

STANDING COMMITTEE ON LEGISLATION

MINING LEGISLATION AMENDMENT BILL 2015

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 4 APRIL 2016**

SESSION ONE

Members

**Hon Robyn McSweeney (Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Robin Chapple (substituted member)
Hon Kate Doust (substituted member)**

Hearing commenced at 10.03 am**Mr JASON BANKS****Director General, Department of Environment Regulation, sworn and examined:****Ms AGNES TAY****Acting Director, Strategy and Reform, Department of Environment Regulation, sworn and examined:****Ms SARAH McEVOY****Executive Director, Strategic Policy and Programs, Department of Environment Regulation, sworn and examined:**

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

[Witnesses took the affirmation.]

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

The Witnesses: Yes.

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

Would you now like to make a statement to the committee?

Mr Banks: Thank you very much for the opportunity to attend and present to the committee. In relation to the Mining Legislation Amendment Bill, obviously the main intersections that we have had in terms of our regulation and administration of the Environmental Protection Act concerns the exemption under schedule 6, which arises out of this bill in terms of a proposal that the approved program of works or low impact matters will be exempt from the operation of the EP act.

The CHAIR: Thank you. We have a few questions for you, but the committee may jump in at any time and ask their own. Do you consider that the DMP undertook appropriate consultation with concerned stakeholders?

Mr Banks: I can speak in relation to our consultation, I will also probably ask Ms McEvoy to further speak to it. We were, as I said, specifically consulted in relation to the matter that intersects with our act. I ask Ms McEvoy to speak further.

Ms McEvoy: Yes, the Department of Mines and Petroleum consulted with the Department of Environment Regulation in relation to the operation of the regulation of clearing under the mining amendment legislation and specifically how that would intersect with consequential amendments to

schedule 6 of the Environmental Protection Act. They did that on a number of occasions, both during the preparation of drafting instructions through to the final bill.

The CHAIR: Do you know much about their consultation with stakeholders, or no?

Ms McEvoy: No.

The CHAIR: Do you have any specific issues with clauses of the bill? Because it is the clauses of the bill that we are trying to really drill down into. Some people are very concerned about some of the clauses of the bill, so I would like your opinion as to if you have any specific concern.

Mr Banks: I have no specific issues with any of the clauses of the bill.

Hon ROBIN CHAPPLE: Just on that, when it comes to the issues of land clearing, I refer back to the last Auditor General's report on land clearing where I think the DEC also have a bit of criticism. Given the nature of the criticisms during that inquiry, do you think that the mines department would be capable of managing the situation in the way that you now do, given the Auditor General's views?

Ms McEvoy: As I recall, in the Auditor General's report, the main criticism was in relation to the enforcement and prosecution at that time. That was addressed by the then Department of Environment and Conservation. There was no difference in the way that that issue was raised between the Department of Mines and Petroleum or the Department of Environment and Conservation. There is a delegation, currently, of the clearing provisions of the Environmental Protection Act to the Department of Mines and Petroleum, so they regulate clearing under the Environmental Protection Act through that delegation.

Hon ROBIN CHAPPLE: Just further on that, if I may, we have signed a bilateral agreement with the commonwealth, referred to as the bilateral agreement made under section 45 of the Environment Protection and Biodiversity Conservation Act. That agreement basically identifies that as a result of that agreement, the EPA and/or the CEO, who is of your department, are the people who will administer land clearing in the state. If this land clearing goes from DEC to the mines department, what is the validity of the bilateral agreement?

[10.10 am]

Ms McEvoy: The bilateral agreement would continue to apply to clearing regulated under the Environmental Protection Act. If there were to be a bilateral agreement in respect of the amended mining act, that would have to be separately sought, because there is not currently one.

Hon ROBIN CHAPPLE: Can I then proffer the view that if land clearing occurs around, I think, section 6, which actually gives the descriptor of what are the implications of land clearing. If land clearing occurs and it is covered by the mines department but not involving DEC or the EPA, does that mean that the land clearing can then be referred back to the EPBC act, because it is still covered by the EPBC act and not by the state?

[10.10 am]

Ms McEvoy: Yes, that is correct in the absence of a bilateral agreement that covers the Mining Act.

