MINING AMENDMENT BILL 2021

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Matthew Swinbourn, (Parliamentary Secretary) in charge of the bill.

Clause 10: Section 46 amended —

Committee was interrupted after the clause had been partly considered.

Hon NEIL THOMSON: Just so that I am clear about this prescribed provision and the parliamentary secretary's explanation prior to question time, is the parliamentary secretary saying that at the moment nobody in the department has the power to make a judgement about the safety of any person or animals or whatever? I think that two references—maybe three—are made to "prescribed official" in section 46. How is that actually managed? Is the parliamentary secretary saying that it is just a definition? Does this mean that it becomes just a legal issue? Is that what the parliamentary secretary is saying?

Hon MATTHEW SWINBOURN: People will still be involved in this process, including the people who inspect the site and might see something that they believe is unsafe. However, we are moving from a subjective standard—for example, when the individual officer has to form an opinion that it is not safe—to an objective standard, which is simply that it must be safe. Of course, that will still involve, to a degree, a person forming an opinion, but it is about making it clear in the act itself what the obligation is.

I have been advised that the subjective nature of different views was an issue prospectors raised with the department. The department, more centrally, will be able to set parameters around what is a safe pit or hole—those sorts of things—and set guidance for industry people, not unlike what WorkSafe and the WorkSafe Western Australia Commissioner do with other safety issues. It will be against that standard that things are checked rather than a particular officer forming an opinion, which could differ between officers. Fred and Mary might form different opinions: one day Fred visits the site and says that something is okay, and the next day Mary visits the site and says that it is not okay. This is about providing consistency to industry on standards and expectations. The locus will shift from the individual to create a more uniform standard across industry that will come from the department rather than an individual officer. This is not about disempowering the officers; this provision will provide them with more clarity and certainty. For example, section 46(b) of the act 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 …

As the member can see, proposed section 46(b) states —

> that all holes, pits, trenches and other disturbances to the surface of the land the subject of the prospecting licence that are made while prospecting, and that are likely to endanger the safety of any person or animal, will be filled in or otherwise made safe; …

That prescribes a more objective standard, rather than inserting "in the opinion of a prescribed official". That is more reflective of the modern standards of drafting as well so that each day somebody knows what their obligation is rather than having, as I said with Mary and Fred, different inspectors with different standards.

Hon NEIL THOMSON: I understand that the language is trying to be more prescriptive with the words "likely to endanger the safety of any person or animal". The current provision in the act refers to the opinion of an officer and creates a line of responsibility. If there is a conflict of opinion with, for example, the prospector, or the person undertaking the mining activity, who says that the site is safe, who will have the final say on that? It is still a matter of opinion. I will not linger on this anymore but it seems unusual because, at the end of the day, someone such as an inspector will have the authority to say that it is unsafe. I would have thought that that would be a pretty straightforward process. Perhaps that inspector would have had some guidance in terms of the requirements.

Hon MATTHEW SWINBOURN: I do not want to labour the point here, but it currently focuses on the state of mind of an individual rather than on an objective criterion. If a prosecuting officer were to prosecute this section, they would have to establish the state of mind of the officer at the time that they had formed that opinion, as opposed to whether objectively, on the description of the facts and circumstances, it was safe or not safe. That is how we get more consistency. Yes, humans are still involved in the process. For example, if the case is taken before a judge, the judge would have to form a view, but we do not have to understand the state of mind of the officer. That is fairer to everybody involved in the process.

Clause put and passed.

Clause 11: Section 46A deleted —

Hon NEIL THOMSON: This clause might be along a similar vein—I do not know—but it deletes a large section. I presume that this bill might put some of it back into the act, and my challenge was in trying to marry up the two. However, section 46A(1) of the act states —

> Reasonable conditions may be imposed on the holder of a prospecting licence …

Is the reasonableness test or provision still contained in this bill or is this also part of the changing of the language in the act?

Hon MATTHEW SWINBOURN: The term "reasonableness" has not been picked up in the new section, which I think is what the member is referring to. I refer the member to proposed new section 103AU, "Conditions for preventing, reducing or remediating injury to land and for other purposes", that has moved away from that terminology about reasonable conditions. It will state "the minister may impose a condition". There will be a change in the sense that the provision currently states "reasonable conditions". What is implicit is that the minister must impose reasonable conditions within the ambit of the power exercised by the minister. Although it is not explicit, we say it is implicit that any of those conditions will continue to have to be reasonable. As a matter of record, I put that on *Hansard* for anybody seeking to interpret this section and decide whether there is a reasonableness element in it. It remains an element and we say that it is necessary for the minister who imposes a condition on a mining tenement to do so reasonably.

