MINING AMENDMENT BILL 2021

Committee

Resumed from 1 September. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon NEIL THOMSON: It is good to be back. I will follow up on where we left off at the last sitting of Parliament. I have some questions about the timing of the regulations and when they are likely to be finalised. Could the parliamentary secretary elaborate on when it is expected that they will be promulgated, noting the considerable time it has taken to get to this point? I believe the industry is looking forward to the finalisation of this bill.

Hon MATTHEW SWINBOURN: My advice is that, all things being equal—this is a bit of a guesstimate, because it is obviously dependent upon the passage of the bill, the availability of drafters and the consultation, because that is an important element—we anticipate that the regulations will be finalised by around September 2023, so in about 12 months' time. That does not mean that all aspects of or changes in the bill will commence at that time, because there are other systems that will need to be put in place, but in answer to the member's direct question, we are hoping to have the regulations finalised by September 2023.

Hon NEIL THOMSON: The parliamentary secretary mentioned other systems that had to be put in place. Does he anticipate that, as we transition to the new regulatory regime, there will be a requirement to engage with industry specifically around the nature of the systems and changes in the way things are managed? Can the parliamentary secretary give us a bit of background as to what that might look like in terms of the support or otherwise of industry, and making the appropriate adjustments?

Hon MATTHEW SWINBOURN: The short answer to the member's question is yes, there will be comprehensive consultation with industry regarding the systems that are going to be put in place. That is the general answer. The kinds of systems we are talking about are the computing systems, which will be the interface and back-end stuff that needs to happen for the eligible mining activity process to be established. The department has indicated to me that it will put out a policy position paper after the bill has been passed, and that will then inform industry about the parameters of the kinds of changes that will be made. The consultation will be informed by that positional paper. When the consultation formally starts, the position paper will help inform industry about what is proposed to happen. It will be very clear for industry which direction this is going, and if the industry identifies issues in the position paper, it will be very straightforward for industry to identify the issues and to point to people to interface with the department regarding that process.

Hon NEIL THOMSON: Before we move on from clause 1—I am not sure whether any other members will ask questions on clause 1—and at the risk of repetition, I mentioned earlier some of the challenges with the way the bill has been structured because large sections will be deleted and consolidated under one section. There might be some repetition in my questioning. I hope that is not too onerous. We can probably work through that.

I have an issue that I want to get to in a more generic sense before we move on from clause 1. I have a couple of matters that I would like to discuss in the context of clause 1 that appear later at clause 34. Maybe we could have a discussion about that before we get there.

I think there was some discussion at the last sitting of the challenges of the environmental officers and the low-impact activity. Has the parliamentary secretary been able to ascertain in the time that has elapsed to what extent this bill will result in savings for the department and the extent to which the changes might speed up the approvals process? Maybe the parliamentary secretary could give us an understanding of the total value of approvals and processes in the context of the current delays. What is this bill likely to achieve in terms of its overall benefit to the mining industry?

Hon MATTHEW SWINBOURN: No additional work was done between when we last dealt with this bill and now. The reason for that is that it is difficult for the department to do that work until the regulations have established the parameters of an eligible mining activity, so there is an issue there. The department anticipates that 30 per cent of the approximately 3 500 applications that occur every year will be affected. That is about 1 000, or one-third, of those applications. Again, they are estimations, not concrete figures, because, again, it will depend on some variables that have not yet been settled that will happen as a result of the consultation and the settling of the regulations. The department will then be in a much better position to understand the overall value, but we know there is inherent value in what we are doing.

In terms of, as the member said, the savings for the department, that is not how the department is characterising it or looking at what will happen, because the savings will not be a reduction in the size of the FTEs who work for the department; it will be about reprioritising the work of the department. We discussed that the last time we dealt with this and about environmental officers in particular, who will go from being desk-based for a large part of their working day to getting out and doing onsite work because they will not be bound up in so many of these rats and

mice–type applications that have to come before them. The benefit here is pretty clear, but, as I said, at this stage we are not in a position to measure that with any certainty.

Hon NEIL THOMSON: I appreciate that. It raises another issue that I would like to raise when we get to clause 34, which we may skip through, depending on how far we progress in this discussion. I am happy to do it either way. Those matters in clause 34 relate to the definition of "eligible mining activities" and the exclusions and conditions et cetera. I am happy to go into those in detail at that clause.

