STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

APPROVALS AND RELATED REFORMS (NO. 1) (ENVIRONMENT) BILL 2009

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
MONDAY, 8 FEBRUARY 2010

SESSION TWO

Members

Hon Adele Farina (Chairman)
Hon Nigel Hallett (Deputy Chairman)
Hon Helen Bullock
Hon Liz Behjat

Hearing commenced at 11.10 am

ANDREWS, MS MICHELLE
Acting General Manager, Office of the Environmental Protection Authority,
sworn and examined:

MURRAY, MR COLIN
Director, Assessment and Compliance Services, Office of the Environmental Protection Authority,
sworn and examined:

The CHAIRMAN: You would have heard earlier this morning that we will try to keep this as informal as we can, but I do have some formalities that I need to go through to begin with. On behalf of the committee, I would like to welcome you to the meeting. Before we begin, I must ask that you take either the oath or affirmation.

[Witnesses took the affirmation.]

The CHAIRMAN: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of the hearing for the record. Also be aware of the microphones and try to talk into them and ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Do you have any questions arising from that?

The Witnesses: No.

The CHAIRMAN: We might go straight into the questions. As discussed earlier today, the committee did provide the office of the—what is it called, again?

Ms Andrews: It is the Office of the EPA.

The CHAIRMAN: The committee did provide the Office of the EPA with some questions, and we will probably need to run through all those questions because they more directly relate to the role of the EPA. However, the first series of questions sought some information in terms of statistical data. I do not propose to go through and ask those questions to either of you, but I would like your consent for that material to be made public as part of the proceedings of this committee. Is there any objection to that?

Ms Andrews: No.

The CHAIRMAN: I also note that there are a number of questions for which the information has not been provided in terms of the statistical data. I understand that that is because the information is required to be sought from the Office of the Appeals Convenor. We did speak with the DEC representatives in the earlier hearing today and asked that the answers to those remaining questions be provided in writing to the committee by Monday.

Ms Andrews: On that matter, in terms of the Office of the EPA, can I just clarify that, because of my lack of experience of the procedures around here, are we able to forward the question to the Appeals Convenor's office, or are we prevented from doing that?

The CHAIRMAN: There is not a problem with you forwarding the questions on.

Ms Andrews: We will consolidate the information that comes back in one form.

The CHAIRMAN: With the committee's leave, I will just check with members whether that is okay. That will not be a problem at all. I am somewhat surprised that you do not already have the information, given that there are already at least three or four committees of various sorts that have met to consider the approvals process. I am surprised that because of the alleged time delays with the approvals process, this information is not already available and in those various reports, or at least available to hand. I am a bit surprised that it is taking the length of time it is to get the answers.

Ms Andrews: It is more a case of us having got the questions and really, in a practical sense, having started working with them on Thursday. That information, you are quite right, was looked at and explored last year. It was more updating it and giving it to you in a complete form. We just were not able to do that in the time frame.

The CHAIRMAN: Okay. I will start with a series of questions we have starting at section 2. The second reading speech—I might just note also for the public record that you have provided written answers to these questions. Wherever possible, I would appreciate it if you did not simply reread the printed answer.

Ms Andrews: Do we not need to do that?

The CHAIRMAN: I will ask the question and I would like an answer, but I do not want you to just read the answer that has been provided. Perhaps that will enable us to have more of a discussion.

The second reading speech in respect of the bill states that the deletion of the particular appeal rights is to align appeal periods across environmental regulations processes. Is this a reference to the reduction in the time for lodging certain appeals from 28 to 21 days, or is it a broader statement as to the purpose of the bill in respect of the deletion of other appeals?

Ms Andrews: It is simply a reference to that reduction from 28 to 21 days.

The CHAIRMAN: That being the case, can you identify what other appeal provisions the bill aligns with? Are there any other appeal provisions?

Mr Murray: The 21 days aligns with the other appeal provisions under part 5 of the Environmental Protection Act, such as works approval and licence, which are also 21 days at the moment. It is intended to retain that. Appeals under part 4 of the Environmental Protection Act are 14 days.

The CHAIRMAN: The March 2009 EPA "Review of the Environmental Impact Assessment Process in Western Australia" contains worksheets and refers to submissions in respect of appeals from EPA decisions. The committee understands that the Environmental Stakeholder Advisory Group's review of the role and structure of the Environmental Protection Authority also considered and made recommendations in respect of the role of appeals from EPA decisions. However, there do not appear to be any recommendations in the published reports in respect of the appeal provisions amended by the bill. Are you aware whether any recommendations were made to the minister by either of the review groups that I have just referred to, in respect of any or all of the Environmental Protection Act appeal provisions proposed to be deleted or amended by the bill?

Ms Andrews: There were no recommendations relating to appeals in the EPA's report last year, and that really is because the scope of their review did not extend to the appeals and ministerial conditions setting phase of the environmental impact assessment process. The EPA's review was very much focused on its processes—that is, its part of the overall process. It was never intended for it to go into appeals and the ministerial condition setting. In regard to the minister's advisory group, which was set up more recently last year—it is commonly referred to as ESAG and is chaired by Bernard Bowen—that group has provided advice to the minister, and I understand that she is considering it and that it has not been released as yet.

The CHAIRMAN: Okay. So you are not aware whether that information was provided in writing to the minister?

Ms Andrews: I believe it was a written report that the Bernard Bowen committee—ESAG—has provided to the minister.

The CHAIRMAN: Are you able to provide the committee with a copy of that report?

Ms Andrews: No. That is a separate ministerial committee, reporting directly to her. It had some executive support, provided by DEC.

The CHAIRMAN: The second reading speech states that the only possible outcome for an appeal on level of assessment is "imposition of a more onerous assessment". Proposed section 101B of the EP Act empowers the minister to remit a proposal back to the EPA for a fresh decision as to the level of assessment. Please identify the provision of the EP Act that requires the EPA to impose a more onerous assessment?

Ms Andrews: My understanding of it is it is the operation of section 43 that requires that. It is the link between the appeal process and section 43 of the EP Act, which states that the direction is for the assessment of a proposal "more fully or more publicly or both". That is the wording in the act.

The CHAIRMAN: I suppose that the issue there is whether the words "more fully or more publicly" actually means that it can be only a higher level of assessment. Do you actually have legal advice on that?

Ms Andrews: Yes, legal advice has been sought previously. Colin might want to add something.

Mr Murray: There has been advice given to the EPA about "more fully and more publicly", and that is saying that it should be a higher level of assessment involving either public input or a longer period of public input, and that is the way that section 43 has operated.

The CHAIRMAN: Are you able to provide that legal advice to the committee?

[11.15 am]

Mr Murray: I would need to check.

The CHAIRMAN: With the leave of the other members of the committee I would like to, on behalf of the committee, formally ask for that —

Ms Andrews: Certainly.

The CHAIRMAN: — legal advice to be provided and for that to be provided by Monday of next week.

Ms Andrews: Hmm.

The CHAIRMAN: Interesting question: in view of the interpretation that has been put on section 43 in which you suggest that the minister cannot impose a lower level of assessment, is it open under the act for the EPA to impose a lower level of assessment?

Ms Andrews: I do not know what the process would be for it to revisit that decision—Colin, are you aware?—once it has made a decision. Are you talking about through the appeals process or through another process?

The CHAIRMAN: It is an open-ended question.

Mr Murray: Once the EPA has made a decision, the EPA's decision is locked in. The EPA cannot revisit it on the proposal that was referred. Where the minister remits it under section 43, the minister will determine the new level of assessment, which would be more fully, more publicly. There is a provision, as mentioned in the notes, where if the minister on appeal remits the decision back to the EPA for a fresh decision, the EPA can make a choice as to what level of assessment it goes to, so it could actually go to a lower level of assessment or a higher level of assessment or retain the level of assessment decision previously. The only other way in a process sense that the EPA —

The CHAIRMAN: Sorry, Colin, can you just explain again those circumstances in which the EPA could actually look at a lower level of assessment?

Mr Murray: Where the minister asks the EPA to make a fresh decision then, effectively, the EPA starts from scratch so it can set a lower level of assessment, retain the level of assessment decision or go to a higher level of assessment, but that requires the minister to send it back to the EPA for that decision to be made.

The CHAIRMAN: What are the five current levels of assessment that are available under the act?

Ms Andrews: The five levels are listed in the answers we gave you: assessment on referral information; environmental protection statement; proposal unlikely to be environmentally acceptable; public environmental review; and, environmental review and management program. Those last two are commonly referred to as PER and ERMP.

The CHAIRMAN: And the proposed two levels of assessment?

