STANDING COMMITTEE ON LEGISLATION

MINING LEGISLATION AMENDMENT BILL 2015

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 4 APRIL 2016

SESSION SIX

Members

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

Hearing commenced at 3.30 pm

Mr PETER ROBERTSON
Senior Campaigner, The Wilderness Society (WA) Inc, sworn and examined:

Mr PATRICK PEARLMAN
Principal Solicitor, Environmental Defender's Office WA (Inc), 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 the affirmation.

[Witnesses took the affirmation.]

The CHAIR: You will have both signed a document entitled "Information for Witnesses". Have you both 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 the 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 like to make an opening statement to the committee?

Mr Robertson: Thank you very much for having us here today. We are appearing together, obviously, The Wilderness Society and the Environmental Defender's Office. We put in a very brief submission because there seems to have been quite a lot of committees and panels and inquiries recently that we have had to attend to, but we do consider this legislation as very important and we do have very serious concerns about it. I outlined quite briefly in our submission the nature of those concerns. Fundamentally, we believe that the Department of Mines and Petroleum is not an appropriate body to take on more responsibility for environmental protection or environmental regulation, and we will go into more detail as to why that is the case. We are concerned about changes being made to the Environmental Protection Act via mining approvals legislation, which is, I suppose, what this essentially is. If changes are to be made to the EP act, they ought to be made to improve the protection of our environment, not to weaken it or to delegate responsibilities for the protection of our environment onto another agency other than the EPA. Our third main point is that the EPA is the foremost and principal agency for assessing and making recommendations in relation to projects that may have an impact on the environment, and nothing should be done to try to subvert or undermine or weaken the role of the EPA in that incredibly important function, which they carry out on behalf of the public of WA and, of course, future generations.

I will hand over to Patrick from the EDO to go into some more detail in relation to the specific provisions and some of our concerns but, in a nutshell, those are what particularly concern the Wilderness Society in terms of the drift of this legislation, if you like, and the fact that this is another example of attempts to try to, as we see it, erode the powers and functions of the EPA at

a time when, if anything, we should be increasing the EPA's powers and responsibilities and their capacity to carry those out.

Mr Pearlman: As you probably know, we lodged somewhat more fulsome submissions regarding our concerns with the proposed legislation. We largely echo the concerns that Mr Robertson has already raised but I will make a couple of additional points and then I am happy to go into some of our concerns a bit more deeply. The first is trying to ascertain the actual purpose and objective of this legislation. It appears to be to streamline and facilitate approvals more quickly for the benefit of industry and mineral development while minimising further environmental impact. Environmental impact appears to be very much pulling up the rear of the train on this legislation and rather than bettering the environment, as I believe the purpose suggests, it appears that the main goal is to minimise further damage to the environment as a result of the legislation.

The points that we make in our submission I would like to supplement with a few items that were not raised in our submission. I think it is fair to say that we have concerns about differences in the definition of "environment" and "environmental harm" that are defined in the proposed legislation. Those are not consistent, in our view, with the definitions of those terms in the Environmental Protection Act. We view those changes as, in essence, watering down, if you will, the protections that the Environmental Protection Act would otherwise extend to clearing activities.

We are also concerned, frankly, with the fact that if this program is moved to the Mining Act, as proposed, many of the core fundamental guiding principles that govern agency decision-making under the Environmental Protection Act, such as the precautionary principle, intergenerational equity and conservation of ecological integrity, are not carried, if you will, into the Mining Act. The Mining Act really is about the development of mineral resources; the Environmental Protection Act truly is about protecting the environment, so that is a significant concern for us. That really summarises the points that we made in our submissions.

In addition, in going back and preparing a bit more for today's hearing, I think it is fair to say that the committee should also be cognisant of the fact that significant issues were raised by the Auditor General in the Auditor General's 2007 report about the degree to which both the DER or what would be the DER now and the DMP as its predecessor was constituted, whether or not those entities are adequately ensuring compliance with conditions of environmental clearing permits, whether or not they have adequately addressed and assessed the degree and scale of illegal clearing activities and whether they are taking adequate enforcement action. As I read it, the 2007 Auditor's report left it very much in the open whether or not the agencies were doing a sufficient job in those respects. By the way, I brought eight copies of the auditor's report from 2007.

The CHAIR: That was nine years ago.