Hon NEIL THOMSON: Is this removal reasonable? Is this change in language in the legislation a trend that is happening across the board or only in the Mining Act, and is it regarded as contemporary?

Hon MATTHEW SWINBOURN: I do not want to talk about the whole statute book, but I understand this drafting was put forward by the Parliamentary Counsel's Office. Hon Nick Goiran has entered the building, so I will say that that agency is always mentioned, but never here! It did not come from the department itself. To the extent I can give the member any comfort, it reflects PCO's more modernised drafting practices, but I cannot extrapolate that to the entire statute book and whether other bills will reflect that, but that is our understanding of why the change was made here.

Clause put and passed.

Clauses 12 to 14 put and passed.

Clause 15: Section 63 amended —

Hon NEIL THOMSON: I am a little challenged by this clause and the conditions associated with an exploration licence. I wonder what impact this will have on the security of an existing exploration licence. In the past, decisions have been made in the High Court about the conditions applied to leases when they are not explicitly managed. I would like clarification on the amendment, which deletes a considerable part of section 63. This is a repetition of some of the criticisms we raised earlier. It seems to be a truncated provision so that every exploration licence will be taken to be granted subject to the condition that the holder of the licence will prospect for minerals. This provision contains a significant deletion. Then in the blue bill, proposed new section 63A(b) talks about terms and conditions of an exploration licence not being complied with, including prescribed expenditure conditions referred to in section 64, and refers to any conditions to which the licence is taken to be subject. It refers to a whole range of sections as well. Without being an expert on this act, I would like the parliamentary secretary's general comment on some of the challenges we saw arising in Forrest & Forrest Pty Ltd v Wilson in 2017, when doubt was cast on the validity of certain mining leases because some conditions were not seen to have been met. A view was put that those conditions had to be met within the absolutely strict definition in the legislation. Given the changes and the significant red lines we see in the blue bill, what are the parliamentary secretary's views on any potential risk to the security of those licences going forward?

Hon MATTHEW SWINBOURN: I will make some general comments about what we are doing in this clause. Section 63 will be updated to modernise the language, and the provisions related to programs of work on exploration licences will be relocated to proposed part 4AA, and specifically to proposed section 103AG. The section 63(b) and section 63(c) conditions relating to the manner in which exploring for minerals is carried out have been revised with modern drafting to focus on ensuring the outcome of making disturbances safe and preventing damage or injury. In relation to the member's specific question about the potential risk to the security of current exploration licences, which is a genuine and important consideration, the advice is no. The bill contains transitional provisions that will protect existing rights, and it is not intended to disrupt those existing rights by what we are doing here. Primarily, the intention is to modernise the language and simplify the act through the drafting, particularly of the section we are dealing with now, so that it is contained within proposed part 4AA. The bill will make it easier for the industry that uses the act to comply with its obligations and to understand what it needs to do. The short answer to the member's question about risk is that this does not pose a risk.

Clause put and passed.

Clauses 16 and 17 put and passed.

Clause 18: Section 69D amended —

Hon NEIL THOMSON: This follows on a little from our previous discussion on licences. Clause 18 amends section 69D by deleting significant elements, which we do not have to go into in any detail. The clause reads —

> (1) In section 69D(2) delete "a form approved by the Minister" and insert:
>
> an approved form
>
> (2) Delete section 69D(4) and insert:
>
> (4) On and from giving notice in writing to the holder of the licence of the imposition of the condition, the condition has effect for all purposes as a condition to which the licence is subject.

Will this substantially change any obligations, and will it impact at all on the security of the lease, which we discussed previously?

Hon MATTHEW SWINBOURN: I can understand again why the member has asked the question. It does appear that something is missing and, in a sense, it is. Section 69D(4)(a) provides that the licence holder —

> may be endorsed on the exploration licence, for which purpose the holder of the licence shall produce the licence on demand;

That requirement will be removed. We are modernising the language and reducing that obligation; they will no longer have to produce their licence on demand.

The member's more general question was whether that undermines their existing rights and those things. The answer is no. I would imagine that most people would be very welcoming of this provision because they will not have to carry their licence around and produce it on demand. That is positive, and I am sure that the member would agree with me.

Clause put and passed.

Clauses 19 to 21 put and passed.

Clause 22: Section 70IA —

Hon NEIL THOMSON: Clause 22 amends section 70IA. Proposed subsection 70IA(3) states —

> A condition imposed under subsection (1) may be cancelled or varied by the Minister at any time.