Ms Andrews: Assessment on proponent information and public environmental review, so those two levels of assessment, really, colloquially you can say that one involves public review and the other does not.

The CHAIRMAN: So, the assessment on proponent information would mean that there would be no public process involved in that —

Ms Andrews: That is right.

The CHAIRMAN: — and then the public environmental review would be a decision to assess and allow public review of that process.

Ms Andrews: That is right.

The CHAIRMAN: So does that mean that the more onerous level of assessment of environmental review and management program has been removed altogether?

Ms Andrews: It is probably more appropriate to think of them being incorporated into that one level of assessment rather than removing what you call the "more onerous", the idea being that under the PER the appropriate level of both scrutiny by the EPA and length of the public review period will be set depending on what the circumstances are, the significance of the proposal, the complexity of the issues, the level of public interest. So this new PER is not the old PER but it is a more generic public environmental review process and some of the proposals assessed under that will run through a process as the ERMP process operates at the moment.

The CHAIRMAN: Okay, so once a decision has been made to assess a project and to have that assessment subject to public environmental review, a further decision is then made by the EPA as to the requirements of that public environmental review and that is done without any public input effectively because there is no capacity to get public comment on that level.

Ms Andrews: On the length of the public review period, is one aspect of it.

The CHAIRMAN: And the criteria of it.

Ms Andrews: And the scoping? No, there is opportunity for public comment.

The CHAIRMAN: Where is that?

Mr Murray: Under the new administrative procedures the intention is to provide the opportunity for the public to provide comment to the Environmental Protection Authority before the decision on level of assessment is made. That will inform the EPA about the issues that are of interest to the public but also an opportunity for the public to inform the EPA about whether it should be assessed or not and whether there should be a public process and if there is a public process, how long that public review process should be. All of that will be part of information which would go to the chairman of the EPA at the time that the chairman of the EPA makes the decision on whether to assess a proposal.

The CHAIRMAN: Okay, I might come back to that a bit later in terms of the administrative proposals.

What is the rationale for reducing the number of levels of assessment and how does the reduction of the number of levels of assessment actually reduce the time for finalising an approval?

Ms Andrews: Firstly around reducing time, it would be very hard to come up with a clear statement around how this particular initiative is going to reduce the time line. The reforms are really a package of administrative reforms that are being worked through with all the stakeholder groups, all of which are contributing to improved timeliness and efficiency without reducing transparency and accountability and environmental outcomes as being the overriding objective around these reforms. The levels of assessment is one element of that, so it is around reducing the complexity of those levels of assessment, getting some greater certainty around what the processes are associated with those two levels of assessment, and some changes around the scoping process. It certainly had been found that the scoping phase had been blowing out in terms of time lines so there are changes to the scoping. This reduction in the levels of assessment allows some of those other things to happen more easily, so it is a combination of things that then contribute to improved timeliness of the process.

The CHAIRMAN: So are you able to give the committee any indication of what the expected time reductions will be for an average proposal?

Ms Andrews: It is always difficult around that because of the EPA controlling only one part of the process. Where it is part of, again, these administrative reforms, drafting a document that sets out very clearly the time lines for each phase of the EPA's process that we are committing to, of course we have limited control and influence over the proponent's time lines and so, again, to give you a total time line, we are dependent on the proponent's contribution to the process around that. So, really it is the EPA's process that we are in control of; I cannot give you any actual numbers in weeks around it. I think we have provided some statistics for you out of the annual report about what the time lines have been in the past, and we are in the process of finalising the time lines we are committing to for our part of the process—that is a document that we publish with the administrative procedures.

The CHAIRMAN: Okay, so just in terms of the EPA component of that time line, what sort of time reductions do you anticipate as a result of these proposed measures?

Mr Murray: The measures as they relate to the Environmental Protection Authority itself, we are not anticipating a significant reduction in time but that, as Michelle said, is partly because the EPA's component of the overall time is relatively small in the total time frame. Michelle mentioned that the intention is to move project assessment scoping back into the EPA and for the EPA to issue project scoping for the bulk of projects—not for all; the most complicated would remain with the proponent. We have done some recent work that shows that it takes about six months after the decision to assess a proposal before the project scoping document has been agreed to by the EPA and almost all of that time is taken by the proponent and their consultant preparing the document.

We are making an internal commitment within the office of the EPA that we believe we can do that within three months, so over the total time frame there is an opportunity to potentially save three months but that time could easily be taken by a proponent for their own reasons for doing work, so we are very cautious about what time line improvement we can actually assure.

Ms Andrews: In terms of the EPA, can I just add one more thing around that? What the reforms have mostly been around is making our process clearer for proponents; it is helping proponents do their job better because that is where the most opportunity is for reducing the time lines, so having a clearer, simpler process for proponents to operate within, having clearer guidelines and rules for them. You may have seen some reference to—we are introducing what is called a risk-based approach, so that is having more rigorous methodology for identifying what are the significant issues for this project, what are the ones that we need to focus our effort on and resolving other ones quickly and easier. So there is a package of reforms that are focused on helping proponents do their job better, particularly in the scoping phase, getting issues resolved early. So these levels of assessment are there to make the process work better but it is very hard to articulate what the reduction in time lines is going to be. We are dependent on proponents, but we are effectively trying to help them do their job better. As you know, Adele, it is a proponent-driven process; they drive the environmental impact assessment process. We are trying to set up a framework for it, so it works efficiently and that we are confident about the outcomes.

[11.30 am]

The CHAIRMAN: It just seems to me from what you are saying that the real problems do not lie in the right of appeal at various stages. It really lies in the scoping of the work that needs to be done in terms of the environmental assessment and then actually undertaking that environmental assessment and providing that information to the EPA. It seems to me that the proposed package of amendments in this bill are not really going to produce any efficiencies, or very minor efficiencies, in the time frame taken for approvals. That interests me. You also made a comment that what you are doing as part of this package of amendments is putting in place various time lines where the EPA is going to commit to turn stuff around within a specific time line. The committee does not have that information before it. Can you table that information to the committee—what those new guidelines are?

Ms Andrews: The guidelines are only a draft before the EPA at the moment, so I think we are probably constrained from providing that at this stage. It has not been endorsed by the EPA because it is being worked through —

The CHAIRMAN: Sorry for cutting across you, Michelle. What is the time line for having the EPA finalise those guidelines?

Ms Andrews: We are hoping to finalise both those and the administrative procedures that we have referred to as well in March, and they are very close. The outstanding issue we are still working on is with the commonwealth, so it is how this plays out with the bilateral agreement and the process for amending the bilateral agreement. That is the uncertainty around the timing.

The CHAIRMAN: So it will actually require amendment of the bilateral agreement in order to put these —

Ms Andrews: Because we are changing the levels of assessment; that is right.

The CHAIRMAN: But in view of that, it is very difficult for this committee to assess, and provide advice to the Parliament on, the merits of the bill before us without having the full package before the committee for its consideration. So I might just leave that with you.

Ms Andrews: Did you want me to respond to that?

The CHAIRMAN: Certainly.

Ms Andrews: We certainly saw the amendment bill as being, as you suggest, not one of the things that is going to deliver the most significant reforms or improvements to the process; it is one element of it. It was very much seen as relatively straightforward changes and amendments to appeals to remove duplication. That was the flavour of this amendment bill. It was never seen as being something that was the major component to the reforms required to the environmental impact assessment process; in fact, those are administrative reforms that we are in the process of implementing. This is just a component of it sitting next to it. I can understand you would like some more information around those administrative reforms. They are being worked up and implemented in a very consultative process with the EPA stakeholder reference group, whom we meet with bimonthly and report on those reforms progressively with them.

The CHAIRMAN: I suppose the concern for the committee is that the second reading speech says that this set of amendments is going to deliver these reforms and these improvements in the approval process, but the reality is that it is not likely to deliver any, or very minor, improvements. The bulk of the improvements are actually being delivered through the agreement that the EPA is proposing to put in place where it will, say, commit to turnaround times at various points in the process. It is still very much dependent on the turnaround time for the proponents' areas of responsibility in the process as well. We are faced with that position, and the second reading speech is indicating that this package will deliver the reforms that it really is not going to deliver. And we are faced with also having to balance that against the impact that it has in terms of removing the rights of third parties to appeal—a right that has been greatly hailed and copied around the world and is highly regarded. In fact, we have even got industry saying that they think that is an important part of the process because it provides an opportunity for the public to be involved in the process and reduces the level of angst in relation to projects. They actually see it as a very positive aspect of engaging the community with their projects. It seems to me that the likely harm of this bill is greater than any positive effect it is going to produce because the main time efficiencies that are being proposed as part of this package are not actually contained in the bill. Without knowing how they all interact, it is very hard for us to make assessments about the merit or otherwise of what is currently before us.

