MINING AMENDMENT BILL 2021

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 34: Part 4AA inserted —

Debate was interrupted after the clause had been partly considered.

Mr W.J. JOHNSTON: The Department of Mines, Industry Regulation and Safety knows the geolocation of an application. It knows whether it is disturbed ground, whether the land has already been cleared or whether it is farmland. The eligible mining activity process can proceed quickly without the need to review that. That is why we are heading down this pathway. Before the debate was interrupted I gave the example of drilling being carried out by a drill rig on the back of a four-wheel-drive rather than by a full drill rig and discussed the land clearing arrangements. The bill proposed by Hon Bill Marmion sought to include native vegetation in this legislation. We have chosen not to do that. We are leaving native vegetation under the Department of Water and Environmental Regulation. For a long time, approvals for native vegetation clearance were given by the department. Under the Mining Act, decisions about native vegetation clearing are appealable, but other decisions are not. That is the idea behind the EMA. If there is a standard application for the sorts of things that we understand—that is, we know the geolocation so we know where native vegetation clearing is needed—then we can provide an automated response. That will speed up the process, but it will release the resources currently occupied by low-impact approvals. Those resources will then become available to us to apply to high-value and high-impact activity. Although it is true that that will not help the Chamber of Minerals and Energy directly, it will help it indirectly because it will release resources to do the work that will benefit the chamber's members.

Mr R.S. LOVE: Clause 34 is a very large clause that includes many proposed sections. Moving to proposed section 103AC, "Excluded area notices", the explanatory memorandum states —

> The proposed section identifies that the Minister may gazette areas in which an eligible mining activity notice cannot be given. These notices can be cancelled, and a publicly available register of these areas must be made.

I want to ask about the matter of gazetting those areas. If areas are already gazetted—for example, environmentally sensitive areas might already be gazetted as such—will the minister have to re-gazette each of those areas or will he simply include the class of land in some way so that he does not have to double up? What procedure will be involved?

Mr W.J. JOHNSTON: Again, that is a very reasonable and sensible question. I am advised that we will not have to separately notify the areas already excluded. We could simply say "all national parks", for example, and that would have an impact. One good thing is that the increasing use of GPS and other geolocation services makes the process easier to perform and automate. That is one good thing. Areas that are currently excluded will continue to be excluded, and the gazetting can be done by class.

Mr R.S. LOVE: I am happy with that response. I move to proposed division 3, "Programmes of work", and proposed section 103AH(6), which reads —

> Unless a Government agreement provides otherwise, this section does not apply to a mining lease granted or held under the agreement in accordance with proposals approved, taken to be approved or determined under the agreement.

I assume that those will generally be long-established mining operations that have complex arrangements in place. Would there be benefit for certain state agreements to be updated in some form? Will they eventually have similar provisions put into them?

Mr W.J. JOHNSTON: As the member knows, state agreements are always a vexed issue. We will not unilaterally amend a state agreement. All this will do is to carry over an existing exclusion into the new provision. We are moving from the old structure of the act to the new structure of the act, so we are protecting existing rights. It is not a new arrangement.

Mr R.S. LOVE: I guess the basis of the question goes back to the point the minister was making about possibly being able to free up resources. Would there be a mutual benefit for some of these measures to be included in state agreements as a way to regulate?

Mr W.J. JOHNSTON: No, because the low-impact activities are probably not relevant. We are just preserving existing rights. Whatever rights a proponent currently has will be maintained. There are already arrangements. Whatever they are, they will stay.

Mr R.S. LOVE: I move to proposed section 103AJ, "Lodgment of programmes of work". This goes back to the discussion by the Chamber of Minerals and Energy in which it was seeking some clarity around some measures.

If the minister does not mind, I will read what the CME said about proposed section 103AI(5), and the minister can then provide clarity. It states —

> The ability to amend PoW applications prior to assessment/approval is necessary to enable proponents the flexibility to update the application to incorporate new information received from infield surveys, or to reflect last minute changes to work plans. It may also be necessary to address the assessment recommendations and advice of DMIRS staff. Therefore, limiting this ability may unnecessarily increase system administration and impost on proponents through requiring withdrawal and resubmission.
>
> Additionally, a key current concern of industry is that PoWs are not able to be edited (at all) once submitted due to limitations with the IT system. This current situation requires significant re-work due to the need to withdraw and re-submit PoWs which, although not currently required by the Act, may become embedded under the proposed Act amendments. This withdrawal and resubmission process also results in resetting the clock and extends actual assessment timeframes for proponents.

It also states —

> The proposed amendment limits variations to PoW applications prior to assessment/approval by the Minister.

What clarity can the minister provide around the CME's concerns?

Mr W.J. JOHNSTON: One of the interesting things about approvals processes is that sometimes it is the proponent who causes the delays. What happens is that the proponent thinks that they want to do something and they get on with the work, and then they decide they want to do something else. This is basically saying that if a proponent wants to amend a proposal, it has to be an amendment and not a new proposal. It is giving some flexibility for a proponent to amend a proposal after they have submitted it, but not so that it becomes a new proposal. I am advised that there are some limitations in the IT system, but this policy is not designed to fit in with the IT system. Even if the IT system were more flexible, we would still want to do this. If a proponent is substantially just amending it, it will proceed as part of the same application, but if the amendment is such that it is actually a new proposal, they will need to make a fresh submission. That is not a question for us; that is a question for the proponent. They will need to work out in advance what they want to do and then ask us for approval to do it. We should not have a situation in which a proponent says, "I want to do X", and then halfway through the approvals process they say, "Actually, I want to do Y." Does the member see what I am getting at?

Mr R.S. Love: Yes.

