was sensible. I asked him outright in the hearing whether he believed the government had taken that approach, and his answer was, no. The reason for that, of course, is because the government made that decision, which I have, in my words, conveyed as that step back and the casting of a wide net—that is, the step back from looking at the CCI, determining exactly what can be done to remove those three tax exemptions for the CCI, asking if anybody else operates in exactly that way, and, if so, then let us do it to them as well, and then coming in here with a bill. It is that step backwards that says: spread the net really wide and then let us see what we can do to pull it back. It was Assistant Professor Murray's clear view that this is not a cautious approach or a minimalist approach; it is—I am not quoting Assistant Professor Murray now—much more the sledgehammer, heavy-handed approach than is sensible.

Let me take each of those points in turn, because various people have commented on each of those five concerns. The first one is the lack of information. The lights just dimmed. That might be the Assembly deciding they have had enough.

The ACTING PRESIDENT (Hon Liz Behjat): Sorry to interrupt Hon Sally Talbot, while there is a tiny break, could I welcome into the public gallery the students from Hale School this afternoon. There are probably a few old Haleians in the house. They are very welcome here this afternoon to listen to our proceedings.

Hon SALLY TALBOT: Thank you, Madam Acting President (Hon Liz Behjat). Now the lights have come back on!

Hon Donna Faragher: The speech has not improved, though!

Hon SALLY TALBOT: I do not know. I think I have been giving Hon Donna Faragher enough signposts and handholds to know where we are going.

When I referred to the lack of information last night—or was it when I talked about the potential capture of 3 000 charities—I know Hon Robyn McSweeney, who is away from the house on urgent parliamentary business, and Hon Donna Faragher raised their eyebrows when I referred to these numbers. However, the reality is—I am going to put this boldly and not dress it up, because it was a shock to me—every now and again something happens in this place and I think, "Something is wrong here; we ought to be able to fix it." I had one of those moments in which I realised that there was something wrong when I walked into the committee on the first day of the hearings and made the assumption, as I think others had—I do not claim to speak for them, because they can speak for themselves—that the committee would start by asking how many charities would be affected.

Members should remember that we are talking about charities being affected in a number of different ways. In essence, we were asking three quite distinct questions. The first was: how many fourth-limb charities are there in Western Australia; the second was: how many fourth-limb charities in Western Australia engage in the promotion of trade, industry and commercial; and the third question was: of that subset, how many are going to be captured by the government's bill, and then a further subset of that third question was: intentionally or unintentionally? I hope I can convey a little of my shock, because I am not playing political games here when I tell honourable members that we were not able to get that information. It seemed to me to be a fundamental problem that the committee was charged by the Parliament with examining unintended consequences of the Taxation Legislation Amendment Bill 2014. The unintended consequences were clearly not going to be that the rates in the City of Armadale would increase or that camels would no longer be allowed on the beach in Broome—empirical consequences that we could go out and test by ringing the City of Armadale and the Shire of Broome; the consequences were going to be on fourth-limb charitable organisations that engaged in the promotion of trade, industry or commerce—so we asked over and again: can we have the list? We were told that we could not have the list. I will go into a little detail, because I am not playing a political game or scoring political points; it was a blanket refusal to provide us with that information. I go to the comments to the committee of Professor Murray, who states —

> My first concern is that the changes are being made without complete information about the charity sector in Western Australia or, for that matter, Australia more broadly being known, and in particular without full information being known about the number of fourth-limb charities in Western Australia that undertake a purpose of promoting trade, industry or commerce. I think there is a lack of information. There also does not seem to be any explicit reliance in the second reading speech or the other explanatory materials about the information, albeit partial, that does exist. My impression is that we are operating in somewhat unchartered territory to a large degree …

I remind honourable members that when I went through that list of five concerns, my initial reaction and what remains my reaction, is that even if we take them as only partially verifiable or establishable, they suggest we ought to proceed with caution. That is what Professor Murray was saying: if we do not even have a sense of who we are dealing with we ought to be cautious about putting measures in place, because we do not know who will be captured. It is important here that I give honourable members a sense of exactly how this request for information unfolded. I will probably refer to at least a dozen pages of committee documentation, which has been made public; we only kept a very small amount of material private. This material is not necessarily on the internet; it is available for people who want to look at it. Importantly, it will be available in the future if a court needs access to materials that went into informing the committee's concerns on these matters. As I say, all this documentation has been made public but not necessarily posted on the internet. What I am quoting from now is not from that wealth of material that lies slightly behind the scenes, albeit public material, but the section of the committee inquiry in which we started to delve into this matter. We were asking for some way of establishing what the basis was in the second reading speech for the minister to say that only a very small number of organisations would be affected. When we hear that sort of thing in a second reading speech, we accept that the minister himself may not know—particularly as the minister who made the second reading speech in this place is not the minister with carriage of the legislation, it is the Minister for Finance, who sits in the other place. One would assume in being able to stand up in this place and say that only a small number of charities will be affected that the minister who does not have carriage of the bill will have asked someone if that is, indeed, the case. I felt the committee was in a very privileged position because we were sitting there with the people who

would have been asked for that advice in order to write the second reading speech that said only a handful of charities would be affected. A question was asked about the national register, the Australian Charities and Not-for-profits Commission, a commonwealth body. It is the most comprehensive list that is available to us of every charity that operates in the whole of Australia. It contains about 60 000 entries Australia-wide. It is, however, complicated to work out what limb or category a charity falls into. One of the other things I thought was important to establish when we started contemplating this list is there is also no way of telling, specifically from the ACNC list, whether a charity has been accorded tax exemptions in various states. We started talking about the national register, and I will read a short extract of dialogue in an exchange between the Acting Commissioner of State Revenue and me. The acting commissioner states —

> As these records identify individual taxpayers, we are not able to provide that to the committee.

I said —

> This is the list of currently —

She said —

> The list that we have within the office of fourth-limb charities.

I asked, "What is the reason for not being able to provide it?" She responded —

> Because it lists the individual taxpayers.

I asked, "So who can see that list—a minister?" One of the acting commissioner's staff, Mr Hancock said —

> No, just the commissioner, and there are certain people under the act whom the commissioner has authorised to —

The acting commissioner said —

> Under the confidentiality provisions.

Mr Hancock carries on —

> release that information to. The minister is not one of those persons.

Then we went to section 114 of the Taxation Administration Act, and I asked —

> Just before you go on, can you tell us how many there are?

The acting commissioner answered —

> It is not a complete list and it has only been maintained in recent years.

I asked, "Why is it not a complete list?" She answered —

> Because it does not cover all limbs. It is dealing with exemptions that we have approved in probably the last four years in relation to fourth-limb charities. So, within our office we will have records at an individual taxpayer level that sit within our system of whether somebody has been granted an exemption or not, but we have not collated those individual records into what we have with the fourth-limb charities that we have been maintaining for the last four years.

Mr Hancock goes on —

> For example, for payroll tax registrations, we will put a code alongside their registration so we are able to extract that information in report form, but we do not maintain a complete register of all organisations.

I then asked —

> When you run that report, how many are there?

Just to divert from the transcript, it is important to remind honourable members what I was asking for at that stage was not a list that said this is charity X, its income is Y, its expenditure is Z, its tax exemptions are A, B, C, or D. I was asking for an indication about the number of charities in Western Australia.

The acting commissioner answered —

> We actually have not run that report. In terms of our spreadsheet, and I am going from memory, but there are over 100 in terms of those recent numbers. I would have to double-check because I have not seen that spreadsheet myself for some time.

Hon Lynn MacLaren said —

> Those are just exemptions?