Proposed section 70IA(3A) states —

> On and from giving notice in writing to the holder of the licence of the imposition of the condition, the condition has effect for all purposes as a condition to which the licence is subject.

Does this mean that the minister will be able to give notice in writing and cancel a condition? I assume the answer is in the affirmative. Will the minister be required to outline reasons for the cancellation and will there be any recourse for the licence holder to appeal the cancellation? What other forms of recourse will the licence holder have?

Hon MATTHEW SWINBOURN: There was a lot in the member's questions and I am trying to make sure that I cover it all off. The first thing to understand is that what has arisen in proposed subsection (3) is a condition imposed under subsection (1). It is only conditions that arise under subsection (1), which states —

> On the granting of a retention licence, or at any subsequent time, the Minister may impose on the holder of the licence a condition requiring the holder to comply with a specified programme of work in respect of the land the subject of the licence within a specified period.

Proposed subsection (3) relates only to subsection (1) and those conditions that arise with that program of work. It does not relate to other matters. I am also advised that in practice the circumstance that might prompt the imposition of a condition will not come out of the blue after the minister got out on the wrong side of the bed and decided to impose conditions and that would be the first time that people understood they were in that regime. It is typically at the end of the process—for example, an investigative process that the department might have engaged in. That process would have afforded people procedural fairness in matters raised against them and have an opportunity to respond to actions proposed against them, and potentially give an indication whether that would be appropriate and things of that kind. It is probably important to understand that first element—that it is only in relation to subsection (1) conditions and that it is an end-of-process imposition. The department, as a matter of practice, affords people procedural fairness as they go along. If they took the view that the conditions were unreasonable—I do not know that they would be unreasonable—or were not justified, they could take legal action against the minister to dispute those sorts of things. There are no specific provisions for that, but the normal judicial powers would apply

to any administrative decision so that people could go to court. It is not normal practice for that to happen. We do not expect a range of disputation to suddenly arise because we have modernised the wording of the provision.

Hon NEIL THOMSON: I apologise for not outlining that it is subject to section 70IA(1), which deals with the conditions of the program of work. That is an important point. I assume that under the current legislation, when a program of work is approved by the department or the minister, it cannot be altered. The current legislation does not seem to have the provision to cancel or vary. This seems to be a new provision. Is that correct?

Hon MATTHEW SWINBOURN: I am advised that the bill is not creating any new power. Essentially, the conditions relate to the prevention or reduction of injury to land, which is the section that is being deleted. Section 70I(2) provides that a condition imposed under this section may be cancelled or varied by the minister at any time. The conditions for the program of work relate to the prevention or reduction of injury to land, which is quite an interesting phrase. It is obviously historic, but it relates to environmental matters. The member has a history in planning, so I suspect that he is not unfamiliar with that kind of archaic language. The short answer to the member's question is that the minister is not being given new powers; the minister already has the power to vary conditions. The way that I answered the question previously gave the impression that this is a punitive provision. I understand that the powers will mostly be exercised to vary or cancel conditions at the request of the tenement holder. It is not normally used as a punitive process in any event. Someone will write to the department to say that the conditions are either unnecessary or oppressive, or the circumstances have changed, and that they would like the conditions on their program of work to be varied or cancelled. The department will advise the minister and the minister will either agree or disagree—I suspect that he would overwhelmingly agree with the advice from his department—and that is where that will end up.

Clause put and passed.

Clauses 23 to 26 put and passed.

Clause 27: Section 82 amended —

Hon NEIL THOMSON: There are various elements to this clause. I will make sure that I have the right number so that I do not send the parliamentary secretary on a wild goose chase. I will have to go back to the blue bill. There is quite a lot of material here, so finding it all in a timely way is quite difficult. I will read out what I have in front of me so that the parliamentary secretary might be able to find it. It is to do with the review of the mine closure plan contained in the relevant mining proposal and the need to obtain written approval for the mine closure plan. Elements are being deleted. The word "review" in relation to a mine closure plan does not appear in the proposed changes.

Hon Matthew Swinbourn: Member, the advisers have indicated to me that you might be referring to clause 29 if you are talking about mine closure plans, rather than clause 27.

Hon NEIL THOMSON: That is probably why I cannot find it! Let us move to clause 29, if you do not mind, Deputy Chair.

Clause put and passed.

Clause 28 put and passed.