Mr W.J. JOHNSTON: I have no doubt that applicants would like more flexibility. As I said, there are currently some technical issues that limit the amount of flexibility the department can provide. This is not intended to reflect that technical issue; it is about the policy intent. The policy intent is that if a proponent wants to amend their application, that is okay, but if they want to do something substantially different, they should start with a fresh application.

Mr R.S. LOVE: I move now to proposed section 103AK(1), which states —

> The Minister must approve, or refuse to approve, an activity proposed in a programme of work or a substitute programme of work (if any).

There is subsequent wording in proposed subsection (2) over the page. On proposed subsection (1), the CME provided in its advice, which I think it gave to the department as well, that —

> The current drafting implies the Minister does not approve a PoW but instead approves "an activity" that is contained with the PoW application (e.g. build a camp, drill a bore, etc.) It is therefore unclear the implications for PoW applications which contain more than one activity and whether the Minister can approve one activity and refuse to approve another contained within the same PoW application.
>
> **CME recommends the section be reworded to clarify the PoW application as a whole is approved or refused or otherwise clarify the drafting (including of all other related clauses) if an alternative effect is intended.**

Was this considered; and, if so, what was the conclusion?

Mr W.J. JOHNSTON: Again, that is a perfectly reasonable question to ask. The regulator decides—it is done in my name; it is the minister's decision, but it is done by the agency—whether to approve the activities. Let us say the application has 10 activities on it. We say that nine of those are okay but the tenth one is not. The Chamber of Minerals and Energy is saying that we should reject all nine, even though we have an argument with only one. This provision allows us to approve the nine activities that we think are okay and reject the one that we do not think is okay. Approval is given in the name of the minister and returned to the proponent. Then the proponent can decide what to do. We do not make them implement the proposal. We just say, "These nine things are okay; that one isn't." If the proponent decides that the proposal does not work for them, that is up to them. But from our point of view, we will approve what we think is okay—otherwise, we would have to reject the entire application. The CME's

position is that we should either accept or reject what a proponent proposes, but that would increase the number of things that get rejected. If we are happy with nine things and unhappy with only one, the proponent might look at it and say, "Actually, I think this is enough and I'll get on with my project." Otherwise, the whole thing would go back to square one.

I understand why the CME is asking for what it is asking for, but I do not think it has thought through what it has asked for. Sometimes people ask for the "nice to dos" rather than the "must dos". If we did what the CME asked, more proposals would be rejected, and I do not think that would be a good policy outcome.

Mr R.S. LOVE: Would I be right in presuming that if the nine activities were accepted and work started, the tenth topic about which the minister did not agree could be discussed further with the department and the proponent could resubmit an amended proposal just on that tenth point?

Mr W.J. JOHNSTON: Yes, that is absolutely correct. The proponent might go away and think, "I don't need that but maybe I could do this other thing", and then come forward with that. The proponent is in charge. We are not making them do things. We are just saying that if they want to proceed, these are the conditions.

Mr R.S. LOVE: I move to proposed section 103AK(2), under which the minister is to notify the holder of the mining tenement of approval or refusal of a program of work application. We should bear in mind that these are the older comments by the CME on the first consultation, but to my knowledge some of these things are still relevant. I ask the minister to tell me if I am wrong. It goes on to say —

> The current drafting only requires the Minister to notify the holder of the mining tenement of the outcome of a PoW application and does not contemplate notification to the authorised person of the holder.
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> There exist scenarios in which an authorised person of the holder of a mining tenement (not the holder of the mining tenement themselves) will be the person responsible for lodgement of a PoW application and implementation of the approval. In this instance, notification by the Minister of the approval/refusal of a PoW application must be given to the authorised person.

The CME goes on to say that it —

> … recommends the section be reworded to require notification by the Minister of the approval/refusal of a PoW application be provided to the holder of a mining tenement or a person authorised by the holder of a mining tenement.

I am wondering again whether that was considered and what was the conclusion.

Mr W.J. JOHNSTON: Again, that is a very interesting question. A range of issues need to be considered here. Let me make it clear that in the end, the conditions apply to the holder of the tenement. There are often cases when a tenement holder authorises somebody else to execute projects. That may be a person with no specific knowledge who hires a mining contractor or one of these agencies that manage titles to do the work. Lots of people lodge applications. In the end, the obligation always remains with the tenement holder. Who gets sued if things go wrong? It is the tenement holder. That is why the notification of the obligations returns to the person who has the legal obligation—that is, the tenement holder, not the authorised person. The tenement holder can have their own systems to make sure that the authorised person is aware of the situation. In the end, the legal obligation is on the tenement holder. They have to comply with the obligations. I also note that we have to give reasons. It is not capricious. That is a strong benefit for the applicant. Not all legislation requires reasons.

Mr R.S. LOVE: I move to proposed division 4, "Mining development and closure proposals", and proposed section 103AL. Again, this is an issue that the CME raised at some point in the consultations on the previous drafts. The discussion point relating to proposed section 103AL(2) states —

> Low-impact activity must not be done until notice of the activity is given, or the activity is approved under an Approvals Statement.

The CME is asking whether it is intended that once an exploration licence converts to a mining lease, any program of works that existed on the exploration licence will be voided and any remaining activities that were approved via the program of works must be reapplied for under a MDCP and approved in an approvals statement. Is that the intent of that passage?

Mr W.J. JOHNSTON: I was making sure I got the answer right, so I will make sure I get the question right as well. This applies to an existing exploration lease; there is already approved activity on the lease and the mining companies apply to convert that to a mining lease. Do they need fresh approvals for the activities that have already been approved under the exploration licence? The advice I have is that administrative approval would be given to the activities that had previously been approved under the exploration licence or the mining lease. The advice I have is that they would not need to make a fresh application. That is the answer that I have been provided and which I have given to the member. I might just check with the agency to ensure that that is entirely correct. If I need to

make any corrections to the record, I will come back and do that, but the advice I have at this stage is that it would be approved under administrative arrangements.

