

ECONOMICS AND INDUSTRY STANDING COMMITTEE

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH,
THURSDAY, 6 SEPTEMBER 2001**

THIRD SESSION

Members

Mr McRae (Chairman)
Mr Day (Deputy Chairman)
Mr Bowler
Mr Masters
Mr Murray

ST JOHN, MR PHILIP AMBROSE,
Principal Town Planner, City of Swan,
examined:

ERCEG, MR JOHN,
Manager, City of Swan,
examined:

The CHAIRMAN: The committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the House itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as contempt of Parliament.

With those words can I welcome you to this hearing. Would you, for the record, please state your business address and the capacity in which you appear before this committee.

Mr St John: My full name is Philip Ambrose St. John. My business address is the City of Swan, Old Great Northern Highway, Midland and I work there as the principal planner of the city and have done so since June 1999.

The CHAIRMAN: Have you completed the details of witness form?

Mr St John: Yes, I have.

The CHAIRMAN: Did you understand the notes attached to it?

Mr St John: I did.

The CHAIRMAN: Did you receive and read an information for witnesses briefing sheet and guides in that regarding giving evidence before a parliamentary committee?

Mr St John: Yes, I have.

The CHAIRMAN: And did you understand all aspects of that information?

Mr St John: Yes.

The CHAIRMAN: Thank you for that and welcome. As Mr Day was saying, can I give you our apologies for the delay. Mr Erceg, is there something that you wanted to lead with following on from the last time that you came to us.

Mr Erceg: Not really. I guess I gave you a fairly comprehensive overview of the city submission at the time. I was the last person on the day as you recall and there were several questions that members of the committee wished to asked so I will go straight to them.

The CHAIRMAN: Have you had any further thought about the level of notification and involvement of the City of Swan in the initial planning and subsequent licensing arrangements for Bellevue site?

Mr Erceg: I have had some more thought about it and I have not changed by view in any way.

The CHAIRMAN: Can you briefly recap on that.

Mr Erceg: The submission looked at two aspects. One was the approval process, and the City of Swan is the approval authority.

The CHAIRMAN: That is the initial planning approval.

Mr Erceg: Yes, the initial planning approval. I talked about the fact that there were problems with the scheme text with regard to the definition of hazardous industries. I also mentioned that the process that was adopted for local government involves an interdepartmental committee assessing the merits of an application and a referral, in the case of hazardous industries, to the Department of Environmental Protection and the Department of Minerals and Energy for their advice. The City of Swan makes an assessment of whether something should be approved on the basis of that specialist advice and any other referring authorities that are deemed relevant to the particular circumstances. One of the difficulties that I spoke about is the fact that in the case of hazardous industries, local government generally does not have the expertise to make expert opinions and therefore relies very much on external agencies. I also talked about the fact that there were a number of circumstances in which it is difficult for local governments; for example, industries that are approved without prior knowledge of the type of industry that is to be established at the time of application. We may not necessarily know the end use of a factory when we make the assessment and approve it.

Mr DAY: Would specialist advice be more readily available today than it was in 1989 if an approval for an operation such as this was being sought?

Mr Erceg: I am not confident that that would be the case. One thing that was revealed to me when making inquiries with the DEP after the incident, was that the criteria that it used to make assessments was very unclear. It had at its disposal experts within its department, and it was very much a value judgment as to whether it referred onto those areas. There is also the matter of the information that it gets from local government. It comes in various degrees of quality and if the DEP does not have all the facts before it, then it is very hard for it to make an assessment. Clearly, there is a need to clarify the roles and the expectations. The DEP is very much focused on making a decision about whether formal assessment is required rather than giving advice about the merits of a particular industry in a particular location.

Mr DAY: In the written submission by the City of Swan, and in your verbal comments last time and just now, you expressed the same sort of the view as we just heard from the Department of Health, that was about the need for a health impact assessment. Do you believe that that process would address the problems that you have just identified?

Mr Erceg: I think it would. One thing that I have observed in my 20 years in local government is the association between local government and State Government in this particular area. When I first started in local government as an environmental health officer, the Department of Health was responsible for these sorts of industries and there was a close working relationship between local government and State Government. Back then we felt we had a better idea of what was going on. The process as it is now involves referral to the DEP, the DME and other agencies and the Department of Health is not involved in the process. Therefore, we do not have access to various opinions and the various agencies are not set up to provide expert opinion with regard to assessing applications in the initial stages.

