PLANNING APPEALS AMENDMENT BILL 2001

Committee

Resumed from 21 August. The Deputy Chairman of Committees (Hon Jon Ford) in the Chair; Hon Graham Giffard (Parliamentary Secretary) in charge of the Bill.

Debate was interrupted after clause 14 had been agreed to.

Clauses 15 to 19 put and passed.

Clause 20: Transitional regulations -

Hon BARRY HOUSE: The parliamentary secretary indicated during yesterday's proceedings that he will not move the amendment in his name on the supplementary notice paper. As the Chairman of the Standing Committee on Public Administration and Finance, which considered this Bill and presented the House with its recommendations, I intend to move amendment 29/20. I move -

> Page 38, lines 24 and 25 - To delete the lines and insert instead -
>
> (3) If regulations made under subsection (1) and published in the *Gazette* are expressed to take effect on a day that is earlier than the day on which they are published, the regulations have effect accordingly.

The rationale that the committee adopted in making this recommendation appears on page 29 of the committee's report, which states -

> **The Committee has referred the issue arising under clause 20 to the House. This amendment ensures that publication in the Gazette must occur before any retrospectivity can have effect.**

If members have the report at their disposal, they will note that the minister's response to that is in italics, and the parliamentary secretary will probably elaborate on that.

Hon PETER FOSS: I have a further concern with this. It is a pretty broad clause, and it is supposedly justified by virtue of the fact that it is needed to enable a transition to take place. However, it does not have any limit on it. If we just want to allow for things to happen during the transition, one year or two years might make sense; but this is totally unlimited as to time. Look at the sorts of things it can do. Subclause (2) states that the regulations under subsection (1) may provide that specific provisions of the Town Planning and Development Act do not apply, or apply with or without specified modifications. That is a Henry VIII clause if ever there was one. This is the Henry VIII clause that gives a dispensing power - so it is probably actually a Charles I clause - and allows the law to be changed and modified, which is a bit extraordinary. The clause states that the regulations may have effect before the day on which they are published in the *Gazette*. However, if the law has been changed, it would seem to me that even if it is disallowed, it is too late. The regulation comes into effect, the law is changed - whatever is the problem vanishes - and even if it is disallowed, it does not have retrospective effect. Therefore, it is gone; the opportunity is totally gone.

It seems to me that this is an extraordinary piece of legislation. I not only support the amendment that Hon Barry House has moved, but also I think that we probably need another amendment that states that this section will expire 12 months after the Act comes into operation. Justified or not, it should not go on forever. It allows the minister to change the law from time to time as she thinks fit. She will be able to say that it either does not apply or applies in a way that she says should be changed. She can change the Town Planning and Development Act. That is a bit of a worry. That Act affects a lot of rights and subsidiary legislation. The interesting thing about subsidiary legislation under the Town Planning and Development Act is that, once enacted, it has the effect as if it were enacted in the original Act. It is hardly subsidiary once it has been enacted because it is an Act that has old 1960s-style drafting. No-one would suggest today to draft an Act in such a way; however, it happens to still be there as a bit of a leftover. The Act and subsidiary legislation that has the force of the Act can be declared not to apply or to apply as the minister sees fit. Both are subject to changes in regulations.

Members of the Chamber talked earlier about the "emperor" at the tribunal. I think we will have another imperial sort of person set up by this provision.

Hon Derrick Tomlinson: Perhaps imperious, rather than imperial.

Hon PETER FOSS: That is true; imperious is probably the motive behind it. The powers we are investing in the minister are imperial. The minister will have a dispensing power to make effective law. It will come into effect before the day on which it is published in the *Government Gazette*. Even if regulations are disallowed, it is probably a waste of time because the minister will be able to give effect to what she wants to do. To take power

away by disallowing a regulation will have absolutely no impact because disallowance occurs only from a particular date. This sort of provision is normally a once off; it is not a continuing provision. It happens, and that is the end of it. This is an unusual alteration that has no time limit. I support the Committee and this amendment moved by Hon Barry House. If this amendment is accepted I will move an amendment for a time limit on the power.

Hon GRAHAM GIFFARD: The Government supports the amendment moved by Hon Barry House. It deals with the issue referred by the House to the Committee. The purpose of the amendment is clearly expressed. Regulations made under subsection (1) and published in the *Gazette* will take effect on a day earlier than the day on which they are published. The Government indicated it was prepared to accept the amendment. Proposed subsection (3) is predicated on subsection (1), which states that the transitional regulations are for the purpose of transition. As such, the regulations can be enacted only for the purpose of transition -

> If there is no sufficient provision in this Part for dealing with a matter that needs to be dealt with for the purpose of the transition from the repealed Part to the new Part . . .