Ms Suchenia said yes, Mr Hancock said yes, and Hon Lynn MacLaren said —

> And you are calling them individuals rather than corporations or companies or …

The acting commissioner said —

> No, it is everybody. It is also all fourth-limb charities, whether they have been approved on the basis of the promotion of trade, industry or commerce or any one of the myriad factors that would allow a fourth-limb charities to be approved. So, it is a very large list.

I said —

> Can we ask you to provide us with the data on notice? Can you go back and run those reports?

The acting commissioner said —

> I can provide statistical data and I can provide statistical data out of that spreadsheet. I am not certain, without consulting my systems people, what could be pulled out of the system, but I can endeavour to try to do that.

I then said —

> With the greatest respect to you, I just find it rather extraordinary that we have got to this stage with a piece of legislation that is so contentious where we cannot really get a feel for how many people currently claim the exemption.

I have a short extract to read; there are only a couple of paragraphs that I want to continue with. This was the moment that prepared the committee for what we went on to hear for the remainder of the hearings; that is, charity after charity came in to see us and told us that they were not sure which limb they were captured by. They were not provided with documentation to say why they had been granted tax exemptions. Members should remember what I read from the second reading speech, which is that only a small number of charities will be captured. About halfway through the second reading speech, Hon Peter Collier stated —

> Other charities will not be affected in any way by these amendments nor will they experience any additional burden or red tape.

That is not the view of the charities sector. Having heard this account of a database that is only partial and that has been kept only since 2010, in which we cannot print reports to give us answers to the questions that this bill gives rise to about how many charities exist, how many charities are likely to be captured and how many charities are, to use the government's own terminology, legitimate or illegitimate, there is no data. That is essentially what the acting commissioner is telling us. She went on to state —

> I can give you the statistical data in terms of what I can pull out of the system, but I guess the difficulty—and it is part of the difficulty that we have had and why we are actually keeping the fourth-limb charities—is there are large numbers of different criteria across the office and reasons why charities would get exemptions. We could provide a very high number of organisations that have a charitable exemption, but the records that we keep in the system do not go down on the basis of listing exactly why each organisation was given an exemption. It will tell you these are the number of exempt organisations that we have, but the data that we can extract from the system will not give you a level of granularity —

That could rapidly become somebody's favourite word —

> that tells you that we have this many organisations that were given an exemption on the basis of a narrower part of the definition of charities, because it is quite broad.

We are getting a flavour of the government taking a step back. I bet it was because it got exactly that kind of advice from the Office of State Revenue. The government said it just wanted this very narrow sliver of organisations to be captured by this bill. Members should remember what I just read —

> It will tell you these are the number of exempt organisations that we have, but the data that we can extract from the system will not give you a level of granularity that tells you that we have this many organisations that were given an exemption on the basis of a narrower part of the definition of charities, because it is quite broad.

I went on to say —

> Okay. Just one further question ... When the office has provided information about the fact that there are likely to be a low number of charities impacted by this bill, how did you arrive at that conclusion?

The acting commissioner said —

> Over the period since early 2010, —

That is a very important year because that is when the government realised it had a problem with the CCI. We should note that the government went to the Office of State Revenue and said, "Guys, we are going to have

a problem. You need to start keeping the records." That is this Excel spreadsheet that was started in 2010 in a desperate attempt to try to get the database in order. The acting commissioner said —

> Over the period since early 2010, the records that we have been keeping in a spreadsheet format have been listing the reasons why we have granted exemption to fourth-limb charities.

I said —

> Since 2010?

The acting commissioner replied —

> That is right. So, from that information, we have been able to ascertain the approvals in that process, and we obviously have a much larger number that have had approvals much earlier than 2010, but from that period onwards we have been able to keep track of information in relation to why we granted the approval for fourth-limb charities.

She was saying that she could provide some numerical data but only since 2010. She said that the office has a much larger number that gained approval much earlier than 2010. We do not know here and now today how many organisations are missed. Nobody knows. The minister does not know, the executive does not know and the Office of State Revenue does not know.

Hon Sue Ellery: And the sectors do not know—the stakeholders do not know.

Hon SALLY TALBOT: The sector itself does not know. As I said, following this hearing, we heard from a number of local charities that said they have no idea which limb they were considered under for their tax exemptions. The extract from the transcript concludes with me asking —

> Do you know how many there have been since 2010 since you have been keeping the spreadsheet?

The answer was —

> I would have to go and double-check that. I do not know off the top of my head.

That is absolutely chilling. That tells us that the government has no basis —

Hon Peter Collier: Did she come back with that information again?

Hon SALLY TALBOT: Not only did she come back with it but it is in the appendix of the report. There is a problem with that, though, as well, which I will come to later.

I say to members to please not feel that they have to take 100 per cent of what I am saying as a major problem. I put it to members that even if they have a 10 per cent concern about this, it is a reason for adopting a cautious approach. Even if they think there is a little bit of a problem and not a problem as big as the one I am suggesting, that ought to suggest that a cautious approach is the right and sensible one to be taking.

Let me turn to the second point. The first one was about lack of information. Let me go on to tease out some more details about this "small number" that the minister in this place and the minister in the other place have assured us will be the intended consequence of the bill—that a small number of charities will lose their tax exemption. I refer to the Australian Charities and Not-for-profits Commission database. If we start breaking it down, we immediately find that there are 3 000 fourth-limb charities in Western Australia. As we referred to last night, basically by way of interjection between me and Hon Robyn McSweeney, nobody is suggesting now and nobody has ever suggested that all those 3 000 fourth-limb charities will be captured by the bill. Very clearly, they will not. The most obvious reason they will not be captured is that of that 3 000, many, most, some—I do not know what word to use because we cannot delve down that far—will not be engaged in promoting trade, industry or commerce. Clearly, a subsection of those 3 000 charities will be exempt immediately because they have nothing to do with trade, industry or commerce. That takes a subset of them out. Another subset comes out. We are left with the fourth-limb charities that have some sense either to do with their purpose or activities, and I will come to that decision later. They have some involvement with the promotion of trade, industry and commerce. Of that subset, we can clearly and immediately rule out a further subset, which will be the charities that do not meet the thresholds. Everybody knows this because we debated this fairly recently in another tax bill. I think Hon Ken Travers referred to it last night in his contribution to this debate.

Hon Sue Ellery: The retrospective one.

Hon SALLY TALBOT: It was the retrospective duties legislation, and we were talking about the government's promise to wind back payroll tax. Every member in this chamber knows that the threshold for paying payroll tax is $8 000 a year. The threshold for land tax is about $300 000. Therefore, some charities in that subset that have something to do with the motor trade industry and commerce will nevertheless be eliminated immediately because they do not meet the threshold. I suggest to honourable members that that final subset is in itself

a problem that we ought to be considering. There are two things that we need to consider. The first is that those thresholds sound high. When I first heard them, I thought, gosh, if an organisation has a payroll of more than $800 000 a year, it must be a whacking big organisation. But of course that is not true. It could be an organisation that had a dozen staff and that serviced, for instance, my electorate of the south west, which goes from Mandurah to Albany and is a vast area —

Hon Sue Ellery: It could be a women's refuge, with shift workers.

Hon SALLY TALBOT: Exactly—a women's refuge with shift workers. All kinds of organisations could be covered by this. If we gave this more than a moment's thought, we would realise that a payroll of more than $800 000 is not so large that we are talking only about the charitable equivalents of BHP or Rio Tinto. We might indeed be talking about genuine community-based organisations that have a payroll of more than $800 000.

I venture to suggest that the land tax threshold of $300 000 is also quite low. People cannot buy much for $300 000 in Western Australia these days—maybe a one-bedroom apartment here or there, but not much. I remember the days when people could go to Collie and buy a four-bedroom house for $25 000. Those days are long, long behind us. I suggest that some small organisations may nevertheless be caught, or, to put it another way, will not be excluded, because they do not meet the threshold.

