

BIODIVERSITY CONSERVATION BILL 2015

Committee

Resumed from 18 August. The Deputy Chair of Committees (Hon Liz Behjat) in the chair; Hon Donna Faragher (Minister for Planning) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon ADELE FARINA: Can the minister identify the clauses of the bill that deal with regional conservation plans?

Hon DONNA FARAGHER: It is part 5.

Hon ADELE FARINA: My understanding is that part 5 deals with management programs as opposed to bioregional plans or regional conservation plans. Is that the case?

Hon DONNA FARAGHER: I appreciate that we are at clause 1, but clause 69 refers to the content of biodiversity management programs. As I understand, those programs can be put together depending on the location, species and the like. Page 54 refers to the distribution or population size of native species in the state or a part of the state. The programs can be specific to specific regions, depending on what particular plan or program they are looking at.

Hon ADELE FARINA: Can the minister identify those clauses of the bill that require regular biodiversity audits to be undertaken and for those audits to be made available to the public?

Hon DONNA FARAGHER: There is no requirement for an audit, but there is a requirement for a review of the act.

Hon ADELE FARINA: I am not too sure whether we are on the same page but, in any event, I will move on. Can the minister identify those clauses of the bill that require a state biodiversity strategy to be prepared?

Hon DONNA FARAGHER: There is no requirement.

Hon ADELE FARINA: I would just like to talk through some of the comments made by the minister in her response to the second reading that affect the reading of this bill and consideration of the bill in committee. In her response to the second reading, the minister took a fair bit of enjoyment out of pointing out that the discussion paper released by the former Labor government in 2002 included a similar “God clause”.

Hon Donna Faragher: I did not take enjoyment out of it; I simply stated the fact.

Hon ADELE FARINA: Well, the minister seemed very happy.

The DEPUTY CHAIR: Order! One at a time.

Hon ADELE FARINA: If the minister will give me a chance.

The minister undertook to table the discussion at the conclusion of the contribution and I do not think the minister did so; I certainly did not see it.

Hon Donna Faragher: I thought I did, and I apologise if that did not occur.

Hon ADELE FARINA: That is okay. That aside, the minister went on to state that all the draft bills subsequent to that discussion paper also included a similar God clause. That may well be true, but the minister declined to table those draft bills so that we can ascertain that for ourselves. The minister sought to use this information to chide the opposition for not disclosing this information when we raised concerns about the God clause in the bill. The minister failed to inform the house of the issues raised in the submissions on the discussion paper and the 2005 draft bill and to inform the house that there were reasons the former Labor government did not finalise the Biodiversity Conservation Bill and introduce it into Parliament. Perhaps if the minister had looked at those submissions, she would have understood those reasons. The Labor government did not introduce the biodiversity bill into Parliament, for good reasons. It had listened to the concerns raised on the draft bill and the discussion paper about the God clause, and also about the exclusion of fish from the application of the bill—to name just two of the issues of concern that were raised in the submissions—and believed that more work needed to be done to address these concerns. Submitters expressed the strong view that if the God clause were to be retained, the decision by the minister should be tabled in Parliament as a disallowable instrument under the Interpretation Act 1984, thereby providing for true public scrutiny and accountability.

We need to put all this stuff in context. There was a reason why that concern was raised at that time. That concern continues to exist. We need to ask ourselves: why would a government introduce a Biodiversity Conservation Bill that has more to do with facilitating state development than it has to do with

biodiversity conservation, hence the reference in the minister's second reading speech to reducing unnecessary regulation? Therefore, let us make sure that we understand this bill in context.

When I suggested to the minister that she table the previous draft bills, she declined to do so. The minister is entitled to do that. As I understand it, the draft bills prepared by the former Labor government were more substantial than the current bill. I understand also that about 100 clauses, covering some 77 pages of the 2008 draft bill, have been redacted from the bill currently before the chamber because those clauses were determined to be unnecessary to meet the Liberal–National government's policy commitments. It is important that when a member on one side of the chamber criticises members on this side of the chamber and puts an argument about the need for full disclosure, they ensure that they follow through. I suggest that if the minister wants to pursue this, she should table the previous draft bills and the government's drafting instructions on the bill before us, so that we can understand the policy and intention of the government on this bill, because that has not been made clear in either the second reading speech or the minister's response to the issues that were raised in the debate. It is important that when a government makes a commitment to introduce a piece of legislation, and when it makes a substantial change from the draft legislation as it had been widely consulted on with the community, it gives the community another opportunity to look at the bill. I want to put those comments on the record.

I now want to look at another important issue—that is, whether fish are excluded under the Biodiversity Conservation Bill 2015. That issue covers a number of clauses in the bill, so it is quite reasonable to have that debate under clause 1. The short title of the bill is the “Biodiversity Conservation Act”. There is no suggestion that any species has been excluded from that biodiversity conservation. I have looked at the bill to try to work out whether fish are excluded from the bill. Clause 5, “Terms used”, states —

fauna means —

(a) an animal that —

- (i) belongs to a native species unless the animal is determined by order under section 9(2) not to be fauna for the purposes of this Act; or
- (ii) is determined by order under section 9(1) to be fauna for the purposes of this Act;

or

(b) a native species or taxonomic grouping of native species that is determined by order under section 10(1) or (2) to be fauna for the purposes of this Act;

We have no idea what animals may be determined not to be fauna by order under clause 9(2), or what animals may be determined to be fauna under the definition of “fauna” in clause 5(a)(ii), because the orders will be made only after the bill has been passed. It is deemed by the government to not be necessary for Parliament, when it is considering legislation, to be fully informed about the intent of that legislation. This is an issue that I raise continually and that I continue to have problems with. Clearly, if these provisions are in the bill, the government intends that the minister will be able to determine at some point in time that although a native species is an animal, it is not fauna for the purposes of this bill. Those provisions are clearly in the bill for a reason. We cannot discount them. This Parliament is being asked to make a decision on this bill without knowing which native species of animal may be considered not to be fauna at some future time, because that will be determined by order.

When I was trying to get my head around this, I found it quite frustrating. The minister made the statement in her response to the second reading debate that “fish are fauna under the act”. The truth is we do not know that, and we will not know that until any orders under clause 9(2) are made. It is also not clear whether orders will be incorporated into the regulations and therefore easily accessible to the public, or whether the public will need to go on a search-and-find mission to locate those orders and therefore find out what animal species are considered to be fauna under the bill. That is a concern. That raises a riddle for members: what is an animal that is not by order under clause 9(2) declared not to be fauna, and is not by order made under clause 9(1) declared to be fauna? I have to tell members I have no idea what an animal that falls into that category would end up being, because that is unclear in the bill. Clause 5 of the bill and the definition of “fauna”, and clause 9 of the bill, do not clarify whether fish are fauna under the bill. That is because it will depend on what orders might be made.

Clause 5 of the bill also provides a definition of “fish”. It states —

Fish has the meaning given in the *Fish Resources Management Act 1994* section 4(1);

So much for acts of Parliament being clear and containing all the information that they need to contain. If we want to know the definition of “fish”, we will not find it in the Biodiversity Conservation Bill; we need to go to the Fish Resources Management Act 1994. That act states in section 4 —

fish means an aquatic organism of any species (whether alive or dead) and includes —

- (a) the eggs, spat, spawn, seeds, spores, fry, larva or other source of reproduction or offspring of an aquatic organism; and

- (b) a part only of an aquatic organism (including the shell or tail); and
- (c) live rock and live sand,

but does not include aquatic mammals, aquatic reptiles, aquatic birds, amphibians or (except in relation to Part 3 and Division 1 of Part 11) pearl oysters;

Are members any clearer about whether fish are fauna under the bill? I am not. I think it is reasonable to assume that the minister intends to make orders pursuant to clause 9(1) and (2), otherwise those provisions would not be in the bill. I ask the minister to explain what orders are intended to be made pursuant to clause 9(1) and (2) so that we might begin to understand whether the bill actually provides for fish to be fauna.