That means that transitional regulations that are for the purpose of transition are the only ones that can be enacted to effect transition from the repealed part to the new part. When subsection (1) is read in conjunction with proposed subsection (3) the situation is not as open as Hon Peter Foss has suggested. However, the amendment moved by Hon Barry House is satisfactory to the Government.

Amendment put and passed.

Hon PETER FOSS: I move -

> Page 39, line 4 - To insert -
>
> (5) This section expires on the first anniversary of the *Planning Appeals Amendment Act 2001* being assented to.

It is unusual to grant a broad power to dispense and alter law in this form. To give an example of what people in the past have thought about dispensing powers, I will refer to the Bill of Rights, which was enacted in 1688. The first clause states -

> That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

The second clause states -

> That the pretended power of dispensing with laws, or the execution of rules, by regal authority, as it hath been affirmed and exercised of late, is illegal.

People did not like it in 1688 yet we are putting it in our legislation in 2002. We are being very generous by agreeing to it. I do not think we should agree that the power should be available forever and a day. I propose that the section expire on the first anniversary of assent being given to the Planning Appeals Amendment Act 2001. I used the term "being assented to" rather than "coming into effect" because it is one of those commencement dates that allows for different dates of commencement. As such, we cannot legislate for when the Act comes into effect because it may come into effect in bits and pieces. The only date we can refer to is that of the date of assent. We could legislate for when the first part of the Act comes into effect, as the clearest date is obviously the date of assent.

Hon GRAHAM GIFFARD: The Government supports the amendment.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 21 to 24 put and passed.

Clause 25: ***Metropolitan Region Town Planning Scheme Act 1959 -***

Hon PETER FOSS: I move -

> Page 42, lines 7 to 17 - To delete the lines.
>
> Page 42, line 18 - To delete "(9)".

Points of Order

Hon GRAHAM GIFFARD: I seek the Deputy Chairman's ruling on whether the amendment before us in order. The amendments moved by Hon Peter Foss relate to part 4 of the Bill, which is headed "Consequential

Amendments". The amendments will have the effect of deleting section 33 of the Metropolitan Region Town Planning Scheme Act 1959.

Hon Derrick Tomlinson: Somebody told you that!

Hon GRAHAM GIFFARD: They did indeed.

Hon Derrick Tomlinson: I know who it was.

Hon GRAHAM GIFFARD: The member might be right.

The amendment is a consequential amendment that is required because of the repeal of section 40 of the Town Planning and Development Act 1928, which establishes the planning appeals committee. In substance, the section allows for and sets out the process for making minor amendments to the metropolitan region scheme, and not planning appeals. In name, and in substance, clause 25 is a consequential amendment. An amendment that wholly repeals section 33(A) cannot be described as consequential to the principal amendments in the Bill. Certainly, such an amendment would require other consequential amendments to be made to the Metropolitan Region Town Planning Scheme Act, the WA Planning Commission Act 1985, and the Environmental Protection Act 1986. It would also require the insertion of transitional provisions. The Government believes that the amendment should be ruled out of order.

Hon PETER FOSS: There are many different ways in which one can deal with consequential amendments, particularly section 33(A) because it fell into desuetude during the time of the Court Government. It was a section that we refused to use because of the difficulties in deciding what was a "minor" and "major" amendment. The terms "minor amendment" and "major amendment" do not appear in that section. It is unfortunate that the Court Government's good practice of always submitting amendments to Parliament for consideration has been ignored by the Government, which is using section 33(A) for, of all things, the southern and urban rail development. That is not a minor amendment by anybody's stretch of the imagination. There are two ways of dealing with the new tribunal: we can consequentially decide to refer matters to the town planning tribunal instead of the appeals board, or, the simplest way to deal with it would be to dispose of it altogether. We certainly have to do something with section 33(A). Having decided that we need to do something, we must either adapt it to the situation or remove it altogether. I do not think that it is worth keeping. Do we keep section 33(A) and change it, or do we have it deleted? It certainly cannot be left as it is; something must be done with it. I have simply taken a different view from the Government about what the consequence should be. It is quite clear that it cannot be left as it is because, given that the body to which the process belonged no longer exists, the process can not be carried into effect. I might have proposed a slightly more radical consequence than the one proposed by the Government, but, it is nonetheless precipitated, caused and necessitated by the amendments that have been made to the rest of the Act. It is a matter of degree rather than substance. My amendments should remain within the ambit of the Bill.