Mr DAY: In situations in which the industrial or commercial activities on site may change or expand to a much greater extent than was the case at the time of approval, do you believe that you need greater powers to be able to deal with that situation, or are the powers that you have at the moment adequate?

Mr Erceg: I guess if the State Government becomes aware, we then become aware subsequent to the event. Before the DEP licenses industries, it seeks comments from local government with regard to a works approval or a licence. Therefore, in a number of those cases, when it is picked up eventually, we do not have an opportunity to decide whether the industry should be there in the first place. By the time we get the application it is subsequent to the event.

Mr MASTERS: Roughly quoting, you said that you can approve a factory without knowing to what use it will be put. That sets alarm bells ringing with me. As a local government authority, are

you concerned that you can make a blanket approval for a site and yet not know the detail of what will happen there?

Mr Erceg: Yes, I think that is fair to say.

Mr MASTERS: Are you changing any of your internal procedures to try to get on top of this particular aspect of the issue?

Mr Erceg: I do not know that we can. It would be an extremely difficult task to know the end use of every industrial premises in the city. We have very large areas in Malaga and Bellevue and some in Guildford and the premises change hands on a regular basis.

Mr MASTERS: If someone changed from, say, a sawmill to a chemical plant of some sort, you would not necessarily know about it?

Mr Erceg: In those sort of the cases there is a legal obligation that they will seek the approval of relevant government departments and licensing, if that is required.

Mr MASTERS: However, if it was not required, would you then not know about it yourself?

Mr Erceg: No. Just to give you an indication, we have 63 premises in the City of Swan licensed by the DEP and 108 licensed by the Department of Minerals and Energy. We do not know about the ones licensed by the Department of Mineral and Petroleum Resources.

Mr MASTERS: Do they not communicate with you?

Mr Erceg: Very rarely.

Mr DAY: Even when a licence has been granted?

Mr Erceg: I am not unaware, from my position in the organisation, of receiving any information about licences. I am unsure if they are referred to planning.

Mr DAY: Do you believe that should change?

Mr Erceg: It should. It is also fair to say that there is a scale of licensed premises. The ones on a smaller scale, for instance a service station or a small chemical storage facility with chemicals of an insignificant nature, do not need to be looked at. However, there should be an intergovernmental process.

Mr MASTERS: Yes. If someone proposes to build a service station on a particular site, you are saying that would require both DEP and DMPR approvals? Would it notify you of say an approval required only by the DMPR for someone who applied for a licence to operate a service station?

Mr St John: We are not informed of licences that are granted. We refer an application to those agencies that respond by saying that they intend to grant a licence and it broadly complies. The city would then proceed on the understanding that the licence would be granted. We put a footnote on all approvals saying that these licences must be obtained.

Mr MASTERS: I am trying to ask a different question. Do people require a licence, apart from the DMPR, to operate a service station?

Mr St John: Yes.

Mr MASTERS: Would the DMPR tell you formally that such a licence had been applied for?

Mr St John: No.

Mr MASTERS: In theory, you would find out only because of a request for a zoning change. How would you know, for example, of a proposal to erect a service station on a particular lot?

Mr St John: We would get either a zoning change request or a development application.

Mr MASTERS: That suggests to me that some internal communications need to be improved in not only your organisation but also local government in general to ensure that the left hand knows

what the right hand is doing. I am surprised to hear that the DMPR is not required to let you know of such applications; there is therefore clearly a problem there. I am still trying to understand your statement that a factory could be approved without knowing the use to which it will be put. I would have thought that any use that requires a licence or permit from either the DEP or the DMPR would be automatically notified to you. In the standard cases such as service stations, you would have no comment to make and pass that comment back to the licensing authorities; whereas, if it were something like another Waste Control Pty Ltd site, you would say that it is out of your league and you need more advice from environmental health authorities, the DEP, the DMPR and so on before you could make a judgment. Is that scenario reasonable or unreasonable?