Hon DONNA FARAGHER: That was fairly involved. I do not intend to delay the chamber with respect to the comments made by Hon Adele Farina about my response to the second reading debate. However, with respect to the first matter raised by Hon Adele Farina, there was a lot of commentary at the time that we had not taken into account any consultation that had been done prior to the introduction of this bill to the house. I pointed out to members opposite that in fact a particular matter had been raised in a discussion paper, and that is the exact same principle that is now contained in this bill; that is, this bill now has a clause that is equivalent to what had been proposed under the Labor government's bill. I appreciate that Labor members may not have wanted to hear that. I simply wanted to advise the house that it is a matter that had been discussed previously and at length, going back to early 2000.

With respect to fish, I will answer the question, and if we then have to go back and forth a bit on it, I am happy to do so.

Hon Kate Doust: Happy?

Hon DONNA FARAGHER: I am always happy!

Hon Kate Doust: I would not say the same for some of your colleagues, I have to say.

Hon DONNA FARAGHER: Come on!

Fish, for the purposes of this legislation, are a native species and therefore fall within the meaning of fauna. I appreciate that we have not got to this point, but I refer the member also to clause 8(2), which provides what native species is a species. It refers to a number of matters and states —

- (a) that is indigenous to Australia or an external Territory; or
- (b) that is indigenous to the sea-bed of the coastal sea of Australia or an external Territory;

It goes on. They are a native species and are therefore covered under the meaning of "fauna". I understand that an order under clause 9(2) would have to be an order that is disallowable for the minister not to declare that a particular fauna—it would not necessarily be just fish, I might say; it could be another species—be removed. In this Biodiversity Conservation Bill, "fauna" encapsulates fish. That is reiterated at clause 8, titled "Native species".

Hon ADELE FARINA: I suppose this is frustrating because the issue about whether fish are covered by this Biodiversity Conservation Bill was not covered in the second reading speech, which is supposed to set out the policy of the bill. In her response to the second reading debate, the minister made some comments, which on my reading of the bill simply do not follow. The minister stated, and I quote —

In clause 5 the bill recognises that fish are fauna and provides recognition for sustainable fishing to be managed under the Fish Resources Management Act 1994 or the Aquatic Resources Management Bill 2015, dependent upon it passing.

Clause 5 of the bill does nothing of the sort. Through the application of clause 9, the definition of fauna allows for fish to be excluded, and there is no mention of the Fish Resources Management Act 1994 or the Aquatic Resources Management Bill 2015 in the definition of "fauna" under clause 5 of this bill. I fail to understand how the minister could have made that statement. The definition of "fish" in clause 5 makes reference to section 4(1) of the Fish Resources Management Act, which is the definition of fish. Again, it has nothing to do with biodiversity conservation. Clause 12 of the bill makes clear that "This Act, other than Part 9, does not apply to or in relation to any fish or pearl oyster that is the subject of" aquaculture, commercial fishing or recreational fishing under the Fish Resources Management Act 1994 or hatchery activities or pearling as defined under the Pearling Act 1990. I do not pretend that I know a lot about fish, but it is fair and reasonable to say that the list of fish is a pretty comprehensive covering of fish. Given that clause 12 specifically states that the act, other than part 9, does not apply to any fish as detailed in that clause, I find it hard to understand how the minister can stand up in this place and say that fish are captured by the Biodiversity Conservation Bill currently before us. I do not see it, and based on the express words in the bill, I do not see how the minister could have made that statement. In my view, the terms of the bill are very clear and the bill makes no mention of the Aquatic Resources Management Bill; nor should it, because the Parliament has not even considered that bill yet,

so we do not know what it might include or what it might do once it passes through the house. If the minister is suggesting that the Aquatic Resources Management Bill will deal with biodiversity conservation for fish that are excluded from the bill before us, the government might, rightly, have introduced that bill first and let the Parliament deal with it first and decide what was covered by that bill before we considered the Biodiversity Conservation Bill.

My issue is that the minister has stated that, under this bill, fish are fauna and they are covered by the bill. Clearly, clause 12 of the bill states that that is not the case, at least in relation to the fish listed under clause 12. As I said, I do not know a lot about fish or whether that list is comprehensive, but it looks pretty comprehensive to me. The frustrating thing is that there is not a good list of fish in the Fish Resources Management Act. We need to go to the Fish Resources Management Regulations to find out what is protected, and then it refers to limits on the size of the fish or bag limits. I got no sense, from reading that legislation, that it would do anything to protect biodiversity conservation with respect to fish. I think we need to spend a bit of time on this and be clear what the government's policy position is.

The minister has told us that the bill provides recognition for sustainable fishing to be managed under the Fish Resources Management Act 1994 or the Aquatic Resources Management Bill 2015, depending on its passing. This bill provides for the exclusion of fish covered by the Fish Resources Management Act. To say that it provides recognition of sustainable fishing to be managed under the Fish Resources Management Act is, in my view, overstating the express words of this bill; nevertheless, as far as fish management deals with the taking of fish, it is very different from biodiversity conservation. As previously stated, this bill makes no reference to the Aquatic Resources Management Bill. If the minister is suggesting that this bill will deal with the biodiversity conservation of fish, as I said, the government should have introduced that bill first so that we were clear about what that bill covers.

In a statement the minister made, which is in *Hansard*, the minister also told us that the bill provides for fish to be declared as threatened or specially protected fauna in part 2, subdivisions 1 and 2 of the bill. However, clause 12(1) of the bill clearly does not provide for this in relation to fish. It says that, with the exception of part 9, the legislation does not apply to the fish covered under clause 12. I have carefully read part 2, subdivisions 1 and 2 of the bill, and cannot find anywhere in the express words of those subdivisions any suggestion that they provide for fish to be declared as threatened.

Hon Alyssa Hayden: Ask a question.

Hon ADELE FARINA: I do not have to ask a question. I am allowed to speak.

Hon Alyssa Hayden interjected.

Hon ADELE FARINA: I am allowed to speak; I am making a point. I will start that again.

I have carefully read part 2, subdivisions 1 and 2 of the bill, and cannot find anywhere in the express words of those subdivisions any suggestion that they provide for fish to be declared as threatened or specially protected fauna, and clause 12(1) expressly excludes this being the case for the classes of fish that have been identified in clause 12(1). The Council needs to understand the policy of the bill as it relates to fish. What the minister has told us is not supported by the express words of the bill, as far as I can ascertain it. We need to get very clear exactly what is the government's policy in relation to this bill and in relation to the handling of fish and whether those statements made by the minister in this place are accurate because the express words of the bill suggest either the government has failed to implement its stated policy in the express provisions of the bill or it is a little bit confused about its policy. I think we have some significant problems until we get this sorted, so I invite the minister to make a statement explaining her previous statements and that inconsistency between the stated policy and the express words in the bill.