Mr Pearlman: Yes, that was nine years ago. That is a pertinent point, and it is a point I was just about to raise, which is that as far as we can tell, those concerns and those findings have not been addressed in any subsequent auditor's reports. So, the Auditor General's report of 2011 and the Auditor General's report of 2014 do not speak to those concerns about inadequacies and deficiencies in the clearing program. So, rather than proceed forward, if you will, with the proposed legislation, which will in essence make major changes to environmental regulation of clearing, we think it would be more appropriate to first further investigate the Auditor General's 2007 findings and see whether or not those still hold true before we take a leap forward into changing the basic legislative framework. That is an overview of our submissions. Thank you.

[3.40 pm]

The CHAIR: Robin, do you have any questions?

Hon ROBIN CHAPPLE: I suppose I go back to the one that I have been dealing with most of the time, and that is the bilateral agreement with the commonwealth in respect of clearing. That is the bilateral agreement made under section 45 of the Environment Protection and Biodiversity

Conservation Act with the EPA, where the EPA is identified as the agency that would be responsible, or is responsible, via the delegation of the bilateral agreement. The issue is that that is the agreement that stands, and by moving the authority for land clearing over from the EPA to the mines department, one, it means that this piece of legislation, or this bilateral agreement, no longer has validity, but also it means, as we have heard from other presenters today, that a new bilateral would have to be established between the commonwealth and the mines department to actually carry out the same process. We have been told that that would be a fairly simple thing to do and that once the legislation is passed, it would be just a matter of time before they established that agreement. I would first talk to Peter in this regard, if I may call you by your first name, and your knowledge of bilateral agreements historically would be of value, because I think they take quite a considerable amount of time to establish, so I am wondering how long that would be the case; and then I will most probably go to Patrick afterwards to say what would be the legal implications of land clearing that was not covered by a bilateral agreement, and would that mean that land clearing would then have to be referred to the federal EPBC as opposed to being dealt with by the mines department or the EPA?

Mr Robertson: Those are very pertinent questions, Robin. I have not actually particularly thought about that angle, but it is a relevant consideration for sure. I mean, the so-called one-stop-shop program that the commonwealth is rolling out at the moment, where it is working, shall we say, with various state governments to devolve itself of its responsibilities under the federal legislation, that process is of great concern to us because we have always maintained that we do not believe in many cases that the states have the adequate legislation or policies or political will to carry out those assessments properly to a standard that we would normally expect to be required by the commonwealth. So we have long questioned and opposed that approach of devolving responsibilities onto the state. The state has always said, and the commonwealth has said, that they are doing it at the same time as maintaining the highest environmental standards, and we have always doubted whether that is the case. This, I think, is clear evidence of a situation where that may very clearly not be the case—where the commonwealth are actually, directly or indirectly, devolving their responsibilities onto an agency that has got no environmental legislation, has got no environmental policies and has got a deep conflict of interest in terms of being both the promoter of mining and supposedly a regulator of environmental impacts. So, it is a very good question. As to the complexities around the signing of these bilaterals, the bilateral agreement to allow the state to take over the commonwealth's assessments under the EPBC act seem to happen quite regularly. The other bilateral agreement to allow the commonwealth to delegate its approvals under the EPBC act to the state has taken a lot longer to try and get through, and it is currently blocked in the Senate and has been for 18 months, and there is no likelihood that that is going to go through any time soon. So we are dealing with a situation at the moment where the assessment bilateral has been approved and put in place, as I understand it, but the approval bilateral is still locked in the Senate. So, in a nutshell, you have raised a very relevant and important consideration, and we would certainly welcome clarification both from the state and the commonwealth about how this instance would be dealt with under that bilateral agreement.

Mr Pearlman: Would you like me to speak to that now as well?

Hon ROBIN CHAPPLE: Yes. I know you have got a legal brain, and I do not have one.

Mr Pearlman: No; I think your question belies that statement. I do not know who has suggested that the change would be relatively simple to accommodate. As I understand it, the bilateral agreement requires that the program that is going to be relied upon by the commonwealth has to be accredited, for one thing, in order for that assessment to, if you will, be determined to be at least as rigorous as the assessment that the commonwealth would be undertaking. So, it is not a simple administrative matter to change the name of the legislation and simply have the assessment agreement reflect that. I think the commonwealth actually has to undertake a fairly rigorous review in order to determine that, if you will, the new legislation and the new clearing regime that would be

established under that legislation is in fact accreditable as being adequate under the commonwealth law. So I think that would probably take some time, and for the reasons that we have already identified, there are some real reasons why the commonwealth might question, indeed, whether the new framework would be adequate and would be accreditable. So I do not think it is a slam dunk that once this legislation goes through, for matters of national environmental significance this program will be adequate to allow the state to undertake the assessments.