Clause 29: Sections 84AA and 84 deleted —

Hon NEIL THOMSON: Sorry; that was my error. I put the wrong clause number in my annotations. I was searching in my paperwork, but it was just a typo in my notes, so I apologise. Clause 29 deals with the review of mine closure plans contained in relevant mining proposals and the need to obtain written approval for reviewing mine closure plans from a prescribed official. Again, it mentions a prescribed official, but I will not go into that part. I am focusing on the issue about "review" in relation to mine closure plans, which does not appear to be in the new section. What is the process for continuing to meet best practice in mine closure plans? It seems that we are deleting the section on the review of mine closure plans. I would like to get some clarification of what that all means.

Hon MATTHEW SWINBOURN: Section 84AA is being deleted, which I think is fairly evident from the blue bill, as the provisions for the review of mine closure plans are being relocated to proposed sections 103AS and 103AT in division 5 of proposed part 4AA. The review date will be listed on the approval statement and this date may be extended or varied by the minister. The three-year time frame is being deleted to remove a default time frame for submission and to provide flexibility for this date to be varied on a case-by-case basis.

Clause put and passed.

Clauses 30 to 33 put and passed.

Clause 34: Part 4AA inserted —

Hon NEIL THOMSON: As the parliamentary secretary knows, all the consolidation occurs under clause 34. There might be a few questions on clause 34. I will try to avoid any duplication from my previous questions, because we ended up with a lot of provisions that have been deleted and are now appearing under clause 34 in a new form. We

have to be quite specific about insertions, such as proposed subsection 103AP(1). I do not know whether that is helpful at all.

Hon Matthew Swinbourn: If you have the blue bill there, it might be helpful with the page number.

Hon NEIL THOMSON: It might be easy to go through the blue bill. I have put notes initially with the deletions and then put the inclusions—hence the challenge.

Proposed subsection 103AA(a) states —

> in relation to a mining development and closure proposal — the outcomes, objectives or goals to be achieved at the completion of the decommissioning of a proposed mine …

Why does it have "or"? What does that actually mean? Given that we were trying to be more prescriptive and clear about things, is it outcomes, objectives or goals? Could the parliamentary secretary explain the difference between an outcome, an objective and a goal, and how would a proponent distinguish what those are and how they would be used within the preparation of the mining development closure plan?

Hon MATTHEW SWINBOURN: I might not get the answer the member was seeking, because we got a little lost along the way, but I will give it a shot. If we are off the mark, let us know and we will try to provide a different response. The member referred to proposed subsection 103AA(a) and the definition "closure outcomes". What I could say generally about that is that it is now outcomes focused, which is what we are trying to achieve. With these closure outcomes, we are trying to achieve a safe, stable, non-polluting or contaminating and supportive agreed post-mining land use. That is the outcome that we are trying to achieve from this change in focus rather than being prescriptive with specific things. Does that answer the member's question?

Hon Neil Thomson: It just seemed like it had three different terms—outcomes, objectives or goals. It seemed a bit loose for the legislation, given that the parliamentary secretary has explained what the objectives are. It just could have been "the outcomes" in the legislation. It might have been the outcomes, as the parliamentary secretary just described. What was the purpose of having those three terms in there, and what is the distinction?

Hon MATTHEW SWINBOURN: Maybe the member should seek the call.

Hon NEIL THOMSON: My point was that it says "the outcomes, objectives or goals to be achieved". It seems like there are three different things that are hoping to be achieved, yet there is no real definition. It is not a term. I assume that those terms are used throughout clause 34 or throughout the closure plans, but maybe interchangeably. I do not know; I am asking why it has that broad description.

Hon MATTHEW SWINBOURN: I think we have a better idea of what the member is getting at. I can see the point he is trying to make, which is that "outcomes, objectives or goals" could be synonyms with each other, and so it might have been easier to perhaps say "outcomes or objectives or goals". But the advisers tell me that this is drafting language used by the Parliamentary Counsel's Office in order to cover the maximum scope of the overall clause. This is a definitions clause and we have a small phrase here, which is "closure outcomes". The PCO is making sure that the meaning is as broad as it needs to be by using all that language. There are slight differences between the meanings of outcomes, objectives and goals. An outcome might be a specific thing, but an objective might be more—for want of a better word, it is a motherhood statement. The objective is to have a mine closure that is returned to the community in a fashion that is consistent with what the community wants, which is an objective, but the outcome for that might be that X, Y and Z might need to happen. We are trying to capture it all here, but again, I cannot give the member much more insight into exactly why those three words are used in that order.