Mr R.S. LOVE: Staying on that same point, I move on to proposed section 103AL(4), which states —

> It is a condition of every mining lease that, if an activity on land the subject of the lease is proposed in a mining development and closure proposal and approved under section 103AO(1), the lessee must not do the activity on the land otherwise than in accordance with the approvals statement for the lease.

The emphasis is on the lease. The Chamber of Minerals and Energy's concern on this matter is stated in its submission, which reads —

> Current drafting can be read to indicate an Approvals Statement is issued for individual licences. This is inconsistent with the proposal that a single Approvals Statement may cover multiple tenements, as outlined in the Consultation Summary and DMIRS public briefings. Clarification is requested.

This is, again, around those final two words—"the lease".

Mr W.J. JOHNSTON: I understand the question and, once again, it is perfectly reasonable to ask on behalf of the CME. The point here is that the approvals statement is for the lease. The approvals statement might cover many different tenements. It is the approvals statement that is relevant to that lease; it is not the approvals statement issued exclusively for that lease. We are moving to the idea of a project approval, rather than individual approvals. The project approval might include five mining leases, three miscellaneous licences and something else, and the approvals statement would cover all the activities on those leases. It is not that the approvals statement will be for only that lease; it will be the approvals statement for that lease. The approvals statement will say that the project that is being conducted on certain parcels of land is approved subject to certain conditions. That means that the conditions apply to the project, and that is why it is written in that way. I understand why the question has been asked, but I can assure the member that that is not what it means.

Mr R.S. LOVE: Proposed section 103AM deals with miscellaneous licences in a similar fashion. Would the same answer apply?

Mr W.J. JOHNSTON: Yes, that is correct.

Mr R.S. LOVE: I move on to proposed section 103AN, "Lodgment of mining development and closure proposal". The point to be raised here is found under proposed section 103AN(5), which states —

> The activity proposed in a substitute mining development and closure proposal must not be substantially different to the activity proposed in the mining development and closure proposal it is intended to replace.

The issue is outlined by the CME in its submission. It is quite lengthy, and states —

> The proposed amendment limits variations to MDCPs prior to approval by the Minister. It is unclear the key issue this new provision is intended to address.
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> The ability to amend MDCP applications prior to assessment/approval is necessary to enable proponents the flexibility to update the application to incorporate new information received from infield surveys, or to reflect last minute changes to work plans. Without this flexibility proponents will be required to withdraw and resubmit MDCPs, resetting the clock and extending approval timeframes.
>
> It may also be necessary to address the assessment recommendations and advice of DMIRS staff. Therefore, limiting this ability may unnecessarily increase system administration and impost on proponents through requiring withdrawal and resubmission (as is currently experienced). This current situation requires re-work due to the need to withdraw and re-submit a Mining Proposal which, although not currently required by the Act, may become required for MDCPs due to the proposed Act amendments. This withdrawal and resubmission process also results in resetting the clock and extends actual assessment timeframes for proponents.
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> Proponents need some flexibility to incorporate new information and make adjustments (including adjustments to adopt DMIRS advice as part of the assessment process).

The CME requested further clarification on that.

Mr W.J. JOHNSTON: I thank the member for the question, and understand why it has been asked. Interestingly, the view of the department is that it does not currently have the power to do what the CME is claiming that it does. This is one of the challenges we have following the Forrest & Forrest case, because we need strict compliance. The implications of the Forrest & Forrest finding, although it has never been tested, is that it applies to every aspect of the application process.

We are trying to provide the flexibility that the CME is asking for. Again, however, we do not want it to completely change everything, particularly if it is asking us not to stop the clock. Think about this. I hate to say this, but I have

seen it happen. A proponent comes along and says that it is trying to get a rapid approval because it does not want to burn capital; it wants to get it done. The company proposes two open pit holes, and says that it wants to get it done. It selects a site for the waste, and then comes back three months later and says that it has done some more drilling and the place it was going to put the waste is where the high-grade ore is, so the waste dump will have to be moved over to the other side, and there will now be four holes. Then the proponent wants the department to respond quickly. Does the member understand what I mean? We are providing the flexibility the chamber is asking for, but it is saying that it is not as flexible as it is now. The point is that we are unsure whether we have the authority to exercise the flexibility we are currently exercising. We are giving ourselves specific authority, but we are asking proponents to work out what they want before asking us. If, during the development of the proposal, it needs to be adjusted, we are happy with that, but they should not come back to us with a new proposal.

In 2013, I became shadow Minister for Mines and Petroleum, so this is my tenth year with the portfolio. The number of times people have talked to me about projects to which significant changes have been made from what was planned while the application was live is quite large, and I am quite surprised. The great thing about the West Perth people is that they have entrepreneurial spirit and they get things done on short time lines. The problem with the West Perth people is that they have an entrepreneurial spirit and they get things done on short time lines. Sometimes that leads to trouble for the agency that is protecting the interests of the resource owner—the people of Western Australia. We are trying to give ourselves the flexibility that the Chamber of Minerals and Energy says that we currently exercise. We are unsure of the legal authority for exercising that discretion, but we are trying to limit that discretion so that we do not have people completely changing everything they want to do and arguing that it is exactly the same proposal.

Mr R.S. LOVE: Just to follow up, if I understand correctly, an arrangement has been allowed to exist under which changes have been made and accepted, even though there is no official framework for that to happen. Are the limits that the government is trying to set here in words roughly cognisant with where the limits are at the moment and with what would normally be done?