Ms Andrews: Around the general principle about the appeals and the value of them, you are absolutely right. We get those messages coming through to us on a regular basis. This amendment bill does not tamper with the critical appeal points and the process around those, which we see utilised far and away more than anything. The decision of the EPA to not assess proposals at the front end and the appeal on the EPA's report and recommendations when the EPA is finished its assessment, aside from the area you have already been exploring around the clearing regulations, are, I think, really quite fundamental to the environmental impact assessment process. They are maintained and protected for all parties—proponents and third parties.

The CHAIRMAN: I think the level of assessment appeal opportunities is pretty important as well, but perhaps we can explore that a little bit later.

Just going back to the questions that we have before us, perhaps you could explain to the committee the rationale for reducing the number of levels of assessment and how this reduces the time for finalising approvals. It seems to me that, whether there are five levels of assessment or two levels of assessment, if there is an appeal right on the level of assessment, you still are going to go through that time period in terms of the time it takes to give the approval, so why reduce the number of levels of assessment?

Ms Andrews: Again, it was primarily around simplifying the process. It was one of the changes that was to bring about a simplification—an opportunity to be much clearer about where responsibilities lie. For example, with assessment on proponent information, we are now saying that the office of the EPA will work with the EPA to prepare scoping documents. This was a task that was being done by proponents, commissioning out to consultants, blowing out for months and

months and months. We were able to group those levels of assessment into one and put some procedures in place that are being finalised at the moment, with the EPA taking that responsibility back. It is about simplifying the levels of assessment and getting clearer rules around those levels of assessment about responsibilities. Colin, do you want to add something?

Mr Murray: Perhaps if I explain in a slightly different way, and that is not to disagree with Michelle at all. Assessment on referral proponent information is essentially bringing assessment on referral information, environmental protection statement and proposal unlikely to be environmentally acceptable together under one term rather than three, because in each of those cases there is not a public process that currently exists under the existing administrative arrangements and procedures. What we have found is that there was confusion amongst the public as much as amongst proponents about what the distinctions were between some of those things—the same as public environmental review and environmental review and management program. In a straight administrative way, the distinction was becoming less and less. Just to note that the commonwealth currently has two public levels of assessment—public environmental report and environmental impact statement. The Hawke review, which was recently completed by the commonwealth, is recommending that they only have one, which is to remove environmental impact statement. They themselves have gone through a separate process and they are looking at also simplifying not the process so much as the levels—the number of options that you have in there. What we are doing is looking at bringing the non-public assessments together under one name rather than three and the public levels of assessment under one.

The CHAIRMAN: Michelle, in your answer to this question you indicated that the EPA is now going to take responsibility for preparing the scoping documents, so providing the proponents with the advice about what they need to provide an environmental assessment on and the extent of that environmental assessment.

Ms Andrews: For some of the proposals, yes.

The CHAIRMAN: For some of the proposals; okay. I would be interested to know the guidelines on which you will determine which proposals the EPA will be taking on that role and which ones you will not, and also what additional resources the EPA is going to require to do that task. Currently, the EPA battles to do adequate monitoring of conditions that are imposed and adequate assessment of the PERs and ERMPs and other documents that are actually lodged. Now you are taking on this additional task, which is over and above what you are already required to do. Clearly, additional resources are going to be needed. Perhaps you could advise the committee of the nature of those additional resources.

Ms Andrews: Firstly, on the circumstances where the EPA does the scoping versus the proponent doing the scoping, that is going to be clearly stepped down in the administrative procedures as well. It will be very clear when that happens and when it is the EPA's responsibility or when it is the proponent's responsibility. Colin can set that out in a moment. In terms of the resource implications of that, we are very confident that there will not be significant resourcing implications. It has been our experience that for some of the, let us say, less complex proposals, proponents, through either inexperience or consultants' desires, have turned the scoping phase into a far more complex phase than it needs to be. But that has also taken up the time of our officers because they are toing and froing and trying to resolve issues where there are disagreements. We are fairly confident that, in terms of the EPA and the office of the EPA taking on scoping responsibility for some of the more straightforward proposals, we do not require extra resources to do it. We are going to put in place obviously generic guidelines that officers would start with and then be tailoring for the particular circumstances of the proposal. Where you are looking at projects that are in the more complex arena, that is when proponents will have responsibility for doing the scoping. Obviously, interacting with us and the scoping document still has to get signed off by the EPA. But that preliminary work will be done by the proponent and the consultants.

Mr Murray: In broad terms, the EPA has basically said that, as Michelle said, it wants to see major projects done through a risk-based assessment model. We have been trialling that for a couple of years. The EPA has found that some proponents are very competent and comfortable with it because they already have a risk-based assessment framework within their own businesses. Oil companies and the major mining companies are particularly quite comfortable with that, and they are encouraging the EPA to continue that model because it allows for the environmental conclusion of any assessment to be more readily incorporated within their business model. What we have found, though, is that most proponents really struggle with the risk-based framework and so the idea is for the EPA to pick some of that up. The model that we have been applying for a number of years is that the EPA already does instructions, which is effectively a scoping document, when it is assessing a town planning scheme under part IV of the Environmental Protection Act. We already have a model. The EPA already does that within the office of the EPA. We already have experience. We understand what that means in terms of our capacity to deliver it. As Michelle said, we are spending a lot of time with proponents and their consultants, going through multiple versions of scoping documents to make sure that they address the right issues very early. We believe we can save a lot of time, but even more we believe that we can commit the resources we currently do to that to actually righting it. The key issues that we believe are important for an assessment process are identified from right at the beginning rather than have to wait until the proponent actually gives us the document.

The CHAIRMAN: I suppose my concern with that, though, is: how can the public be confident that every EPA officer that is going to be given that task of preparing that scoping document has actually got the range of knowledge and skills to assess every proposal? They are very varied in their nature and you have got some extreme and very particular areas of scientific knowledge that are required in certain circumstances or engineering knowledge or whatever. It is very easy when you are first looking at a proposal not to pick all of that up because you are simply not aware of the sort of detail of the project and what is exactly involved. We see it often with the setting of conditions, particularly on subdivisions and a whole range of other things, where the officers just go through a process of ticking standard conditions that then get placed into the approval. Then, when you are actually trying to make these things work later or something goes wrong, you find out that the conditions do not adequately deal with the issue that needed to be addressed because someone just ticked the box and used the standard conditions that had already been prepared. I would think that the advantage with the current process, where there is this negotiation and discussion between the EPA and the proponents, is that you are actually learning about the proposal and the depth of issues involved in the proposal through that dialogue, and you are able to then better identify the scoping needs for that assessment. It might be overlooked where it is simply an EPA officer sitting in an office trying to assess from little information; in some cases it might be detailed but in some cases it could be very little information that has been provided by the proponent.

[11.45 am]

Ms Andrews: You are absolutely right. Some of the more complex proposals we deal with, there is no way one of our assessment officers could sit down one afternoon and articulate all the key environmental issues and factors associated with that proposal. It is not appropriate for that to happen for the more complex projects. We would not even set a process up like that because we would have the problems that you are pointing to. We are trialling two assessments at the moment around this risk-based approach which puts a lot more effort and time into that scoping phase. You are absolutely right; that is the crucial time in any proposal to both identify the issues but also get all of the key officers, not just in the office of the EPA but also in other parts of government, familiar with the project as well and starting to think about what are the key issues, what are the likely management responses around those. The sooner that happens in the process the more effective it is going to be. We are not walking away from that process; in fact we are trying to enhance that. Where that dialogue and interaction that happens across government with all the

specialist groups that sit in other parts of government, EPA is trying to enhance that happening for the projects where it needs to happen. Where the EPA is doing the scoping itself—firstly it is for the less complex, more predictable proposals. We have assessed them before, there is no new technology involved, it is in an environment where we are confident about the predictions and so on. It is a process which identifies those things fairly quickly upfront and then you are setting some conditions fairly quickly—confident about the environment, the technology, the proposal; just need to get the conditions in place. Even then, we use a process of consultation with other parts of government, with specialists in DEC. Within the Office of EPA we have got areas of expertise around marine and terrestrial as well. The assessment officers never work in isolation, they have access to that specialist expertise; and then you have the normal checks in any department with managers, directors and so on, who are assigning. Those things have to still get signed off, right through to the chairman of the EPA and the full EPA.

The CHAIRMAN: But the issue then becomes the fact that by taking that out of the public review domain and doing that internally, you remove the ability for members of the public, who have an interest in the project, actually having any input into that consultation and that preparation of the scoping document.