Mr St John: A problem arises when these things occur that normally do not require planning applications. The service station is a straightforward example, as it is a structure that is being built which is a change of use of the land. It is clear that a zoning application is required in that case. A difficulty comes about when we commonly get applications, for example, for a tin shed with an office or factory in it in an industrial zone and at the front it is called "warehouse". The council may approve it but the precise uses that occur there or precisely what is stored there is not a matter that is considered at the time.

Mr MASTERS: I appreciate that. However, if that site required a DEP or DMPR licence and you were notified before giving your approval that the licence was required from those government agencies and they sought your advice, would it be an unreasonable request on the resources of the council for you to say that you had no concerns, based on the advice that paints would be stored there in a paint shop to be built? You could then send a letter to that effect to those agencies. However, if something like Waste Control were to start up again within your boundaries, you could then express concern.

Mr St John: It would not be unreasonable for us to say to those agencies that a planning application is or is not required for that change and to include our comments.

Mr MASTERS: Leaving a planning application aside, is there a way in which the state government agencies can seek your advice before a building requiring permits or licences is constructed or operated in your local government area?

Mr St John: That could happen.

Mr Erceg: It does happen with the DEP but not with the DMPR.

Mr DAY: Is it realistic to put a process in place in which you would give development approval, such as in the example you mentioned, with a condition that required people to inform you of what would occur there?

Mr St John: It is probably not realistic because uses change quickly and subtly. We can deal with an application for a structural building, but problems arise particularly with applications for a storage yard or a storage building.

Mr MASTERS: On the second page of text on page 3 of your submission you refer to 22 September 1993. In the second sentence, you said -

Council requested an application for approval at its 19 April 1993 meeting after an investigation of a complaint in March 1993 revealed that no approvals existed for the storage of chemicals and solvents on the site.

You then go on to say -

The approval was granted following referral letters . . .

I interpret what you said there to mean that in spite of a complaint having been received in March 1993, you assessed the use of that Bulbey Road site as fair and reasonable; hence, the reason the council then gave approval. Have I interpreted that correctly?

Mr Erceg: Not exactly.

Mr MASTERS: I am sorry, the council requested an application for approval.

Mr Erceg: There are two sites. The approval was in relation to the methyl nitrate recycling facility on the Bulbey Street site. Following complaints to council, a site meeting found that there were no approvals for the 88 Oliver Street site where the solvent storage facility existed.

Mr MASTERS: Was it an extension of the approval on the Bulbey Road site?

Mr Erceg: Yes.

The CHAIRMAN: Did the operator do that without seeking approval from the City of Swan?

Mr Erceg: It appears that way. There were certainly no approvals in place for doing that.

The CHAIRMAN: Was an application subsequently made?

Mr Erceg: Yes, and it was approved.

The CHAIRMAN: The City of Swan approved it?

Mr Erceg: Yes, I believe with about 14 conditions including the condition that formal approvals be obtained from the DEP and the DMPR.

The CHAIRMAN: Is it possible to provide the committee with a copy of the minutes of the meeting approving that application and the conditions?

Mr Erceg: Yes. Every bit of correspondence on the files has already been provided to the committee.

The CHAIRMAN: We are still trying to dive through a room full of documents.

Mr Erceg: I can provide that document separately.

Mr MASTERS: You stated that 14 conditions were imposed. However, the top paragraph on page 3 states -

Furthermore, even if the proposed activity is known at the time of application, there is no mechanism for identifying changes or expansion of activities once the business becomes operational.

Why can you not impose a condition that approval must be obtained for any material change to the business or expansion of the business on that site?

Mr Erceg: I believe because that is a matter of law anyway. If businesses expand the use for which they were approved, they are required by law to apply for approval. That would be merely a reminder of their legal obligations.

The CHAIRMAN: The problem is it was in force?

Mr St John: Local government enforcement -

The CHAIRMAN: You cannot go into a warehouse and see whether the nature of the business inside has changed.

Mr Erceg: That is right.

Mr MASTERS: What I am leading to is if there were specific conditions saying that if the business changed from methyl nitrate production to solvent recycling, that is a significant enough change of the business activity or expansion to require prior approval. If they do not apply for that approval and you subsequently get a complaint, you can close down the business or take other appropriate action because one of the conditions of operation has been breached.