But there is another consideration about the elimination of that last subset. That is that organisations grow. We need to consider whether we really want to operate a charitable tax exemption system under which part of a charity's consideration about its future growth path or future development will be about whether that charity will go over the threshold and all of a sudden end up on the relevant body list and be required to go to the minister and request a ministerial determination about whether it will retain tax exempt status.

That was a slightly long way of explaining how there were never going to be 3 000 organisations on that list. Therefore, how many organisations will be on that list? I refer again to what the Acting Commissioner for State Revenue said during the committee hearing —

> I can give this statistics at the high level, and I will do my best to see what we can do about breaking them down into classifications, but I know for a fact that it does not sit within the reports that we would generate out of the system.

In order to give that quote a context, I refer to the fact that preceding that extract that I have just shared with members, the chair of the committee gave a summary of the proceedings so far and said —

> … I guess what my colleagues are asking for is some sort of statistical analysis …

The chair was exactly right. That is exactly what we were asking for. We were not asking for details of individual taxpayers. We were not asking for any contravention of section 114 of the tax act. We were asking for some numbers. I repeat that the acting commissioner said very clearly —

> … I know for a fact that it does not sit within the reports that we would generate out of the system.

I suppose at this stage we have to ask why we should take the government on trust on this matter. I would be happy to take the government on trust if I thought that the information on which the government is basing its claim had any kind of substance to it. But I suspect that the minister and his advisers have asked exactly the same questions that I and other committee members were asking, of exactly the same people, who were unable to give us the answer. I do not know how on earth we have got to the stage where, when we are looking at a bill that is supposed to affect only a small number of people, and when we ask how many people will be affected by the bill, the person who is running that system in the Office of State Revenue has said —

> … I know for a fact that it does not sit within the reports that we would generate out of the system.

I move now to the third area of concern; that is, the costs and uncertainty that the measures in this bill will impose on fourth-limb charities. It is probably appropriate for me to acknowledge at this stage that it became a major concern of the committee very early in our work that there are clearly first, second and third-limb charities that will be captured by this legislation. Therefore, I want to make it very clear that although some of the costs and uncertainties for first, second and third-limb charities have probably been removed, they still exist for fourth-limb charities. I will have more to say in a moment about the amendments that are proposed by the government, which the government is confident will finally remove first to third-limb charities from the ambit of the bill. I am talking about the remaining fourth-limb charities that will indeed find themselves on the relevant body list.

I want to go back to the example that was given by Assistant Professor Murray, which I thought was quite illuminating. He did not call on a list in his back pocket of organisations that he considered might be captured. He talked from his personal experience of being a faculty member at the University of Western Australia. He was able, in doing this, to show very effectively how this level of uncertainty operates. I cannot express it better than by sharing his words with honourable members. He said —

> … charities that are not excluded are still going to incur significant costs, time and uncertainty working out whether they are or are not excluded. Even if they are not, they are going to have to work out in many cases if they are. I hesitate to name too many, but thinking of my own employer institution, the University of Western Australia, I am sure, if we start thinking about related bodies—UWA is trustee of various trusts, and it is also involved in various different joint ventures and research collaborations. I would be shocked if not one amongst those many different trusts or research collaborations did not involve somewhere a purpose of promoting trade, industry or commerce. If it does, UWA is out to the extent that these state tax concessions apply to it. It is going to have to incur time and costs in trying to work out whether it is in or out. That is not really a task that I envy anyone, given the complexity of coming to an answer on that.

Just as a side observation, we would have thought that somebody who had this very narrow area of expertise would absolutely relish the uncertainty that has been created by this bill. Hon Ken Travers referred last night to the fact that for every paid lobbyist in this state, it must feel as though all their Christmases have come at once. But such is the integrity of this man from UWA that he has said —

> That is not really a task that I envy anyone, given the complexity of coming to an answer on that.

I know that the minister will have heard the word "trust" in that extract that I have just read, and I know that the government again has taken steps that it considers will remove the issue of trusts. Professor Murray said —

> UWA is trustee of various trusts, and it is also involved in various different joint ventures and research collaborations.

He then said that somewhere amongst all those, there will be an organisational mechanism that is indeed captured by the phrase "promotion of trade, industry or commerce."

I have kept my comments on that third point quite narrow, recognising that the committee in its report expresses concern about first, second and third–limb charities and that they may end up being excluded by the government's proposed amendment.

The fourth area of concern is the ministerial determination for re-inclusion. I have already indicated that it is my understanding—I do not think that this will be disputed by any members on the other side of the chamber—that the provision of the ministerial determination mechanism is the government's attempt to address the unintended consequences of the bill. I suppose we might call everybody who knocks on the Minister for Finance's door to request a ministerial determination an intended unintended consequence, because people are supposed to be able to knock on the door and get a determination that re-includes them and takes them off the relevant body list so that they are once again granted tax exemptions. The minister and the bill make it clear that the test that will be applied by the Minister for Finance to reach a decision is a public-interest test. So far, that news is not necessarily bad, because, as I have already indicated, when a court makes a decision about granting charitable status, it takes into account exactly that—essentially, a public-interest test. One would have thought that we would operate in the realm of charities law with one concept of a public-interest test, and that the question whether the activities or the purpose of an organisation were beneficial to the public would be a question for which we apply one set of considerations whenever we try to grapple with that question. The astonishing thing about this bill is that it actually introduces a second kind of public-interest test and a second kind of public-interest decision. It is clearly not the public-interest decision made by the courts; it is not that test. If it was that test, the minister would have to show where the court decision was flawed. The minister would have to mount a legal argument based on the same evidence in the same sense that an appeal court hears different arguments. It is not necessarily a matter of introducing new evidence; it is the mistakes and errors of law that have been made and things such as jurisdiction. Appeal law is a very complicated area of law, but it works effectively in every area in which it is applied.

However, the re-inclusion test the Minister for Finance will be asked to apply is a different sort of public-interest test. This could lead us into a very interesting discussion. Imagine teaching a bunch of year 12 politics and philosophy students about the niceties of this debate, it would be a fantastic topic for them to consider. Are there different kinds of public interest discernable in relation to one consideration—that is, charitable status? I image there could be very many hours of interesting debate on that. Unfortunately, that is not a debate we can have in this place, because, although we know an awful lot about what a court takes into consideration when it rules on whether a body has a public benefit, we know absolutely nothing about how the minister will define that task; all we know is that it is a public-interest decision. When we arrived at the briefing yesterday, there was the withdrawal of supplementary notice paper 1, which only had the amendments from the government; and its replacement with supplementary notice paper 2, and the rewriting of the amendment that is supposed to exclude first, second and third–limb charities, amongst other things. I thank the advisers for their assistance yesterday; they did their best to help us get our heads around the issues. We asked the advisers—I recognise that the advisers did not have a role in determining the policy of the bill, so we asked them the factual question—how it

can be that when the court already applies a public-interest test to a charity that the minister can apply a public-interest test? Does that mean any organisation that has passed the public-interest test in a court will inevitably meet the public-interest test that the minister will apply? The answer was: no, this is a different kind of public-interest test. But we do not know what that test is; nobody knows what it is. I think the minister does not even know what it is.