Ms Andrews: Firstly, that is the point that is referred to in the second reading speech, and we have talked about in the answers here—this intention to introduce a new procedure in the EPA's process of publishing a notification when a referral has been received. We do not do that at the moment. The public do not know when a referral has been submitted with the EPA. They only know about it once the chairman has made his determination. We are looking at introducing a step where there is a notification that is made public. The objective is twofold there; firstly gauging the level of public interest in a proposal. At officer level we might assume that there is not a level of interest around a proposal, and there is. That is the first objective. Secondly, it is another opportunity for issues to be identified that we may not have been aware of. That happens from time to time as well, that for some reason our systems, our GIS systems, our corporate knowledge, whatever, are not aware of a particular issue but there is an opportunity for that to come that way. We are opening up that part of the process to try to get that early identification of interest and issues.

The CHAIRMAN: I might come back to that when we come back to the questions that are designed around that admin process. Just going back to the questions before us: how much time will the deletion of the right of appeal from EPA decision as to level of assessment cut from the approvals process? I think you have probably answered this. You have indicated, for the record, that you are not able to specify.

Ms Andrews: Isolate; yes.

The CHAIRMAN: Which makes it very interesting in terms of trying to then later assess the success or otherwise of the proposed amendments, if you do not actually have any targets upfront. Are you able to indicate what is the average time taken for approvals to issue from the time of referral of the proposal to the EPA, which is basically length of time to get an approval on a project?

Ms Andrews: I think you have got that attached to the answers there. In our annual report, we report that sort of statistical information each year. So at the back of your answers —

The CHAIRMAN: The document that was tabled when the DEC officers appeared in the hearing before the committee this morning?

Ms Andrews: Yes.

The CHAIRMAN: Given that they are there, we might review those. If we have got any follow-up questions we might come back to you on that. I assume that the information in relation to the next question, the average time taken for setting of a level of assessment to the proponents submitting the PER or the ERMP documents, are also in that statistical information at the back?

Ms Andrews: Yes, that is right.

The CHAIRMAN: Again we will come back to you if we have got some queries on that. Can you explain the relationship between the proposed new levels of assessment and the bilateral intergovernmental agreement entered into with the commonwealth; that is, the agreement between the Commonwealth of Australia and the state of WA under section 45 of the commonwealth Environment Protection and Biodiversity Conservation Act 1999 relating to environmental impact assessment—can you explain the relationship between the two?

Ms Andrews: That bilateral agreement between the commonwealth and the state only relates to the public levels of assessment—so PER and ERMP that exist at the moment. It is because we are looking to change that that we need to now be talking to the commonwealth to change the bilateral agreement.

The CHAIRMAN: Are you able to indicate to the committee at what stage those discussions are at?

Ms Andrews: We started the discussions probably about midway through last year.

Mr Murray: Middle of last year.

Ms Andrews: We have had some recent advice in December as to what sort of process now would be involved in amending the bilateral agreement. We are meeting with some commonwealth representatives in about two weeks' time to pick up on some issues that they flagged in that letter in December. It really comes down to looking at the options—if we proceed to gazette the administrative procedures, what you have in place in the interim period before a new bilateral agreement is in place, and whether that is acceptable or not; whether there is enough certainty in that for the community and for proponents. When we meet with them later this month we will clarify that. We will be making a decision. The EPA will make a decision on how to proceed.

The CHAIRMAN: Are you able to table that document with the committee?

Ms Andrews: The letter from the commonwealth?

The CHAIRMAN: Yes.

Ms Andrews: I am not sure. Colin, can you tell me?

Mr Murray: If we are able to, we certainly will.

Ms Andrews: I am happy to do so. I presume we need to check with the commonwealth.

The CHAIRMAN: With the leave of the committee, I formally request that that document be tabled with the committee by Monday.

How does the proposed amendment to remove the rights of appeal on level of assessment compare with the environmental impact assessment processes in other states, and in the commonwealth? You have outlined it a little in relation to the commonwealth in terms of the levels of assessment, but I would be interested to understand how it compares with other states. Do the commonwealth and other states and territories have a third party appeal right against level of assessment, for example?

Ms Andrews: None that I am aware of. Colin?

Mr Murray: Western Australia and the commonwealth are the only jurisdictions which have a similar environmental impact assessment process. Most of the other states have environmental impact assessment embedded within their statutory planning approval processes. The commonwealth does not have appeal rights under its legislation. Western Australia really is the only place which overtly has the right of appeal on level of assessment. We would like to confirm that advice in writing. That is our understanding, having looked at the issues on a number of occasions. There is no equivalent process to the Western Australian process.

The CHAIRMAN: When you say that, are you referring to ministerial rights of appeal? I understand that some of the other states do have tribunals or courts, or rights through the courts, to appeal. Perhaps you could explain that a little bit in terms of which states actually have a formal environment court or whatever they are called.

Mr Murray: New South Wales has an environmental court. Again, what we would like to do is take that on notice and come back to you with a more specific answer to it.

The CHAIRMAN: That will be fine. The second reading speech refers to the new administrative procedures being established to ensure EPA consultation with relevant parties before setting the level of assessment. Are you able to provide the committee with a copy of those administrative procedures?

Ms Andrews: It is my understanding, because they are still in draft form with the EPA, that I am not able to do that.

The CHAIRMAN: On behalf of the committee I reiterate the comment that I made earlier; that is, it makes it very difficult for the committee to assess the impact of these proposals in terms of the proposed amendments to the bill in the abstract of not having that information when it really is part of the package, as has been indicated in the second reading speech.

Ms Andrews: I can ask the EPA.

The CHAIRMAN: That would be great if you could do that, if it is possible and if they agree, to provide those to the committee by Monday.

Ms Andrews: That can apply to both the draft time line document and the admin procedures?

The CHAIRMAN: Yes. Given they are not yet finalised, when do you expect they will be finalised? In preparing these administrative procedures, what level of public consultation is occurring?

Ms Andrews: We are working on a time line of hoping to have them finalised in March. As I said, the main outstanding issue at the moment is the bilateral agreement. If there is a delay, it will be because of resolving the bilateral agreement with the commonwealth. The consultation that we have undertaken—the changes to the administrative procedures, the key changes that have been made—have come out of the EPA's EIA review. The report was published in March last year. That review was undertaken with a stakeholder reference group, it had all the peak bodies represented on it, and 100 per cent endorsement and support for the reforms that were identified. These administrative procedures then pick up a lot of those reforms. We now have a stakeholder reference group. The EPA has set up an ongoing group that those draft guidelines have been to and comments sought. That has been the primary consultation process that we have undertaken with them.

The CHAIRMAN: Can you explain to the committee why the decision was made to go through the process of adopting administrative procedures and not incorporating those, at the very least, as regulations so that there was some scrutiny by Parliament of those administrative procedures?

Ms Andrews: It has always been the practice that the EPA's administrative procedures are produced and gazetted in this way. There is the opportunity to make them regulations but that has never been taken up. There was not a push for that through the reform process. In the consultation process we have undertaken, I think there is a general level of comfort around these administrative procedures being gazetted.

The CHAIRMAN: Once the administrative procedures are gazetted, what is the mechanism for amending them?

Ms Andrews: Through gazettal formally and then, obviously, as a precursor to that there would be appropriate consultation around it.

The CHAIRMAN: Who has the power to amend the administrative procedures?

Mr Murray: Only the EPA, because they are the procedures of the Environmental Protection Authority and it is the Environmental Protection Authority that gazettes them

The CHAIRMAN: That could be done independent of any view that the minister may have?

Mr Murray: Yes.

The CHAIRMAN: That could be done independent of any view that the public has about the value of those administrative amendments?

Mr Murray: The Environmental Protection Authority is independent.

[12.00 noon]

The CHAIRMAN: How can the public be confident that any amendments to those administrative procedures will be the result of extensive consultation and agreement before any amendments are made? It is fine to say that one has consulted. As a member of Parliament, people are continually telling me that my job is to represent the views of the public. Unfortunately, the public do not always speak with one voice, which makes it very difficult. When I hear that consultation is being undertaken, that is very important and valued. However, the responses that one gets through the consultation process are not always speaking with one voice. Clearly, some decision needs to be made by a decision-maker as to what aspects of those responses are to be picked up on and what are to be ignored, or incorporated into the amendments. It seems to me that as there is a complete lack of transparency in the process because it was all done internally, and that at the very least, given that we are reducing the public consultation process as it is embedded in the legislation quite substantially in terms of third party rights of appeal, that there should be an onus now that the administrative process actually be opened up to greater scrutiny to ensure the transparency of that process.

Ms Andrews: Is it the process of amending the administrative procedures that the Chair is talking about now?