Mr St John: That is correct. The problem comes about with the evolution of businesses outside the planning system when the council does not have a strong net into which to catch those problems. If someone wants to build something, we catch it but if it is an evolutionary thing, such

as an open storage building or a change in existing buildings, although technically speaking any change requires further approval, it is difficult for the council to keep up with those things.

Mr MASTERS: I would have thought to protect your backsides you would need a general catch-all clause so that any material change required prior approval. In that way, if someone does something significantly different that causes an increase in hazards or risks or creates complaints, you would have that person by the short and curlies.

Mr St John: There is now a clause in all approvals that states the approval is limited to what was applied for and any further change requires further approval. I am unsure if we did that back then. It is stating the obvious.

Mr MASTERS: One needs to state the obvious at times.

Mr St John: Yes, and it does happen now.

The CHAIRMAN: When was that belated approval sought and subsequently given?

Mr Erceg: Council requested an application for approval on 19 April 1993 and it was approved on 22 September 1993.

The CHAIRMAN: It had been operating there for some time?

Mr Erceg: It appears that it had been operating for some time. Between 19 April - when council requested the approval - and September it was also operating illegally.

The CHAIRMAN: Was that approval given in line with the July 1991 policy planning document on planning for hazards and safety of the Western Australian Planning Commission?

Mr Erceg: I am not familiar with it.

Mr St John: I am familiar with it but there is no evidence on the file to that effect.

The CHAIRMAN: Were the 1999 guidelines part of the thinking?

Mr St John: There is no evidence to suggest that. I was not working with the City of Swan at the time but looking at the file there are no notes to that effect.

The CHAIRMAN: Would there be a reason why that would not have applied? If those were the guidelines issued by the Planning Commission and you received what appeared to be a belated application for planning approval, and part of the cause had been a complaint and part of that complaint had been because people perceived it to be either noxious, hazardous or dangerous, do you know why those guidelines did not apply?

Mr Erceg: From my reading of the file, it appears that the storage facility was examined in isolation of the whole site. What occurred as a result of that site meeting at which a number of agencies attended when concerns were expressed to all those agencies -

The CHAIRMAN: What were those concerns?

Mr Erceg: There was spillage on the ground, rusting drums and that sort of thing.

The CHAIRMAN: Were there pollution concerns?

Mr Erceg: Yes.

The CHAIRMAN: Were there public health concerns?

Mr Erceg: No public health concerns were expressed in the file. It appears that it was all contained within the property and not external to the property.

The CHAIRMAN: Were the complaints to the shire not based on public health concerns?

Mr Erceg: I cannot recall. The complaints were about rusting drums of chemicals lying around and leaking on the ground near the site. There were concerns. I do not know whether the investigation by the officer was about health.

The CHAIRMAN: I accept that you do not at the moment have the file notes to indicate whether the motive was primarily a public health concern or an environmental concern, but nonetheless, the shire received complaints about the carrying on of a businesses at a place for which there was no approval in 1993.

Mr Erceg: That is right.

The CHAIRMAN: You met with a number of agencies, including environmental agencies. Did you say that the Department of Health was represented?

Mr Erceg: They were there as well.

The CHAIRMAN: Was the Planning Commission represented?

Mr Erceg: No.

The CHAIRMAN: What about the Ministry for Planning?

Mr Erceg: No.

The CHAIRMAN: In any event, there were a number of state government agencies.

Mr Erceg: Yes.

The CHAIRMAN: You were dealing with the complaint and looking at the facility. At that moment it looked like a storage facility. Later it developed into a different animal altogether. It was 1993, and the Western Australian Planning Commission's policy on planning for hazards and safety of 1991 did not come into your thinking?

Mr Erceg: As Phil said, it does not seem to have come into the thinking. There is nothing on the file to indicate that it did.

The CHAIRMAN: You may have heard me suggest to other parties who have presented evidence and material to this committee that I am developing the view that to have a disastrous incident like this requires a whole bunch of systemic errors at best, or failures at worst, to have all lined up. It is like putting billiard balls in a line and being able to tap a ball at one end and watch the ball at the other end fly off. I am looking at the planning approval process. It seems to me that it was an early billiard ball in that sequence of events.

Mr Erceg: Without knowing the contents of those guidelines, I cannot say how that would have assisted.

The CHAIRMAN: I do not ask you to do an immense job but could you just check to see whether there was any reference to the Planning Commission's guidelines?