The DEPUTY CHAIRMAN (Hon Jon Ford): I will leave the Chair to seek advice on this matter and return at the ringing of the bells.

Sitting suspended from 3.17 to 3.22 pm

Deputy Chairman's Ruling

The DEPUTY CHAIRMAN (Hon Jon Ford): Hon Peter Foss has moved to delete certain lines in clause 25 on page 42 of the Bill that deal with amendments to the Metropolitan Region Town Planning Scheme Act 1959. The amendment would substitute amendments being made to section 33A of the Act for outright repeal of the section. I must decide whether the proposed amendment is in order. I have heard the parliamentary secretary's description of what the amendments in clause 25 are intended to achieve. Essentially, there is a need to amend section 33A because of the changes that the Bill makes in relation to the existing right of appeal to the minister. The Bill, for most purposes, extinguishes that avenue and channels appeals to the tribunal. As it stands, section 33A provides for a reference to the appeals committee from the minister. Such a reference is inconsistent with the abolition of the dual system for which the Bill provides.

Clause 25, as it stands, complies with the requirements of Standing Orders Nos 221(c) and 222: that each provision in a Bill be relevant to the scope and purpose of each of the other provisions, and that each provision accords with the long title of the Bill as introduced. The nexus required between the scope and purpose of the Bill and the amendment made by clause 25 is established. Section 33A requires amendment to align it with the law as it will be when the Bill becomes law.

The amendment is subject to the structures applied to any amendment by Standing Order No 237(a), which refers to amendments that are relevant to the subject matter of the Bill. Standing Order No 3 defines subject

matter of a Bill as the Bill agreed to on its second reading. The subject matter of this Bill is sufficiently understood that I do not need to restate it.

I am unable to see the relevance of the amendment to the scope and purpose of the legislation. Clause 25 is a provision of the Bill by reason only of the need to align section 33A with the law that the Bill enacts. Repeal of section 33A is not a consequence of the changes being made to the law. It stands in its own right and with its own policy intent. Its legislative effect goes well beyond and arguably destroys the current intent of clause 25.

I rule that the amendment is out of order and cannot proceed.

Debate Resumed

Clause put and passed.

Clauses 26 to 29 put and passed.

New clause 20 -

Hon GRAHAM GIFFARD: I move -

Page 38, after line 10 - To insert the following new clause -

20. **Submissions under *Metropolitan Region Town Planning Scheme Act 1959***

On the coming into operation of section 25 of this Act, any submission received by the Minister under section 33A of the *Metropolitan Region Town Planning Scheme Act 1959*, and not reported on under section 33A(5) of that Act, is to be dealt with by the Commission as if the submission had been received by the Commission under section 33A of the *Metropolitan Region Town Planning Scheme Act 1959* as amended by this Act.

In abolishing the planning appeals committee, the Bill, as it now stands, needs one further consequential amendment, which relates to the appeals committee providing a report to the minister on minor amendments. When the Bill, as amended, comes into effect, it will enable the Western Australian Planning Commission to assume the role of providing that report to the minister. This raises the question of what will occur during the transitional period. My amendment recognises the need for the legislation to contain provisions that will enable the commission to report to the minister on submissions on minor amendments, and that will apply to amendments initiated prior to the finalisation of the legislation, because the appeal committee will have been disbanded. The legislation will allow the Planning Commission to provide that report to the minister, and this amendment will allow it to do so during the transitional period.

Hon DERRICK TOMLINSON: The Opposition supports this amendment. In doing so it wishes to express its extreme gratitude that this Bill has taken so long to get to this stage. Had it not, this Government would have had legislation that was terribly flawed. The Bill has been so long in gestation that, during that period, it has been realised that, "Oops, we did not do this", "Oops, we did not do that" and "Oops, we did not do the other". Therefore, a series of amendments has arisen during this extended period of gestation, of which this amendment is one. When the Bill was undergoing its labour pains, suddenly someone said, "Oops, there is something we have overlooked."