The CHAIRMAN: Yes, and developing them in the first place.

Ms Andrews: Yes. I can only say that this process has been incredibly transparent and consultative. As I said, it really started two years ago and the information around that process has been continuously available and updated on the EPA's website. There have been open invitations to attend workshops, and there has been a stakeholder reference group with peak body representation on it. The EPA published its report in March; again, it is a publicly available document and there has been an effort for wide distribution around that. Now there is the process of implementing those reforms—similarly, information on the website and peak body consultation throughout. To my mind that has been a very transparent process.

The CHAIRMAN: Yet this committee cannot obtain a copy of the administrative procedures that have been drafted.

Ms Andrews: Only because I need to ask the EPA.

The CHAIRMAN: Hopefully they will be provided.

Ms Andrews: Yes. I have no reason to think that they will not be.

The CHAIRMAN: In relation to the administrative procedures, what mechanism has been put in place as part of those procedures to ensure that there is compliance with those procedures? Obviously this is going to be happening internally, so the public will want some confidence that once those administrative procedures are put in place, they will actually be complied with.

Ms Andrews: Again, there is an increased amount of information and earlier in the process, information going on the EPA's website, so the accountability, to my mind, comes through that transparency of the key steps in the EPA's process. That, of itself, brings the scrutiny and the checks that the EPA is operating within the administrative procedures that have been gazetted.

Mr Murray: If I may, the EPA's role in assessment largely finishes when the EPA has prepared its report and its report has been published. There is and will remain right of appeal on that. If the EPA has not actually followed its administrative procedures in getting to that point, it may be a point that the public or anyone raises with the minister on appeal. There is a requirement for the EPA to be transparent about how it administers its administrative procedures on an assessment, and there is also the opportunity for someone to raise the matter with the minister through the appeal process at the time of the EPA report.

The CHAIRMAN: Although that is very late in the process and it could result in a significant cost to the proponent if it is found that there was an error perhaps in the scoping and the environmental assessment was too narrow, and therefore all the aspects of the project were not properly identified and therefore had not been properly dealt with by the proponent's environmental assessment, and therefore the EPA's bulletin report; by that stage a huge amount of time has been invested in developing that project to that stage and a decision at that point in time that an error was made in terms of the breadth of the scoping document will have huge ramifications for the proponent.

Ms Andrews: If there is a significant matter that is missed in the EPA's assessment, I would suggest that that is not necessarily a problem of itself with the application of the administrative procedures that could have come about through some other reason, and obviously I hope it does not. It is not necessarily compliance with the administrative procedures that might lead to something like that. The administrative procedures are there to run a process; they do not of themselves guarantee an outcome. It is how we go about it.

The CHAIRMAN: But currently, in terms of the appeal on the level of assessment, information is provided to the public about the scoping that is required as part of that level of assessment at the time it is advertised.

Mr Murray: No, it is not. Scoping happens after the EPA has made a decision to assess. So it only applies to projects that the EPA is going to assess, rather than to every project that has been referred to the EPA. That applies whether it is a proposal under a section 38 assessment or a scheme under a section 48 assessment.

The CHAIRMAN: Perhaps you could explain to the committee how a process that requires the EPA to consult before setting the level of assessment with no time frames for response to the EPA inquiry being stipulated in legislation actually cuts the time taken for finalising an approval. It just seems to me that the process that is being adopted is, rather than consult publicly through an appeals process whereby third parties, government agencies or the proponent can lodge submissions, what you are saying is that before we set the level of assessment we will consult, but you have no legislative time frames to confine that consultation period. My experience through the planning process is that the DPI is required to consult various government agencies, but sometimes six months later it is still waiting for a government agency to respond. Hence, in the time that was identified in a review of the planning process, a lot of time was being taken up in that process. Now it seems to me that without any legislative provision requiring government agencies to provide a response within a specified period of time, you cannot require a government agency to provide a response within a specified period of time; it leaves open to question the value of that process if half or more of the government agencies you have sought consultation with have not replied.

Ms Andrews: Is this around the setting of the level of assessment? There is a statutory time line on the EPA actually making its decision, and that is 28 days.

The CHAIRMAN: But that is not a statutory requirement on other government agencies' replying. At the current time, the level of assessment is sought and if people are not happy with it, there is an appeals process within which to lodge their concerns. What you are saying is that you are removing the appeals process and that you are going to do that work ahead or upfront before setting the levels of assessment, but you have no time frames to confine how long that will take.

Ms Andrews: Recognising what sort of information the EPA needs to make that decision, it is not comparable with a more substantial submission on an actual environmental review document that will happen further down the process. This is simply around the matter of whether to assess and setting the level of assessment—that is what the chairman has to turn his mind to, and the sort of information the chairman needs. Most of the time, our assessment officers can gather that information themselves through, in this day and age, the access they have to GIS information and policies and standards that exist out there, and that sort of thing. Our assessment officers are very good; that is what they do every day now. When a referral comes in, they look at the proposal and go through a process of identifying the key environmental factors of the proposal, and anticipating reaching their best view on gauging the level of public interest, so they go through that process now and they do it well. When they need to pick up the phone and talk to someone, they do it; when they need to get some clarification from another agency, they will do it and do it informally. They will still do all of those things. Now we are saying that we are adding another mechanism for information to come to the office of the EPA and the EPA chairman around that proposal. So, it is adding to that process by making it public at the very beginning whether the EPA is even considering a referral, and whether there is anything else that might come in over and above what our assessment officers flag at that time that might influence the level of assessment. The decision is around that—whether to assess, and the level of assessment. It is quite a robust process that we operate to inform the chairman before he makes his decision.

The CHAIRMAN: However, the very important check and balance to ensure that that process is working right, which currently exists as the right of appeal on the decision on the level of assessment—that is the only check and balance that is in place at the moment, and it is being removed. You are telling me that it is being removed, but that we are going to consult in front. My understanding, from what was said, is that there would be a more robust consultation ahead of setting that level of assessment, but now I am hearing that they do that anyway, which suggests that it will not be any more robust than it currently is. It concerns me that if what we are talking about is that the very check and balance that was put into this legislation when it was initially designed is being removed with no check and balance being substituted in its place, and the fact that that consultation process is not being defined in any legislative sense to give the community confidence that it is being done adequately and in a timely manner. As I have indicated, how do you identify who you will consult? In terms of government agencies, I think that that would be fairly straightforward, but in terms of members of the public, how can you possibly identify all the members of the public who may have an interest in that particular proposal? I would suggest that it would be impossible to identify them; however, with an appeals process on the level of assessment, those parties are identified because they make a submission.

Mr Murray: If I may just clarify one thing: the bill does not remove the right of appeal where the EPA chooses to not assess, unless the EPA specifically says that it should be assessed through a native vegetation clearing permit. The fundamental decision the EPA needs to make in setting the level of assessment is whether it will assess or not assess. The decision to not assess is one which will remain appealable, subject to the EPA not recommending that it then be subject to a part 5 clearing permit. The appeal point that is proposed to be removed is where the EPA has already decided to assess the proposal, and in that case our understanding of section 43 says that for an appeal where the EPA has made a decision to assess, the minister has to require the EPA to assess more fully or more publicly, or both. The fundamental decision about assessment has already been made. There is then a process which we set in place through the administrative procedures.

The CHAIRMAN: Yes, but in terms of appeals on the level of assessment—for example, if there is an appeal that the level of assessment should not be set at a PER, it should be set at an ERMP under the current process—you are actually going to ask questions about the scoping document about how stringent that level of assessment should be, and that is being removed. The capacity for input on that particular aspect is being significantly removed with the proposed amendments.

Mr Murray: If I may, as I said earlier to the committee, there is very little difference now between the scoping requirements for a public environmental review and an environmental review and management program. Indeed, the current administrative procedures really relate not to the issues to be addressed, but the length of public review. What we are doing with the administrative procedures is saying that a public environmental review can cover the whole period that a PER or ERMP would have, which is effectively a minimum of four weeks out to three months.

The CHAIRMAN: Who makes that decision?

Mr Murray: The chairman of the EPA.

The CHAIRMAN: What input does he have into making that decision? How do we identify which members of the public might have an interest, and the extent of the public concern in the project, without having that appeal process to help identify the level of public concern? There is no way that the EPA, no matter how diligent one is, can identify all members of the public who might have an interest in a project. The public comment period provides an opportunity to identify those parties who have an interest in the project, ands that is now being lost by the removal of the appeal.