Hon ROBIN CHAPPLE: So what would then happen to a land clearing that would occur under the new act, if, for example—and obviously it has to have some significant impact; it cannot just be BCL —

Mr Pearlman: That is right.

Hon ROBIN CHAPPLE: Normally it would go before the EPA. The EPA is now out of it, and the commonwealth is now in. What would a proponent need to do?

Mr Pearlman: If I understand the process correctly, what the proponent would have to do, if there is a potential to have significant impacts on matters of national environmental significance—you know, Ramsar, or threatened fauna or threatened flora or ecological communities—is that would have to be referred to the commonwealth, and the commonwealth would have to undertake a concurrent assessment of its own on the impacts to those matters of national environmental significance. So you would in essence end up with two assessments going on, presumably in parallel, which I think would add a layer of complexity and cost, and potentially even delay, even to the proponents, who would want to get this thing through. I think that would be the fall-out of that.

The CHAIR: I do not think it is two assessments. I was in a briefing not so long ago. I think if it was a huge environmental impact on a national scale, the money is paid to the commonwealth, and they do the assessment. The state does not do the assessment alongside the commonwealth. I cannot explain that any better.

Mr Robertson: I do not really think that is correct, with respect.

The CHAIR: Yes. The assessment is there. It is not double money. The money goes only to the federal government. Obviously it has to go to the state first, but it is sent on to the commonwealth if it is of national importance.

Mr Robertson: Okay. If you look at James Price Point, for example, the commonwealth basically commissions, if you like, the WA government and the EPA to carry out the bulk of the assessment, but the commonwealth still has to, at the end of the day, check the assessment and carry out potentially its own independent assessment. If they believe there are matters that are outside the scope of or are particularly relevant to the commonwealth but not the state, they still carry out their own independent information gathering process, and ultimately at the end of the day the federal minister still has to give his or her approval for that project to go ahead. So it is not all delegated one way or the other; it is a parallel process, and different parts of government may take on the responsibility for doing the bulk of the work, but by no means does the commonwealth, for example, just surrender the field, if you like, to the state.

[3.50 pm]

The CHAIR: That was not what I said.

Mr Robertson: Yes, sure.

The CHAIR: I said that the commonwealth certainly does have a big part to play, if it is of national importance. There is a bill going through Parliament at the moment, which you might not be aware of, and that was the briefing I was in the other day, having a look at the delineation.

Mr Robertson: Do you mean the Biodiversity Conservation Bill 2015?

The CHAIR: Yes, that is the one.

Mr Robertson: I am very familiar with that.

The CHAIR: Of course you are aware of it.

Mr Robertson: When you say it is a matter of national importance, it only has to be a single threatened species. It does not have to be something of international—you know, if a numbat happens —

The CHAIR: It just has to trigger it.

Mr Robertson: Exactly.

Mr Pearlman: It has to essentially meet the significant impact guideline, but once that is met for any single matter of national environmental significance, that triggers that EPBC act assessment, and if it is not an accredited state program—assessment process, if you will—under a bilateral agreement, then as I understand it the commonwealth is obliged to undertake the assessment. That is really what I am getting at.

Hon ROBIN CHAPPLE: I guess the point I was trying to make was that, because we have an agreement which actually says the state can do it all instead of the commonwealth, as long as it is the EPA, the moment we bring that over to the Department of Mines and Petroleum, it actually creates a pathway to bring in the commonwealth, which is exactly the opposite of what we are trying to do.

Mr Pearlman: I would agree that that would be an unintended consequence and, quite frankly, we did not touch that point in our submissions, but I think you are exactly right. The part V clearing program under the Environmental Protection Act is the accredited assessment process that is subsumed in the bilateral agreement. If that process no longer applies because the proposed amendments would move the process out of the Environmental Protection Act and over into the Mining Act, then I think that would trigger a review and an amendment. It would have to trigger a review and an amendment of the bilateral agreement.

Hon ROBIN CHAPPLE: Thanks for that. Obviously, land clearing has always been a significant issue to the conservation movement. In terms of moving it out of the EPA into the DMP, what are the issues that may not be able to be covered? This is a question to you; I have no idea. Under a DMP administration, would that be covered under an EPA or a DEC review?