Hon DONNA FARAGHER: I feel as though I need one of Hon Lynn MacLaren's props. Fish are a subset of fauna. The bill covers every single species of native animal, whether that is fish, birds, mammals, reptiles—I could go on. We have not listed all the native species that would fall within the ambit of this bill because it would be beyond a mile long. Clause 12—we will come to that when we come to it—deals with the taking of fish, and that is dealt with under separate legislation to which it refers. Yes, the member stated correctly that I referred to the Aquatic Resources Management Bill 2015. That bill has not passed Parliament, hence we would not refer to that bill in the bill before us now. I simply wanted to advise the house, and if that caused some confusion, I apologise. However, I indicated that we refer to the relevant fisheries legislation at clause 12. It is obvious that should the Aquatic Resources Management Bill be passed, this bill would be updated to reflect the new act. However, I say again: fish are a subset of fauna, and every single species of native animal is covered under this bill. That is not just fish; the entire ambit of fish, mammals, reptiles—you name it—is covered under this bill.

Hon LYNN MacLAREN: I want to continue on the theme of fish. My understanding is based on Andrew Burbidge's *Threatened animals of Western Australia*, which I found to be a very good reference for

species specific to Western Australia. When I looked at the bill, I was concerned to see whether the species that are listed in this publication are indeed covered by the bill. Like the honourable member before me, I have no specific knowledge about fish other than my own very special interest in sharks, but I note that the Western Australian Museum's fauna list includes 3 207 species of fish in 293 families. The Museum of Western Australia includes fish under the category of fauna, because it is listed in its fauna list, but I was very concerned. This book was written in the lead-up to the previous government's biodiversity conservation legislation—it is a 2004 publication—so I do not know the current number of fish listed in the fauna list, but I concur that it must run to several pages. I am heartened by the minister's clarification that this bill does indeed—I have raised this in several briefings—include the protection of fish. I note that, in this publication anyway, no fish species has become extinct in WA. This book was written in 2004 so I do not know whether that is still true, given that we have not had updated biodiversity laws, but certainly at that time no species had become extinct. The publication also lists many of the threatening processes facing fish and also the habitats in which fish live. It might be worthwhile, just as a point of clarification, for the minister to specifically address whether the Biodiversity Conservation Bill will cover that, because also for the first time it will protect habitat. Therefore, I ask whether the bill covers over-exploitation; habitat destruction, especially in estuaries, rivers and lakes near urban areas; and deteriorating water quality. When looking at threatened fish species, we would want to ensure that a conservation bill of this type includes those habitats. My first question to the minister is: does this bill apply to those habitats? My second question, which she may want to take on notice, is whether any fish have become extinct in the time that the biodiversity conservation laws have languished—I see her shaking her head.

Hon Donna Faragher: I do not believe so.

Hon LYNN MacLAREN: Possibly that is no. I am going to also list a couple of animals listed in this book and ask specifically whether this bill protects them—the blue whale, the humpback whale, the southern right whale and the fin whale. All of those are cetaceans, which I believe are covered by this bill; however, it would be good to have that clarified at this point because we are talking about marine animals. The other species that were listed as threatened at the time of this publication are the grey nurse shark, the great white shark, the blind cave eel and the blind gudgeon. Would the minister clarify once and for all whether those fish are covered by this bill? I think then I will rest assured that this legislation includes protection for threatened fish.

Hon DONNA FARAGHER: We are not aware of any fish becoming extinct. We will double-check whether there has been any change to that, but it is my understanding the answer is no. On the member's question about threatened ecological communities, firstly, the bill recognises ecologically sustainable fisheries management under the fisheries legislation, to which I have already referred, and provides principally that the matters surrounding the taking of fish will be under that fisheries legislation. I think that is clause 12. If a fish is specially protected under the relevant fisheries legislation, this bill provides also for fish to be declared as threatened or specially protected fauna. That is at subdivisions 1 and 2 of part 2 of the bill.

On the listing of threatened ecological communities—forgive me if I am incorrect—I think the member was asking what is the ambit of that listing, whether it is ocean or inclusive of all marine environments. Is that what the member was asking about?

Hon Lynn MacLaren: Yes.

Hon DONNA FARAGHER: I would refer the member to clause 27, which refers to the listing of threatened ecological communities. That does not specify or provide a restriction on how that may apply. For a subset to that clause, we turn to clause 54, "Listing of critical habitat", which refers to matters surrounding Western Australian waters; it also refers again to the Fish Resources Management Act. As I understand, it is effectively a subset to the substantive clause 27, which relates to the listing of threatened ecological communities. I hope that I have answered the member's question; if not, I will come back again.

Hon LYNN MacLAREN: The minister answered my question in the main; however, there is a bit of ambiguity about the relationship between this legislation and the Fish Resources Management Act. Does a fish have to be listed under that act and this legislation, because it seemed as though the minister just said that if a fish is under the ambit of the Fish Resources Management Act, it also has to be listed in this bill? My understanding of the two pieces of legislation is that the Fish Resources Management Act covers fish that are exploited. We would not exploit a threatened fish; rather, a threatened fish would be protected and it would be listed under this legislation. There is, of course, the added complication of bycatch, which was mentioned by Hon Rick Mazza as his core reason for his decision to oppose this legislation. I think it is very important at this point that we clarify exactly which legislation covers which fish.

Hon DONNA FARAGHER: Again, I go back to my original response to Hon Adele Farina's question about whether fish fall within the ambit of fauna. Again, fish are a subset of fauna and every single species of native animal in total is covered by this bill. Under the fisheries legislation, if a fish is determined to be protected from

fishing, it is also eligible to be declared under this bill as threatened or specially protected fauna. Fish are covered under the bill in total, as are all other native species that one can think of. The fisheries legislation has the capacity to list fish that are protected from fishing, and under this legislation those fish are eligible to be declared a threatened or specially protected fauna, so it is in addition to.

Hon ADELE FARINA: Does it have to be identified as a protected species under the Fish Resources Management Act before it can be considered for listing under the Biodiversity Conservation Bill?

Hon DONNA FARAGHER: As I understand it, they need to be protected from fishing first.

Hon ADELE FARINA: The minister has said a number of times that all fish fall under the ambit of this legislation. Clause 12 reads —

- (1) This Act, other than Part 9, does not apply to or in relation to any fish or pearl oyster that is the subject of —
 - (a) aquaculture, as defined in the *Fish Resources Management Act 1994* section 4(1); or
 - (b) commercial fishing, as defined in the *Fish Resources Management Act 1994* section 4(1); or
 - (c) recreational fishing, as defined in the *Fish Resources Management Act 1994* section 4(1); or
 - (d) hatchery activities, as defined in the *Pearling Act 1990* section 3(1); or
 - (e) pearling, as defined in the *Pearling Act 1990* section 3(1).

Is the minister saying that we are to ignore the express words in this provision of the legislation or is the minister saying that every fish not covered by the categories in proposed section 9 will be covered under the legislation? The words in the beginning of this clause are very clear —

This Act, other than Part 9, does not apply to ... any fish or pearl oyster ...

And it goes on. To me, this is diametrically opposite to what the minister is saying. We need clarification on this.

Hon DONNA FARAGHER: Clause 12 refers to the taking of fish and the legislation that is covered for that purpose. It does not relate to native species per se; rather, it relates to the taking of fish.

Hon ADELE FARINA: Is the minister putting on the record that none of the fish taken in those categories identified in proposed section 12 are native species?

Hon DONNA FARAGHER: No, I am not saying that. I am saying that fish are a native species. Clause 12 seeks to identify those acts that deal with matters surrounding the taking of fish. Matters relating to native species are not in this part of the bill.

