STANDING COMMITTEE ON LEGISLATION

PETROLEUM AND GEOTHERMAL ENERGY LEGISLATION AMENDMENT BILL 2013

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 16 OCTOBER 2013

SESSION TWO

Members

Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Lynn MacLaren.

Hearing commenced at 12.31 pm

ECKERT, MS SANDRA
General Counsel, Department of Lands, examined:

RICHMAN, MR TONY
Manager, Strategic Policy, Department of Lands, examined:

The CHAIR: On behalf of the committee, I would like to thank you both for attending the meeting. You will have signed the 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 the 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 and 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?

Ms Eckert: No thanks, Madam Chair.

The CHAIR: I have a question: right of access—power to veto or challenge. As you may be aware, members of Parliament have raised concerns about the impact of this legislation on the rights of private property owners, including farmers. Regarding the proposed power to enter and occupy land, does the bill or legislation provide a private landowner or person with an interest in land a statutory right to challenge—veto—or appeal a decision that their land be accessed or acquired for GHG operations; and, if not, why not? Do landowners affected by GHG operations have the same veto or challenge rights as those affected by mining under the Mining Act? Do other jurisdictions include a legislated or other right to veto or appeal a decision to enter land and carry on GHG operations?

Ms Eckert: Madam Chair, perhaps I should have made an opening comment that, of course, the Petroleum and Geothermal Energy Resources Act is not under the responsibility of the Department of Lands, as is neither the Mining Act. In preparation for today's session I have done a lot of work in trying to work my way through it and understand how I think it operates, but of course it is not our legislation so we are not intimately familiar with how it does operate. So I will answer the questions to the best of my ability based on my research of the bill and the act. In answer to the second question of if not, why not, the answer is that I will not be able to answer that because that is a policy question that is not within our department. Similarly in relation to the Mining Act, I have not investigated that, so I will just say now that this question and any other in relation to the Mining Act I will not be able to answer in any detail. I have focused on sort of investigating what was in the Petroleum and Geothermal Energy Resources Act. Again, that is bearing in mind that I have been

looking at it over the last few days rather than it being something that I have a working familiarity with.

To answer your question in terms of a right of veto, from the way I read what will be section 11(2A), which is what is being inserted, for access to land by the minister, there will be no power of veto by the landowner. If the land has been taken and it is compulsorily acquired under section 12, then part 9 of the Land Administration Act applies, which means there will be notices of intention to take, which means the landowner will have a right to object. It is not a power of veto but a right to object, which will be taken into account by the Minister for Lands in making the decision whether or not to take the land. If the land is being accessed by a titleholder, then section 16 requires the consent of the landowner in certain cases that are listed in there—that is, private land that is less than 2 000 square metres, that is near a cemetery or burial place, that is within 150 metres from a cemetery or burial place, reservoir or any substantial improvement. So the answer to that question depends on whether it is access or whether it is taking the land, and if it is access, who is accessing it—whether it is the minister or a titleholder, and if it is a titleholder, what land they are trying to access. That is my analysis of it in a nutshell.

The CHAIR: Actually I apologise; I should have read that more clearly and then I would have known that you could not answer that one. But thank you for the answer that you did provide. You can take this on notice if you prefer. Could you explain the proposed process of applying for and negotiating compensation for land used for the GHG operations whether it is a private landowner, Aboriginal community or pastoralist?

Ms Eckert: Okay. By "land used" I presume you mean the access as opposed to taking under section 12, so I am talking about access either by the minister or by a titleholder. If it is access by the minister, then the compensation principles and the basis on which compensation is calculated is set out in section 11 of what I call the PGERA act, the Petroleum and Geothermal Energy Resources Act. If you cannot agree how much the compensation is, going through the process of determining that is set out in part 10 of the Land Administration Act. If it is a titleholder wanting to get access, then it is through the Magistrates Court and the process that was described by the officers from the Department of Mines and Petroleum. So it depends on who wants access. If it is the minister, then the compensation amount if you cannot agree is determined through the Land Administration Act. If it is a titleholder, the compensation amount if they cannot agree is determined through a process through the Magistrates Court.

[12.40 pm]

The CHAIR: Thank you.

Hon SALLY TALBOT: Can I ask some questions about the code of conduct that relates to the Barry House inquiry in 2004—the Legislative Council inquiry?

Ms Eckert: Of course you may.

Hon SALLY TALBOT: As a result of that inquiry, the government's response was six principles and the six principles were condensed into a code of conduct. Is that correct?

Ms Eckert: The code of conduct relates to mining activities. That is my hesitation. I understand that either that code has been updated or that there is work being done to update it, but that is actually a matter that the Department of Mines and Petroleum would be far better able to answer than I because it relates to the mining, and, as I understand it, it related to part of the report that was around mining activities.

Hon SALLY TALBOT: So in your day-to-day activities to do with this section of the act, you do not deal with it in terms of minerals.

Ms Eckert: No and not in terms of activities and access in relation to the Mining Act either. That is all dealt with through the Department of Mines and Petroleum.