I take members back to the observations I made at the outset of today's debate, that once we starting using terms such as legitimate and illegitimate or appropriate and inappropriate, we are using political language. It is language that is subjective and lacks clarity and any sort of transparency. We have no guidelines for what the minister will determine. I will narrow this right down to a situation that every member in this place experiences at least on a weekly basis and at certain times of the year on a daily basis. A person walks into a member's office and says that they run the local budgerigar cultivation club and that they have noticed that a grant is available from the department for budgerigars. The person says that they have read about the grant and that there is—I was going to say $20, but let us be a bit more generous to budgerigars—$20 000 available for groups like theirs to improve their facilities, and they ask, "Do you think my club might be eligible for some of that money?" We would go straight to the website and look up the guidelines and go through them line by line. We might find that to be eligible, the group has to be an incorporated body, and that as this one is not, it is not eligible, or the club might need a membership of more than 50 people, or need to service people with a disability. There are any number of ways to write guidelines that enable us, as members of Parliament, to send that person away, back to their club, to tell members that if the club satisfies all the criteria it might get a few bucks towards its budgerigar pursuits. But that is not the case with a ministerial determination, because there are no guidelines. What is supposed to happen? There might be the argument that the government does not want guidelines because it does not want to curb the minister. We are all familiar with the argument that guidelines or regulations tell someone what they cannot do, and the government wants to give itself maximum wriggle room. That is not necessarily a bad objective. Indeed, when I come to look at the way the ministerial determination is written in the bill, members will see that the explanatory memorandum and, I think, the second reading speech and a few other places refer to ministerial determinations needing to be a quick way to respond. I suppose the government is thinking that last year, when the State Administrative Tribunal determination gave the Chamber of Commerce and Industry of Western Australia a tax exemption, if it had had a mechanism such as this one in place, it could have moved very quickly , and the state would not missing the, I think it is in the region of, $59 million that that decision has cost it.

Hon Sue Ellery: It is $56 million.

Hon SALLY TALBOT: It $56 million, thank you, Hon Sue Ellery.

It is not, of course, $56 million going to the CCI. I think it is about $9 million to the CCI.

Hon Sue Ellery: There are eight organisations.

Hon SALLY TALBOT: There are eight or nine organisations. I think it is the CCI plus eight, so it is nine organisations altogether, and due to the SAT determination the government has had to pay retrospective tax exemptions to the value of about $56 million. That is a significant hole in the budget, and clearly one that any member of Parliament would like to prevent if it were in their power to do so.

The government is saying that it started to write guidelines, but immediately that might present the government with a problem, because it honestly does not know what bizarre finding will come out tomorrow on what might be a charity; what is coming next? Therefore, the government needed to move swiftly in order to secure the state's revenue. But, of course, the problems are numerous. The problem, just for the purpose of the initial survey, is that there is no transparency; we do not know what could possibly constitute a public interest test that is so significantly different from the public interest test that is applied by the court that it would actually reverse a court decision. It is impossible to contemplate; indeed, I have nothing more to say on this point.

Hon Robyn McSweeney: It sounded important!

Hon SALLY TALBOT: Yes! I am trying not to catch the eye of Hon Robyn McSweeney as she has returned to the chamber from her urgent parliamentary business, no doubt lured in by the debate!

At this point, I turn to the fifth concern, which is the scope of the bill. As I have said, the committee members and I—not the majority of committee members necessarily, but some of us—have worked on the basis that the primary intent of the bill is to remove the tax exemption for the Chamber of Commerce and Industry of Western Australia. That is not an unreasonable conclusion to draw, given that there was a ministerial statement on the day or the next sitting day after the State Administrative Tribunal's CCI determination was made. The Treasurer got up in the other place—it was the Treasurer and not the Minister for Finance, because it was Hon Troy Buswell when he was the Treasurer—and said, to paraphrase him, that dreadful things had happened in SAT and that the government had to act quickly to change it by taking away the tax exemption from the CCI.

That was flagged a little over a year ago. The next thing was this bill, and the opening statement in the second reading speech reads, in part —

> As announced by the former Treasurer in the Legislative Assembly on 15 May 2013, the amendments are in response to a decision of the State Administrative Tribunal that found the Chamber of Commerce and Industry of Western Australia to be a charitable organisation and therefore, eligible for state taxation exemptions.

Surely, that is the policy intent of the bill, with the scope of the bill to effect that exclusion. Why on earth have we been presented with a bill that has reference to unions and political parties? Maybe somebody was under the impression that while the government was taking money back from the CCI, it should also take back money from political parties and unions. I mean, if the CCI is not going to have tax exemption, why would the government want to continue to pay tax exemptions, if you like, to the other side of the arc—that is, employers are on this side of the arc and the trade unions are at the other end of the arc—if it is to deny it to employers? Of course, that is rubbish; it is absolutely not true. Not only do unions and political parties have no tax exemptions, none of them are charities; indeed, none have ever claimed to be a charity, nor have they claimed charitable status and been knocked back. This is purely and simply a political stunt. If the government is going to claim that it is not a stunt, then it needs to show us that unions and political organisations are somehow the next cab off the rank; that is, if a union went to the State Administrative Tribunal and mounted an argument that was sufficiently similar to that of the CCI to capture the attention of the commissioners, perhaps they could be deemed to be charities tomorrow. So, do we want to be back here tomorrow? No, because it is Christmas, so let us just whack them in the bill, and we have got that covered; that bushfire is not going to take off. But that is an absolute nonsense, because there is not one shred of evidence from anywhere that that is a remote possibility. It is not just that people are being secret squirrel about it and it is not as though everybody has rushed off to a remote island to cook up some devious and dastardly plans to whack the Office of State Revenue with huge tax exemptions for unions. That is absolute rubbish! Unions exist to serve the interest of their members; that is what they have always talked about and why unions have never contemplated applying for taxation status. If members were to ask me whether I think an argument could be mounted for trade unions—or, to use the term in the supplementary notice paper, "industrial associations"—I would think that is an interesting question. If I did not spend so many days working on the Standing Committee on Legislation inquiries and I had more time, it would be an interesting question to which I could give some energy. I think there clearly is a sense in which unions serve a broader benefit. We have already established that political ends do not rule organisations out from being a charitable status. Look at the Fair Work campaign that won the 2011 federal election for Labor. Can a case be made from the WorkChoices argument that there is a broad public benefit of having an effective trade union organisation? Maybe there is. Is anybody contemplating that argument at the moment? No, they are not, because every union that I have talked to—and I talk to ever so many of them over the course of every week—has told me that they exist to serve the —

Hon Robyn McSweeney interjected.

Hon SALLY TALBOT: I am not embarrassed to talk about that, Hon Robyn McSweeney. I know that the member is embarrassed about some of the people she has to talk to, but I have no hesitation coming in here and making my diary public, because I meet with some exceptionally fine people in the course of my work, many of whom are trade union officials, organisers and members.

Not one of them has put to me that there is a case for claiming charitable status, because what they do put to me is that they exist to provide benefits for their members. That is why it has never been contemplated before and why it will not be contemplated in the future. Now we come to stretching considerations, because do I want to argue as a logical consequence of saying that it is not reasonable or fair to put trade unions in the bill that it is also not reasonable or fair to include political parties? Do not forget that the key consideration here is that an organisation has to be a fourth-limb charity to start with; indeed, even to be on the list an organisation has to have gone through a process that is extremely time consuming, complex, expensive and arduous to prove that it is a fourth-limb charity. If a political organisation went to all that trouble and came out with a judicial decision that it was a fourth-limb charity, should it be captured by the bill? I would say, "Do the public interest test; do the test about public benefit and come to me on the basis of what that determination shows." That is how that final point ought to be addressed.

Professor Murray expressed mystification about why trade unions and political organisation were included in the bill. Obviously UnionsWA expressed the same consideration, not on the basis that it was being denied anything but on the basis that it was being used as a blowing of the dog's whistle—that is, the CCI is bad and unions are bad, so let us get them all out. It is nonsense and should not be there, which is a way of explaining why there is an amendment in my name. It is in my name, but it is a minority amendment from the committee to remove trade unions and other things, but I will come to those in a minute. Before I conclude my point, there are two points in the State Administrative Tribunal determination that make it clear why it is such a nonsense to exclude political

organisations from tax exemptions and why it is ridiculous to exclude charities that are based in political organisations from the tax exemption. On page 36, in paragraph 93 of the State Administrative Tribunal determination, the commissioner states —

> The fact that the role played by CCI may be driven from a particular political or philosophical perspective does not disqualify its purpose from being characterised as charitable

There is precisely that determination expressed in terms of what might accurately be described as a right-wing organisation being accorded its charitable status despite the fact that it engages in activity that is clearly political activity.