Hon ADELE FARINA: In order for the minister's interpretation to be correct, I would expect this provision to read that this part does not apply in relation to any fish, but it does not say that; rather, it reads, "This Act, other than Part 9". That means that every other part—parts 1, 2, 3, 4, 5 and the rest of them—except part 9, does not apply to the categories of fish identified in proposed section 12. Therefore, for the minister to say that fish that are included in the categories in proposed section 12 can be listed under part 2 defies logic when we look at the express words of proposed section 12 of the bill, which states, "This Act, other than Part 9, does not apply" to any fish that are in those categories. The minister cannot have it both ways.

Hon DONNA FARAGHER: I appreciate, Madam Deputy Chair, that we are on clause 1. We seem to be spending quite a lot of time on clause 12 —

The DEPUTY CHAIR (Hon Liz Behjat): I guess it is either spend it now at clause 1 or spend the time when we get to clause 12.

Hon DONNA FARAGHER: I appreciate that, Madam Deputy Chair. I just hope that we are not going to re-engage in the same debate at clause 12.

The DEPUTY CHAIR: I am sure we will not. I am certain that whoever is in the chair at that time will be aware that we have had a very wide-ranging debate about clause 12.

Hon DONNA FARAGHER: That is excellent.

If we are dealing with fish taken in any one of the categories referred to in clause 12, it is managed under the Fish Resources Management Act or the Pearling Act. If a fish is not subject to that legislation—that is, the taking of that fish—it is fully covered under this bill. What needs to be borne in mind is that there are a lot of fish that are not covered under the Fish Resources Management Act. It is not an exhaustive list; not all fish are covered under that act. The ones that are not subject to these categories of aquaculture, commercial fishing, recreational fishing, hatchery activities or pearling—which is defined at clause 12—are fully covered under this bill. I do not resile from the fact that I said that fish are covered as a native species under this bill. That was the original

question put by the member and, again, this bill provides for fish to be declared as threatened or specially protected fauna.

Hon LYNN MacLAREN: To clarify: what is important to us as legislators is to work out which act will take precedence. For example, if the scientific community decided that a fish was threatened and listed it under the biodiversity conservation act and the minister decided that it should be listed under the biodiversity conservation legislation that we are debating right now, does it matter if it is listed in the recreational fishing act or the Fish Resources Management Act as well, or does it take precedence once it is listed as a threatened species under the biodiversity conservation act? My question might directly relate to the contemporary situation of shark fishing. Right now, species that are listed as threatened are being caught. If a person takes a fish that is a threatened species, will that person be fined under the biodiversity conservation act or the Fish Resources Management Act?

Hon DONNA FARAGHER: If I can put it this way: if a fish is being managed by Fisheries, it is obviously covered under the Fish Resources Management Act. With respect to whether a fish would be threatened or not, that advice would come from experts within the Department of Fisheries.

Hon Adele Farina interjected.

Hon DONNA FARAGHER: Can I just answer the question and then if Hon Adele Farina wants to ask a question, she can do so. But it is a little difficult if the member just yells out. Sorry, Madam Deputy Chair.

If the Department of Fisheries determined that a fish was threatened or should come under that listing, obviously that advice would be provided to the Department of Parks and Wildlife under this legislation, and they would be eligible for listing under this legislation.

Hon ADELE FARINA: Again, I point to the fact that I do not understand how a fish that comes within the categories covered by the Fish Resources Management Act can be listed under this bill because of the express words in clause 12 that state the act does not apply to them. From where is the minister taking advice that the express words in the bill, which is what the courts turn to first, do not mean what they actually say? Proposed section 12 clearly states that there is no intention for the bill, other than part 9, to apply to all those fish. Therefore, if a fish is being commercially fished, it cannot then be listed under part 2 of the Biodiversity Conservation Bill because it is being managed under the Fish Resources Management Act. Is that the case?

Hon Donna Faragher: Yes.

Hon ADELE FARINA: So the minister agrees?

Hon Donna Faragher: Because it is being managed under the Fish Resources Management Act. It does not preclude, though, if Fisheries under its legislation determine that a certain fish should be protected from fishing, in that instance it would also be eligible for listing under this bill. I again reiterate that not all fish fall under the categories the member is referring to.

The DEPUTY CHAIR (Hon Amber-Jade Sanderson): Order! Minister, if you are responding, I will ask you to get to your feet.

Hon DONNA FARAGHER: I appreciate that. I was invited to answer the question like that, but I acknowledge that.

I again indicate that this deals with fish that fall under certain categories—that is, aquaculture, commercial fishing, recreational fishing, hatchery activities or pearling. They essentially come under the Fish Resources Management Act under the purview of the Department of Fisheries. I again reiterate: if the Department of Fisheries determines that a certain fish should not be the subject of any one of those categories and declares it threatened, that fish is eligible for protection under this bill. I reiterate that not all fish are subject to the categories that are outlined at clause 12. There are a lot of fish out there.

Hon ADELE FARINA: When the minister considers a nomination for listing a fish that falls within a “fish” under part 2, does the minister take advice from the Department of Fisheries or does he take advice from the Threatened Species Scientific Committee?

Hon DONNA FARAGHER: The minister could actually take advice from anybody. I would expect that he would take advice from the Department of Fisheries. With respect to the threatened species committee—I will get the exact name in a moment—I expect the minister would seek advice from it as well. The minister could also seek advice from other scientific experts, if he or she so chose.

Hon ADELE FARINA: Is there an automatic notification process between the Department of Fisheries and the Department of Parks and Wildlife in the event that the Department of Fisheries lists a species of fish as protected? Is there a process for the Department of Fisheries to notify the Department of Parks and Wildlife?

Hon DONNA FARAGHER: Yes; it would be covered under the operational arrangements under this bill. That would be subject to the regulations, which obviously have not been developed yet.

Hon LYNN MacLAREN: If we had any remaining questions about fish, we would certainly have an opportunity to do so later on when the minister seeks to amend the bill and insert the exclusion provisions for pearl oysters. I thank the minister for addressing that quite fulsomely in debate on the first clause.

I just want to make some comments on the first clause to point to the amendments that I have circulated on the supplementary notice paper. There are three main amendments that I will seek to move. One will address the “God clause” and put some brakes on that provision by requiring the minister to seek the approval of both houses of Parliament. That is the amendment to insert new clause 42. The amendment to clause 37 will require the minister to obtain advice on listing decisions and to have due regard for that advice. I note that Hon Adele Farina also has amendments on the supplementary notice paper that deal with this issue in a different way. There are alternative proposals to the amendments that I have proposed, and I hope the government has an appetite to address these two very critical concerns that the community has. The third amendment I have on the supplementary notice paper is to clause 314. It is a matter of trying to connect the Biodiversity Conservation Bill with existing environmental laws. The Environmental Protection Act deals specifically with clearing critical habitat, and I believe it should be explicitly listed in the bill. I will suggest that we amend this bill to strengthen the connection between this legislation and the Environmental Protection Act.

Those are the three amendments that the Greens have on the supplementary notice paper that we hope to move in due course. However, I also intend to seek further explanation from the minister during debate on these clauses, because there is, in a few cases, a lack of detail about how decisions will be arrived at. One example of that is the inadequate definitions of “lawful authority” and “lawful activity”. I will ask about that matter when we get to those clauses and also for a little more detail about how listing decisions will be arrived at. Members will be aware that I have on the notice paper the Biodiversity Legislation (Priority Reforms) Bill, which provides for a much more explicit explanation of how listings are arrived at. In gaining our support, this bill would have to provide a bit more detail about exactly how those listings will be developed and arrived at. That is one of the issues that I will be looking at as we debate the bill clause by clause.