Hon LYNN MacLAREN: I am not sure if this is relevant, but the Chair said we could ask some questions.

The CHAIR: If you want to ask a question, ask a question.

Hon LYNN MacLAREN: If the minister wanted to seek access on land that was, say, not private land but, say, Bush Forever or crown land—some land of high environmental value—does that trigger the Land Administration Act? Do the Land Administration Act provisions kick in and is there some compensation to the state for that? How does that work?

Ms Eckert: Under section 11, the minister for petroleum would have the power to enter, because it would probably fall within "any other land" under paragraph (b). Might I address the question that was addressed to the Department of Mines and Petroleum around the terminology of "vacant Crown land" and "any other land". The DMP officers sort of said that they would defer to us. The terminology of "vacant Crown land" and "any other land", as you know, is already there in subsection (1) and has been replicated in subsection (2A). Vacant crown land as a concept is no longer used and is not used in the Land Administration Act. The Land Administration Act uses "unallocated Crown land". I have to confess that I did not check the land act, but my recollection is that the old 1933 act did refer to vacant crown land, and I suspect that it would be read in that context. So in terms of the minister's rights of access under section 11(1), now subsection (2A), "vacant Crown land" would probably be any unallocated crown land and "any other land" would be anything that is not unallocated crown land, which would include a reserve and that sort of thing, which does then raise an interesting issue as to what that means in the context of compensation then payable under subsection (2) because ordinarily the state does not pay compensation to itself.

Hon LYNN MacLAREN: And there is no negotiator, because it would be negotiating with itself.

Ms Eckert: I beg your pardon; did that answer your question?

Hon DONNA FARAGHER: It is interesting that you no longer use the term "vacant Crown land", yet it is still referred to in the —

Ms Eckert: I assume that was —

Hon DONNA FARAGHER: It has not been updated.

Ms Eckert: That is right, and the bill, obviously, was at the time of the land act and they copied subsection (1).

Hon SALLY TALBOT: So the act still refers to "workmen".

Ms Eckert: Yes, it does.

The CHAIR: Is the compensation available to private landowners whose land is required for mining exploration and other operations as defined in the Mining Act 1978—I know that you said you were not familiar with that—different to compensation payable for GHG operations? In other words, under the land act, is it different under the Mining Act to what it is?

Ms Eckert: The Mining Act has its own regime for compensation, in the same way as the PGERA act has its own regime for compensation, except in the case of taking land under section 12, and that is always a caveat because it then does go fully into the Land Administration Act. In terms of compensation payable under the PGERA act as compared to the Mining Act, I do not know the answer to that. I know, for example, under the PGERA act there is a distinction around pastoral leases, grazing leases, leases for timber purposes and leases for use and benefit of Aboriginal inhabitants. The compensation that is payable there, or the heads of compensation, is less than for other types of land. I know that there are similar distinctions made in the Mining Act, but I do not know the detail around whether the limits of those are exactly the same or not in terms of them being coextensive.

Hon SALLY TALBOT: I accept that this is a little bit outside your everyday responsibilities, but can you tell us anything about the commissions that are being established in other states?

Ms Eckert: No.

Hon SALLY TALBOT: That is a mining question?

Ms Eckert: Yes.

The CHAIR: I guess from our point of view it gets back to clauses 11 and 12 and compensation. As I said to the committee, I come from a very old farming family, and farmers and their land are very much "you cannot come on my land without first asking me". To me that is a very fair protest. This is why it has been sent to the committee; it is the whole crux of the negotiations part about farming and mining and land use. So if the mining and petroleum act is all about taking the minerals out of the ground and this is a very new process about putting CO_2 back into the ground, I guess we really want to know that compensation is going to be fair and just and that it is the same for the mining as what it would be for GHG on the land. Is that your understanding?

Ms Eckert: My understanding is that the compensation principles that are being applied with the GHG are the same as what applies for the petroleum and geothermal energy resources. As to whether that is the same for the mining exactly, I cannot comment because I have not looked at the Mining Act in that much detail to see if it is the same or if there are areas of difference. As I said, I know it does make a distinction between pastoral leases and those other uses as opposed to other types of land, but that could be the limit of my comments today around what the differences might be between levels of compensation under the Mining Act as opposed to under the PGERA act. But from what I can see, the way that the amendments have been drafted is that the compensation that is available under the PGERA act already for petroleum and geothermal is the same as what is available for GHG operations, which from what I read includes, if you bear with me, exploration, drilling for potential storage formations or injection sites, injection operations and other prescribed operations, so it is not just about exploration. This is just a layperson's understanding of what GHG is about—you find where you want to put it and then you put it into the ground. From my bare reading of the legislation, it covers that gamut of the GHG operations and treats it in the same way as it treats petroleum and geothermal energy resources.

[12.50 pm]

The CHAIR: So compensation is very clearly spelt out in both acts, in the Mining —

Ms Eckert: Yes, and the PGERA act.