Hon Matthew Swinbourn: If that is detailed stuff, I suggest we deal with that at clause 34 because it would be covered off there. We might otherwise lose the context if we deal with it just at clause 1.

Hon NEIL THOMSON: Therefore, I will keep the questions on this brief in clause 1. I appreciate that feedback. This is to do with the intersection between the Aboriginal Cultural Heritage Act and the bill and the challenges that might raise, particularly around the additional approvals that might intersect with certain activities. In a generic sense—we will go into detail later when we get to clause 34 and those particular proposed sections—has any significant work been done between the two teams to try to get harmonisation, or would it be fair to say that the definitions that will be defined in the regulations will be harmonised such that those eligible mining activities might also require one approval, or has there not been that level of coordination that might be required to get the benefit that would flow from the red-tape reduction activity in this bill?

Hon MATTHEW SWINBOURN: Member, I am advised that, in the first instance, we have to appreciate that this is the Mining Amendment Bill and it deals with the Mining Act. It is obviously a separate regime from that now dealt with by the Aboriginal Cultural Heritage Act and is also under a separate government department and agency. But I am told that because that department is working on its regulations following our reform of that legislation earlier this year, when we draft our regulations, there will be an opportunity to seek to harmonise some of those elements, if that is possible. At a departmental level, they are talking to each other, noting that this is not yet law, so there are obviously limitations to the degree to which our department can deal with the harmonisation of a prospective bill before Parliament has given it its imprimatur.

I want to make a general point about the protection of Aboriginal cultural heritage and its intersection with this act, which I hope will be helpful to the member. The proposed amendments seek to amend only the mining environmental approvals framework within the Mining Act 1978, and the proposed changes will not impact or alter any obligations under the Aboriginal heritage legislation. Current or future obligations under the Aboriginal heritage legislation will continue to apply to tenement holders in Western Australia. The criteria that defined an eligible activity under the eligible mining activity framework will be prescribed in the Mining Regulations 1981 and will be subject to a separate consultation process post the passage of this bill.

The bill signals that spatial locality will be a factor in determining what constitutes an eligible mining activity. Proposed section 103AC of the bill provides for the minister to exclude areas—for example, environmentally or culturally significant areas—from the eligible mining activity framework by publishing them in the *Government Gazette*. Activities authorised through a low-impact notification will also be subject to standard conditions relating to management of the activities and will be subject to other legal obligations—for example, the requirements under the Aboriginal heritage legislation.

We are not trying to interfere with the broader context of the reform that has happened with the Aboriginal cultural heritage legislation and the existing regime that applies. This is not an attempt to circumnavigate that. I think, because of the low-impact nature of the EMA process, it would go beyond the scope of the policy that we are trying to deal with if we were to talk about the impact on cultural heritage sites, because obviously one cannot rehabilitate damage to those sites in the same way that one may be able to rehabilitate environmental damage. I do not want to dissuade the member from talking about Aboriginal cultural heritage and things of that nature, but it is outside of what we are trying to achieve here with the policy of this bill, because, as I say, it is not a big, big reform. As the member has indicated, this is a red-tape type of approach to try to streamline existing processes for the approval of mining activities.

Hon NEIL THOMSON: This is my final question on clause 1; it may again feature in some possible questions further down on programs of work and the relocation of those provisions into, I think, clause 34. Those provisions are being moved to proposed section 103AG, but some other proposed sections also feature elements of programs of work, redefining that within a condensed part of the new bill.

I am looking to get clarification on something that Hon Dr Steve Thomas raised. He clarified something for me, and I want to hear from the parliamentary secretary on the scope of the legislation. The question I have is whether there is anything in the proposed legislation that might open up the possibility for any regulatory change that might, in some way, redefine in the program of work those activities that are not picked up within the EMAs—the eligible mining activities. It is the activities that are, I suppose, exempt. To my understanding, eligible mining activities will have to be mentioned in the program of works. If the activities fall under the definition of eligible mining activities, my understanding is that the detail of those activities will not have to be defined within the program of

work. But will there be anything in the new regulations that might lead to different requirements? If the member could bear with me, the challenge I have is that we have moved a bunch of sections within a pretty big piece of legislation into one consolidated section. Is there any possibility of additional requirements being put on miners or people engaged in mining activity that is not subject to an EMA that might change in any way the requirements of the scope of those programs of work, or lead to the capacity for further intervention by officers within the department to maybe create more requirements, or more prescription, within those programs of work? I hope that is clear. If the parliamentary secretary could have a go at that, that would be much appreciated.