Hon ROBIN CHAPPLE: We are establishing a bilateral agreement with DEC and the federal government and this bill cuts across that and, therefore, means that there will be actually an increased potential of involvement of a federal agency in the process because we currently do not have a bilateral agreement.

Ms McEvoy: Assuming that there is no assessment under part IV of the EP act or a bilateral agreement.

The CHAIR: Yes, by actually removing the need for proponents to make a separate application for native vegetation clearing permits when submitting mining proposals or programs of work through

these amendments to schedule 6 of the EP act. I can see where Robin's questions were leading up to.

Hon ROBIN CHAPPLE: What we are creating is the potential for another level of review because we will not have a bilateral with the mines department; we have only got a bilateral with DEC.

The CHAIR: But it does go back to part IV if it is needed.

Ms McEvoy: To part IV, yes.

Hon ROBIN CHAPPLE: What would be the implications of part IV? How would part IV apply?

Ms McEvoy: If it was a significant proposal referred to the EPA and it was assessed in accordance with the terms of the bilateral, whether it is clearing or any other kind of aspect of mining impacts would be accredited under the bilateral agreement.

Hon ROBIN CHAPPLE: So it would have to come back to the EPA, not the mines department?

Ms McEvoy: Yes.

The CHAIR: Do you have any recommendations to improve the operation of the bill?

The Witnesses: No.

The CHAIR: It is not really your bill. How do you consider this will affect the roles and interlinking relationships between DMP, DER and the EPA?

Ms McEvoy: It reduces the intersection that there currently is through the delegation, though there still are matters that would be within the scope of the delegation—for example, petroleum activities and activities that are not under the Mining Act.

Hon ROBIN CHAPPLE: Because, I suppose, we have had this issue with Mines and Petroleum, this determination of whether on-ground search for petroleum was under the Mining Act or came under the Petroleum Act—we have had that clarified and it has been moved quite clearly to the Petroleum Act—what would be the process for on-ground activity by a petroleum explorer?

Ms McEvoy: With petroleum exploration, it depends on the nature of the exploration whether it is covered by exemptions or not, but generally it is regulated under petroleum legislation. The delegation does apply to the various petroleum acts.

Hon ROBIN CHAPPLE: When you say “various” —

Ms McEvoy: I can remember the 1967 Petroleum and Geothermal Energy Resources Act, Petroleum (Submerged Lands) Act, and the petroleum act; there are a number of different pieces of legislation concerned with regulating petroleum.

Hon ROBIN CHAPPLE: If I may, Chair, just on this, I want to go back to mining. When it actually comes to minerals-to-owner land, of which there is quite a lot in Western Australia around Toodyay and Hampton lands up near Kalgoorlie, what happens there

Ms McEvoy: They are regulated by the Department of Environment Regulation because they are not under the Mining Act and they are not actually regulated by the Department of Mines and Petroleum.

Hon ROBIN CHAPPLE: So the mining activity that occurs there would be dealt with by you —

Ms McEvoy: It would continue to be regulated.

Hon ROBIN CHAPPLE: — but if a tenement covered a bit of mineral-to-owner land and another part of that tenement was outside the minerals-to-owner land, part of it would be administered by the mines department and part of it would be administered by you.

Ms McEvoy: As is currently the case, yes.

Hon ROBIN CHAPPLE: So you would have a range of approvals for one tenement.

Ms McEvoy: Potentially, yes.

The CHAIR: Just going on from that, it says that in determining whether to formally assess proposals involving the clearing of native vegetation, the EPA takes into account the provisions of part V, division 2, of the EP act relating to the clearing of native vegetation. Where the EPA has confidence that a clearing proposal can be adequately regulated and managed under part V the EP act, the EPA may not undertake a formal environmental impact assessment. How do you determine what is not going to be an impact on that assessment? Is it acreage or is it —

Ms McEvoy: I think that is a matter for the EPA, because they are the ones that are making that call.

The CHAIR: Okay. So it is not your question, basically.

Ms McEvoy: It is not our question, no.

The CHAIR: Would the DER support a tiered approach to regulation of environmental management for fossickers and recreational prospectors, small-scale miners and large-scale miners, with different requirements under the act for each delineated by activity or by area of land operating on? That is probably where I was getting to before.