Critical habitat is also an important aspect of the bill, and I will seek to draw attention to the definition of “critical habitat”. In our view, this is another area that is ill defined and gives the minister far too much discretion. In seeking to get the minister to comment on these areas of the bill, we will be seeking to further define the law so that, in the future, if this bill passes, people are adequately informed about what it will cover, because we do not think that detail is presently obvious in the clauses that we are about to debate. I just wanted to flag those issues in the debate on the first clause.

In closing, one of the features of this government’s legislation has been that a lot of detail has been left for the regulations. This is another one of those bills for which we are setting in place a framework but a lot of the detail that will illustrate how the law will work long into the future is left to some future process. I would like to know when I conclude my remarks on the first clause when the regulations will be drafted, how long it will take before we have a complete biodiversity conservation regime and how that will occur. In drafting the regulations, will this government adequately include the very expert advice from the conservation sector that, as we have pointed out, has been lacking thus far? Will the regulations be provided to the public in a discussion paper beforehand? From time to time, the government chooses to release draft regulations for people to reflect on. It has experts in the business of, for example, fish resources, conservation protection and the protection of threatened species, who could reflect on those regulations and say, “That is not going to work” and provide advice to the government up-front before the regulations become part of this legislation. In a nutshell, my question is: how long will it take to develop the regulations that will underpin this legislation and can any detail be provided about the consultation that will be undertaken in the development of those regulations?

Hon DONNA FARAGHER: As I understand it, work has started on the drafting instructions for the regulations. I take the point that a large part of the detail will be in the regulations as opposed to the primary act. I do not disagree in a general sense. I think all of us as Legislative Councillors often take the view that more should be in the bill as opposed to the regulations. Having said that, notwithstanding the fact that we are seeking with this bill to replace an act that is some 65 years old, we also need to be alive to the fact that should this bill pass, it will provide the overarching policy framework. It is fairly exhaustive in that regard in any event; I think it has over 300 clauses. It also needs to be recognised that we must ensure that we keep up to date and respond to emerging issues and challenges, and one way to do that is through the regulations.

I understand that consultation will be as required. I cannot give the member the full scope of that level of consultation now. As I said at the beginning of my comments, drafting instructions are being prepared. I understand that making the regulations is likely to take over a year, because obviously some are fairly complex, and we need to make sure that we get it right. Work has started and consultation will be on an as-required basis.

If the member wants some further detail and to be kept informed about that, I will certainly take that back to the Minister for Environment. I think that is a fair question.

Hon JACQUI BOYDELL: I want to raise with the minister a couple of issues that have been raised with me. Those issues cover a number of clauses in the bill, but I want to raise those issues at the start so that I can seek the minister's guidance on the intent of the bill in relation to those issues; and, if I need further clarification, I will raise them again when we get to those clauses of the bill. I am concerned about how clauses 149, 150, 153, 171 and 173 will affect the commercial and recreational fishing industries, and the pearling industry. It is amazing that fish are taking up so much time this afternoon! I want to give the minister a heads-up that there is concern about the potential impact of those clauses. Those clauses relate in particular to taking fauna, taking threatened fauna, disturbing fauna, taking flora on crown land, and taking threatened flora on crown land. In my electorate there are a number of commercial and recreational fishing industries. Those industries have sought advice from me and raised their concerns about the potential impact of those clauses on their lawful activities. They are concerned that there is a risk that normal fishing activities will be criminalised, even if those activities are conducted according to world's best practice. They are concerned that if they were to inadvertently pick up in their bycatch threatened fauna or flora, they may be exposed to the extreme penalties listed in the bill. They may not reasonably know or be aware that they had inadvertently picked up that fauna or flora in their bycatch. They typically would carry out their activities through a management plan of world's best practice. However, that might not be a defence if they did inadvertently catch threatened flora or fauna. I therefore ask the minister to put on the record the intent of the bill, because there is uncertainty about whether commercial and recreational fishing industries will potentially be subject to green warfare when they are going about their legitimate activities and will be exposed to these extreme penalties. I seek clarification of that issue.

Hon DONNA FARAGHER: Can I say by way of background that the current Wildlife Conservation Act provides no defences for people who take other fauna while fishing. That is the current provision. This bill specifically provides defences that can be used by people who are fishing appropriately. That is a step up, I suppose, from the legislation as it stands at the moment. I am aware that concerns have been raised by the Western Australian Fishing Industry Council, and I think also Recfishwest, about this matter. A supplementary notice paper has been circulated that includes a couple of amendments with respect to, I suppose, substantially dealing with some of the concerns of the fishing industry that the member has outlined. In short, the current act—as at today, if this bill was not before us now—provides no defences. In this bill, we are providing a defence that can be used by people who are fishing appropriately. In addition to those clauses, I understand that the courts can consider other defences that are put forward in the hearing.

Clause put and passed.

Clause 2 put and passed.

Clause 3: Objects of Act —

The DEPUTY CHAIR: I draw the attention of members to supplementary notice paper 166, issue 2, which contains a proposed amendment to clause 3 from Hon Adele Farina.

Hon ADELE FARINA: Clause 3(1) states —

The objects of this Act are —

- (a) to conserve and protect biodiversity and biodiversity components in the State; and
- (b) to promote the ecologically sustainable use of biodiversity components in the State.

In the event that there is a conflict between those two objects, which will have precedence—use, or conservation, as suggested by the short title of the bill?

Hon DONNA FARAGHER: I indicate for the information of members that the objects of the bill directly reference the objectives listed in the international Convention on Biological Diversity. Therefore, the objects of the bill are entirely consistent with internationally accepted practice in biodiversity conservation and management. With respect to parts (a) and (b), there is no doubt that this bill is designed to protect the environment, recognising the fact that development and other activities can occur in a sustainable way. With respect to who will ultimately make that decision, depending on what assessment or proposal might be put forward, it will be the Minister for Environment. I indicate also that the Minister for Environment makes these decisions every day, whether under the Environmental Protection Act, or under this bill. I would argue, as a former Minister for Environment, that the minister often has to make difficult decisions that require a balance across both protecting the environment and recognising how and when activities can be done in a sustainable way. Ultimately, the Minister for Environment would make these decisions. That is no different from the situation under the current acts.

Hon LYNN MacLAREN: My advice is that the divergence from these objects is unlikely to invalidate any decisions under the legislation. The objects and principles of the legislation, for example, have to be considered by the minister in recovery plans under clause 97; otherwise, they are not mandatory considerations. My question is: can the minister confirm the role of these objects?

Hon DONNA FARAGHER: The role of the objects is to give guidance to the minister and the relevant department. Those objects are identified in clause 3(1)(a) and (b). Yes, they absolutely give guidance and all ministers will take note of that.

Hon LYNN MacLAREN: I want to make it explicit. These objects are not mandatory considerations, they are just sort of pointers. As the minister says, they provide guidance, but they are not mandatory considerations. In other words, a minister can make a decision that maybe does not fit within these objects.

Hon DONNA FARAGHER: I refer the member to clause 4, “Principles of ecologically sustainable development”, which refers also to decision-making processes. I agree that it does not say, “The minister will”, but it is a clear guide to the minister of the day, and the Department of Parks and Wildlife, in this instance, to work under the auspices of the objects and have regard to the principles at clause 4.

Hon LYNN MacLAREN: Will the minister please advise us how these objects are an improvement on the Wildlife Conservation Act?