The ACTING PRESIDENT (Hon Dr Sally Talbot): Hon Neil Thomson, I draw your attention to the fact that your microphone is still on.

Hon Neil Thomson: Sorry.

The ACTING PRESIDENT: It is not you; I am just drawing your attention to that.

Hon MATTHEW SWINBOURN: The intention is not to create any new changes to those matters that will fall outside the EMA matter. I bring to the member's attention that the bill will require the program of work to be defined in the new regulations, which is a change in itself, but I am told that the intention of the definition is only to reflect current practice; in effect, it is only to codify and provide clarity for the existing understanding of what is a program of work. It is not the intention to impact those remaining 70 per cent of applications that will still be dealt with in the way that they are currently dealt with in the program of work.

Hon NEIL THOMSON: I thank the parliamentary secretary; that is helpful. I guess it is the old saying about the road to hell being paved with good intentions. This is a concern that I have had raised with me by individuals within the mining sector. It was not by peak bodies per se, but people concerned about the possibility that in the codification of those programs of works, there could be a level of prescriptiveness that may not have been there before. I think it is probably a good thing that there might be some consistency with the codification, so the flip side of that is that there will be a guarantee of consistency. I am not an expert in this field and I have never undertaken any sort of work in relation to developing a program of works. I understand that it is just an online form. I assume that a wide range of detail goes into those programs of work, depending on the proponent to some degree. My question is: what processes will be undertaken in the codification of the program of works to ensure that the objectives of consistency and simplicity are appropriate and provide the industry an opportunity to give feedback on the codification to stop any creep in detail for what is required in the future? What protections will be put in place so that we do not end up with something in five years' time that was not intended and does not reduce red tape?

Hon MATTHEW SWINBOURN: The first thing I will say is that the member commented that the road to hell is paved with good intentions. However, the current arrangements contain no statutory provision for programs of work. It is an understanding; it is an administrative arrangement. A change of personnel at the department—I am not proposing that this will happen—could possibly result in a change in the interpretation of a program of work. Risk is already built into the current arrangement because it is not certain or clear, but by putting it into regulations, it will provide certainty for industry on the definition of a program of work and what it does or does not include.

To get to the point of regulating for it, as we indicated, that will be part of the extensive consultation that will take place in the establishment of those regulations in, hopefully, September next year. Once those regulations are in place, the department will have an ongoing mechanism to continue consultation with industry, including the opportunity to make refinements to improve processes, interfaces and things of that kind, to reduce red tape. The whole point of this is to reduce the burden of compliance with administrative processes on that part of the—I do not want to use the word "market"—industry that engages in low-impact mining activities. The point is not to create a new problem by solving a problem. As the member said, there are examples of when good intentions result in bad outcomes, but that is not what is happening here. That is not the process. It is not the culture of this department. It wants to work closely with the industry to ensure that there is a better outcome overall. I do not know whether I can provide the member with more reassurance than that because at this stage we do not have a definition for "programme of work". That will be the subject of consultation. It will not be dumped on the industry. It will know what it is getting. I hope that provides the reassurance that the member was looking for.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Section 6 amended —

Hon NEIL THOMSON: Clause 4 amends section 6(1d)(b) by deleting "mining proposal" and inserting "mining development and closure proposal".

Again, my concerns might not be valid, but they are worthy of some investigation. Various sectors have expressed concern about the combination of both mining and development and closure proposals at the commencement of

the process. My first question is: what distinction, if any, will be made in the regulations for development and closure proposals and associated programs of work?

Hon MATTHEW SWINBOURN: It might look as though this clause will do more than it actually will. All that the drafting has done is to change the name. According to the blue bill, the definition of "mining proposal" will change to "mining development and closure proposal", so it is only a name change. The proposed change in section 6(1d) is an update and reflects the relocation of sections that relate to programs of work and mining development and closure of proposals, previously mining proposals, to new part 4AA. It is not a substantive change. It is only a drafting change in the bill, because parts that are spread throughout the act are being uplifted into this new part to make it more straightforward for those who use the act. Unfortunately, that makes it complicated for those of us who are dealing with this bill because there are bits all over the place, but it does not substantially change anything.

Hon Neil Thomson: So they will still remain as separate proposals?