Mr Erceg: I know there was not because I have been through the file in detail a number of times.

The CHAIRMAN: Do you know whether at the time the Shire of Swan's town planning scheme contained zoning or planning approval guidelines for dealing with hazardous industry?

Mr St John: The scheme partly did. The scheme has three relevant definitions. It defines hazardous industry, storage yard and general industry.

The CHAIRMAN: It does now?

Mr St John: It does now and it did then. The use was assessed and it was approved as a storage yard - that is, on the basis of the definition of "industry". It could not fall into the hazardous industry definition. I can table the definitions. The industry definition refers to manufacturing products, breaking up articles, etc. This was an application for the storage of materials, so it did not fall into either of those industry-use classes; it was assessed as a storage yard, which is permitted in an industrial zone because it has normally a fairly innocuous use. There was a clear problem in the scheme definitions, and there still is, because there is not an adequate mechanism in those scheme definitions to trap these sorts of uses.

Mr MASTERS: If one of the recommendations of this inquiry was that all local government bodies should, as a matter of urgency, inspect every Department of Environmental Protection and Department of Mineral and Petroleum Resources site within local government boundaries, how big a job would it be for the City of Swan, recognising that 171 such premises exist.

The CHAIRMAN: Some of them are cross-registered.

Mr MASTERS: I presume so, and some would be very simple to assess, such as service stations.

Mr Erceg: It would be extremely onerous, I would suggest. We already inspect a number of other facilities, from food premises to offensive trades to lodging houses. We inspect a whole range. We have gone down the path of contracting out that process in a number of instances because we do not have the resource capability to do it.

The CHAIRMAN: In peak periods or as a general rule?

Mr Erceg: As a general rule.

Mr MASTERS: I guess I am asking for a one-off inspection to see whether there are any more waste control operations in your area.

Mr Erceg: The Department of Mineral and Petroleum Resources has started the process of redoing the whole of its approval and inspection process. It has the expertise to make judgments about those sorts of industries. That is why it is the licensing authority.

Mr MASTERS: You have the planning powers to a large degree. Maybe the suggestion should be that the department should have to liaise with you in some way so that the findings of its inventory analysis get conveyed to you, so you can take appropriate planning action for development approval should it find another cumulative waste control operation in your local government boundary.

Mr Erceg: That would be perfectly appropriate. If we found out that there were illegal activities subsequent to the event, we could respond to that.

Mr MASTERS: Not even illegal but -

The CHAIRMAN: Confirmation of the approved use.

Mr MASTERS: The Bellevue site use slowly grew and metamorphosed over time, yet the whole time it may well have been within planning approval guidelines in the absence of the local authority knowing just how hazardous the site was. The DME may well have known a lot more of the consequences of that activity continuing there but you may not have known about that activity.

Mr Erceg: That is certainly the case. That is an area where there is significant room for improvement.

Mr DAY: In summary, the comments that have been made by a number of people, particularly around the Bellevue area, are that they believe approval should not have been given for an activity such as this on that site close to the Helena River and a residential area. They were critical of the Shire of Swan, at least as it was then. Do you regard that criticism as appropriate or fair?

Mr Erceg: It is perfectly appropriate. Looking back from where we are now, it is a perfectly valid criticism. I guess the only defence that the city could offer is that it was an incremental change over a number of years. Relevant government departments with expertise were aware of what was going on. The operators were licensed by those government departments, so there was an expectation that everything was under control.

Mr DAY: It is much easier to look back now than foresee what was likely to happen. Is that right?

Mr Erceg: Yes.

The CHAIRMAN: As I said before, everybody was in the bus but nobody was in the driving seat.

Mr Erceg: Yes.

Mr MASTERS: On page 3 of your submission, just above the recommendations box, you state that expert health risk advice is not available to local government for high risk facilities, such as hazardous waste industries, to support its decision making. I appreciate that you have no in-house advice available and that consulting advice is obviously expensive and may well be beyond the local government's means. However, I am curious to ask whether what you are saying is that the Department of Health or other state government agencies with that expertise are reluctant or unwilling or have proven not to have provided advice to you when requested?

Mr Erceg: I guess what I am saying is that the Department of Health is not part of the health impact assessment process, and it should be.