Mr W.J. JOHNSTON: Again, that is a very good question. Yes, that is our intention. We are trying to describe what we think is happening now, and the Chamber of Minerals and Energy says that it is actually more flexible. We are unsure that it is correct. We are trying to be flexible; we are trying to do what the chamber wants. It is saying that it is not quite what it wants. There has to be a limit, because we cannot just say that any change can be made. It has to be a reasonable change related to the proposal, and it must be reasonably recognisable as the same proposal.

Another issue is the question of those that have a part 4 approval. There is now a new argument arising from the Mulga Rock approvals about exactly how much it can be varied from the part 4 approvals because it may be that the Mulga Rock matter has shown there must be much less change between the original proposal that is approved under part 4 and the proposals that are put to us. We are constantly learning exactly where the law sits, and we are trying to give ourselves some flexibility to take into account that this is an imprecise science and that the proponents are trying to get things done as quickly as possible to save capital. We are trying to be responsive to that, but we cannot be a complete gymnast; we have to have some framework to work within.

Mr R.S. LOVE: I move now to proposed section 103AO(2)(a). Again, this is the same concern around the term "the mining lease" that I outlined. Can the minister confirm that his earlier remarks also apply here? This is potentially across multiple leases.

Mr W.J. JOHNSTON: Yes, I can confirm that. The approval is across all the tenements that are in play for the proposal. The approvals are given at the project level, but they apply equally to each of the leases and therefore the obligations apply to each lease, even though they might be described in the overall approval.

Mr R.S. LOVE: I move to proposed section 103AP, the approvals statement. I am talking about the document that is the approvals statement. I assume that at some point some of the consultation has involved showing samples or proposed forms of the document to outline the structure of the document and how it will work. The Association of Mining and Exploration Companies has expressed concerns about that. I will read from its submission on the first draft. The submission states —

> The intent behind the new Approvals Statement concept is noted, to function as a single source of truth for all approved mining operations and corresponding conditions, anticipated to be regularly updated through a project's life. Industry seeks assurance that the updates that will be required to the Approvals Statement as operations or conditions change, will not result in more administrative workload and costs than is currently required under the existing process.

I am not sure exactly whether that relates to this proposed section, but it is certainly to do with the approvals statements. Would the minister like to comment on that?

Mr W.J. JOHNSTON: Again, that is a perfectly reasonable question. I am trying to provide a proper response. At the moment, the approval is a prescriptive document with hundreds of pages about the way the activity is

performed, whereas here we are moving to an outcomes-based approval. Therefore, we will be describing in simpler language the outcomes that need to be achieved. Therefore, if an amendment is needed, it will be a matter of simply amending the outcome to be achieved rather than all the procedures. I will give the member an example that I will invent on the spot while I am talking. At the moment, the document might refer to a road that can be only three metres wide, whereas in the future it might be described as a haul road that cannot impact blah, blah, blah. Does the member see? In our view, the approvals statement is in a simpler format and therefore seeking amendments to it will be a simpler process because people will be describing the outcome they want rather than the procedure they are using to achieve the outcome.

Mr R.S. LOVE: I thank the minister for that description. My understanding is that AMEC would have seen some sort of proposed form. Given what the minister just said, it is surprising that AMEC goes on to say —

> Industry is concerned the requirements proposed within the new approvals statement process are too prescriptive, and this has the potential to create long-term issues. With prescriptive requirements, there is potential for clerical error, but constrained ability to enact amendments.

That does not seem to correspond with what the minister is saying. I have not seen the document, so I do not know. I wonder whether the minister might like to comment on that observation.

Mr W.J. JOHNSTON: I am advised by the agency that there was consultation about what form an approvals statement might take. There is no question that whether we move from one form of regulation to another there will always be nervousness about the new format procedures. I am stating on the record here that it is our clear intention to have an approvals procedure that is less troubled by the process and is more focused on the outcome. If I can use a health and safety example, the big change in the oil and gas sector post–*Piper Alpha* was to move to the safety-case approach, which was about describing what could go wrong and how to fix it if it did. Some people in other industry sectors look at the oil and gas process and say that it is too prescriptive, yet it was invented by the sector to get away from black-letter law regulation. It is a bit the same here. This is a new concept for the way the approval is being explained. We are explaining it by the outcomes that we want for a project, as opposed to the inputs we want a project to go through. We think this is a better way. In fact, our view is that industry has been begging us for this for years. I am sure my friends in Kalgoorlie are nervous, but I am confident that our friends in the Chamber of Minerals and Energy can cope with the idea. I accept that AMEC is concerned, but we believe we are heading in the direction it wants. We will have to see how we go with some of these things, but the idea is to move away from those very, very detailed and prescriptive approvals processes to an outcomes-based approvals process for what the government and the proponent are trying to achieve in the management of and impact on the project.

Mr R.S. LOVE: On this same topic, proposed section 103AP(1) includes the types of things that will be in the approvals statement, such as the activity, the conditions, any relevant information, closure outcomes and dates et cetera. If the form of the approvals statement proves to be cumbersome and a change is needed, there would seem to be some flexibility in there to make some changes to the actual format of the statement. If that was deemed to be possible and was done, what effect would that have on the already issued statements?

Mr W.J. JOHNSTON: We are prescribing what needs to be in the approvals statements, but not the way they are worded. If we changed the way it was worded, it would not have any impact on any pre-existing approval because that would be subject to its own words. If we learn as we go and amend it, it will not impact anything that has been done already. In my view, this is very flexible. It sets out only what information needs to be in it, not the way that the information is presented.