Hon DAVE GRILLS: I guess it is taking that one step further because it is putting something back in the ground. For any unforeseen thing that comes along, that compensation will carry on into that because it is an unknown thing and something happens and then the legislation only goes that far and stops, and then you get left between a rock and a hard place when something else happens. So I guess that is the sort of thing we are looking at, making sure that it is in place and it is available, because I notice that if you put in a hole and you put a collar around it, who knows; there are lots of things lurking.

Ms Eckert: If I might just reiterate something that was said at the end of the DMP comments, it was that section 19, I think, does allow for later claims. Now, I am not making any comment whether that provision would cover the sort of situation that might happen, but unusually it allows for later claims. The Land Administration Act does not allow for later claims in the context of when you are taking land. It is a different thing and that is perhaps why it does allow for later claims because it is about the physical effect of accessing land as opposed to the Land Administration Act, which is more about the pure "we take your interest in land" and it has gone. You get compensated once and for all. Like I said, I am not familiar enough with the exact terminology of section 19 to see whether it would cover the sorts of circumstances, but it is there and probably worth looking at to see that it does.

Hon DAVE GRILLS: I think as long as it is broad enough to cover that —

Ms Eckert: Yes, and I am not making a comment as to whether it is.

Hon DAVE GRILLS: No, because in that way you could turn around and say, "In the legislation that is not covered under that; all this isn't covered under that." It just needs to be broad enough to cover, and then that is a case for courts to decide with regard to that sort of thing. But the legislation needs to be there and it needs to be robust in the fact that you can go and make that claim, because if you cannot, then it is going to stymie negotiation, because if it was me, I would say, "Okay, what a lot of red herrings." But people need to be comfortable in the fact that that does allow for that.

The CHAIR: I am presuming that in the regulations it will be about services and information that you provide to persons who are eligible to make a claim for compensation, so those steps will be set out very clearly. Are they in regulations now?

Ms Eckert: In terms of making claims, are you talking about section 11 where they might be making a claim under the Land Administration Act?

The CHAIR: Yes.

Ms Eckert: Part 10 of the Land Administration Act has very detailed provisions about the whole process, which I can run through very quickly, if you would like just a feel for what is in it.

The CHAIR: If you can go through it, yes.

Ms Eckert: Just very quickly, so a person makes a claim in an approved form. The agency can then ask for further particulars, which are required to be provided within 30 days. If the person does not provide it within 60 days of being asked for the further particulars, the claim is barred. There is provision around the authority being able to dispute the claimant's title to make a claim. So there are two things. Either they say, "Yes, you can make a claim" and then you argue about how much, or whether or not you can make a claim. So there is a provision about the authority being able to dispute the claimant's title within 60 days of the claim being made by the claimant—so by the landowner. So if there is no dispute that they are the landowner, then after 60 days the state cannot say "you aren't the landowner and so therefore you cannot make a claim" or within 60 days of their making a claim or of them providing the further particulars that are asked for by the agency. If there is no dispute around the title and they have either not been asked for or they have provided the further particulars, then the state agency has to, within 90 days of either the claim or the further particulars, prepare a report as to the value of the compensation, and as soon as possible after the report it must serve an offer of compensation on the claimant. The claimant has 60 days in which to reject the offer. If they do not reject the offer, then they are deemed to have accepted it. If the offer is rejected, then the claimant has three options under the Land Administration Act. They can continue to try and negotiate an agreed amount with the agency, they can commence proceedings in an ordinary court or they can go to the State Administrative Tribunal. So effectively they have two contested options and one agreed option. If an offer is not made by the agency within 120 days—so they are required to do it within 90 days and it gives them another 30 days' grace period—the claimant can then commence their own proceedings in a court or with SAT, which is the same as if they reject the offer. If the claimant rejects the offer and does not do anything to commence proceedings within six months, then the state agency can give 30 days' notice and itself apply to SAT to have the matter determined so that it gets off their books.

So that is essentially the process. That is set out in the legislation. If part 9 had applied in that the land was actually taken, at the very end of the taking process in part 9, the person whose land has been taken or whose interest has been taken is required to be served with a statement of procedures, which sets out the process for claiming compensation, and so it sets out that process I just very quickly ran through. Because in the case of section 11 there is no taking, there is no strict statutory requirement to serve a copy of that statement on the landowner or the others who are interested, but we would consult with the Department of Mines and Petroleum if that were to ever happen and

consider whether or not it would be appropriate to provide a copy of that statement, with appropriate reservations about, "This talks about taking orders and you do not have a taking order but it gives you a rough idea of what the process is." So that is a document that is currently used when we are taking land, and could be used because it does have the process in part 10. I actually have a copy of that document available if you would like me to table it.

The CHAIR: Yes, that would be good. Thank you.

Ms Eckert: There is one other matter, if I may just finish off, my colleague has reminded me of. The "Crown Land Administration and Registration Practice Manual", which is on our website, also has a specific part, chapter 10, which is dealing with part 10 of the LAA. That is similar but a little more detailed than the statement of procedure, so members may wish to have a look at that if they are interested.

The CHAIR: Thank you. On behalf of the committee, if there are no more questions to be asked, I would like to thank you for coming along and providing the briefing that we have had today.

Hearing concluded at 12.58 pm