I want to talk about specific clauses of the bill. As I said last night, only two or three clauses need specific consideration. The bill comprises 30 pages, but essentially the same thing is said three times because it deals with three bills. I want to draw attention to proposed paragraph (d). It is slightly disturbing, if not alarming, to find that one can refer to paragraphs in a bill without looking them up because one is so familiar with them. Clause 6 will insert proposed section 96A(d), which is on page 5 of the bill. The Standing Committee on Legislation concluded, on the basis of evidence it heard and submissions made to it, that there were four specific problems with proposed paragraph (d). It is about the definition of a relevant body. Members will see on page 5 of the bill that clause 6 amends the Duties Act. I am using only the Duties Act as an example; the same provisions apply to the Pay-roll Tax Assessment Act and the Land Tax Assessment Act. It does not matter which definition of a relevant body one goes to; they are all exactly the same. Clause 6 inserts proposed section 96A of the Duties Act. It states as follows —

> A reference to a relevant body is to any of the following —
>
> (a) a political party;
>
> (b) a trade union;
>
> (c) a professional association;
>
> (d) a body, other than a body referred to in paragraph (a), (b), (c) or (e), that promotes trade, industry or commerce, unless the sole or dominant purpose of the body is —
>
> (i) the relief of poverty; or
>
> (ii) the advancement of education; or
>
> (iii) the advancement of religion;

Those members who have been paying attention will know that they are the first, second and third limbs of the Pemsel determination of charitable categories.

Proposed paragraphs (e) and (f) follow. Proposed paragraph (f) is also extremely problematic. I want to focus for the moment on paragraph (d). This short paragraph (d)—which I recognise is now the subject of a government amendment, which I will come to in a moment—was considered in some detail by the committee. I draw members' attention to minority finding 2 on page viii of the report. The text refers to page 36. There are four problems with the proposed paragraph (d) as drafted. I want to go through it as drafted, and then I will talk about the way the government proposes to amend it. Minority finding 2 states, in part —

> **Paragraph (d) of the definition of 'relevant body' as drafted presents four specific problems:**

The first is the breadth of the definitions of "promote", "trade", "industry" and "commerce". Those four terms are key to the bill. The second is the definition of "promote trade, industry or commerce". The third is the exception clause, which refers to a charity having "the sole or dominant purpose" of a first, second or third-limb charity. The fourth concern is that the definition of "promote trade, industry or commerce" refers to both the activities and purposes of an organisation. I recognise that the issues that arose during the committee's hearings have been taken up, and taken very seriously, by the government. This relates to "the sole or dominant purpose". Because of the way in which proposed section 96A(d) is drafted, its definition is "unless the sole or dominant purpose of the body is" limb one, two or three. Numerous stakeholders pointed out—I think I can remember the figures—that a large number of charities have two, three or even more purposes. It is often very difficult, if not impossible, to ascertain which might be classified as a sole or dominant purpose. It might not have a sole purpose, and it might be very difficult to decide which is the dominant purpose. I think a third of charities have more than one purpose; a third of charities have two purposes; a quarter of charities have three purposes; and about 13 per cent of charities have more than three purposes. It was quite clear from that data that, out of that 3 000—given that I have eliminated two tranches of them—an enormous number of first, second and third-limb charities would be caught by that provision. That has been taken up in the proposed amendment. I will have a bit more to say about that later.

For the purposes of this debate, I will put that matter aside. I will come back in a moment to talk about whether the government's proposed amendment is an effective fix of that problem. I suspect it probably is. I have been assured by the advisers that it is. There is certainly a way of reading it that suggests it might be, but I still want to thrash out that particular issue with the minister. However, the concerns expressed in the other three dot points of minority finding 2 are very serious. I will go to the first one, which is about the breadth of the definitions of "promote", "trade", "industry" and "commerce". It is not beyond our wit to come up with a definition that we think will serve the purpose, but there is a problem if we take the standard way of resolving these difficulties by just going to a legal dictionary. I think the committee's report quotes two sources of definitions, one of which is a bit more comprehensive than the other. If we go for the shorter definition in a legal dictionary, we will end up with a workable set of concepts to take to a court or maybe to the minister for a ministerial determination, but who knows, because nobody knows how that will be done. The problem is if those terms are left relatively broad, as they have been and as would be done by accepting those definitions, they will capture organisations that were not meant to be captured. Will the government keep coming back to us and saying that it does not matter how many are captured by mistake because that is an intended unintended consequence and that the ministerial determination is the check and balance? Quite frankly, from what I have told honourable members about my understanding of a ministerial determination, it is anything but a check and balance. A check and balance is surely some kind of mechanism to refine decision-making. The ministerial determination is much more like a mallet or a sledgehammer. It is not a check and balance; it is the exercise of political will, which is quite within the government's right to do, but it is not acceptable for it to be done in such a closed, opaque way.

Hon Sue Ellery: By a politician.

Hon SALLY TALBOT: By a politician; exactly. Thank you, Hon Sue Ellery.

I put to honourable members that there is a huge and unresolved problem in leaving those terms so uncertain. The government ought to at least provide its own reading of what those terms mean.

This leads me directly to the second issue, which was canvassed at great length in hearings—all the transcripts from the committee's hearings have been made public; there were no closed hearings—about how we define "promote trade, industry or commerce". I will go directly to the bill. In the definitions section at clause 4, "promote trade, industry or commerce" is defined as follows —

> … includes to carry out an undertaking a purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce, whether generally or in respect of any particular kind of trade, industry or commerce;

I ask honourable members when considering those two clauses to not get them mixed up with each other, because there is a remedy, which is the remedy suggested by the minority amendment to the problems created by the definition. If one were paying close attention, one would notice that the definition says that it involves "undertaking a purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce". It is not saying "primary" purpose, "dominant" purpose, or "sole" purpose. There is no qualification of the extent of this purpose in how much time it takes up every day of a person's working life. This is not an arcane appendix up which I have rushed to hide this whole debate in obscurity! This is a central point on which every member of this chamber ought to have an opinion, because, remember: I referred to the key paragraph in the SAT determination, paragraph 96. What was expressly determined there by the commissioner is the identification of the primary object of the organisation. That is why the CCI received its tax exemption—it had as a primary object the promotion of trade, industry or commerce. The government has not said here that an organisation cannot have a tax exemption if its primary object is promotion; it said any involvement in trade, industry or commerce, even if an organisation spends only five minutes on that.

During a public hearing the chair of the committee raised the example of a coffee shop run by Anglicare. WACOSS raised examples about training organisations that have as part of their activities some kind of retail outlet. Members should think about the number of organisations that cater for people who are trying to make the transition from long-term unemployment into the workforce and who set up a facility so that people can go in and experience real-life, live engagement with the public. That is all commerce. That is what commerce means. This is where our broad definition of commerce takes us. Instead of saying that if the primary purpose of an organisation is the promotion of trade, industry or commerce, then that organisation is out, which would have captured the CCI, the government has gone for a broad definition that states —

> **promote trade, industry or commerce** includes to carry out an undertaking a purpose of which includes the promotion of, or the advocacy for, trade, industry or commerce".

That is a major problem that remains in the bill.