Mr R.S. LOVE: I would like to move on to what appears to be a controversial matter, proposed section 103AQ, "Cancellations and variations recorded on approvals statements". I start with the concerns outlined by the Chamber of Minerals and Energy on proposed section 103AQ(1), which reads —

> (1) The Minister may, on the Minister's own initiative or by application in writing by the lessee of a mining lease or the holder of a miscellaneous licence to which an approvals statement relates —
>
> (a) cancel an approval given to an activity under section 103AO(1); or
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> (b) cancel or vary a condition that is recorded on the approvals statement under section 103AO(4); or
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> (c) vary any relevant information that is recorded on the approvals statement under section 103AO(6).

Regarding proposed section 103AO(1), the CME has stated that it does not support the current draft version. Again, I am not entirely sure whether there have been any changes since then, but the CME is saying —

> CME does not support the Minister's unilateral power to vary or cancel an approval without prior consultation with the proponent. CME also does not support the absence of appeal provisions to enable proponents to appeal such a decision.

> The proposed amendments and accompanying Consultation Summary provide no detail regarding the conditions under which the variation or cancellation of an approval would be warranted. CME understands this detail and the supporting policy work is yet to be developed, and that this power is not expected to be delegated.

It goes on to say —

> CME strongly recommends the section be reworded to require the Minister to consult and reach agreement with the proponent prior to varying or cancellation of an approval.

I will let the minister make a comment on that.

Mr W.J. JOHNSTON: Dealing with the last issue first, of course, the minister still has to provide procedural fairness. Section 111A of the Mining Act 1978 is an incredibly broad power but can be exercised only after providing procedural fairness. I think that power includes the power to cancel a tenement. The minister already has the power to cancel a tenement, which would, in effect, cancel the approvals, so it is not correct to say that it is providing the minister with a new power.

People often write to me to say that I should exercise my authority under section 111A and cancel something or other that is happening. That is quite regular, and it is amazing who does that. Often, it is a mining company about another mining company, but it is not just that. Generally, it is members of the public complaining about some outcome for their local community that they are not satisfied with. The point I make is that the minister already has this power. I think that is something that the chamber has not properly considered. I can cancel the lease, and that means that no mining can take place. This is a narrower right. Again, I can execute this right only by providing procedural fairness, because all my decisions are subject to review by the Supreme Court on the basis of whether I have provided procedural fairness. A lot of things like the Warden's Court matters end up on my desk, and I have to make a decision. It cannot argue with me about my decision on its merits, but it can argue that I have not provided procedural fairness. That is one of the reasons I will not meet with parties to Warden's Court matters. The former minister Sean L'Estrange got into trouble because his staff met with one of the applicants to a Warden's Court matter, and the Supreme Court overturned the decision because his staff met with one of the applicants. Many people make applications under the Mining Act; it is not just mining companies. Pastoral leaseholders could make an application to the Warden's Court to review something and then say, "I want to see the minister", but I will not meet with them. They get cranky because they think the minister is being unfair: "You are always talking to mining people. How come you will not talk to me?" It is because they are an applicant in a Warden's Court case. I make the point that it is not an unfettered power. The minister still has to provide procedural fairness, and it is a narrower power than I already have under the other provision in the act.

I had formal duties during lunch, and I was unable to talk to the member then, but I am still happy to talk to the member behind the chair. I will give an example of a matter, and I will remove the names of the guilty parties. A tenement holder had an agreement with an Aboriginal traditional owner party. They transferred the tenement to somebody else, and that meant that the obligations under the agreement they had with the traditional owners continued to apply, but there had never been any contact between the new holder and the traditional owners. The tenement holder then made an application to the department to take activity. The departmental delegate gave approval because it was a relatively vanilla application; it was outside the strict rules, but it was asking for discretion that was ordinarily given. The departmental delegate acted on the discretion and gave the approval. Unknown to the delegate, about a week prior to them giving approval, the site in question had been listed as an Aboriginal heritage site, but they were not aware of that when they gave approval. The heritage site listing had occurred and, therefore, the approval should not have been given, but it was given.

Mr R.S. LOVE: Can I hear more from the minister?

Mr W.J. JOHNSTON: The applicant took action. The traditional owners complained. The tenement holder had complied with the rules, and it may well be that the tenement holder had acted in accordance with the approvals, but the approvals should never have been given.

Mr R.S. Love: But they were.

Mr W.J. JOHNSTON: This will allow the minister to cancel the approvals and get out from underneath the mess in this hypothetical example. Sometimes, the minister might need the ability to cancel not the tenement itself but just the approvals that have been given. However, in doing so, the minister still has to exercise natural justice and provide procedural fairness to the person so that they can understand what the minister's intentions were and make submissions on the minister's decision.

Mr R.S. LOVE: A question occurred to me while the minister was talking about that process. The approval had been given without the knowledge that circumstances had changed between the time of lodgement, assessment and granting. In a case such as the minister described, what would happen if a settlement or a native title agreement came across an existing approval—one that was already granted and had been acted on for some time—but the circumstances of the land or area underneath it changed. Would that be affected at all?

Mr W.J. JOHNSTON: This goes to the question of compensation. The tenement has been validly issued and therefore can be exercised, but that may lead to a compensation claim by the native title party. Let us assume that a piece of land has no recognised native title claim and maybe not even a claim at the time the title was issued. The title is valid, but if the courts subsequently realise that native title exists—remember that the courts do not create native title, but they recognise that it pre-exists—it may be that the native title party has the right to compensation. Who knows? That would be a matter for the courts. That is just an example.