Hon DONNA FARAGHER: The Wildlife Conservation Act currently does not have any objects, so it is a vast improvement.

Hon ADELE FARINA: The minister stated that the objects of the Biodiversity Conservation Bill are entirely consistent with the objects in the international Convention on Biological Diversity. I want to clarify that there are two objects in this bill and there are three in the convention, so one has been dropped. That aside, there are two objects in this legislation and lots of concerns have been raised by conservation groups that the objects are not comprehensive enough. I note that the Fish Resources Management Act has an objects section, which contains a second part that states, “Those objects will be achieved by these means in particular”, and it goes on to set out the means by which the objects will be achieved. The bill before us does not do that. I am curious to know from the minister why it was not felt necessary to provide some guidance in this bill, as has been done in the Fish Resources Management Act, for the achievement of the objects.

Hon DONNA FARAGHER: The objects are clear inasmuch as they can cover the full suite of considerations that the minister might consider concerning conserving and protecting biodiversity and biodiversity components in the state, and to promote the ecological use of biodiversity components in the state. If we were to go down to a great level of detail of what can or cannot be considered, that would leave open the potential for interpretation. If something is not stated in an exhaustive list, the minister may not be able to consider that matter. The simple fact is that by keeping it broad, it enables the minister to cover the full suite of considerations. Once we start detailing specific obligations and requirements, they could be open to interpretation, and if we say these are the things that need to be considered and something else needs to be considered but it is not in a full list, it could be argued that the minister did not need to consider that, so keeping it broad enables the minister to consider a whole range of matters.

Hon ADELE FARINA: I take the minister’s argument, but I find it interesting that we have the management of the terrestrial environment, by and large, under the Biodiversity Conservation Bill and the biodiversity conservation of fish in the marine environment under the Fish Resources Management Act. Under that act, we deemed it necessary to include two objects, which are self-explanatory, as are the objects in the bill before us, and to provide the means by which those objects would be achieved. That is one of the issues raised by the groups that have raised concerns about the bill. In relation to fish and fish conservation, it is okay to have a means to achieve objectives, but not for the Biodiversity Conservation Bill. I note also that the proposed Aquatic Resources Management Bill, which was mentioned by the minister, contains two objects, which are pretty self-explanatory, and it provides the means to achieve the objects. It is not an exhaustive or exclusive list, but it refers to means that should be particularly taken into consideration. It also contains a provision that says “regard must be had to the objects of the Act”. Why is it that in modernising legislation to bring it into the current day, this government feels that the Aquatic Resources Management Bill needs objects and a separate clause containing means of achieving the objects and a further clause saying “regard must be had to the objects of the Act”, but in response to the issue raised by Hon Lynn MacLaren, those provisions are not in the bill before us? Are we seriously suggesting that these two completely different regimes should provide for management of conservation biodiversity on land and in water, but when we are talking about the aquatic environment, objects are stated, as are the means to achieve them, and it is made clear to the minister that he must have regard to the objects, but that is not required in the Biodiversity Conservation Bill? Minister, when the government has two bills before the Parliament that both refer to modernising the system to make it relevant to the way government does business today, why do the two bills contain two completely different regimes, particularly given the

concerns raised by the conservation movement about the possible conflict between the two objects in the Biodiversity Conservation Bill and that the means by which they are to be achieved are not set out, nor is there any requirement for the minister and the department to have regard to them?

Hon DONNA FARAGHER: I suppose I would argue in a general sense that I do not think the environment movement would want to see the minister constrained in the considerations that he or she may have on a particular matter. They would want the minister of the day to have the capacity to look at the full suite of considerations when looking at an issue.

We are not dealing with fisheries legislation at the moment, but that obviously deals with matters surrounding the management of fishing and the use of aquatic resources. I would argue—perhaps people may disagree with me—that the Biodiversity Conservation Bill 2015 is far more far-reaching in its ambit than the fisheries legislation. It deals with a whole host of scenarios and matters surrounding private land, crown land, marine environment and terrestrial environment. This legislation covers a whole suite of activities. Its ambit is larger than the ambit of the fisheries legislation, to which the member referred. The objects are clear. The objects state —

... regard must be had to the principles of ecologically sustainable development set out in section 4.

It is clear that regard must be had to these matters. As I have already indicated, I understand that the current act does not even include objects. We are elevating them through this legislation.

Hon LYNN MacLAREN: That is very enlightening. History will show that this government chose to put before us a Biodiversity Conservation Bill that was already in conflict with itself. One would hope that the only object of an act dealing with biodiversity conservation would simply be that in (1)(a) —

to conserve and protect biodiversity and biodiversity components in the State;

But the government has gone on to look at the ecologically sustainable use of biodiversity components, which I argue should be in different legislation. A provision in this bill is about nature-based tourism. That could be more in line with the fisheries management act, for example, which will become the Aquatic Resources Management Act. We look at how natural resources can be used or commercialised or managed in some way separate from how we can conserve and protect species. This is the beast we have before us. We have to work with what is before us, but at this point of the debate, it is important to acknowledge that the bill's objects are broader than a pure conservation act would be because they include that use of our environment. Ecologically sustainable use is not the same as conservation and protection. I believe that that is the view of the conservation sector.

I make that comment, but I also want the minister to reflect on the other advice we received; namely, that the broader and simpler these objects are, the more important they are. An amendment on the supplementary notice paper that I hope we will get a chance to debate lists all the other considerations that one might include under the objects of the bill. I want to hear from the minister the reasons these two broad objects are included and not an explicit list of the very many considerations that might be listed under the bill's objects. Is there a reason these inherently conflicting broad terms of (a) and (b) are in the bill instead of a long list, such as that flagged on the supplementary notice paper?

Hon DONNA FARAGHER: I respond to Hon Lynn MacLaren's comments. The member suggested that the government was taking it a step further with paragraph (b) in the objects of the act. The objects directly reference the objectives in the international Convention on Biological Diversity. They are entirely consistent with internationally accepted practice in biodiversity conservation and management. With respect to why we have kept it short and simple rather than having a full list of considerations, the simple fact is that nothing is precluded from consideration under these objects. If we start putting in certain requirements, potentially we might miss something, which then arguably the minister could not consider. I accept the purest argument by Hon Lynn MacLaren that the Minister for Environment should look at only paragraph (a), which states —

to conserve and protect biodiversity and biodiversity components in the State;

That is certainly the key remit of the Minister for Environment. Having said that, the Minister for Environment also has to make decisions on projects and activities across the state that may impact on the environment, and those are decisions made under the Environmental Protection Act. The Minister for Environment makes those decisions every day, and it is fair to say—as I learned very early on when Minister for Environment—there are generally two sides to an argument. Some people will say that the Minister for Environment has gone too far in a decision, and others will say the minister has not gone far enough. Very rarely do they coincide and say, “You've had a good day, minister.” The simple fact is that the Minister for Environment's responsibility is absolutely to conserve and protect biodiversity, and that includes management of the environment. It must also be recognised that the Minister for Environment has to make decisions, particularly under the

Environmental Protection Act, but also under other legislation, that must take into account the decision-making role that the minister has regarding whether a project can proceed, and, if so, under what conditions. That is why paragraph (b) is important.

Hon LYNN MacLAREN: Thank you for that explanation, minister. I was merely making the point that I do not see why they are in the same bill. We could have an ecologically sustainable development act that looks at development, nature-based tourism and how we use the environment in the same way that the Fish Resources Management Act looks at how we use the marine environment. That is my point, because having those two objects in this bill creates that conflict in the one bill. Why not have a bill that just looks at the protection and conservation of our environment? Sure, the minister might have to consider other competing interests in making decisions—we understand that—but it weakens this act in having it as an object.