Mr Pearlman: I think the easiest answer to that—or the only answer I am probably able to give at the moment, because it would take some thinking through—really stems from those definitional changes that we pointed out in our submission. You have, in essence, a broader and, I think, more readily discernible definition of "environment" in the Environmental Protection Act, which is being, if you will, replaced with a more limited definition of "environment" in the proposed legislation. For example, the man-made cultural amenity aesthetic aspects of the environment that are carried in the Environmental Protection Act, as I read the proposed legislation, those issues are not included within the definition of "environment", as it will be carried into this program. Likewise, "environmental harm" is substantially more detailed in its definition in the Environmental Protection Act as opposed to the proposed legislation. If you would like, I could take you to the pages of our submission where we deal with that.

Hon ROBIN CHAPPLE: I think it is page 5.

Mr Pearlman: That is right. So what would fall out would be those things that are defined under the Environmental Protection Act and that are administered by DER under part V that would not be consistent with the definition in the proposed legislation, and would presumably fall out from the DMP's review.

Hon ROBIN CHAPPLE: That would be harm to the environment involving removal or destruction of native vegetation. Is that it?

Mr Pearlman: We certainly have concerns about the way in which, for example, "environmental harm" seems to be defined as impacts to land, and land is defined in a pretty limited fashion in the Mining Act. That does not seem to include a lot of, if you will, ecological interaction between communities and species; how the clearing would impact on those interactions is not altogether clear from the proposed legislation.

Hon DAVE GRILLS: Before, we had the DMP in with regard to this, and we asked them about this matter and we spoke about the definitions of "likely" and "may", with regard to what they thought. My question to them was: if there was an incident under the Mining Act, and these 10 points related to that, and the mining inspector came along, who would decide whether it would be a mining thing or an EPA thing, and who would look at it? They said to us that that would be judged on what happened at the time. Why do you not think that, if they have taken it on and they are prepared to do that, these 10 principles would be looked after by the DMP?

Mr Pearlman: Are you talking about the clearing principles?

Hon DAVE GRILLS: Yes.

Mr Pearlman: It seems to me that the intent, as I read the legislation, of part IVAA, which has all these provisions about programs of work and low-impact activities in mining leases and so forth, there at least is some reference to the 10 principles contained in schedule 5 of the Environmental Protection Act, so I think there is at least an intent to incorporate those principles. Whether or not that falls out in terms of what constitutes environmental harm, that is really where our comments were going to. It seems that the definition of "environment" and "environmental harm" are different in the two pieces of legislation. Even though the DMP may be attempting to apply the clearing principles, the question would be, in subsequent enforcement or inspection, were you to find that there is actual harm, what would be harm under the Environmental Protection Act may not, in fact, be harm under the provisions of the proposed legislation.

Hon DAVE GRILLS: That is exactly what we did ask them, and they did say that it depends on what happens with regard to what it is and who would go with it. I said that, having been an ex–police officer, I understand the fact that separate laws, different agencies have that, you know, and that would be the case. That was the answer that they gave us with regard to that when I asked that question.

Mr Pearlman: That would be one of the reasons why, obviously, we are not supportive of the legislation, at least as it is drafted, which is that it introduces, if you will, an uncertainty and complexity that does not exist in the current framework. The current framework—the Environmental Protection Act—supplies the definitional terms that guide DMP in its implementation, pursuant to delegation of the clearing program. Once the legislation, if you will, bifurcates, and DMP is now no longer enforcing a clearing program under delegated authority from part V of the EP act, we are going to have, I think, different considerations. If the legislation is sufficiently different, then you are going to have, I think, these inconsistencies or contradictions between the current situation in enforcement and inspection and what will be the future situation.

Hon DAVE GRILLS: Okay, I have two questions, and they will be my last two. What would you do to fix that? What would be your magic-wand solution? Do you think that, given the fact we are talking about the goldfields in particular, and the fact that the goldfields is mining country and is different—do you think there is an opportunity to have these rules apply to different areas with regard to different levels of land clearing, animals and things like that? Do you think that might be an option?

[4.00 pm]

Mr Pearlman: Let me address your first question, which is: could the bill be fixed? I suppose —

Hon DAVE GRILLS: What your goal one solution is.