I have one more point to make about this. I just said that the government had not moved at all on either of those two points, but that is actually not true. The Office of State Revenue has said that in its discussions with WACOSS it has undertaken to bring down a revenue ruling that it says will provide those definitions. I ask honourable members to contemplate whether it is a proper course of action to rely on a revenue ruling for something as fundamental to the core purpose of the bill. The fact is we have got to a stage where there is consensus that there is a problem. It would be one argument if the government had said, "No, it is not a problem, because we are happy to work with these broad definitions of the terms; we are happy to capture everybody who has anything to do with commerce or trade or industry, and then we will fix them up later." But the government is not saying that. The government is saying, "Yes—well, it may be that there's a weeny bit of a problem, but we think we can fix it up with a revenue ruling." That is not good enough. A revenue ruling does not come before the Parliament. It is not a regulation. It does not go to a legislation committee of any kind; it does not go to the Joint Standing Committee on Delegated Legislation or any other legislation committee. A revenue ruling can be changed from week to week, from commissioner to commissioner; it is not set in stone. It might provide guidance today, but not provide guidance tomorrow. It is not good enough. If there is a problem with the breadth of these definitions, if there is a problem in capturing too many people in the provisions of the bill, it ought to be addressed in the bill; but it is not. My proposition is that a revenue ruling is an entirely unsatisfactory response and unsatisfactory mechanism to resolve this outstanding problem. It is not good enough and it is not acceptable. I make that point in relation to two of those dot points. One of them has been solved perhaps by the amendment; the government is saying that the other two will be resolved by a revenue ruling, and I am suggesting that that is not good enough.

The final point is the confusion between activities and purposes, which is central to understanding why this bill is so problematic. The reality is—I hope I have given a flavour from the relatively small extract I have put into the record about the SAT determination—that the terms "purpose" and "activity" cannot be used interchangeably. They are not interchangeable. We have a clear ruling from the SAT commissioner about the objects and the purpose of the organisation. It is true in a very narrow sense, as the acting commissioner pointed out during the hearings, that we cannot have one without the other. I accept that absolutely. It is almost a truism to say that. Nevertheless, for the purposes of putting together a statute, we ought not to be slip-sliding from one to the other.

There is a troubling piece of evidence, which has been made public but is not on the internet, so the majority of people in this house would not have seen it, about another piece of case law that is likely to be cited many times over the ensuing months if this legislation is enacted, and it concerns the Word Investments case. I am not familiar with the details of the case, so I am just going to give a very broad outline to give people a flavour, because members should remember that I am trying to illustrate the importance of distinguishing between "purpose" and "activity". My recollection is that Word Investments Ltd was a funeral director company—they provided funerals as their business—but every cent of the money they made from the funeral business went into the production of bibles, which were then distributed for free to people. The company went to court and applied for charitable status. If members go back to that original 1601 long list of 10 categories of charities, they would not be terribly surprised to find funeral director as one of those charitable activities—but it is not there. We could imagine that it might have been contemplated centuries ago, but we would not now consider that running a business as a funeral director would be a charity. Nevertheless, Word Investments was granted charity status. Why? Not because they looked at the activity, which was to provide funerals for which they charged people; they looked at the purpose of the whole activity: all of the operations of Word Investments were set up solely to provide free bibles for people who could not afford to buy them. That was the charity nature of the organisation. To suggest that an organisation cannot have one without the other and, therefore, we are not going to distinguish, skates over this all-important question about what a charity says it does and what it in fact does in practice between its purposes and activities. Members can see that in proposed section 96A(d), which is why it comes up as a concern. The fourth dot point of page 36 of the report reads —

> **Paragraph (d) and the definition of 'promote trade, industry or commerce' refers to both the activities and purposes of an organisation and is therefore too broad in its application.**

I refer straight back to paragraph (d) as drafted in the original bill, unamended, which reads —

> a body, other than a body referred to in paragraph (a), (b), (c) or (e), that promotes trade, industry or commerce, unless the sole or dominant purpose of the body is —

In other words, it says do not look at what they do, look at their purpose. Members have to ask what difficulties that would lead to or, in terms of the specific referral to the committee, whether that will have unintended consequences.

The distinction between activities and purposes was something that the State Administrative Tribunal looked at closely. Members will understand why when they look at section 94 of the act, with its definition of

"primary purpose" and it is a direct linking of primary purpose to the ruling in favour of charitable tax exemptions. In a summary of its decision, SAT makes the point at paragraph 21 that it may be that we have to contemplate activities that are not intrinsically charitable but are charitable in nature. Although that is supposed to be read in a legal frame, and it was said by a commissioner of SAT, it is not a terribly complex idea to get our heads around when we are being told by the minister and the Office of State Revenue that we do not have to worry about whether there is a difference between purpose and activity. When we go back to the original SAT determination that led to this problem, we find that activities that "are not intrinsically charitable, but they are charitable in character" and that is not something the government should have skated over. The answer is not that we can use the words interchangeably, but in fact we have to look at both. I put it to the minister that one of the key problems with the bill is that the government has said that every time it writes down "purpose" it means "purpose/activity" and it lumps them together. The SAT determination shows that if the government starts pulling those two things apart, it might come to the conclusion that the SAT came to, which has given rise to the problem the government is trying to address. However, because the government has not pulled those concepts apart, it has thrown fuel on the fire and added to the complexity and confusion of the bill. The Office of State Revenue says that we cannot have one without the other, and SAT says we have to look at activities, but for "purposes" we have to look at the constitution of the organisation, which is exactly what SAT did. SAT did that effectively. There is no doubt reading this judgement that it is very thorough and if we disagree with the conclusions we are going to have to go back and reargue it and not just dismiss it as an incompetent argument.

I put to honourable members that the basic point here is not disputed, and I will be interested to hear the minister respond to this point directly. What is not disputed is that the purpose of promoting commerce, industry or commerce in general may yet be a charitable purpose. It is when I hear it expressed in those words that I am able to articulate exactly what the problem is with this bill. The committee's minority conclusions expressed it in that form and, in fact, the state of Western Australia will end up with legislation so that some charities that promote trade, industry or commerce will be granted tax exemptions and some will not. How will that distinction be made between two sets of charities, both of which promote trade, industry and commerce? It will be made on the basis of a ministerial determination about which we have no detail, no guidelines, and not one single indication about what might guide the minister's decision in that regard, other than it is going to be a public interest test that is in some substantive way different from the public interest test that is provided by the court.

Hon Adele Farina interjected.

Hon SALLY TALBOT: There is quite an extensive section on this in the report, because both the departmental and political discussion in the other place has been around the concern that if the government puts guidelines in place it may inhibit swift action that needs to be taken to protect state revenue and that guidelines will only hamper the minister in being able to take quick action. If the minister has to come back to the Parliament to amend the act, as the minister is having to do now, that means we have had some seepage of state revenue that could have been prevented. The same argument could be made for regulations. Of course, when I get to that part of the debate I will point out that the very fact that we are here now having this debate and we needed a referral to the committee to iron out some of the problems, and the very fact that the first amendment we contemplated and the second amendment we contemplated were both from the government trying to fix up problems, indicates exactly why this cannot be done with a ministerial determination. These decisions are extremely contentious and they need to be considered by Parliament.

Hon Ken Travers: It is the whole question of taxation by a whim of a minister. From one decision to the next that whim could change completely.

Hon SALLY TALBOT: Precisely.

Hon Ken Travers: We should just pass a bill that the government can tax by ministerial determination!

Hon SALLY TALBOT: That is exactly right.

I will spend a little time talking about other considerations that ought to be brought forward.

Several members interjected.

The ACTING PRESIDENT (Hon Alanna Clohesy): Order! This will actually pass. Hon Sally Talbot has the call and if there are fewer interjections this will continue quickly.

Hon SALLY TALBOT: I can see that the minister is getting is very annoyed.

Hon Peter Collier: I am not only annoyed but if we can get to committee we can discuss things. You have just gone through the entire report!