Hon ADELE FARINA: On that note, it might be a good time to move my amendment, because the reason for this amendment is that the opposition believes the objects as they are currently set out in the bill are not comprehensive enough. They do not adequately have regard for biodiversity conservation, which, after all, is the short title of the bill. Therefore, I move —

Page 2, lines 12 to 18 — To delete the lines and insert —

- (a) it is an obligation on any person on whom a function is imposed, or a power conferred under this Act, to perform the function or exercise the power in such a manner as to advance and further the primary object of conserving Western Australia's biodiversity;
- (b) in complying with the duty imposed by subsection (1), a body or office holder must have regard to the Act's primary object, and any strategy designated under Part 1A;
- (c) the primary object of this Act is to be achieved by, amongst other things:
 - (i) preventing human-induced extinctions of species and ecological communities;
 - (ii) ensuring the survival and maintenance of biodiversity at community, species and genetic levels, and its evolutionary potential in the wild;
 - (iii) enhancing and restoring biodiversity through protection and management of habitats and ecosystems, and ensuring ecological integrity and processes;
 - (iv) identification and management of biodiversity that is significant at local, regional and national levels;
 - (v) ensuring sustainable use of biological resources, according to the principles of ecologically sustainable development set out in Part 1A;
 - (vi) ensuring the fair and equitable sharing amongst stakeholders of benefits arising from bioprospecting involving indigenous biological resources;
 - (vii) mitigating key threatening processes and impacts of environmental pests;
 - (viii) ensuring that citizens have access to reliable and relevant information, in appropriate forms to facilitate understanding, and opportunities to participate in planning and policy development;
 - (ix) promoting co-operative management with all levels of government, community-based organisations, Aboriginal people and landholders;
 - (x) furthering biodiversity knowledge and promoting education;
 - (xi) periodic evaluation and reporting on the state and condition of WA's biodiversity as designated under Part 1A; and
 - (xii) implementation of the strategy set out in Part 1A.

The opposition argues that it is these objects that one would expect to find in biodiversity conservation legislation. They are very clearly focused on conserving biodiversity as the primary and sole object of the act. They certainly pick up on community concerns about human-induced extinction. They also pick up on the third object of the international convention that is not picked up in the objects of this proposed act—that is, ensuring the fair and equitable sharing of bio-prospecting. However, the international convention states —

... the fair and equitable sharing of the benefits arising out of the utilization of genetic resources,

When the minister continues to say that the objects of the act in this bill are directly picked up from the international convention, she is not quite right. One is missing, but it is picked up in my amendment, which provides a far more comprehensive list of biodiversity conservation objectives. I think that it picks up on all the

issues that all groups in the community have raised concerns about. It presents us with a stronger bill that is solely focused on conserving biodiversity, which is what the short title of the bill is about. I agree with Hon Lynn MacLaren that it is true that on a daily basis ministers have to make decisions in which they balance competing interests. That is true; that is part and parcel of the job. However, that does not mean that in every piece of legislation we set out the competing interests that a minister needs to consider. That would be complete and utter nonsense. The Road Traffic Act deals just with road traffic. It does not deal with all the things it could deal with, such as road maintenance, road repair or alternative forms of transport; it does not do that. This bill is about biosecurity conservation, and that should be the focus of the bill. It should not deal with a whole lot of other issues. The bill currently before us is very weak because it will do exactly that. By removing the objective clause that is currently in the bill and replacing it with the objectives outlined in my amendment, we will have a much stronger bill and, I think, a much happier community.

Hon DONNA FARAGHER: I indicate that I have provided some information to the house on the objects and why the government believes that the objects as they stand are clear and all-encompassing and that they enable the minister of the day to consider the full suite of matters. All the considerations the honourable member has put in the amendment now before us can also be considered under the all-encompassing objects of the act as they stand. For that reason, the government will not support the amendment.

Hon LYNN MacLAREN: I support this amendment. The minister has made it clear that the objects of the act only guide the minister, so the bill will not be weakened by having a longer list of explicit guidelines. It does not address our core criticism, which is that paragraph (b) is in conflict with paragraph (a); it goes into more detail and lists the direction in which the public would expect the government to go in biodiversity conservation. I particularly appreciate the scope to include indigenous biological resources and to ensure that citizens have access to reliable and relevant information. It is these kinds of objects that we want the minister to aim to achieve. It could be a statement of direction that he takes to achieve his work and to go about his work. It is a great list of overarching and peculiar elements of decision-making that we would hope a minister would consider when trying to conserve biodiversity. I note that the minister said that a shorter list is better, but in that regard, because I think the amendment is more explicit about what we expect to see in biodiversity conservation, I support the proposed amendment.

Hon SUE ELLERY: I rise in support of the amendment. The minister may have referred to this earlier, but I cannot recall, and if I was out of the chamber, I apologise. I ask the minister whether she can confirm what is the situation in legislation in other Australian jurisdictions on the nature of a broad statement of objectives or a more detailed statement of objectives?

Hon DONNA FARAGHER: I understand it varies. I have advice on the newest other biodiversity bill currently being contemplated in New South Wales. I understand it includes a purpose statement, which again is fairly short and clear. I will read from the draft bill that has been publicly released in New South Wales, which states —

The purpose of this Act is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development ... and in particular:

- (a) to conserve biodiversity and ecological integrity at bioregional and State scales, and
- (b) to facilitate ecological sustainable development,

Paragraph (c) includes traditional knowledge.

Hon SUE ELLERY: I appreciate that information. That is not legislation; that is a proposal.

Hon Donna Faragher: I prefaced my comments by saying that it varies, I understand. That is an example.

Hon SUE ELLERY: The advice I got is that all other Australian jurisdictions except South Australia have a multifaceted and broader set of objectives, albeit perhaps the New South Wales government wants to take a different path, but it has yet to do so. It has a proposal, but it is not in legislation. It seems to me that the purpose of objectives is less a statement about the scope, if you like, of the legislation and more about being a reference point when components of the legislation inevitably have to be interpreted because something was not anticipated. When that inevitably happens, the courts go to the second reading speech and the bureaucrats go to the objects of the legislation for guidance. It is important that the set of objectives canvass all the elements to which we might want to give guidance when a bureaucrat looks to interpret parts of the legislation. I understand the government taking the point of view that it wants a less prescriptive list of things that it is mandated to do, but that is not in the objectives, unless they include specific words to mandate them. That is not what these words will do. The objectives, as the minister described them, are a guide or a go-to point when we are trying to interpret something. I do not know how canvassing as much as we possibly can in a set of words that will be only a guide in any event will cause offence or curtail the government's capacity in the future. I understand the

argument that a prescriptive list of mandated things could curtail a government, but we are talking about the traditional use of objectives, which is to provide an overarching framework and a point of reference for people. Long after the bill has passed into legislation and when people have to interpret, for example, clause 23(6)(c) and contemplate exactly what it means in the circumstances of the day, they will go to the set of objectives for guidance. I do not see how the set of objectives in the amendment can cause the government any offence. It is not about mandating a prescriptive list; rather, it is about providing an overarching set of guidelines.