There can be an impact, but that impact would already exist. It has nothing to do with this provision, and it is not related to this. That is one of the complexities of the game, and one of the reasons we are having so much trouble dealing with Forrest & Forrest. We are not sure about any other title, but we know the title that was affected by the Forrest & Forrest decision was not validly issued because the High Court said it was not validly issued. Therefore, if we were to reissue or validate the tenement in that case, we would have to take into account the native title rights at the same time.

Mr R.S. LOVE: Still on the point of cancellation, I refer to some concerns voiced by the Association of Mining and Exploration Companies in this regard. It wrote —

> … we are concerned with the proposed ability for the minister to cancel an approval, without providing a reason. This practice would oppose the progress made towards transparency, and diminish confidence across the sector. AMEC recommends this is not implemented, and the Minister should still continue to publish reasons why a cancellation has been issued.

I have written this in my *Hansard* so I must have found this at some point; I understand the minister has to publish the reasons the cancellation is issued under the current act, so why is that practice not carried through in this provision here?

Mr W.J. JOHNSTON: Often in the act the minister does not have to provide reasons. We talked before about the fact that that I have to provide reasons for those things that we were talking about before but a lot of the provisions do not allow the reasoning behind the matter to be justiciable—only the procedural fairness question. I suppose we are trying to continue that. As I said, section 111A is a very, very broad power for the minister to take a lot of actions under the act and the minister is not required to provide reasons under section 111A, but I am required to provide procedural fairness. We are effectively continuing that arrangement into this provision. If we think about it, as I am arguing, it is a subset of the powers under section 111A.

I have had both the Chamber of Minerals and Energy and the Association of Mining and Exploration Companies, in person and in writing, raise concern about this matter. I had a detailed discussion with the departmental officials at the time that I was signing off on the approval to go to cabinet, but I was persuaded by the department that the power is required for use in exceptional circumstances. I am here saying on *Hansard* that it is intended for exceptional circumstances. We are not writing that into the act. It is not an unfettered power, because we have to provide procedural fairness. We will not require the minister, whoever it is, to provide reasons because that then makes the decision justiciable. In the end, that is a matter for policy and, therefore, we would not want that matter to be dealt with through appeals to the courts, but we certainly want to make sure that the party involved has procedural rights. Therefore, before the minister exercised it, he would have to give proper thought to what is being asked for by the applicant.

In my corrective services role, I have powers that I exercise on discretion that were given to me by the member's government under the provisions about lack of confidence in prison officers. I sweat over my decisions there and I will tell the member what—any minister would be very, very cautious about making any decision because if they started to use this provision, they would undermine the high standing that Western Australia has. But I just want to emphasise that this is an extraordinary power, but it reflects a power that the minister has elsewhere in the act. The other power in the act is much broader. This is a narrower one, and it is designed to fix problems that may arise in very, very rare cases.

Mr R.S. LOVE: I move on to division 5, "Mine closure plans" and proposed section 103AR, "Contents of mine closure plan", and other matters that progress beyond that in the operation of the closure. I will talk about this provision more or less as a unit, I suppose, in some ways. Again, I refer to what the AMEC group wrote about this matter. It said —

> We made a recommendation that the mine closure process could be streamlined by DMIRS working with the EPA, DWER and DPLH to prepare a holistic document that will cover a project from operations through to closure and relinquishment, to avoid the onus of navigating the process resting solely on the proponent.

I wonder whether the mine closure plan and the mining development and closure proposal conditions and obligations align with the obligations under other legislation? Will the plans address that integration?

Mr W.J. JOHNSTON: The member referred to two separate agencies. The Department of Lands does not have involvement until after the mine closure. At some point at the end of the mine's life, the proponent satisfies the Department of Mines, Industry Regulation and Safety that the mine is now in a final state. There still could be a hole

in the ground because particularly in remote parts of the state we do not require the void to be filled in. Of course, now often in iron ore mines where they do not go that deep, they do the continual rehab and the void is not that big. A goldmine, for example, will have a large mine void left at the end of the project. Once we are satisfied that the mine is in its final format, the title is relinquished and at that point the land is handed back to DPLH. It is finished and then the mining proponents' obligations cease. Of course, until the time it is relinquished, it has obligations, and because of the introduction by Hon Norman Moore of the mine rehab fund, that encourages continual rehab because the miner has to pay for all the disturbed land. Let us say it is a 30-year project, it might get some landform finished after 10 years and then hand that land back. That may be a waste dump or a rock dump. That might get handed back early and then that is no longer part of the closure plan because it has been closed. But, in the end, at some point the proponent will convince the department that the project is now finished; the rehab will be over. Whatever the final landform is, that is what it is, and then it is handed back to DPLH and then the mining company does not have an obligation to DPLH, because it was acknowledged by DMIRS that its obligations are complete.

The Environmental Protection Authority would probably be silent on the obligations on closure because it is satisfied that DMIRS and the Mining Act have sufficient obligations for the final landform. The EPA probably would not put an obligation in its approvals for the mine closures process because it is satisfied, generally speaking, with DMIRS. Of course, it might be in a particularly sensitive part of the state and, therefore, it would be interested in the post-mine state and it might give rehab obligations. I am not saying that this has happened, but I just give the example of a sand mine where the mineralisation is only three per cent of the dirt. It is only shallow, so they take out 10 metres, extract three per cent, put 97 per cent back, put the farm back on top, and it is basically the same landform at the end. It might be in a sensitive area, so the Environmental Protection Authority might be interested in saying, "Your approval includes the need to rehab to this standard", but, generally speaking, the EPA does not deal with the closure because it is satisfied with what the department is doing. Again, I do not think it would need to, but it might say, "You have to rehab consistent with the obligations placed on you by the Department of Mines, Industry Regulation and Safety", but that is going to happen anyway, so it does not need to write that in. Generally speaking, the EPA is not going to have closure obligations in its part IV or part V approvals, or whatever, because our legislation deals with it.