[12.15 pm]

Mr Murray: It is certainly true that we cannot identify each and every person who may have an interest. The appeal process is one way of doing so, but in most cases our experience in dealing with projects in the state over a long period of time is that we already have an extensive understanding of the key players who are likely to have an interest. We are dealing with proponents all the time, and there is still a fundamental expectation by the EPA of proponents that proponents are consulting with people throughout. So there is a range of opportunities that the EPA already has to identify who should be involved in consultation. We will still have the opportunity for people to self-nominate, as we currently do.

Ms Andrews: Would this be the circumstance that you are concerned about—where a proposal is referred to the EPA, the EPA chairman sets the level of assessment of proponents' information, so without public review, and you are concerned that he has misread the level of public interest in the proposal?

The CHAIRMAN: That is certainly one possibility.

Ms Andrews: As I have talked about before, there are a lot of internal processes we use to make a very well-informed judgement around that most of the time, but there may be an occasion when he gets it wrong. There is still the opportunity for the minister to use section 43 if she is receiving a fairly obvious indication that there is a higher level of public interest than the EPA thought.

The CHAIRMAN: In relation to the minister using that power, is there a time constraint in the legislation within which she is required to use that power?

Ms Andrews: I do not believe so.

Mr Murray: The limit is that the minister can do it at any time right up to the point where she issues an approval, which is at the very end of the process. So the minister can apply section 43 while the EPA is assessing or after the EPA is assessing and while it is in the minister's process for making a decision about whether the project can be approved, implemented, or not.

The CHAIRMAN: Such a decision at a later stage would have quite significant financial implications for a proponent.

Mr Murray: Correct.

The CHAIRMAN: So it is not likely to be used very frequently, is it?

Mr Murray: It is used now.

The CHAIRMAN: How often has it been used?

Mr Murray: Not often.

Ms Andrews: Once every year or two or something like that.

Mr Murray: For instance, the minister has remitted back to the EPA after the EPA has assessed and reported several times. It is not something that happens every day, certainly, but the capacity for the minister to remit to ask the EPA to further assess or more fully assess exists and has been used.

Ms Andrews: Sometimes it can be around a component of the proposal.

The CHAIRMAN: But does relying on that mechanism not actually introduce greater uncertainty into the EPA approval process? One of the arguments that have been run in the second reading speech is that these changes provide more certainty to the approvals process for the proponent. It seems to me that the proposed amendments actually provide less certainty to the proponent in terms of the approvals process because you are placing the opportunity for any members of the community who have any concerns about the project to then appeal to the minister via section 43 of the act, which could be made at a very late stage in the process. The proponent may have invested all their money in terms of submitting all the environmental reports. The EPA might be in the final stages of assessing those documents and, as a result of public pressure, the minister may then decide, "We probably should have a longer level of public consultation on this project or a higher level of public consultation." That is a huge financial cost to a proponent. So it seems to me that until such time as a final decision has been made, a proponent can have no certainty in the process that they are undertaking now, whereas previously there are a number of milestones that the proponent could tick off on, and say, "Phew; I'm through that."

Ms Andrews: That lack of certainty that you were talking about exists at the moment.

The CHAIRMAN: But it is very rarely used because of the other milestones for the public to actually have input in the process.

Ms Andrews: So the framework that has been established by removing this appeal point has been then shifting to earlier in the process the opportunity to identify any of the issues that the EPA might otherwise have missed. So, if you like, that is counterbalancing the concern that you have there.

The CHAIRMAN: We will have to agree to disagree on that point.

Ms Andrews: Yes. Clearly, in the briefings that have been provided to the peak bodies representing industry, they do not have that view; so they are supportive of the amendments that are being proposed and do not see the risks that you are articulating. The information has not come forward to us anyway.

The CHAIRMAN: I suppose the concern I have then is that if industry does not have that concern, it is making an assumption that the political imperative in those circumstances will be for a minister not to exercise that power because of the likely costs and the political implications in doing that at a very late stage of a proposal being assessed, which then gives weight to the concern that members of the public might have about their ability to actually lodge an objection or concern that will be given some weight, because those clear milestones at which they can do it have been removed.

Ms Andrews: Quite the contrary; I think it is both the EPA's and the proponents' view that we have such a transparent process that the risk of something not being identified or a wrong judgement being made around the level of public interest is very, very low. So I think in terms of looking at that risk, both the EPA and the proponents are reaching the view that it is a very low risk. We have a very transparent process—a very consultative process. There are also good proponents who treat their project well and treat the community with respect, who are out there talking way before their proposal comes into the EPA formally and is referred.

The CHAIRMAN: There are very few who do that.

Ms Andrews: No, I think that more and more are doing that. They recognise the importance of that to the process. Any approval process is more than just a technical process and a tick at the end. It is about engaging with the community and engaging earlier. There are increasing numbers of proponents out there who recognise the importance of that. So, again, a competent proponent doing that part of their job well would also be coming into the EPA's process feeling pretty sure about the issues, having identified the issues and having been speaking to any communities that have an interest in the proposal.

The CHAIRMAN: Michelle, in your explanation about the new process that is being put in place through the administrative procedures, you indicated that the EPA would be making a public notification on receiving a proposal, which they currently do not do, so that would flag to members of the community, "Hey, this proposal is before the EPA, so if you have got a view on it you can write to the EPA and express a view or contact them", but there is not a formal process in place; it will just be an informal thing if somebody wants to take it up.

Ms Andrews: Yes.

The CHAIRMAN: What additional resources will be required to manage that part of the process that currently does not exist?

Ms Andrews: That certainly does require some dedicated resourcing to make that process work—validating the information when it comes in. We still have to do that at the moment, putting that information up on the website and so on.

The CHAIRMAN: I am more concerned about dealing with the number of phone calls that you might receive.

Ms Andrews: Dealing with the communication that we then get—emails and writing. We are certainly looking to put some procedures in place about telling the outside world about how to communicate with us on that, so that is managed well. Internally, we will have to put resources into it. Removing the appeal points will relieve some resourcing commitment.

The CHAIRMAN: They will not because you will be doing the consultation before you make those decisions, so they will be tied up in a consultation process ahead of those decisions being made.

Ms Andrews: It is a shifting of resources; that is where I am getting to. The EPA puts substantial resources into responding to appeals at the moment, and so there is a shifting of resources from dealing with those appeals through to managing this process up-front to resolve issues early.

The CHAIRMAN: Just trying to move along because I appreciate the time is getting on, in terms of the EPA identifying the relevant parties to be consulted before determining whether or not to assess a proposal, what process does the EPA go through in terms of identifying those parties? Is it done on a case-by-case basis?

Ms Andrews: Do you mean consulting when a proposal is referred —

The CHAIRMAN: And you need to make a decision about whether to assess or not. How do you identify the relevant parties in the consultation process that is being proposed to happen ahead of that decision being made?

Mr Murray: We already have a process where people self-nominate. The appeal process is effectively a self-nomination process as well. As I said earlier, we already have a fairly good understanding from historical involvement and dealing with proponents and other government agencies that have a role to identify those people of those agencies and those organisations that are likely to have an interest. We accept that we cannot identify everyone, and that is why, effectively, there is this self-nomination. So we will have a regular process of advertising the availability of documentation on the web and providing people with an opportunity, using a form, so trying to simplify it for people as much as possible so that they just need to say who they are, what is the

view that they want to reflect to the EPA, what are the key issues and what is the outcome that they would want to see.

The CHAIRMAN: So the onus goes onto the public to continually check the EPA website to make themselves aware of when proposals may be referred to the EPA.

Mr Murray: It is.

Ms Andrews: It does not replace our normal internal procedures, though, that our officers would do at the moment in terms of looking at a referral, identifying issues, consulting other government agencies and so on. That still happens.

The CHAIRMAN: What happens in a situation where an action group has been established against a particular proposal and they are not monitoring your website, so they do not know when the proposal has been referred to the EPA, so they are not able to self-nominate in that way but the EPA is completely unaware that this action group exists? How do you rectify the omission of consulting them through the process they are proposing?

Mr Murray: Perhaps there are two answers. The EPA is currently building a new website, and that becomes an important means of communication for the EPA, particularly in picking up these sorts of tasks. One of the things that we are building into the website is the opportunity for people at any point in time to basically click on a button that says that they will automatically receive the notifications directly to their email account. So the only thing that they then need to do is actually open the account. In a way it does go a bit beyond self-nomination; it is really about making sure that they receive every notification that the EPA publishes.

The CHAIRMAN: Colin, is that currently in place?

Mr Murray: No, the existing website cannot cope with that.

Ms Andrews: We are trialling the new website now, so we hope to be rolling that out. You know how these things are: it was promised last September; it is in the trial phase at the moment.