Mr Banks: I guess not necessarily specific to this bill, but our regulatory approach is risk based, so we basically advocate the use of a risk-based approach to regulation. That may involve tiering, but the tiering is more likely to be centred around risk.

Ms McEvoy: That is the approach that is currently in the Environmental Protection (Clearing of Native Vegetation) Regulations where things like prospecting and small-scale mining activity within less sensitive environments do not require a clearing permit.

The CHAIR: People are very toey about land clearing. I know, coming from a farming background, and I certainly make my views known—I have done over the years—that farmers should have normal farming practices and be allowed to clear, and I helped with those regulations and the EP act when it came out years ago. I can see where miners think that they may have been given a not-so-good outcome under this bill, but, in fact, what you are trying to do is to streamline it and make it easier so that, as I said before, it is less regulation for miners. Would that be right?

Ms McEvoy: We think that is a matter for DMP.

The CHAIR: Okay; that is a matter for the DMP.

[10.20 am]

Hon ROBIN CHAPPLE: Just in relation to the operation of small-scale prospectors, who obviously are the people who are concerned, or mid-tier small miners, I served with some of your officers on MELC and on the Golden Gecko technical panel. We identified that in many cases, prospectors, their rehabilitation system, was better than major miners because the overburden was going back quicker and the seed regeneration was better. What is your view in relation to those components of prospecting versus a major corporation that might stop after five years?

Ms McEvoy: I guess I can only say again that the exemption that was put in the regulations supports your perspective in that we did not consider it was significant when done as you described. The department at the time when they were considering how to frame the regulation of small-scale prospecting and so forth actually looked at those sites.

Hon ROBIN CHAPPLE: When was that definition determined about the small-scale and its environmental credibility?

Ms McEvoy: It was on 8 July 2004, which is when the regulations commenced.

Hon ROBIN CHAPPLE: So July 2004, and those regulations were regulations by DEC or by —

Ms McEvoy: The Department of Environment, it is that long ago.

Hon ROBIN CHAPPLE: As it was then, yes. The name changes continuously—CALM, DEC, whatever!

The CHAIR: And a new minister now!

Hon ROBIN CHAPPLE: I would change the header on that paper every time!

So those regulations that were brought in, will they be diminished in any way, shape or form by passing them over?

Ms McEvoy: If this bill were passed, I think we would have to look at the need for some of that regulation, because obviously to the extent that those matters are covered by the mining amendment legislation, they probably do not need to be covered by environment —

Hon ROBIN CHAPPLE: But the mining legislation merely identifies that these are going to be dealt with via regulation.

Ms McEvoy: And makes consequential amendment to schedule 6, which basically takes all of that activity within the scope of that exemption in schedule 6 out of the Environmental Protection Act.

Hon ROBIN CHAPPLE: I think I have got schedule 6 here. What I was concerned about with schedule 6 was that when the definitions occur in here, they are not as stringent, in my view, as those in schedule 6. I have to dig up schedule 6.

The CHAIR: You have to be a bit more specific I think, Robin.

Hon ROBIN CHAPPLE: I am looking for my document. Schedule 6 was dealt with in the auditor's report; sorry, I am referring to schedule 5, I do apologise. There were a number of criteria from clauses 1(a) to (j), and having a look to the criteria that are established in here, they do not seem to be as —

Ms McEvoy: They have adopted the clearing principles as defined in schedule 5 in terms of how the —

Hon ROBIN CHAPPLE: Yes, but they actually give the minister the power to—I think it is under section —

The CHAIR: Was there a specific —

Hon ROBIN CHAPPLE: Yes, the reason is that, I think it is proposed section 103AY that states that the director general may implement them or may not. Do you have a concern with that? It states —

(1) Without limiting section 103AW(1), a condition imposed under that section —

... may ...

Ms McEvoy: I think that is around the condition-setting powers rather than the decision-making powers. That division is all around powers to implement conditions. There is somewhere else in the bill —

Hon ROBIN CHAPPLE: I think proposed sections 103AM, 103AY and 103AZC cover the issue.

Ms McEvoy: I think in terms of decision-making it is proposed section 103AQ, which sets out the matters referred to in proposed section 103AP(7)(a). In 103AQ(1)(b) it refers to the clearing principles.