Sitting suspended from 6.00 to 7.00 pm

Hon NEIL THOMSON: I am looking at the excluded areas in clause 34. In the blue bill, it is proposed section 103AC. Is there any change in this from the original provisions that have been deleted from the earlier parts of the act?

Hon MATTHEW SWINBOURN: This is a new, for want of a better term, proposed section. It is necessary because of the creation of the EMA regime. This proposed section will allow the minister to exclude particular areas from being eligible for application and assessment through an EMA notice, in addition to the reserved lands excluded under proposed section 103AD when the minister does not feel it is appropriate for an EMA notice to be given in a particular area; for example, those conservation areas that are known but are not protected by the provisions of other legislation. As the member can see, it is necessary to have this new provision because the EMA regime would not work if the minister was not able to exclude areas. Obviously, the automatic function of the EMA process is such that when those areas are sensitive—they might be identified by community members, particular groups or even by the mining industry itself as not appropriate for this sort of thing—the minister has to have the power to exclude those areas.

Hon NEIL THOMSON: To clarify the activities that do not fall within the EMA notice, the minister already has the power to exclude areas. This is only for the notices. Does the minister have the power to exclude any mining

activity in those areas? I will try to get this question right: the act already allows for the minister to exclude mining activities in areas; is that correct?

Hon MATTHEW SWINBOURN: There are no powers of this kind currently in the Mining Act, but there are areas for which applications for tenements have been submitted and the minister currently has that power. However, we need to understand that this provision will not preclude mining activity from occurring on those excluded areas; they will just be excluded from being eligible for being included in the EMA process. Someone could still submit a paper application that would have to be properly assessed by the non-automated approach.

Hon NEIL THOMSON: I will move on from that. We will be stuck on clause 34 for a little while because we are dealing with different proposed sections. It is a little more complicated insofar as it is not a new clause. I have to find my way to the right point. I have the same question. At the risk of repetition, I will probably ask this question a few times. Proposed section 103AG relates to the conditions required for activities authorised by a program of works. Is proposed section 103AG any different from the current provisions? If there are any differences, will the parliamentary secretary outline what the differences are?

Hon MATTHEW SWINBOURN: In general, it is not different, but it is different in the sense that it now includes the EMA. That is the difference. I think the member will appreciate that that is by necessity. If we were to exclude the EMA activity so that someone was not within that regime, this proposed section would not be different for them after translocating the original section—is "translocate" even a word? I do not know!

Hon NEIL THOMSON: I thank the parliamentary secretary. Sometimes I might ask obvious questions, but the assumption is that it is about the EMA component of the new change, and I will try to ask about any other changes. I note that this proposed section talks about a relevant licence being a prospecting licence, an exploration licence or a retention licence. I assume they will be subject to the codification process of the program of works. We talked earlier about how the program of works will be codified by regulation. My assumption is that the codification for these various licences will vary. Is that correct for each of those licence types?

The DEPUTY CHAIR (Hon Dr Brian Walker): Members, it has been noted that the sound in the chamber is a little bit heavy; I ask that discussions be quieter.

Hon MATTHEW SWINBOURN: Proposed sections 103AG, 103AH and 103AI all deal with different tenement types, but note that they all come under proposed division 3, "Programmes of work". Obviously, this proposed division within proposed part 4AA deals with programs of works that will arise. I do not know whether that provides the member with any further clarity. I think he might want to explore it a little more, because I might have lost track of what his original question was about. It is important as a matter of context, when we are talking about proposed section 103AG, to also look at proposed sections 103AH and 103AI as the different types of tenements and that this whole part deals with programs of work.

Hon NEIL THOMSON: Thank you for that clarification. Earlier, the parliamentary secretary mentioned that the programs of work will be codified by way of regulation. The structure or content of those programs of works will be codified and it will be more consistent, but we see here that we have all these different types of activities.

Hon Matthew Swinbourn: That codification would apply across all the tenement types that are in this division.

Hon NEIL THOMSON: Yes. The question is: are there going to be codified programs of work for each activity under each licence type?

Hon MATTHEW SWINBOURN: If I take the member to—we are moving through the bill, in a way—proposed section 103AJ —

> (3) The program of work must —
>
> (a) be lodged in the prescribed manner; and
>
> (b) be in the approved form; and
>
> (c) be accompanied by the prescribed assessment fee; and
>
> (d) include any prescribed information.

That provision will apply to all those tenements. Proposed section 103AJ will apply to all the preceding tenement types in terms of what the program of work must include for each of them.