Mr R.S. LOVE: I move on to proposed section 103AT, "Lodgement of mine closure plans". Again, this is one of the things that the Chamber of Minerals and Energy has discussed. I refer to proposed section 103AT(3), which states —

> The Minister may extend or vary the date recorded on the approvals statement by which a mine closure plan must be lodged.

The Chamber of Minerals and Energy has said that it does not support that as it is currently drafted. I assume that it is the same as it was, but perhaps it has changed. It also said —

> CME does not support the Minister's unilateral power to vary a condition on a mining tenement without prior consultation with the proponent.
>
> The proposed amendments and accompanying Consultation Summary provide no detail regarding the conditions under which the variation of a condition would be warranted.

It recommended —

> … the section be reworded to require the Minister to consult and reach agreement with the proponent prior to varying a condition on a mining tenement.

Mr W.J. JOHNSTON: With all due respect to the CME, I understand some of its other challenges, but I do not think it has this one right. Let us assume that a mine closure plan has to be in by 1 September 2023; this is saying that the minister could unilaterally say, "Don't give it to us by 1 September 2023; give it to us by 1 March 2024." It is not creating a new obligation; it is allowing them more time. An example at the moment is that, because of the challenges we are having in meeting our approvals time lines, we have delayed the consideration of mine closure plans to release resources to do other approvals. If we did not have this provision, we would not be able to do that; whatever the date was for the closure plan, that would have to be the date. This will allow us a bit of flexibility.

If a proponent has approval to start its project and it is subject to satisfying the Department of Mines, Industry Regulation and Safety that its mine closure plan is going to be good, we are saying, "You've got six months extra", just to take a date as an example. I do not think the provision will do what the chamber is complaining about. This provides that we can unilaterally delay the obligation; that would seem to me to be a concession, not an imposition.

Mr R.S. LOVE: I move on to proposed section 103AU(3). I might have my notes mixed up, because this makes provision for the variation, not the time. My apologies; I got my numbering mixed up, but I think theirs is a bit mixed up, actually. Proposed section 103AU(3) states —

> A condition imposed under subsection (1) may be cancelled or varied by the Minister at any time.

Going back to the variations or cancellations of conditions of a mine closure plan that can be varied at any time, can the minister explain the circumstances in which he would envisage that a plan might be varied, and go through the procedural issue he was talking about with regard to his responsibility to take into account all the conditions and necessary situations?

Mr W.J. JOHNSTON: That is a perfectly reasonable question. I understand why the body is asking that question, but it is actually a power that the Department of Mines, Industry Regulation and Safety has under the existing rules. My advice is that we are just translating an existing power into the new approvals process. We did not think it would be controversial, because it is not a new power, and we would still have to provide procedural fairness.

Clause put and passed.

Clauses 35 to 40 put and passed.

Clause 41: Second Schedule Division 3 inserted —

Mr R.S. LOVE: Clause 41 inserts, at the end of the second schedule, proposed division 3, "Provisions relating to Mining Amendment Act 2021". It provides for commencement dates et cetera, but proposed clause 21, "Continuation of conditions for prevention or reduction of injury to land" seems to be very important to some of the stakeholders. Can the minister explain how it will be guaranteed that these conditions will continue after the commencement date?

Mr W.J. JOHNSTON: I thank the member for the question. This simply ensures that the obligations that are already on the tenement holder will continue after the new legislation becomes an act. The tenement holder will already know what they are, because it will already have been recorded on the register. We cannot create new obligations; we simply transfer the existing obligations to being obligations under the new arrangements. The member will remember that we previously discussed moving all the approvals stuff, which is done by a condition on a tenement, from being in a provision about each of the tenement types to being a single provision of the legislation to do with approvals. Therefore, we have to make it clear that the pre-existing approvals that were done under the old structure of the act will still apply under the new structure, as though they were made under the new structure. The tenement holder will already know about the existing provisions, because they have already been recorded on the register. There is no power to create something new; this is a power to take the existing stuff as though it had been issued under the new provisions.

Mr R.S. LOVE: In the transition, would there be any rewording or anything that might present any technical issues?

Mr W.J. JOHNSTON: I can assure the member that there is no new wording; it is taking the existing obligations that were issued under the current structure of the act and automatically issuing the exact same provisions as obligations under the new structure of the act. It is not changing the obligations in any way; it is just making sure that they continue to be enforceable under the new structure. As I say, this will not create new obligations, because the existing wording, as it appears on the register, will continue to be the wording under the new arrangements. In fact, I do not think it even says that anything new needs to be issued; it is just recognising the pre-existing paperwork as being enforceable under the new arrangements.

Mr R.S. LOVE: I note that clause 25, "Transitional provisions for previously approved mining proposals", includes a definition of "transition period" on page 39, which states —

> ***transition period*** means the period beginning on commencement day and ending —
>
> (a) 10 years after that day; or
>
> (b) on a later day approved by —
>
> (i) the minister, or
>
> (ii) if the Minister does not approve a later day — the Director General of Mines.

I have a couple of questions about that. First of all, I think that it must have been proposed during consultation that the transitional period be six years. I know that the Association of Mining and Exploration Companies suggested the period should be at least 21 years. What was the reasoning behind that and why was 10 years considered to be the appropriate period?

Mr W.J. JOHNSTON: Again, I make it clear that there is a lot of consultation on a lot of different legislation, and that it is done on the basis that we are trying to engage with the parties to set our policy agenda. In the end, the government sets the policy agenda, and it is a decision of the government. I am not in a position to go through blow by blow why the government makes particular decisions. Having said that, however, it is true that during the original consultation a shorter period was considered. But after consultation, we decided upon a longer period. A period of time had to be set, and given that a mining tenement lasts for 21 years, it is interesting that AMEC asked for a period that is equal to the length of time of a mining tenement. That seems to me to be a transition period that is not a transition period.