Hon ROBIN CHAPPLE: Yes, but what I am saying is that at the beginning it is clarified that the minister “may” does not “have to”.

The CHAIR: Does this make it any easier for you? The DMP's exercise of its delegated authority over clearing associated with mining activities is subject to the clearing principles contained in schedule 5 of the EP act. By largely exempting such clearing from the EP act, as part 4 of the bill proposes, clearing associated with mining proposals is no longer subject to schedule 5's principles.

Hon ROBIN CHAPPLE: Yes, that is the very point. Those principles were the very principles identified in the Auditor General's report. Suddenly we have a situation where, under the mines department, the schedule for those is not necessarily going to be applied.

Ms McEvoy: I think if you look at section 103AP(7), it states —

In deciding whether or not to approve a proposed activity in a mining proposal, the Director General of Mines —

(a) must have regard to the matters set out in section 103AQ(2); ...

Which includes the current principles.

Hon ROBIN CHAPPLE: Yes, but when you actually get to 103AQ, it states —

Matters to be considered when assessing programmes of work or mining proposals

(2) The matters referred to in section 103AP(7)(a) are —

... the effect the proposed activity may have on the environment; ...

But surely proposed section 103AQ deals with the fact that the minister “may”; he does not “have to”.

Ms McEvoy: I was of the view that the section you refer to is in relation to the minister's powers to set conditions rather than the DG's decision on whether the proposal is acceptable or not.

Hon ROBIN CHAPPLE: The minister or DG—there is an element of decision-making in relation to how they may or may not be implemented. I got a nod of the head on the *Hansard*, so that was a yes?

Ms McEvoy: I understand your view; I still think that the powers in relation to the decision-making of the minister are in relation to condition-setting on tenements, which is a different matter—that is, deciding that it is acceptable—so it is one step further down the decision-making track.

Hon ROBIN CHAPPLE: I take on your point; it is one step further down the decision-making track. Let us go back to the principle of the primary decision-making that the minister “may”; that is how it all starts off.

The CHAIR: If I can just jump in there, that is pretty standard. Most bills that go through have the minister “may”.

Hon ROBIN CHAPPLE: In many circumstances I would agree with you, Chair, but in this case when we are actually dealing with the issue of the level of environmental consideration in relation to land clearing or vegetation clearing, quite clearly the EP act has under schedule 5 a set of principles set out. These principles were endorsed by the Auditor General and those principles, as they currently exist, are dealt with under the current provisions of the mines act. We bring into the bill a set of amendments which determine, in my view, that they can then be prefaced by the word “may”.

[10.30 am]

Ms McEvoy: Just to clarify, they are not currently dealt with in the current Mining Act; it is under a delegation of the clearing provisions of the Environmental Protection Act.

Hon ROBIN CHAPPLE: The delegation has your authority, whereas now we will take that authority away and put it within the Mines Act?

The CHAIR: Well, we are, because, as I read out before from that piece of paper —

Hon ROBIN CHAPPLE: That seems to be sort of an overview rather than necessarily a detailed explanation of clause by clause. That will do me.

The CHAIR: Thank you.

Hon DAVE GRILLS: I am sorry, I did not get the opportunity to ask this during the first bit, but when you describe your consultation amongst stakeholders and other agencies, can you give us an outline of what your consultation is and how that works? How does it happen?

Mr Banks: We have not undertaken any consultation in relation to this bill because it is not one that we administer.

Hon DAVE GRILLS: But with the Department of Mines and Petroleum, did you have any consultation with them?

Mr Banks: We have direct officer engagement and input into the drafting as it related to intersections with our act.

Hon KATE DOUST: My apologies, because I probably missed all the important things so far. Tell me if I am looking at the wrong areas, but I note—you may have answered this already—in relation to the powers of the environment inspectors, we are told in some notes that the additional inspectors' powers prescribed in the regs will not actually be set out in the legislation. Are you able to tell me why that is the case?

Mr Banks: Again, it is a matter for DMP. This is not our bill.

Hon KATE DOUST: Also, in the area of the environmental management system, having some discussions with some of the prospectors, they have talked about the costs associated with getting the experts in to help pull together the documents that they need and to do the various different types of assessments they have. Are you able to talk to us about or give us some ballpark figure what it would cost for a miner in the top end, if you like, or a prospector, what costs are involved with them currently before they can actually start work? What do they have to actually do?