I feel some sympathy for the parliamentary secretary, because I received notice of this amendment before he did. When I was given the notice of the amendment, I was told that the Government would not proceed with it unless we were comfortable with it. I read the amendment and needed a bit of clarification, so I went to the parliamentary secretary. He said that he needed clarification too, because he had only just received it! This is the way in which the parliamentary secretary has been treated. We were accused of being brutal to him two days ago. We had a most extraordinary display during the adjournment debate because of the way Hon Peter Foss and I had brutalised him in debate that afternoon. The poor fellow was labouring under inadequate advice. I am not talking about the staff in the Chamber, but the minister he represents in this place - the Minister for Planning and Infrastructure. He went and got the advice. I am grateful for the clarity of the advice that has been provided by the minister's officers.

This new clause may or may not be necessary. Guess what - the minister does not know whether any matters are in the pipeline that might need to be covered by this new clause. She does not know! Because she does not know that, she does not know whether this new clause is necessary. The argument is that this new clause should be included in the Bill just in case there is something that she does not know about! This characterises the way in which this Bill has been presented to Parliament.

Hon Peter Foss: Do you have the feeling that we are being treated like the fruiting body of a mycelium?

Hon DERRICK TOMLINSON: I am not quite sure how the fruiting body of that species is treated!

Hon Peter Foss: They often show up like mushrooms.

Hon DERRICK TOMLINSON: Yes. I think not. The person who has the ultimate responsibility for this Bill does not understand that mushrooms need to be treated in that manner.

Point of Order

Hon KIM CHANCE: I have been speaking with my colleague about what stage of the Bill we must be at, because it must be one that would promote the breadth of this argument. So far we have had a personal character analysis of both the minister and the parliamentary secretary. The argument has also delved into agriculture. I thought that I had somehow missed a couple of stages and that we were now on the third reading debate. I raise this point of order on the basis of relevance.

Hon Peter Foss: Have you read the clause?

The CHAIRMAN (Hon Jon Ford): Order, members! I take the point raised by Hon Kim Chance. I expect that the member will bring his comments around to the clause.

Debate Resumed

Hon DERRICK TOMLINSON: When the Leader of the House rose to his feet, I was halfway through saying that the Opposition supports this new clause. I was about to sit down. I thank the Leader of the House for his point of order. I had not thought about making a contribution to the third reading, but he has now given me some food for thought. I will prepare a speech for the third reading. The Opposition supports the new clause.

Hon MURRAY CRIDDLE: I have been very interested in this issue because it relates to the time that will be taken to deal with whatever remains unfinished from the past. I am told that there is a bit of a backlog. Will the parliamentary secretary indicate how speedily that backlog will be dealt with, because there are some frustrated people out there?

Hon GRAHAM GIFFARD: I am not sure. We are not dealing with the third reading but with changes to the Bill that will allow, during a transitional period, the treatment of minor amendments. This new clause does not concern appeals or a backlog. It is being proposed because it would ensure that amendments could be treated in the same way that they will be treated once the legislation comes into effect. This is not a backlog issue, because this amendment does not deal with planning appeals.

Hon PETER FOSS: This is an amendment that the Opposition probably should not agree to, but will. No section 33A amendments were made for eight years. For the 10 or 12 years before that, there were constant section 33A amendments. There were no section 33 amendments during that period because the Burke, Dowding and Lawrence Governments used only section 33A. For years, planning fell in a heap in Western Australia because no proper planning was done - there were no major amendments. Members can thank Hon Richard Lewis. He eschewed section 33A and got planning up to date again by bringing in a succession of section 33 amendments. He brought in major and omnibus amendments. Every amendment under section 33 came through this Parliament. That caused some grief at times, because disallowance motions were moved by different members. Those debates often brought down omnibus amendments, even though there was an objection to only one part of those amendments. However, it at least meant that it was an open process. There was a capacity for proper input from the public and the Parliament. So far as I know, there will be no backlog, because Hon Richard Lewis and Hon Graham Kierath never used that section. As far as I know, there is only one section 33A amendment in the pipeline, and that is why this amendment is before us. Can members guess what that section 33A amendment involves? It will allow the southern urban rail development to go up the middle of the freeway!

Hon Derrick Tomlinson: That is minor!