Mr R.S. LOVE: While we are talking about the transition period, it is a period of time during which new arrangements will be put in place and will be worked on by the department and the holders of approvals et cetera. What will happen if there is a delay for some reason and a transition is not possible within 10 years? What will happen then?

Mr W.J. JOHNSTON: The member will see that the definition of "transition period" states —

> (b) on a later day approved by —
>
> (i) the Minister; or
>
> (ii) if the Minister does not approve a later day — the Director General of Mines.

It can be extended by a public servant or the minister. This is an unusual provision, is it not? Perhaps it should be amended. It seems as though the DG will have the power to do it unilaterally, so, if the minister does not do it, the DG may. If there is trouble during the transition and we need to extend it, there is a very, very clear power for that to happen.

Mr R.S. LOVE: Is that what the minister envisages? We are talking about what will happen 10 years in the future. The minister will not be the minister at that stage—we never know—but is it envisaged that the minister of the day or the director general will be able to exercise due discretion and ensure that there will be some change? The minister raised the point—I had already underlined it—that the wording implies that if the minister does not approve a later day, the director general may. Does that mean that the director general could contradict the minister, because it would appear from the wording that that could happen only if the minister does not, which is an active refusal rather than a lack of approval?

Mr W.J. JOHNSTON: I suppose if the minister wanted to fox the DG, they could exercise their discretion and issue a one-day extension and the DG would lose that discretion. People know that I turned 60 this year and I give members the tip that I am not going to be the minister in 10 years' time, because I am not going to be standing here at the table arguing about legislation when I am 70. I do not know who will be the relevant minister, but I know that it will not be me. Perhaps it will be the member for Cockburn!

Mr R.S. LOVE: Maybe the more learned people in the other chamber will wish to discuss this at some length and it will come back to us for reconsideration. I have now concluded all the matters I want to discuss. I thank the advisers and the minister for the answers.

Clause put and passed.

Title put and passed.

[Leave granted to proceed forthwith to third reading.]

Third Reading

MR W.J. JOHNSTON (Cannington — Minister for Mines and Petroleum) [4.16 pm]: I move —

> That the bill be now read a third time.

MR R.S. LOVE (Moore — Deputy Leader of the Opposition) [4.16 pm]: I will not delay the house for very long. We fully discussed the issues that needed to be addressed in the Mining Amendment Bill 2021. I just want to say that, given the important nature of the mining industry and the very important matters that we discussed in terms of the regulation of the industry and the effect that that might have on the further development of the industry in the carriage of its work, it was very important that those matters were clarified. I thank the Minister for Mines and Petroleum for the opportunity to put those things on the record for some of the key stakeholders. I mentioned the Association of Mining and Exploration Companies and the Chamber of Minerals and Energy, but others had spoken to me about these matters and wanted those issues addressed as fully as they could be. I thank the minister for his indulgence and for reading into the record whole passages of information and for his response to that.

I also thank the advisers who contributed to the discussion through the minister. I put on record once again the opposition's support for this bill. I hope it passes through the other place quickly and for the success of the regulations and other matters that need to be considered to make these changes.

MR W.J. JOHNSTON (Cannington — Minister for Mines and Petroleum) [4.17 pm] — in reply: I thank the shadow Minister for Mines and Petroleum for his comments. I will start by placing on the record my thanks to the advisers for the work that they did to equip me in handling the Mining Amendment Bill 2021 in the chamber.

I thank the shadow minister for raising a number of issues that obviously had been raised in private with the government by the Chamber of Minerals and Energy, the Association of Mining and Exploration Companies and others. I want to address only one issue and that is the power to cancel approvals. What happens in these matters is that often people look at only what is being amended and do not think about what is in the act. I want to draw the attention of the CME and AMEC to section 111A of the Mining Act, which provides the minister with broad

powers to do lots of different things, including cancelling tenements. So far in my time as minister, I have only ever proposed to do that once. I wrote to an applicant proposing to do that and they wrote back and said, "How about we throw out our application?", which they did. It is a very rarely used power, but it exists and it has not undermined the security of investment and security of tenure in Western Australia.

The point I am making about the power to cancel conditions that is proposed in the bill is that it is a much narrower power than already exists. The minister can already do what is being proposed. People say that this provision is not in the act, but it is in a different format. It is a rarely used power. I had extensive conversations with the department on the professional advice it had received about needing to include this provision. I am satisfied that it is an extraordinary power that I cannot imagine being used, but it is a power that might occasionally be needed. I again emphasise that it will still require procedural fairness, like all other decisions under the act. Therefore, the applicant will need to know what is occurring before anything does occur. I am confident to say that I do not think it will be used more than once in a very long time.

The final point is about the transition. Twenty-one years is an interesting period. Mining leases are for 21 years, with an option of 21 years, so that is probably why people wanted to have 21 years. Ten years is a long time.

On the comments from the shadow minister about the director general's responsibilities, if members in the other house want to argue about that, it will be a very interesting, esoteric argument. I do not think anything will turn on it. Given it is to allow a longer period for the transition, not a shorter period, and that that is what the Association of Mining and Exploration Companies was requesting, I am not quite sure what will turn on it from an actual perspective as opposed to an academic perspective.

Other than that, I thank the shadow minister for his engagement and questions. I know how hard it is to be a shadow minister! It is good to get these matters on the record.

Question put and passed.

Bill read a third time and transmitted to the Council.