Mr MASTERS: We have certainly got that message from the department. I think we have a lot of sympathy for it. At the top of page 4, the statement is made that, in their roles as licensing authorities, the DEP and DME are responsible for imposing licence conditions and ensuring compliance. Again with the benefit of hindsight, are there any licence conditions relating to changes of operating procedure or size or scope of the operation which you believe either or both of those agencies at state government level should apply to make sure that you are told at the local government level of changes to risk and hazard operating procedures?

Mr Erceg: Yes, that is certainly the case. Those conditions are based on pollution and not necessarily health risk. There is a separation of roles. As I mentioned earlier, when the Department of Health was in that role it worked closely with local governments. The DEP tends to work independently. It licenses and inspects the premises. If any problems are revealed, it deals with those problems without referral to the local government. I guess the problem that local government has is that our community expects us to be an advocate on its behalf. We are not acting in that capacity the way things are now.

Mr MASTERS: Towards the bottom of page 4 under the section on comments and recommendations, the second paragraph relates to a catchall phrase: continue to apply in the Health Act. I am a bit confused about exactly what you are saying there because later on that paragraph states that that clause, which relates to a trade that may become a nuisance to health, was removed in November 2000 following a Supreme Court ruling that any industry that has the potential to cause pollution fell within the definition of "offensive trade". I am not quite sure what you are trying to say to us there.

Mr Erceg: Under the Health Act there is a list of proscribed offensive trades. Until that Supreme Court decision there was also a phrase at the bottom of that list that said that in addition to the list of offensive trades there is any trade that, unless preventive measures are adopted, may become a nuisance to health to inhabitants of the district. The interpretation that was always applied to that is that local government would not make decisions about what could be added to that list. It was only when the Department of Health prescribed and added to that list that a trade became an offensive trade. What the Supreme Court ruling in effect decided was that any industry with the potential to cause pollution which required some sort of mechanism to attenuate that pollution is in effect an offensive trade.

Mr DAY: Even if it was not causing the pollution?

Mr Erceg: That is right.

Mr MASTERS: Even if it was not listed by the Department of Health?

Mr Erceg: Yes. Subsequently the Health Act was amended and the phrase was removed because the problem for a local government, like the City of Swan, where there is a large industrial area is that under our scheme we could not approve any industrial facility in Malaga, for instance, where the scheme does not allow hazardous industries.

Mr MASTERS: Or offensive industries?

Mr Erceg: The definition used in the scheme is noxious industry but it includes offensive trades.

The CHAIRMAN: The hazardous industry reference was in the Planning Commission's guidelines.

Mr Erceg: Yes.

Mr MASTERS: If an industry with the potential to cause pollution if preventive measures were not adopted, which would mean by definition that an industry became an offensive trade, was operating within an industrial area where offensive, noxious trades were not allowed, did that Supreme Court ruling not give you the power to act?

Mr Erceg: For a brief time. That Supreme Court ruling was handed down on 30 July 1999. Several months after that the clause in the Health Act was removed.

Mr MASTERS: By the then minister.

Mr Erceg: Yes.

Mr DAY: By the Governor in Executive Council on the recommendation of the minister having had cabinet approval.

Mr Erceg: I am sorry.

Mr DAY: If the current Government wants to reverse the position, it is very welcome to.

Mr MASTERS: I am very confused, because the reason that clause was removed from the Health Act was that it was redundant.

Mr DAY: It was not redundant.

Mr MASTERS: There was concern that the intent of the definition could be opened up to the extent that no industry could take place anywhere.

Mr DAY: The problem is that it covered any industry that could cause pollution, regardless of whether that industry was taking preventive measures. Therefore, an industry, such as a fish and chip shop, that had the ability to produce pollution but was not actually doing so, would have been prevented from operating. The problem was that it was too all-embracing.

Mr MASTERS: It states, "if preventive measures are not adopted"; so if a fish and chip shop were to put in a filter, that would be a preventive measure and it would cease to be an offensive process.

Mr DAY: We need to read the whole Supreme Court judgment.

The CHAIRMAN: Thank you for your time. I appreciate your patience and willingness to contribute to this inquiry. The Shire of Swan's role and contribution to our understanding of how we can take steps to avoid a repeat of this incident is very important, and we appreciate your input.

Committee adjourned at 4.31 pm