Ms McEvoy: There are no costs under the current delegation for prospectors because there is an exemption from the clearing provisions of the EP Act.

Hon ROBIN CHAPPLE: What is the definition of the exemption? Is it by hectare?

Ms McEvoy: Currently?

Hon ROBIN CHAPPLE: Currently.

Ms McEvoy: It is in schedule 1 of the Environmental Protection (Clearing of Native Vegetation) Regulations. It is actually multi-parted—it is all about low-impact mining and petroleum activities, so it has many different strings to that, and so it is not as straightforward. But my recollection in relation to prospecting is that it is less than two hectares open at any one time, so you need to have rehabilitated that two hectares before you can do any more.

Hon ROBIN CHAPPLE: Which has been part of the reason that we are seeing rehab being so good?

Ms McEvoy: Yes.

Hon ROBIN CHAPPLE: For the committee's general sort of information, if I remember rightly from those regulations, it is more about not what you can do but what you cannot do. So you cannot do clearing within so many metres of a waterway or things like that?

Ms McEvoy: It is a bit of both. It has some areas of sensitivity where those exemptions do not apply, but it also allows for things as various as maintaining submerged pipelines through to the prospecting, various kinds of low-impact mining and petroleum activities; so it is he a bit of a mixed bag.

Hon ROBIN CHAPPLE: If there were not any particular concerns, and we were going to prospect in Kings Park, assuming that we were allowed to.

Ms McEvoy: I think that might be a slight problem.

Hon ROBIN CHAPPLE: Let us pick a bit of the desert somewhere then. So there are no constraints and a tenement holder can take out 100 hectares, but they would work through those 100 hectares two hectares at a time so it would not actually come before you?

Ms McEvoy: That is correct, if it otherwise complied with those requirements.

Hon ROBIN CHAPPLE: So a prospector can take those 100 hectares—yes, fine. That is a beautiful answer, thank you.

The CHAIR: I have just been made aware that the EP Act defines “environment” and “environmental harm”, but the bill defines it differently.

Ms McEvoy: Yes.

The CHAIR: Do you understand that?

Ms McEvoy: I think that is a question for the Department of Mines and Petroleum.

Hon KATE DOUST: Can I follow up on that. If that is the case and if there is a disparity between the two different definitions—I understand from earlier questions that you advised that you had a degree of input into this bill—was that a matter that was discussed during the drafting process, that there was going to be a discrepancy in that definition?

Ms McEvoy: We did provide comment on the different definitions.

Hon KATE DOUST: What was your view? I mean, is it going to cause significant problems for people having to relate to two separate pieces of legislation?

Ms McEvoy: I am not a lawyer, so I am not sure. Our advice at the time was that having a more aligned definition would be easier.

The CHAIR: So that was the reasoning for having—we will ask DMP for that question, but you pointed that out to them in the first place?

Ms McEvoy: Yes.

Hon DAVE GRILLS: That sort of goes to what I said before—maybe “consultation” was the wrong word—your engagement with them with regard to this, and a couple of times you said that is not our thing, that is a matter for the DMP. When you said that to them, if you knew that and it has been pointed out that that was the case, what happened? What was the feedback there?

Ms McEvoy: They preferred their definitions.

Hon KATE DOUST: Again I apologise for not having been here at the beginning, so I do not know whether this question was asked. What was the motivation behind the changes to the Mining Act to enable the matters that we are dealing with now, in terms of the environmental changes; is that something that your department drove?

Ms McEvoy: No.

Hon KATE DOUST: Are you able to provide some sort of explanation so as to what drove the changes or who instigated the changes?

Ms McEvoy: No.

Hon ROBIN CHAPPLE: Just one more question, if I may. Back in 2008 and 2009 there was a group called the industry working group; were you ever consulted by that group?

Ms McEvoy: No.

Mr Banks: If I can clarify, was that the RER group or whatever it was?

Hon ROBIN CHAPPLE: No, it was the industry group.

Mr Banks: That is all right, because we certainly had membership and representation on that one.

The CHAIR: No more questions? On behalf of the committee and myself I thank you very much for appearing before us. Thank you.

Hearing concluded at 10.39 am