Hon SALLY TALBOT: I do not know why the minister is getting irritated. We have time in committee to deal with this. I am happy to stop my contribution to the second reading debate right now and we can go into committee.

Hon Peter Collier: Keep going! It doesn't bother me.

The ACTING PRESIDENT: While you try and decide which way you are going to take this debate, Hon Sally Talbot has the call.

Hon SALLY TALBOT: It is up to the minister to determine how he wants to handle the debate, but as far as I am concerned this is a regular second reading debate. The purpose, surely, of raising details of the second reading debate is that the minister gets the opportunity to respond in the second reading summary.

Hon Peter Collier: So then we do not go to committee?

Hon SALLY TALBOT: We have to go into committee because the government is moving amendments.

Hon Peter Collier: So you won't redo all of this in committee?

Hon SALLY TALBOT: No, certainly not.

Hon Helen Morton: It is a waste of time—admit it.

Hon SALLY TALBOT: I do not know how Hon Helen Morton can accuse anybody on this side of the chamber of wasting time. It is a very complex bill.

Hon Ken Travers: It changes the way we do tax law in this state to an incompetent and irresponsible system, and you know it. It deserves to be scrutinised, minister.

The ACTING PRESIDENT: Order!

Point of Order

Hon SIMON O'BRIEN: Madam Deputy President, I am listening with great interest to the second reading speech and these unruly interjections are preventing the member from carrying on with her remarks. Could you please call them to order.

The DEPUTY PRESIDENT (Hon Alanna Clohesy): I am listening with great interest too, Hon Simon O'Brien. There is no point of order. However, members will listen when I call order. Hon Sally Talbot has the call.

Debate Resumed

Hon SALLY TALBOT: I have considered proposed paragraph (d). Surely the minister can see why I went into those concerns about proposed paragraph (d) in some detail. When we get to that point during the committee of the whole, he will move an amendment. I have now specifically given him the grounds on which to explain to us how the amendment resolves the problems that he has clearly identified because he will move an amendment to the clause.

Hon Robyn McSweeney: I had one of your bills once. It had 186 amendments in it. It was called the EP bill.

Hon SALLY TALBOT: That is very interesting.

The DEPUTY PRESIDENT: If you really want to keep interjecting, we will really stay here a long time. Hon Sally Talbot has the call.

Hon SALLY TALBOT: I am absolutely thrilled to bits, to use another quaint old English expression, that Hon Robyn McSweeney has raised the Environment Protection Bill.

Hon Simon O'Brien: You were starting to flag so we thought we'd encourage you with some new material!

Hon SALLY TALBOT: I feel that I have my fourth wind. I could go all night! Hon Robyn McSweeney decided that she wanted to cite a precedent in the EP bill that the Labor government brought into this place in 2004. That bill was one of the first ones that was referred to the Standing Committee on Legislation before the second reading debate in order to get a better bill. That is why the majority of the amendments on the notice paper were in the name of the government because the government looked to the work of the legislation committee and thought, "Jolly good job. We'll adopt all these amendments and put them on the notice paper—186 of them." That is absolutely right. It is a very fine precedent.

Several members interjected.

The DEPUTY PRESIDENT: Order! Here is how it works, folks. The more interjections there are, the longer the debate will take.

Hon Robyn McSweeney: I am going to be very quiet.

The DEPUTY PRESIDENT: Thank you.

Hon SALLY TALBOT: I know that Hon Robyn McSweeney is working up to her contribution to this debate. That is why she is paying such close attention.

Let me look at a couple of other specific questions that arise in various clauses of the bill. A question has long been raised about the part of the bill that appears to apply to related entities. To help people who are perhaps not familiar with these terms, a related entity is just what it says—an organisation that is not part of the primary organisation but has some association with the primary organisation. The question was whether related entities could apply for a ministerial determination, recognising that related entities may well be captured by the bill. We should remember that the definitions that we are dealing with are about the promotion of trade, industry and commerce. It is not hard to see how an organisation might have a charitable arm. Two examples were raised in relation to trade unions in Western Australia. One was the Mates in Construction program, a suicide prevention program run by the Construction, Forestry, Mining and Energy Union, and the other was a program that runs in the Kimberley called Feed the Little Children, which is run by the Australian Manufacturing Workers' Union, both of which are related entities to unions. A very real and pertinent question was raised about whether those related entities would be able to apply for a ministerial determination if they found that they were captured by the provisions of the bill. I am very happy to tell the house that they will be able to. I think this will give considerable comfort to our trade union colleagues who are running those charities and charities like them. They will be able to apply—there is a technical reason for this—because they are not captured by proposed section 96A (b), which in the original version of the bill says "trade union" and in the amended versions will say "industrial association". They are captured under proposed paragraph (f). If anybody is interested, they can look it up and it will make eminent sense to them.

However, there is one important point to be made. I am very sad that the minister has had to leave the chamber on urgent parliamentary business. When I was talking about the failure of the department or the government to provide us with any information about the number of charities that will be affected, he said, "Yes, but they did give you something." At this point I want to draw the attention of honourable members to appendix 3, "OSR evidence on the number of organisations that may potentially be affected by the bill". It is only a one-page document. Just a brief glance will tell us what it is roughly all about. It is divided into the three taxes that we are considering—duties, land tax and payroll tax. There is a "total" column at the end. Let us take payroll. We can see that the Office of State Revenue has been able to extract from its database the fact that 44 first-limb charities are getting payroll tax exemption; 21, second limb; three, third limb; 81, fourth limb; and six mixed, with a total of 155 organisations. In the narrative that accompanies this information, there is a breakdown of how these organisations that the department was available to identify will be captured. I will go through this in a bit of detail. Appendix 3 states —

> The following information is provided to assist the Committee to understand the basis for determining that the amendments are only likely to affect a small number of organisations.

This is very important. Hon Peter Collier has now returned to the chamber.

Hon Adele Farina: He is still mumbling.

Hon SALLY TALBOT: Yes, he is still mumbling but he is smiling because he knows it is nearly time to break.

This information was, indeed, applied to the committee. The critical question is whether it answers the concern about whether the government has any justification for claiming that only a small number of charities will be affected. The office explains to us, as set out in the appendix —

> Initial examination of the 155 charities who have been granted a pay-roll tax exemption —

They are the ones that I just went through —

> indicates that there are 19 that may potentially be relevant bodies, with 14 being on the basis of a purpose of the promotion of trade, industry or commerce, and five on the basis of being a professional association.

The office came back to us and said that there will be 30; it may be 34 but four came in a slightly different category so the committee was happy to be generous and say that 30 organisations would probably be captured. The department gave us the breakdown of the way those 30 bodies were captured. It went like this: 22 of them were captured because they promoted trade, industry and commerce; and eight were captured under some other provision that I cannot quite recall at this moment. No related bodies were captured to make up that total of 30. We worked all through the inquiry with a ballpark number that, obviously because of the information I have already put on the public record, was far from conclusive because the office said that it did not have the systems in place to run reports of that nature. To the best of its investigative ability in a relatively short time, it came up with 30. None of them were captured under the related body provision. Even that number of 30 is flaky, to be generous. There is no reason for the government to have any confidence that its advice to the house about only a small number of charities being captured is accurate; it is almost certainly not true.

The question then is whether they are caught intentionally. We come back to these unintended consequences. Again, we come to the problem that I raised in proposed paragraph (d). The broader we read proposed paragraph (d)—that is, the definition of "promote"—the more charities we catch in proposed paragraph (e), which refers to a body referred to in another paragraph. This is exactly the point on which I started yesterday when I described that drawing on the whiteboard. This is exactly how that circle got so big that it used up the entire whiteboard—when the original policy object of the bill was an egg that was sitting in the middle. That is an enormous and unresolved problem in this bill.