Hon NEIL THOMSON: I appreciate that; I had a note here on proposed section 103AJ to that effect. I will not labour the point, but, conceivably, could there be different prescriptions or different guidelines or codified instructions for each different licence type?

Hon Matthew Swinbourn: Sorry, member —

Hon NEIL THOMSON: If you cannot answer that —

Hon MATTHEW SWINBOURN: I can answer that, if you do not mind. It will be consistent across all, because this provision prescribes what the program of work must contain, so there will be a degree of consistency across all the tenement types. What might be on a particular tenement, like an individual one as opposed to another one, will be different because this will be populated by the matters that pertain to that particular area. But in terms of the standard, this is the standard that will apply for all those tenements.

Hon NEIL THOMSON: That has been a question at the back of my mind all along. Again, it may be partly because I do not fully understand the detail of the different activities on a mine site; I have not worked on a mine site. But I would have thought that a mining lease would cover a very different set of activities from maybe a prospecting licence, for example. I assume the codification will have to be a principles-based approach; it will be very difficult to have a one-size-fits-all approach, given that quite different activities will likely occur under the different licence types. Does that make sense? Someone is nodding!

Hon MATTHEW SWINBOURN: I am told that the member is correct in the way that he has characterised it. It really will depend on the activities concerned. As I say, there will obviously be a degree of certainty around programs of work under proposed section 103AJ(3). If we look above at proposed subsection (2), it states —

> A programme of work required in order to comply with a condition referred to in section —

I will not read out all those sections —

> must be lodged with the Minister by the relevant lodging party in accordance with subsection (3).

Then proposed subsection (3) provides that —

> The program of work must —
>
> (a) be lodged in the prescribed manner;

The prescribed manner might be different for each of the different tenement types, and —

> (b) be in the approved form; and
>
> (c) be accompanied by the prescribed assessment fee; and
>
> (d) include any prescribed information.

Obviously, those things will be prescribed by regulation at a later date, following consultation.

Hon NEIL THOMSON: I thank the parliamentary secretary; I appreciate that. I refer to proposed section 103AH, "Conditions attached to mining leases". Proposed subsection (6) reads —

> Unless a Government agreement provides otherwise, this section does not apply to a mining lease granted or held under the agreement in accordance with proposals approved, taken to be approved or determined under the agreement.

Can the parliamentary secretary give me a layman's version of what that actually means?

Hon MATTHEW SWINBOURN: This is not the answer to Hon Neil Thomson's question; I am giving him some context because he wanted a layman's understanding of what it means. I will try to give that information regarding the Mining Act and the mining regime to him layman to layman. Having never worked on a mine or done a prospecting licence or any of those other things, some of us are on a learning curve. I have just been reminded that I have opened a mine! It was the Binduli North mine that I had the privilege of opening. I got terribly sunburnt at the same time.

Hon Neil Thomson: That is about the extent of my involvement with mine sites as well; I have made a few visits.

Hon MATTHEW SWINBOURN: That aside, I am advised that this provision has been relocated from a different part of the act, so it is not a new provision. The fundamental difference is the use of the term "Government agreement", which was not used in the old act but will now be a defined term under section 8. That means that the term has been added. The full definition is —

> … the meaning given in the *Government Agreements Act 1979* section 2;

That term will now be used in the revised act; it will provide some consistency in the drafting, but it has not changed it. The definition is essentially "the meaning given under the Government Agreements Act 1979". These are essentially state agreements. What this proposed section means is that a state agreement will take precedence over the Mining Act, which makes sense when we think about what state agreements are and the force of law they carry. It is an inconsistency provision to ensure that state agreements prevail over the Mining Act.

Hon NEIL THOMSON: I move to proposed section 103AJ, "Lodgment of programmes of work". Proposed subsection (4) states —

> Before the Minister approves or refuses to approve an activity proposed in a programme of work under section 103AK(1) —
>
> (a) the Minister may request the relevant lodging party —
>
> (i) to lodge a substitute programme of work; or
>
> (ii) to provide such further information …

That is to allow for advice to be given by the department. I assume that if the minister is not happy with a particular program of work, there might be a requirement to amend or change a program of work.

Hon MATTHEW SWINBOURN: This proposed section identifies the procedural requirements for lodgement and further information required for the program of work. It enables applications to be substituted—that is, either edited or resubmitted—as part of an assessment process that has already commenced when the proposed activities are not substantially different. For example, this might happen when an environmental approval has been granted whilst the process was underway or an environmental approval has come out but with conditions, and rather than having to start from the beginning, they are able to essentially amend the application to take that new information into account.

