

APPROVALS AND RELATED REFORMS (NO. 1) (ENVIRONMENT) BILL 2009

Consideration in Detail

Clauses 1 to 3 put and passed.

Clause 4: Section 45A amended —

Mr C.J. TALLENTIRE: I believe that clause 4 sets up a serious inconsistency in the legislation. I would like to hear from the minister how we can have a situation in which people, as is possible under the arrangements that we have had for so long, will still be entitled to appeal against a level of assessment. They are currently entitled to appeal against a level of assessment if a proposal is deemed to be one that will not be assessed, or that the Environmental Protection Authority might say is a proposal that can be dealt with as an informal review with public advice and upon which some conditions can be placed by another decision-making authority. Under present arrangements, people can also appeal against a proposal being assessed at referral of information level and at a public environmental review level. People can appeal all those levels of assessment in the hope that a higher level of assessment will be achieved; that is the present situation. However, what is proposed under clause 4 is that people will no longer be able to appeal when the EPA has deemed a project to be a derived proposal. That creates a serious inconsistency in this legislation. We already have a situation in which people can appeal against certain things, but under this provision they will no longer be allowed to, if the EPA has deemed a project to be a derived proposal.

Last night in his reply to the second reading debate, the minister went through the Environmental Protection Act and read from the sections of the act that explain how the EPA looks at a project when a proponent is claiming that the project is a derived proposal. He read from section 39B(4) of the act to explain that if the EPA was confident that the environmental issues raised by a proposal were not adequately addressed when the strategic proposal was assessed, and it was of the view that there was significant new or additional information relating to a significant change in the relevant environmental factors, only then would the EPA be in a position to decide that a project could no longer be considered a derived proposal.

We are in an area that is so similar to the sorts of circumstances that arise when looking at levels of assessment that we should not throw out this opportunity that the community currently enjoys to appeal against decisions made by the EPA regarding the determination of a project being a derived proposal. There have been occasions on which the EPA has got it wrong on setting levels of assessment, and I think it is just as likely that there will in future be occasions when the EPA gets it wrong when determining whether or not a proposal is to be deemed a derived proposal.

That is the essence of what I would like to hear from the minister at this stage. I think we could resolve this matter quite simply by rejecting this clause and then moving on. It is, of course, the intention of the opposition to reject the clause. I look forward to hearing the minister's response on that point.

Dr G.G. JACOBS: The clause removes the requirement for an appeal process for a derived proposal, provided it fulfils the significant criteria that the member for Gosnells referred to. The appeals are on the assessment of the strategic proposal. The suggestion that the government is taking away all the checks and balances is incorrect. The advice I have is that the appeals are on the assessment of a strategic proposal. There is no relationship between the level of assessment and the decision to declare a derived proposal. The clause is about notification, not removal of appeal. The clause is consequential on the amendment to remove appeal rights as to whether to declare a derived proposal. The clause removes the requirement for an appeals process to be completed, and substitutes a requirement for the minister to be notified. The member for Gosnells said in his contribution to the debate last night that there had been basically only one strategic assessment in Western Australia; in fact, there have probably been about eight. The government is not trying to remove robustness and thoroughness; we are trying to remove some of the duplication and frustration involved in a derived proposal going through a strategic proposal assessment and then having to go through the process again. I know that there are some concerns that a derived proposal might come out of left field. Once an assessment for a strategic proposal has been done, there is still a right of appeal; that process goes on. Then, of course, for a derived proposal, something may come out of left field that has no real association with the original assessment, such as a nuclear power plant or something, which was not part of the strategic assessment and strategic review.

I think that is quite clear from the Environmental Protection Act 1986, section 39B, "Derived proposals", which states in subsection (4) —

Despite subsection (3), the Authority may refuse to declare the referred proposal to be a derived proposal if it considers that —

- (a) environmental issues raised by the proposal were not adequately assessed when the strategic proposal was assessed;

- (b) there is significant new or additional information that justifies the reassessment of the issues raised by the proposal; or
- (c) there has been a significant change in the relevant environmental factors since the strategic proposal was assessed.

I think that, because of those two processes of appeal, both strategic and derived, it would be fair to say that there has been some disincentive for proponents to do a strategic proposal and to do the strategic work. That has probably been to the disadvantage of Western Australia. In fact, that has probably led to the relatively small number of strategic proposals and small amount of strategic work being done.

So all I can say to the member is that from the discussions I have had with the minister, and from the discussions I have had with the very good advisers here today, my advice is that this is not about taking away checks and balances that are already in place.