Hon MATTHEW SWINBOURN: This is probably simpler than I have made it out to be. Currently, a mining proposal and a mine closure plan require two separate documents. The bill will require one document, a mining development proposal, which will reduce duplication. Currently, two documents are required, but going forward only one document will be required. Does the member understand that we are trying to reduce the burden on applicants? Currently, a mining proposal requires a description of activity details, the environmental legislative framework, stakeholder engagement, baseline environmental data, an environmental risk assessment, environmental outcomes, performance criteria and monitoring, and an environment management system; and the mine closure plan requires a project summary, identification of closure objectives and commitments, stakeholder engagement, baseline and closure data analysis, post-mining land use or uses, closure risk assessment, closure outcomes and completion criteria, closure implementation, closure monitoring and maintenance, financial provision for closure and management information, and data. Those are the two separate requirements that currently exist. Post the passage of this bill and the implementation of this reform, the requirements for a mining development and closure proposal will be a proposal description, the legislative framework, land uses, stakeholder engagement, baseline data analysis, risk assessment and management, environmental and closure outcomes, measurement criteria and monitoring, closure implementation and financial provision for closure. As the member can see, we have gone from a long list of requirements to a short list. The member may have a question about the drafting of this clause, as opposed to what happens further in the bill, but I am trying to get across that this is the streamlining and red tape reduction that the government talked about. The reform will happen under clause 34, which is substantially where we are heading.

Hon NEIL THOMSON: It does need clarification to keep it simple. The parliamentary secretary is saying that currently a mining proposal requires two forms—one for the mining activity and one for the closure proposals.

Hon Matthew Swinbourn: Yes.

Hon NEIL THOMSON: Are they required to prepare those simultaneously?

Hon Matthew Swinbourn: Again, by interjection, yes.

Hon NEIL THOMSON: That clarifies it. Thank you for your interjection. So there is no change in the timing of certain activities or for the miner to provide that closure information. Will they still be required to start the process at exactly the same time that they do now?

Hon MATTHEW SWINBOURN: Nothing will change and the burden will be on them. At the moment, when they start this process, the application and mining closure requirements occur simultaneously. We are trying to simplify the process and reduce the duplication that has existed in those two documents.

Hon Dr STEVE THOMAS: Are we on clause 5?

Hon Matthew Swinbourn: No.

Clause put and passed.

Clause 5: Section 8 amended —

Hon Dr STEVE THOMAS: The parliamentary secretary had jumped into the mining development and closure proposals component in clause 5.

Hon Matthew Swinbourn: I blame Hon Neil Thomson!

Hon Dr STEVE THOMAS: There is plenty of blame to go around. I note that clause 5 will remove the definition of "ground disturbing equipment". It will change the activity that was in the original set of definitions under section 8 of the act to what appears will be new section 103AB in clause 34, which is where all the fun is. This clause will remove the definition of "ground disturbing equipment" and will put in place the definition under proposed section 103AB(1), "Eligible mining activities", which reads —

> (a) the activity uses machinery to disturb the surface of the land for the purposes of, or in preparation for, mining; and
>
> (b) the activity can be carried out with minimal disturbance to the surface of the land.

Minister —

Hon Matthew Swinbourn: Parliamentary secretary!

Hon Dr STEVE THOMAS: The member is such a good parliamentary secretary I keep promoting him in my mind; that is fantastic!

I assume that the definition of "ground disturbing equipment" in section 8 of the act is not used anywhere else in the act. Can the parliamentary secretary confirm that removing it and replacing it in proposed section 103AB will not have any impact? I presume this will be a less unwieldy version of the legislation and the definition of disturbing the ground. The definition goes into less detail, but at the same time the clause gives a bit of flexibility. I presume there is a reason the wording has shifted in defining the machinery and the use of that machinery to any activity that uses machinery. Is there a reason for the shift in wording?

Hon MATTHEW SWINBOURN: The answer to the first part of the member's question is that it does not have any impact on any other part of the existing act. The definition for ground disturbing equipment has been removed as this threshold is now captured in new part 4AA. Just to be thorough, the definition has been replaced in new part 4AA in proposed sections 103AB, 103AG, 103AH, 103AI, 103AL and 103AM, which describe the conditions on tenements for which thresholds of activity require authorisation. These proposed sections state that the activities will require approval when using machinery to disturb the surface of the land for the purpose of, or in preparation for, mining. An example is proposed section 103AB, "Eligible mining activities". I will read this out and emphasise the necessary points. Proposed section 103AB(1) states —

> (1) For the purposes of this Part, the regulations may prescribe an activity done on land the subject of a mining tenement to be an ***eligible mining activity*** … if —

This is the important part —

> (a) the activity uses machinery to disturb the surface of the land for the purposes of, or in preparation for, mining; and
>
> (b) the activity can be carried out with minimal disturbance to the surface of the land.