Hon PETER FOSS: I had great interest in watching question time today in the Legislative Assembly. The Minister for Planning and Infrastructure managed to avoid explaining how she could say that something that was going to cost about $1 billion was a minor amendment. She even claimed that the Government was being open and accountable by using section 33A, because an Act would deal with the section of the railway that will go through Perth. How could she say that this amendment, which does not allow Parliament to have any say in the matter whatsoever, is an example of open and accountable government? Only one matter is in question. The Opposition should delete this amendment to show the minister what it thinks of her stupidity in using section 33A to bring in the southern urban rail development. The use of this section harks back to the days of Burke, Dowding and Lawrence. They always avoided parliamentary scrutiny because they always had some sneaky little deal that they could sneak through with section 33A. That is what it is all about. It is not to do with major or minor amendments, but with avoiding the scrutiny of the people of Western Australia. I have tried to delete

section 33A altogether because it is anathema. It should never have been included in the legislation. I do not know which Government put it in the legislation; it was possibly a Liberal Government. However, the coalition Government did not use that section for the eight years it was in power. For eight years we brought in major amendments and caught up with the planning of this State. Within 18 months of coming to power, this so-called open and accountable Government is already using section 33A in a way that absolutely stinks! It is dishonest and wrong, and the Government is no better than the crooks who were around in the time of Brian Burke. Its members will probably all end up in the same place, because if they cannot be honest in simple things like this, how can they be honest in anything? This Government looks for any little sneaky way of doing things. It likes these frauds - if something can be done either honestly or dishonestly, just for the sheer fun of it, the Government does it dishonestly. Using section 33A in this manner, it is acting like a drug addict. The Government cannot stop itself from being sneaky. This Government seems to think that the law is there to be twisted, turned and used in the way that best serves its own interests, not for the purpose for which it was set up in the first place. This is about the Government being dishonest. It has suddenly realised, after all this time, that it has made a mistake. Perhaps it would have been better if this legislation had passed a bit quicker, because the Government would then be stuck halfway through the process.

New clause 20 is to enable the Government to defeat the proper public scrutiny of the massive extra expenditure it is imposing on the people of Western Australia by its ill-advised planning decision to build the railway up the centre of the freeway. Interestingly enough, the Minister for Planning and Infrastructure has said she will not allow this decision to be debated publicly. Every public meeting, every so-called consultation meeting on this matter begins with an announcement that the Government will not enter into any discussion about the decision to reroute the railway from Kenwick to the centre of the freeway. I have a message for this Government - the public will debate that decision, and question it. The Government cannot shut the public up. The Government might not like democracy -

Several members interjected.

The DEPUTY CHAIRMAN (Hon Jon Ford): Order, members. If we talk quietly and avoid interjection, then Hansard will be able to understand, and you will not have to have a competition of volume.

Hon Kim Chance: Since Hon Peter Foss stood up to speak on this matter, he has been dishonest.

Hon PETER FOSS: I will have to raise my voice if Hon Kim Chance continues to interject. He did hear the Deputy Chairman suggest that he refrain from interjection.

Hon Kim Chance interjected.

Hon PETER FOSS: Yes, I am, and if Hon Kim Chance would stop interjecting, he would hear why.

This clause is to allow section 33A, which, until this Government came in, had fallen into desuetude, to be used to allow the change of use of the centre bus lane of the Kwinana Freeway. I watched the debate in the other place today, and I heard the Minister for Planning and Infrastructure try to justify her use of section 33A to effect that change. I do not believe that falls within the spirit of that provision. The only reason that she will not allow it to go before the public and the Parliament is the same reason that every single public consultation meeting on that railway is preceded by a statement that the minister will not debate that central issue. This leaves everybody in a hard situation. How can they debate logically all the adverse impacts if they cannot debate the central issue. They are frightened that if they upset the minister, something nasty will happen to them. She will become quite upset. Everyone is scared that some nasty thing will be done, and there is a very good reason for that. Look at what Hon Tom Stephens did to local councils as an indication of government policy. He threatened to take away their money, and review the grant procedure.

Hon Ken Travers interjected.

Hon PETER FOSS: Is Hon Ken Travers denying that this is what happened?

Hon Ken Travers: I know all about your victimisation of public servants. I could tell a story or two.

Hon PETER FOSS: Oh, really?

The DEPUTY CHAIRMAN: Order, members. Time tells me that we are about to have a break for 15 minutes. I warn members, however, that I have a responsibility to manage the authority of the Chair. I am warning members not to press me, because I will support the authority of the Chair. I will leave the Chair until the ringing of the bells.

Debate interrupted, pursuant to standing orders.

[Continued on page 469.]

Sitting suspended from 3.45 to 4.00 pm

The PRESIDENT: I draw members' attention to distinguished guests in the President's gallery: a delegation of members of Parliament from the Republic of Kenya and the High Commissioner of the Republic of Kenya. For the particular edification of the father of our House, Hon Norman Moore, I point out that one of the members of the delegation, Mr Sifuna, has been a member of the Parliament of Kenya since its independence in 1963.

[Applause.]