Hon NEIL THOMSON: Would the parliamentary secretary contemplate this provision also being utilised when there is a significant change or when the proponent has a desire to change a program that they might be undertaking because of economic factors, for example?

Hon MATTHEW SWINBOURN: The member characterised the change as significant. That would almost certainly exclude anything, because the process here is limited to things that are not substantially different from the original application. Once the member uses the word "significant", it elevates it past what I would describe as not substantially different. In that circumstance, a new proposal from the proponent would be needed. This process is also considering matters that are under consideration, rather than after an approval has been given. Those are not really the circumstances. If approval has been given—if they have got past that point—and then they need a change or whatever it might be, they would need to put forward a new proposal rather than seek to use these provisions to change it. It can be thought of as a way of ensuring that matters of a minor nature do not derail what might already have been a very substantial application process; that is appropriate. If someone proposes something that fundamentally changes what they propose to do, they will need to start all over again, if I can use a layperson's language.

Hon NEIL THOMSON: I will move on and skip through a few more. Proposed section 103A0(3) states —

> If the decision is to refuse to approve the activity —

This is consistent with other, similar provisions, so we can use it as an exemplar —

> the Minister must notify the lessee of the mining lease or the holder of the miscellaneous licence to which the mining development and closure proposal relates in writing of the Minister's decision and include in the notification the reasons for the refusal.

Reasons are given. However, further in—I am looking for it; I may come to it later—there is an opportunity to terminate a licence without reasons. The minister does not have to answer that; we can move to the other bits. If the officers are able to answer that for me, that would be great.

Hon Matthew Swinbourn: What is your actual question?

Hon NEIL THOMSON: Reasons are required for refusing approval, but somewhere —

Hon Matthew Swinbourn: Is it 103AQ that you want to refer to?

Hon NEIL THOMSON: Probably—the minister is able to cancel a licence without giving reasons.

Hon Matthew Swinbourn: Just for clarity, are you trying to understand why it is different?

Hon NEIL THOMSON: Yes.

Hon Matthew Swinbourn: Why reasons are given in the case of —

Hon NEIL THOMSON: In refusing applications.

Hon Matthew Swinbourn: Yes, but not in a termination.

Hon NEIL THOMSON: That is right; yes, if the parliamentary secretary can answer that.

Hon Matthew Swinbourn: We will see whether we can get an answer.

Hon NEIL THOMSON: Sorry; it was because they were given in different sections.

I have found that provision. It is proposed section 103, if that helps. There is a condition that can be imposed.

The DEPUTY CHAIR: Member, would you prefer to put that question after this one has been answered?

Hon NEIL THOMSON: Yes. Ignore what I said, please.

Hon MATTHEW SWINBOURN: I think the member jumped over a bit because he referred to proposed section 103AU, which does something different from proposed section 103AQ. Proposed section 103AQ is "Cancellations and variations recorded on approvals statements". On the first point, proposed section 103AO, "Approval of activities in mining development and closure proposals", identifies the minister's powers to approve or refuse to approve activities proposed in a mining development and closure proposal. The procedural obligations of the minister as a result of the decision provides for statements of reasons to be given for refusals and the issue of approvals statements for approvals and conditions that may be attached to an approval. The effect of that proposed section is that the minister may approve and refuse activities in the same MDCP application.

The reasoning for that obligation is that a failure to give reasons is an error of law. In this process it will be administrative. Someone will still be able to appeal and get what are called writs from the Supreme Court. If the minister fails to give a reason, he will not be properly exercising his administrative functions under the act. That is what the act prescribes in relation to this matter. But the other matters the member raised are different and they deal with a different kind of mischief, if I can use that term; therefore, it is not appropriate to do what the member did and compare them. This is not a criticism, but we are not comparing apples with apples; we are comparing apples with oranges. We are trying to achieve different outcomes.

Hon NEIL THOMSON: My apologies for confounding the issue. However, I want to be clear. Are we talking about proposed section 103AQ as opposed to proposed section 103AO? The parliamentary secretary addressed the comparison with proposed section 103AO.

Hon Matthew Swinbourn: We talked about proposed section 103AO, which the member first raised.

Hon NEIL THOMSON: And proposed section 103AQ.

Hon Matthew Swinbourn: Yes, and proposed section 103AQ, but that is comparing apples and oranges rather than apples and apples.

Hon NEIL THOMSON: I will move to proposed section 103AU. I am interested in this section because it seems to be a fairly powerful provision headed "Conditions for preventing, reducing or remediating injury to land and for other purposes". When I read this I wondered whether this provision might have been handy in the Juukan Gorge issue. Was there any thought of that when this clause was being drafted?