Hon Dr STEVE THOMAS: Is there an example or a definition of "minimal disturbance"? That might be the next question because a person might find themselves in an argument with a company that has run through a trench digger, for example, versus something more significant. I do not know whether there is a definition—it might be done on a case-by-case basis—but it is worth asking.

Hon MATTHEW SWINBOURN: It is not defined in the act, but when we regulate an EMA and we create the boundaries, that will effectively define, in a way, a minimum disturbance activity. If it is not minimal disturbance activity, it will not be part of an EMA. Does the member understand?

Hon Dr Steve Thomas: Are you in a position to tell us how prescriptive it is likely to be, or you don't know yet?

Hon MATTHEW SWINBOURN: That is up to the consultation. Given that it will be regulated, obviously it may change over time. We cannot get down to the brass tacks of it at this stage. We have undertaken to engage in extensive consultation with industry over that, so we do not want to have a starting position. The member may have been out on urgent parliamentary business, but I did say that the department will be issuing a position paper after the passage of the bill that will help to give people an understanding of where we are at at that time.

Clause put and passed.

Clause 6: Section 12 replaced —

Hon NEIL THOMSON: Clause 6 is about delegations. Why is this change necessary? Proposed section 12(3) states —

> The Director General of Mines may delegate to an officer of the Department any power or duty of the Director General of Mines except this power of delegation.

Section 33 of the Public Sector Management Act 1994 provides for the power of delegation. Subsection (1) states —

> Subject to any other written law, a chief executive officer or chief employee may delegate any power or duty of the chief executive officer or chief employee under another provision of this Act to —
>
> (a) a public service officer; or
>
> (b) any other employee; or
>
> (c) a person who is appointed, employed or holds office in an entity that is —

(i) listed in Schedule 1 column 2; and

(ii) prescribed for the purposes of this section;

or

(d) with the approval of the Commissioner, any other person.

Those delegations are widely used through the public sector. Why is this delegation needed given that we are trying to remove duplication in legislation?

Hon MATTHEW SWINBOURN: The section establishes that the minister can delegate powers, duties and functions. It has been updated to clarify the delegation powers and modernise the language. It might look as though there is more happening here than was intended. For example, there is the removal of "his" and "him" to more gender-neutral language and those kinds of things. The new provision will ensure the continuity of delegations to officers undertaking their work when there is a change of minister. At the moment, a change in the person undertaking the role of minister requires that all delegation instruments be made again. Obviously, that is unnecessary and creates a burden. This provision will update that to a more modern practice. Delegations can be removed or varied. I refer the member to section 59(1)(e) of the Interpretation Act 1984, which governs the matter. It provides that when a written law confers power upon a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon him under a written law, such a delegation may be amended or revoked by instrument in writing signed by the person so delegating. That provision has been relied on to date. We are updating the language in the act. I do not think we are making any radical changes. It is more about continuity and modern language.

Clause put and passed.

Clauses 7 to 9 put and passed.

Clause 10: Section 46 amended —

Hon NEIL THOMSON: This clause deals with the deletion of a "prescribed official". What is the purpose of that?

Hon MATTHEW SWINBOURN: The section is being amalgamated to modernise language and remove reference to "prescribed official". This is intended to provide clarity about expectations in making safe disturbances to the land. The department will set its expectations through supporting guidance rather than in the opinion of the prescribed officer, which was the old language. Section 46(b) states —

> that all holes, pits, trenches and other disturbances to the surface of the land the subject of the prospecting licence which are —
>
> (i) made while prospecting; and
>
> (ii) in the opinion of a prescribed official, likely to endanger the safety of any person or animal,
>
> will be filled in or otherwise made safe to the satisfaction of the prescribed official;

That is a subjective standard. The standard will be "made safe"—full stop—rather than in the opinion of someone. Effectively, we are trying to make the expectations clear rather than leaving them to an individual officer to use a discretion. The expectations should be common and should not vary amongst different people. It is either safe or it is not safe.

Committee interrupted, pursuant to standing orders.

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