Mr Murray: The second thing is that even with the existing processes in place, including appeals, there is the possibility that we do miss out on some of these groups now. So that situation really is not going to change, but what it is going to do is really make us more attuned to the fact that we have a greater responsibility to make sure that we are identifying groups or identifying people who might be able to tell us who are those key groups.

The CHAIRMAN: In terms of the information that the EPA receives in a consultation process with various parties, what process is in place for making that information available to the public so that the public actually knows, "The EPA consulted with all these bodies and this is the advice that they have received"? Currently that information would be made available at the end of the appeal process because there would be a report of those appeals, so that members of the community can assess for themselves the level of community concern with the proposal and whether that was adequately dealt with in the final decision made. Where you are doing that process up-front through an informal consultation process, is there a mechanism in place to then advise the community, "This is who we consulted and this is what they said to us"?

[12.30 pm]

Mr Murray: The administrative procedures will commit the EPA. As part of the chairman of the EPA making a decision on whether to assess or not, we have to provide him with that very information, which is: who made comments, what was the nature of the comment and what is the recommendation. The commitment in the administrative procedures is that that statement will also be part of the decision, and the decision is made public, so that statement would also be made public.

The CHAIRMAN: Is that protected by any legislative provision?

Mr Murray: No.

The CHAIRMAN: Why not?

Mr Murray: Michelle has already explained how the administrative procedures are formalised through gazettal rather than legislation.

The CHAIRMAN: I think most members of the community would take greater comfort if it were protected by way of legislation. Currently, they have those protections in legislation. These amendments propose to remove that level of protection currently in the act in favour of an administrative procedure about which they have no guarantee of the form it will be in, how regularly it might change and whether a protection that is protected in the first drafting of the administrative procedures will still be there tomorrow. There is not a huge amount of comfort there.

The second reading speech indicates that the minister's power to direct the EPA to more fully and more publicly assess a proposal will be retained and will guard against abuse or poor decision making by the EPA. With the removal of the third party right of appeal, it is likely it will fall on the minister to use this power and the minister's use of this power will increase. Do you agree that this is a very real possibility, at the very least, and would you comment on how that might impact on the perceived independence of the EPA?

Ms Andrews: We made an initial comment here that we think that power is not to guard against abuse or poor decision making as much as to acknowledge that the level of public interest may not always be apparent. It is there for that reason now and will continue to be there, and it is a useful check in the system, although one that should not have to be used very often for all the other reasons we have talked about before. I do not think that it impacts on the independence of the EPA. The independence of the EPA is maintained and will continue.

The CHAIRMAN: In what circumstances would the minister currently exercise the discretion conferred on the minister under section 43? Are there a set of guidelines that the minister uses to make an assessment?

Ms Andrews: There are no criteria.

Hon HELEN BULLOCK: It is purely discretionary?

Ms Andrews: Yes.

The CHAIRMAN: With the deletion of the right of appeal how can the public—or the proponent for that matter—be certain that the environmental impact assessment process is free of undue political direction or interference to either set a low or a high level of assessment or to assess or not assess a proposal?

Ms Andrews: The EPA's independence is not changed through these proposed amendments to the EP act. Is that what you are asking?

The CHAIRMAN: There certainly may be a few people who believe that the EPA's independence will be compromised as a result of the lack of transparency, and I simply ask for a comment.

Ms Andrews: We do not believe that is the case.

The CHAIRMAN: We may have covered this already, but I will put the question so it is on the record. Would you explain how an administrative opportunity to comment on the level of assessment prior to the level being set obviates the need for a legal right to require a review of whether the decision to assess at the designated level was correct?

Ms Andrews: As we have discussed before, the removal of that appeal right applies only to the level of assessment. We have indicated in the answer that we provided to the committee that the appeal determinations on level assessment have taken on average between 120 and 160 days. It becomes a balance between a general appeal right and what value that is adding to the process versus putting in another mechanism, an administrative mechanism, to obtain that information that

might otherwise be obtained only through the appeals process. That is the basis for removing an appeal point and enhancing the EPA's processes before a decision is made around level of assessment, recognising there is still an appeal right if the EPA decides to not assess.

The CHAIRMAN: I note there have been a number of reports of committees and task forces that have looked into the appeals process: the March 2009 EPA report; the April 2009 "Industry Working Group Review of the Approval Process in Western Australia", the Jones report; the April 2009 "Expert Committee—Regulations Review Clearing of Native Vegetation Report"; and the August 2009 "Environmental Stakeholder Advisory Group, The Role and Structure of the Environmental Protection Authority", otherwise known as the Bowen report. Which recommendations within all of those documents form the basis of the proposed amendments incorporated in the bill before us?

Ms Andrews: None of those reports specifically develops the recommendations that led to the amendments in this amendment bill, but the general direction that was being taken in all of those reports about looking for efficiencies in process while maintaining transparency and accountability was broadly consistent with where those reports were all going. As I mentioned in answer to an earlier question, certainly the EPA's report from March last year and the ESAG report—I do not think the scope of those reports was intended to turn to this sort of matter—were not within the scope anyway.

The CHAIRMAN: Turning to the issue of the assessment of schemes under the EP act, it appears that the scope of an impact review of the scheme has wider ramifications than the level of assessment of a proposal as the assessment of a scheme applies, possibly, to all proposals made under that assessed scheme, with the consequence that the proposals may not be subject to independent EPA assessment. Would you agree with that proposition?

Ms Andrews: No. It is important to appreciate that the process for dealing with "schemes" under the Environmental Protection Act is quite different to "proposals". Fundamentally, all schemes are required to be referred. The first quite critical difference from other proposals is that significance test under section 38. It does not come into play in the same way. I will ask Colin to give some more detail around this. He is more familiar with the procedures that are used within the EPA around assessment schemes.

Mr Murray: Most of the schemes that are referred relate to just the change of zoning of an independent property to allow for an additional use, or something like that. The vast majority of schemes that are referred to the EPA through the management provisions under the Planning and Development Act have little, if any, environmental consequence. At the other end, there certainly can be major scheme amendments, particularly metropolitan region scheme amendments—we are now going to other regions—and the Bunbury region scheme, and there are others. Some of those can have fairly significant implications, but I would not say that is greater than a large proposal assessment under 38.

The CHAIRMAN: What is the rationale for deleting the right to appeal in respect to the scope of assessment of the scheme, and how does this reduce the time for finalising approvals?

Ms Andrews: In a practical sense the right of appeal is only open to the proponent, and the proponent for schemes is always the local authority or the planning authority. This appeal right has rarely had to be used. You might suggest that it has been used, so probably the process has not run as well as it should have been. The sort of issues that have come up where a planning authority has decided to appeal have been around an issue that should have been dealt with through normal interaction, discussion and negotiation between the Office of the EPA and the planning authority. It is an appeal right that was generally felt was rarely used and there should be other processes in place to resolve any disagreement there might be, let us say, at officer level and about escalation around the instructions and what the scope of the assessment needs to be. That is what we are

talking about here. It is getting agreement around a document that lays out what needs to be covered within the assessment.

The CHAIRMAN: I find it interesting that you say it is an appeal right that has rarely been used. I would have thought, with major scheme amendments, you receive quite a few appeals.

Ms Andrews: Remember who the appeal right is open to; it is only open to the proponent—to the planning authority.

The CHAIRMAN: For example, in the case of the implementation of the greater Bunbury region scheme, before that could be adopted and finalised by the WA Planning Commission that had to be referred to the EPA for assessment. Are you saying that the only person who or body that could make submissions to the EPA —

Ms Andrews: Not submissions, but an appeal on the instructions.

The CHAIRMAN: — was the WAPC?

Ms Andrews: I am not sure who —

The CHAIRMAN: That is not my recollection of what happened.

Mr Murray: There were a lot of appeals, but most of the appeals on the greater Bunbury region scheme, for instance, were appeals lodged under the planning law rather than under the EP act. My recollection is that, in fact, there is a right for a third party

Ms Andrews: Is there? On instructions? Sorry.

Mr Murray: There is a right of third party appeal. The point that Michelle makes is still correct: There have been very, very few appeals lodged on instructions. We can provide that information to the committee as part of the statistical information we have said we will provide.

The CHAIRMAN: If you will, thank you. Noting that the EPA report identifies strategic schemes as "strategic proposals", will a strategic scheme be assessed as a strategic scheme or a strategic proposal?

Mr Murray: It has to be assessed as a scheme because it will be referred under the Planning and Development Act to the EPA as a scheme. A scheme will come into the EPA under the provisions of section 48. A strategic proposal is defined under section 38 and comes into the EPA under section 38. They are discrete points of entry into the EPA and therefore they are separate forms of assessment.