Hon DONNA FARAGHER: I suppose we will have to agree to disagree. I reiterate that the objects directly reference the objectives in the international convention. The amendment before us has an element of mandatory requirements. It refers to an obligation and to complying with the duty imposed. The government believes that the current wording is clear and all encompassing. It does not preclude these matters being considered and it does not preclude other matters that have not been included from being considered. As I said before—Hon Sue Ellery may have been out on urgent parliamentary business—the government believes that the more detail there is in the objects, the more they are open to interpretation. If we miss one part, will the minister be required to consider it? The amendment refers to obligations, compliance and duties being imposed. Certainly the wording of the amendment that has been put forward has a mandatory connotation. Again, I indicate that the objectives are in line with the international convention. For that reason, again, the government will not support the amendment.

Hon SUE ELLERY: If I may, the minister chooses to use the words when they suit her. The government is quite happy to be mandated in clause 3(2), in which “regard must be had to the principles of ecologically sustainable development set out in section 4”. The government is quite happy to be mandated on some things, but it is not happy to be mandated by what is in the objectives.

Hon Donna Faragher: You were saying that what was being proposed was not mandatory, but, in fact, it could be read that it is. I was referring to what you were saying. I wasn’t trying to be cute about it; it was just in response to your suggestion.

Hon SUE ELLERY: Sure; I appreciate that. The point still stands. The government is making a choice to be bound by certain things. It needs to be recognised that the government is prepared to have a set of objects in clause 3(1)(a) and (b), which, effectively, one could drive a truck through, as opposed to what is in the amendment before the chamber, which, I think, would be of more assistance 15 years down the track to some bureaucrat who is trying to interpret what we meant in a particular clause.

Division

Amendment put and a division taken, the Deputy Chair (Hon Amber-Jade Sanderson) casting her vote with the ayes, with the following result —

Ayes (12)

Hon Robin Chapple	Hon Sue Ellery	Hon Martin Pritchard	Hon Ken Travers
Hon Alanna Clohesy	Hon Adele Farina	Hon Amber-Jade Sanderson	Hon Darren West
Hon Kate Doust	Hon Lynn MacLaren	Hon Sally Talbot	Hon Samantha Rowe (<i>Teller</i>)

Noes (21)

Hon Martin Aldridge	Hon Brian Ellis	Hon Col Holt	Hon Helen Morton
Hon Ken Baston	Hon Donna Faragher	Hon Peter Katsambanis	Hon Simon O’Brien
Hon Liz Behjat	Hon Nick Goiran	Hon Mark Lewis	Hon Phil Edman (<i>Teller</i>)
Hon Paul Brown	Hon Dave Grills	Hon Rick Mazza	
Hon Jim Chown	Hon Nigel Hallett	Hon Robyn McSweeney	
Hon Peter Collier	Hon Alyssa Hayden	Hon Michael Mischin	

Pair

Hon Stephen Dawson

Hon Jacqui Boydell

Amendment thus negatived.

Clause put and passed.

Clause 4: Principles of ecologically sustainable development —

Hon LYNN MacLAREN: I want to commend the government for including the principles of ecologically sustainable development in clause 4 of the bill.

Hon Donna Faragher: Thank you. I will take that.

Clause put and passed.

Clause 5: Terms used —

Hon LYNN MacLAREN: Things are going so fast for us. If Madam Deputy Chair has not put clause 5 —

The DEPUTY CHAIR: Not yet.

Hon LYNN MacLAREN: I had a question about the definition of “critical habitat”. I am even questioning whether I have a question! Can the minister address what “critical habitat” means?

Hon DONNA FARAGHER: I refer the member to clauses 54 and 55, particularly clause 55, which states —

Habitat is eligible for listing as critical habitat if —

- (a) it is critical to the survival of a threatened species or a threatened ecological community; and

Hon LYNN MacLAREN: What is the process for identifying critical habitat?

Hon DONNA FARAGHER: I refer the member to clause 56, “Consultation”. I quote from subclause (1) —

Before the listing of habitat as critical habitat or the amendment or repeal of such a listing, the CEO must take reasonable steps to give written notice of the proposed listing, amendment or repeal to the owner or occupier of the land on which the habitat is located.

Subclause (2) identifies what the notice must contain.

Hon LYNN MacLAREN: Is there a requirement for the minister to seek scientific advice about whether a habitat is critical?

Hon DONNA FARAGHER: I refer the member to clause 260, “Guidelines about listing”, which states —

- (1) The Minister may issue guidelines establishing criteria for, and setting out other matters relevant to ...

There is a list. It also provides information about the making of nominations, the process for dealing with those nominations and so forth.

Hon ADELE FARINA: Now that the issue has been raised, I find the definition interesting. It states —

critical habitat means habitat that is listed as critical habitat under section 54(1);

Proposed section 54(1) states —

The Minister may, by order, list habitat as critical habitat.

I am no wiser as to what “critical habitat” means. Why is the term listed in the definition section of the bill but there is no definition of what a critical habitat is? In fact, the minister is right: clause 55(a) provides a little more understanding of what that might be, but again it is hardly a fulsome understanding of what a critical habitat is. It would make no difference if lines 26 and 27 were deleted because they provide no definition at all.

Hon DONNA FARAGHER: Clause 54(1) states —

The Minister may, by order, list habitat as critical habitat.

Then we go to clause 55, which relates to “Criteria for listing as critical habitat”. Clause 260 refers to “Guidelines about listing”. A number of clauses relate to the determination of critical habitat.

Hon SUE ELLERY: If I may, the first reference is to a definition. “Definition” has a particular meaning in our normal use of the English language. To understand the definition, let us go to where the minister told us to go. The clause before us now, clause 5, states in part —

critical habitat means habitat that is listed as critical habitat under section 54(1);

Clause 54(1) does not list habitat that meets any definition of “critical habitat”. It is not a definition; it gives a power to the minister. Clause 54(1) states —

The Minister may, by order, list habitat as critical habitat.

When relying on the definition, I am not taken to clause 55 at all. However, if I were, what would I find? I would find a list of criteria by which habitat is eligible to be considered by the minister; not that it “will” be deemed critical habitat. Here is the eligibility criteria by which the minister “may” make an order under clause 54(1). Clause 56 goes on to the consultation process that the minister has to adopt; that is, he must take reasonable steps. There is no way, by any ordinary reading or understanding of the English language, that that definition in the definitions clause at line 26 on page 7 is actually a definition of anything. It is not a definition of anything.

Talk about sloppy drafting, and I have seen a whole lot of sloppy drafting both in government and in opposition, but that is appalling. That defines nothing.

Hon DONNA FARAGHER: Clause 54(1) is referred to at clause 5 under “critical habitat”. That refers to the listing. The listing of that habitat is referred to at clause 54(1) and the criteria for the listing of a particular habitat in that clause relate to clause 55. With respect to clause 5, it is listed as “critical habitat” under clause 54(1). That is correct; it refers to the listing of critical habitat, and that listing is referred to at clause 54. If the member wants to find what is listed, that would be determined under clause 54(1). The criteria for listing critical habitat is at clause 55 and that is where it outlines what habitat would be eligible for listing as critical habitat.

Hon SUE ELLERY: The minister’s description of what those clauses do is correct. The minister is correct in describing a process by which critical habitat may be determined. However, that is not a definition of “critical habitat”. The minister has described the process by which the Minister for Environment may or may not find something to be critical habitat. That is not a definition. I do not want to belabour the point. However, the normal use of the definitions clause is to assist people who are trying to interpret the legislation to understand what the words in the legislation mean. What the minister has drawn to our attention is the process by which the Minister for Environment determines what is critical habitat and what is not critical habitat. The minister has not led us to a definition in the normal use of that word.

Committee interrupted, pursuant to standing orders.

[Continued on page 4961.]