Mr C.J. TALLENTIRE: I thank the minister for those comments. I note the minister's comment that there may be a disincentive for proponents to engage in a strategic assessment process, because they may be fearful that there will be an appeal at the strategic assessment stage, and also an appeal when their project is considered and is being reviewed as a derived proposal. But that perhaps highlights the fact that many proponents misunderstand the point of a strategic assessment.

I will give the minister an example that he might be able to identify with locally. The Esperance Port Authority might put forward a proposal for an expansion of the Esperance port. That would obviously be a large-scale proposal, and it would involve multiple stakeholders. The Esperance Port Authority, in applying for that expansion, might not necessarily know what minerals would be going out through the port of Esperance in the near future. If we think back to recent events, we have had the problems associated with the export of lead through the port of Esperance. If there was a strategic assessment of the activities of the Esperance Port Authority, we could look at the impacts of dredging and land reclamation on the community of Esperance, and on the marine and terrestrial environments around Esperance. We would then be in a situation, following the strategic assessment, in which individual proponents could come forward with their particular projects. In the case of the lead exports through the port of Esperance, if that had been treated as a strategic proposal rather than a derived proposal, the community would have been given the opportunity to look at that proposal and consider its potential impacts. My concern is that the EPA in its wisdom may make the call that such an activity is a derived proposal, and we would then be stuck, because there would be no appeal rights. I think the minister would agree, given what has happened at Esperance, that we should ensure that we provide this check in the system. It would not be used particularly often, because, more often than not, the EPA would get it right and make the right call about whether a proposal is a derived proposal rather than a strategic proposal. However, there is a great need for a check in the system that will enable the community to appeal a decision.

I therefore ask the minister to relate this to his personal experience with the export of lead through the port of Esperance, because that may help the minister to see why we need this kind of check in the system. I believe that the EPA would probably say, during the strategic assessment process for the export of lead, that it had considered a range of environmental factors, and, on the basis of that consideration, the proposal will present no significant additional risk. In light of section 39B(4)(a), (b) and (c), I do not see how the EPA could possibly determine that a proposal for the export of lead through the port of Esperance was not a proposal that required further assessment. However, that could be the EPA's interpretation. Therefore we need to provide an appeal mechanism so that the community can present concerns that it may have but that the EPA may not have anticipated. We want to ensure that the community is given the opportunity to voice concerns—concerns that our expert authorities may not necessarily see and may not necessarily get right.

Dr G.G. JACOBS: I thank the member for Gosnells for raising a matter that is close to home. This is a matter that I had some experience of, both as a resident and as the local member. However, the experience in Esperance took place under the current system and the current legislation.

Mr C.J. Tallentire: There was not a strategic assessment.

Dr G.G. JACOBS: No, and there probably did not need to be. The member is suggesting in his argument that if the export of lead through the port of Esperance was part of a derived component of a strategic development for the port, the system that is proposed under these amendments would let it down, because it would take away the appeals process for that derived component. I can tell the member as the local member that we were let down anyway. There were some reasons for that. However, that was all part of the legislation and the processes that are already in place. There was a litany of concerns. Like a lot of things, there is never just one cause; there tends to be a knock-on effect, with many issues leading to that. However, section 39B(3) of the Environmental Protection Authority Act states —

If a request under subsection (1) is made, the Authority is to declare the referred proposal to be a derived proposal if it considers that —

- (a) the referred proposal was identified in a strategic proposal that has been assessed under this Part (the *strategic proposal*); and
- (b) after a report on the strategic proposal was published under section 44(3), it was agreed or decided under section 45 that the referred proposal could be implemented, or could be implemented subject to conditions and procedures agreed or decided under that section.

Mr C.J. TALLENTIRE: I think the minister has just indicated to us that he believes that it is not necessary to improve the system; but, at the same time, he is conceding that we did not get it right when it came to the assessment of the environmental implications of the export of lead through the port of Esperance. So, on the one hand, the minister is saying that he knows that we got it wrong, that mistakes were made, and that we could have done it better; but, on the other hand, he is saying that we do not need to try to improve the system by ensuring that there is both an encouragement towards the use of strategic assessments, and an appeal mechanism against a decision that a proposal is a derived proposal when in fact the community wisdom is that it is not a derived proposal. That example of Esperance demonstrates exactly why we need to make these two changes to our system. We need to have strategic assessments that will enable us to look at the broader implications of things such as port expansions, while at the same time we need a check in the system that will enable us to look at the details of individual proposals, so that we do not need to rely solely on the knowledge and decision making of our environmental protection authorities.

Debate interrupted, pursuant to standing orders.

[Continued on page 7643.]