Hon MATTHEW SWINBOURN: The Juukan Gorge issue came under the Aboriginal heritage provisions that existed at the time. That is not what we are dealing with here. From the smile on the member's face, he may be trying to be mischievous. It would be hypothetical, but I understand this is not related to what happened at Juukan Gorge. I can provide the member with a more detailed explanation of what proposed section 103 is trying to do. This section provides the minister with discretion to impose conditions for preventing, reducing or remediating injury to land for other purposes. It substantially relocates all deleted sections regarding reducing or remediating injury to land, which previously included sections 46A, 63AA, 70I and 84, which have now been deleted. The bill also now includes the ability to impose tenement conditions for preventing or reducing the impact of mining on the values of reserved land. That is what is this clause is trying to achieve. Largely it is the relocation of previously deleted provisions and the additional objective of the bill giving the ability to impose tenement conditions.

Clause put and passed.

Clauses 35 to 39 put and passed.

Clause 40: Section 162 amended —

Hon NEIL THOMSON: The language of this clause is unusual, and maybe it is a Parliamentary Counsel's Office issue. We have brought in the terminology "the Governor thinks". Deleting the term "he deems" obviously degenderises the language, which is understandable, but it seems rather odd to replace "he deems" with "the Governor thinks" and I wonder why. Is that part of the normal process?

Hon MATTHEW SWINBOURN: It is a drafting convention from Parliamentary Counsel's Office. It is what it decided to do. I cannot give the member any more insight as to why it has gone from the word "deems" to "think", other than to say that is a modernising of the language. In substance, it will essentially achieve the same thing. Previously, it said "he" deems. We have had a female Governor, and we will undoubtedly have a female Governor in the future, so obviously "he' is inappropriate and gender-neutral language is more appropriate. As I say, I suspect that "deems" can be problematic at times, so I think that is also why PCO has moved to "think". I cannot give the member any more insight than that.

Clause put and passed.

Clause 41: Second Schedule Division 3 inserted —

Hon NEIL THOMSON: Clause 41 deals with transitional provisions. Proposed clause 25 in the new second schedule division 3 refers to transitional provisions for previously approved mining proposals. It states —

> ***transition period*** means the period beginning on commencement day and ending —
>
> (a) 10 years after that day; or
>
> (b) on a later day approved by —
>
> (i) the Minister; or …

I do not have the blue bill with me, but I could probably get to it if the officers cannot find that. How was 10 years determined, and is that consistent with the industry's understanding of what is achievable?

Hon MATTHEW SWINBOURN: I have been advised that originally it was proposed to be six years, and that in engagement with industry, it indicated that it was not comfortable with that time period, so it was extended to 10 years. The purpose is to not have a time frame that is so short that it will place undue administrative pressures on both the industry and the government. Therefore, 10 years is where we have landed. I think that is appropriate given the consultation that occurred. Mining activity may be very short, of course, if we are talking about exploration and prospecting, but most mining activity is long term and people want to have certainty about those things. That figure of 10 years is a very comfortable figure, given that it was reached in consultation and agreement with the industry, so that is where we are at. Of course, any number will be arbitrary in nature. It could be 10 or 11, or whatever.

It is also worth noting that under these provisions there is the possibility of extension by the Minister for Mines and Petroleum to take into account any unnecessary adverse effect on a particular individual at the end of that 10-year period. That will offer the flexibility that is needed. We are now getting to the end of this act. None of this process is about making it more difficult for industry. The whole policy of what we are trying to do here is to move to a risk-based assessment process where our officers can be focused on those matters that deserve their attention, and to take them off these matters by having an automated and simplified process, which I think is reflected in the 10-year period, so that we are not creating a rod for both our back and the industry's back.

Hon NEIL THOMSON: In effect, anyone who has an approval on the day of promulgation of this bill will be required to have their program of works, closure plans and activities compliant with the terms of the new regime within 10 years. Is that right?

Hon MATTHEW SWINBOURN: There will be no compellability for existing applications. I am told that this is not a "sunsetting" provision for those matters. If a proponent does not want to take the benefits that will be provided by this legislation, they will not be obliged to do so. I imagine that for some, it might be more administratively burdensome to do so because they are coming to the end of their cycle and there is no real incentive for them to be involved—if that means 10 years and six months afterwards, there is no reason. It applies to every new application, of course, but it will not affect the existing arrangements of those that already exist.

Clause put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.