Members may well ask, knowing that a parliamentary committee has all the powers of the Parliament, and the Parliament is the most powerful court in this state, why the committee considered itself to be stymied by the Office of State Revenue's flat refusal to produce information for us. Members may wonder why the committee was not more active in the pursuit of that information, given that the denial of that information meant in a very important sense that the committee could not do the job that we were tasked to do by the Parliament itself. The reason is this. There is a precedent, and it is a precedent to which the committee gave a great deal of weight. That precedent was set very recently. Sometimes, if a precedent was set 100 years ago, we might think it is worth testing it again. That is because, just like charities, precedents are movable beasts. They are not static. They have shifting boundaries; they are organic; they evolve. But, unfortunately, this precedent was set very recently. This precedent was set in the parliamentary inquiry into Peel Health Campus. Members will remember that during that inquiry, a summons was issued to a witness to produce information. However, eventually, when the witness did not produce that information, the Standing Committee on Procedure and Privileges determined that a witness must be given time to produce information. That is a matter to which the procedure and privileges committee may well need to give consideration in the future, because if we do have very short reporting times for committees, we may in practice have removed from parliamentary committees—which, as I say, operate with all the powers of the Parliament—the power that they have been given to compel information from people.

Hon Adele Farina: Were you asking for a large number of documents?

Hon SALLY TALBOT: In relation to Peel Health Campus, the committee was indeed asking for what the witness claimed was a very large number of documents. In relation to this inquiry, it was not clear to us whether it was a large number of documents. It was certainly made very clear to us that extracting that information would be very complex. Therefore, the decision was made that the witnesses would not be summonsed to produce that information. I concurred with that decision, because my feeling was that in the long run, we would not get that information because of our short reporting time.

At this stage, honourable members may be asking, particularly those on the other side of the chamber, who are clearly anxious for me to wind up my remarks —

Hon Adele Farina: If I can ask one other question, isn't that information that the officer should have had anyway?

Hon SALLY TALBOT: Hon Adele Farina is asking whether the officers ought to have had that information. Clearly, that was the point I was making when I said I find it extraordinary that we have reached the stage, when this bill has been around for so long, and has proved to be so contentious, that we are not able to get just straight numbers—nobody was ever asking for confidential information about individual taxpayers. This is why I am basing my remarks and my criticism of the government around the fact that the government is trying to make a claim that it cannot substantiate. We know that more charities will be put on the relevant body list than the government intends to be put on that list. That is why the government had to introduce a ministerial determination—it was to give those bodies that are incorrectly captured a way out, back to the tax exemption. But we do not know how many bodies there will be, and we do not know how those mechanisms will work.

Honourable members may be asking why the minority of the committee ended up recommending that this bill be withdrawn and resubmitted in a form that would serve the policy objects that the government has articulated, and why the committee could not have come up with some solution or found some alternative. Indeed, although this is not in the report, I am happy to say that there is a very straightforward alternative, and I go to, of all places, Ireland. The Irish Charities Act 2009, with which I am sure the minister is very familiar, contains a section that specifically excludes a chamber of commerce. I put to the minister that that is the course that ought to have been taken by the government in the first place, and that is the course that the government ought to adopt at this very late stage in the proceedings. That would avoid the need for this house to have any more debate on this topic. It would have been very simple and relatively uncontentious for the minister to walk into this chamber with a bill that took the example of the Charities Act 2009 of Ireland and simply excluded a chamber of commerce.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [4.06 pm]: I thank Hon Sally Talbot for her contribution. I also want to make a contribution to the debate on the Taxation Legislation Amendment Bill 2014.

One of the things for which I particularly want to thank the committee is that it was able to come to terms with all the double negatives that we are dealing with in this legislation. There are a number of double negatives in this bill. That is a point that the Law Society of Western Australia also made quite succinctly in its submission, or its evidence—I cannot remember which one it was. It is because of these double negatives that this issue seems more complicated than it really is. We start off with an exemption. Certain organisations are exempt from the three taxation regimes that this bill deals with. We then exclude organisations if they meet the definition of "relevant body". We then define "relevant body" into inclusions, which is a positive, and exclusions, which is another negative. We then insert a very convoluted mechanism to establish eligibility for that exclusion. So, it is exemption, exclusion; inclusion, exclusion; and application for an exclusion. At first glance, I found it very difficult—maybe nobody else did—to get my head around this legislation. I therefore appreciate the work that was done by the committee to tease that apart.

As the explanatory memorandum tells us, the amendments contained in this bill broadly seek to narrow the scope of existing payroll tax, transfer duty and land tax exemptions as they apply to fourth-limb charities. The bill seeks to narrow the exemptions by saying that no exemption shall apply unless the sole or dominant purpose of the organisation is to deal with poverty, education or religion, or the so-called fourth limb. It then takes that a step further by saying that no exemption will apply to trade unions and political parties. Hon Sally Talbot made the point that an exemption does not exist now. Therefore, I do not know why that needed to be expressed as a particular point of view, unless the agencies or the government are aware that those organisations will be seeking an exemption. Further narrowing of the exemption is allowed by the regulation-making power, to say that no exemption will be made to a particular class of organisation, depending on whether that class of organisation meets the particular characteristics that are set out.

I want to touch on four elements: Assistant Professor Murray's evidence; the issue of discretion by not one but two ministers; whether the regulation power is in fact what the government told the committee it would be, which was a quick way of dealing with any anomalies found; and the absence of any guidelines, framework, regulations or procedure that the minister has to follow when exercising discretion.

I went to see what the minister with responsibility for this legislation had said to guide us on what exactly the government's intentions were. These are comments on the public record from Minister Nalder. He told us that this bill came about because the CCI tried, successfully, to get an exemption from state tax, claiming charitable status. The minister said —

> This bill is not designed to question organisations claiming charitable status.

However, it appears from the evidence put before the committee that application of the law must examine the charitable or otherwise status of organisations seeking the exemption. The minister said that the provisions were all designed to impose a public interest test on whether an organisation should be exempt. That of itself means that there must be questioning of the organisation's status as a charitable organisation, if the provisions of the bill are actually to be implemented. That is how we will determine whether the public interest test has been met. The minister, in making the comment that the bill is not designed to question organisations claiming charitable status, is not being accurate. For the respective agencies and the respective minister to be doing their job, they must question the charitable status. It is in fact the core process—the mechanism—of the bill.

The other point that the minister has made on the public record is that in exercising the ministerial discretion about whether an organisation is eligible for the exemption, that will happen if all of us believe an organisation is really a charity. I underline the word "really"—the minister did not, but I am doing so. He is saying that we do not need to worry about whether organisations will be able to claim the status that gives them the exemption, because we just have to trust the government that this is about whether all of us believe an organisation is really a charity. If that is not about questioning the charitable status or otherwise of an organisation, I am not sure what is.

The other comments that the minister has made on the public record were part of a debate about the eight organisations not paying payroll tax. The comment has been made, and it is reflected in the committee's report, that the CCI was successful in getting the exemption on the basis of it being a charitable organisation, and that on the basis of it being successful in getting the exemption, the government found eight other organisations that had used that to gain the exemption. The state then lost $56 million worth of the three component taxes to those organisations. Referring to those eight organisations that did not pay payroll tax, which would have had the exemption when this bill was overturned, the minister said that he believed that the bill captures all eight, and that the government had targeted the areas that it needed to target. That is effectively code for "trust us". He could not say it with any confidence, and the evidence in the committee report before us makes it clear that the agencies—the Office of State Revenue and the Department of Finance—cannot be absolutely clear about this. There are no absolutes in this. That is what we are being asked to legislate for.

Debate interrupted, pursuant to standing orders.

[Continued on page 8955.]

Sitting suspended from 4.15 to 4.30 pm