Mr Pearlman: I would say that our position would be, in the first instance, that that aspect of the bill not be adopted. The second, assuming that that does not get support in Parliament, I assume that it probably would not, would be to go through and ensure that the definitional terms—the key terms—"environment", "environmental harm" et cetera should be, I think, phrased identically between both pieces of legislation. That ensures that, in fact, they are consistent; they will be and they will continue to be. I think they will continue to be applied in the same fashion and that may also go to Senator Chapple's comment about the bilateral agreement.

Hon ROBIN CHAPPLE: I just made it to federal Parliament! I am not a senator.

Mr Pearlman: I am sorry.

Hon DAVE GRILLS: I get that and that is the reason, basically, that I asked. You are talking to a committee here who is going to put some recommendations, from what we get based on this, to Parliament for that to go to the new minister to look at. That is what we are trying to get; we are trying to get that to put to him.

Mr Robertson: If I could just comment on the suggestion that we put in some sort of regional-based provisions, I think that would just add yet another layer of unnecessary complication. There are already numerous different things under different acts—whether it is the CALM act or the Land Administration Act or the Mining Act or the EP act—which all apply, to some extent, in different ways in different regions for different reasons. I do not really think that is making anybody's lives better.

Hon DAVE GRILLS: That is why you only ask a question if you know the answer. The reason is that the fact of what you said with regard to getting this legislation correct and putting up a decent prospect that mining people and you guys can deal with. That is a question that I felt needed to be asked and answered.

Mr Robertson: I just need to confer for a moment with Patrick. I was just seeking clarification as to whether, under this legislation, the DMP will be obliged to apply the principles under the Environmental Protection Act—the clearing principles. To me, there was a question mark in my mind as to whether this legislation meant that they no longer had to. They could if they wanted to, but they were not obliged to. Patrick is now saying that he thinks that —

Mr Pearlman: I think it is a question that Peter has, from page 4 of our submission, where I think we raised a question about whether part V would continue to apply to DMP. That may have actually, unfortunately, been an inclusion that was inadvertently not omitted. We may have meant to strike that out as we worked our way through the submission.

Mr Robertson: The bottom line is that, in terms of making this legislation better, one thing is to make sure that it does require DMP to fully implement, if you like, or use the clearing principles in making any decisions about what clearing should or should not be approved, removing any doubt.

Hon ROBIN CHAPPLE: Just making sure that the terms "environmental harm" or "environment" are exactly the same as in the EP act.

Mr Pearlman: I think the other—I did not speak to this—would be to ensure that the principles and objectives of the Environmental Protection Act are incorporated into the mining legislation as well, insofar as it applies to this clearing program because you still have the precautionary principle. You do not find that in the mining legislation. You have, conservation and protection of ecological integrity, that is a principle that binds and guides EPA as well as DER in implementing the Environmental Protection Act. That likewise, is not in the mining legislation. Those principles and objectives are missing from the mining law. Those would need to be picked up and incorporated to the extent that DMP is now going to be implementing a clearing program. They apply currently under the Environmental Protection Act part V; they do not, from our review, apply to the part IVAA, even though the 10 clearing principles are, I think, picked up and reflected in the provisions of part IVAA.

With regard to the impact about regions that you mentioned, to be honest, in going back through looking at the legislation and the bill, the one thing that I have a little bit of concern about is, currently, in section 51C of the Environmental Protection Act you have clearing activities that are not considered to be offences if they are prescribed in the clearing regulations. This may be going to the question you asked, because there are a number of bioregions, for example, where clearing that is otherwise not an offence, if it were to be carried out, would constitute an offence. There clearly is an intent in the clearing regulations to provide greater protection for those regions—the coast, for example. I think within two kilometres of the coastline, there are environmentally sensitive areas and there are town sites that are occupied. There are a number of these areas where clearing is not to take place or at least is not exempt. I am not quite sure how, under the new legislation, those sorts of protections are being picked up for DMP.

Hon DAVE GRILLS: Thanks.

The CHAIR: Any other questions?

Hon ROBIN CHAPPLE: I think I am, sort of, done. I do not think there is anything particularly else. I have read the submission. I think it is very self-explanatory and quite clearly, the view of the conservation movement more broadly is that the EPA should remain the purveyor of all things environmental and the mines act should be the purveyor of mining and mining regulations.

The CHAIR: Thank you—very succinct. If there are no further questions, on behalf of the committee, we would like to thank you both for appearing before us. Thank you for your time.

Hearing concluded at 4.06 pm