The CHAIRMAN: I am just trying to get the terminology clarified. Would a proposal made under a strategic scheme be considered possibly a derived proposal?

Mr Murray: No, because the provisions under the planning act say that once the EPA has assessed a scheme, implementation of that scheme cannot be reassessed by the EPA unless there are matters that are in addition to those which the EPA has already assessed. That is what we call "deferred factors". If all of the issues that development under a scheme raised had been assessed by the EPA, the EPA has no right to reassess a proposal. We do not call them proposals because we try to distinguish between them. A proposal is defined under section 38; a scheme is defined under section 48, so we would normally refer to it as a development or a subdivision, or whatever is the specific instrument.

The CHAIRMAN: If you assessed a scheme that provided for an industrial area and then you had a development proposal for an industry within the industrial area, there would still be circumstances in which the EPA would assess that proposal?

Mr Murray: Correct. That would be on the basis that there would be matters that clearly would not have been addressed through the scheme, so they would still be outstanding and the EPA could assess that as a proposal.

[12.45 pm]

The CHAIRMAN: Just explain the term "derived proposal" to the committee.

Mr Murray: The act constructs "strategic proposals" as being conceptual relatively early in the normal sense of things. The assessment of the strategic proposal is intended to set conditions, limits, boundaries and even where development may or may not happen within a conceptual area, but that conceptual area is defined. A "derived proposal" would be a proposal that subsequently comes in as a development within that strategic proposal and where all of the issues that relate to that development have already been addressed. An analogy would be a scheme that zones land for a permitted use and someone then comes in and wants to develop, consistent with that permitted use. That would be a derived proposal. An example that the EPA is dealing with at the moment is the Kimberley LNG precinct. It is a precinct, and there will be an LNG project within it. There may well be a series of other defined developments within it also. The strategic proposal would consider what environmental values would be affected by the development within that precinct, and it may well define an air shed limit, a noise limit or some other limit in that assessment. Provided that the subsequent development is consistent with those rules and meets the requirements of any conditions that are applied through the strategic proposal statement issued by the minister, from the EPA's point of view, all those matters will have been addressed and that will be deemed to be a "derived proposal", and the relevant conditions that fit under the strategic proposal would then apply.

The CHAIRMAN: I note that in the second reading speech there is a statement that the strategic assessments have been significantly underutilised. I would be interested to hear your comments as to why you think that is the case.

Mr Murray: My discussions with industry about trying to encourage them to use the strategic proposal more has been: they are interested, but in recent years they have not been ready. The reason they are not ready is their development proposals are on very tight time frames and there is a "just-in-time" approach that industry has been taking for that. A strategic proposal does not fit that sort of context yet, but all the industries we are dealing with, particularly the major mining companies, are looking at the opportunity to create the concept of multiple projects and getting the rules set on multiple projects earlier. However, they are not looking at doing something like that within—anything that is looking for development within the next five years, from their point of view, is too short a time. The second reason is that we have not done a lot of strategic proposals and people want certainty about the process and the obligations, particularly when a strategic proposal is a voluntary referral by a proponent only; the EPA cannot require it. It is about proponents and it is about a willingness to invest early and provide information earlier than perhaps they would otherwise be inclined to do, in order to give them certainty.

The CHAIRMAN: How will removing the right of third parties to appeal against whether or not a proposal is a derived proposal increase the utilisation of strategic assessments?

Mr Murray: It gives them more certainty. You raised the point earlier about certainty. They believe that the EPA is a body that is competent and capable to be able to make that decision. Provided they fit the framework, which really is set by the minister and the statement that is issued, they believe that that gives them more certainty about what a derived proposal can be. It is the implementation of a derived proposal that is really important to them.

The CHAIRMAN: However, will not the power of the minister under section 43 still apply?

Mr Murray: Once the minister has issued the statement that the strategic proposal can be implemented, section 43 may or may not be limited. I must say, that is a point that I have not looked at. I would be quite happy to take that one on notice.

The CHAIRMAN: That would be great because we would be interested to know the answer to that. The second reading speech states that strategic proposals are subject to the same appeal right

as other proposals. How does this provide an adequate mechanism for a review of a decision that a proposal is a derived proposal?

Mr Murray: A strategic proposal is a referral under the Environmental Protection Act. It is still treated as a proposal. Therefore, when an application is made for a derived proposal, that still has to go through the same process that we talked about in terms of the opportunity for public comment. Before the EPA makes a decision, the public will have an opportunity to comment on whether or not it agrees that a proposal is a derived proposal. Michelle talked about the notification of the decision and about the comments that are made on that also being in place.

The CHAIRMAN: What is the rationale or the justification for removing third party appeal rights against a declaration that a proposal is a derived proposal while retaining the proponent's right of appeal against the decision that it is not?

Mr Murray: We are removing the right of appeal. We are not being selective; proponents do not retain the right of appeal, at this point.

The CHAIRMAN: From our reading of the bill, section 100(2) provides a separate power for a proponent who disagrees with a decision of the authorities to refuse a request made under section 39B(1) in relation to a proposal. It enables that proponent to lodge with the minister an appeal in writing setting out the grounds of appeal. It seems to me that the protection for proponents remains, while the right of appeal is being removed for third parties.

Ms Andrews: If you can leave that with us—neither Colin nor I are instructing officers for the bill—we will get further advice to you tomorrow.

The CHAIRMAN: That is great, thank you. How does removing the third party right of appeal against a decision that a proposal is a derived proposal, while retaining the proponent's right of appeal, reduce the length of time for the approvals process?

Mr Murray: As I say —

The CHAIRMAN: It does not?

Mr Murray: —our understanding is that it did not retain the proponent's right of appeal.

The CHAIRMAN: Perhaps you could come back to us on that one as well.

Considerable time could pass between the time of a strategic assessment of a scheme and a proposal being considered that fits within that scheme. Are there time constraints for the EPA's consideration of a proposal as a derived proposal in these circumstances? For example, if a scheme is 15 years old and you get a proposal that technically fits within the scheme but environmental considerations have changed quite a bit in the space of 15 years, is there some limit at which you say, "Sorry, the assessment on the scheme has a certain life"?

Ms Andrews: The first thing is that the original decision by the minister around the strategic proposal will have a time limit on it. That will be determined through the assessment process. The minister will put a time limit on the overall effect.

The CHAIRMAN: Is there a standard time limit?

Ms Andrews: We do not have standard strategic assessment experience yet because we have not done any of them, so there is probably not a standard in that realm. For normal proposals, it is often five years, but you can see that for strategic assessments there is a thought that they will have a longer time limit. The second thing is that the test that is in the legislation that has to be applied by the EPA plays out, and that is a test around whether the proposal and its impacts were adequately considered in the original assessment, whether there is any new information and whether anything has changed. There is quite a clear test that the EPA is required to go through to determine the draft proposal. They are the two constraints that operate around that decision making.

The CHAIRMAN: I am curious that in the Planning and Development Act, schemes have a certain life. They are required to be reviewed every five years, but the fact is that they are not. I do not know why we continue to maintain that when very few are reviewed within the five-year period. It raises the issue about the length of time that an environmental assessment on a scheme should remain in place. Under the Planning and Development Act, if a scheme is not reviewed within the time specified, then the WA Planning Commission can have regard to the scheme but does not necessarily have to implement the scheme 100 per cent in relation to consideration, for example, an of a subdivision approval. That is my understanding anyway. It seems to me that perhaps the same sort of consideration in the legislation—the EP Act—needs to be incorporated in terms of these strategic assessments because if under the Planning and Development Act the life of a town planning scheme was specified and if you have an environmental assessment on that scheme and that scheme goes beyond the time specified in the life within the Planning and Development Act, what sorts of implications will that have for the environmental assessment of that scheme and any proposal within that? I wonder whether any consideration has been given to those sorts of issues.

Mr Murray: In terms of the scheme, the conditions coming out of the assessment by the EPA of a scheme become conditions of the scheme. So whatever time frame exists for the scheme is automatically applied. In terms of a strategic proposal, as I say, we have had limited experience in actually getting to the end point of having a statement issued by the minister on a strategic proposal. The one that is closest, but might still be some distance away, is Smiths Beach. We have been giving some thought to what a reasonable period of time might be. Currently, the standard for assessment conditions issued on proposals is five years, with an option of a rollover. There is a test of whether these things are still relevant. For a strategic proposal, five years is too short because we are talking about something that might be a conceptual development for the future. The conditions—the statement that is issued by the minister—would put a time limit on it. What we have not done is arrive at what is an appropriate time limit, and it would probably have to relate to the project itself. Some projects would have a shorter time frame and others would have a much longer time frame.

The CHAIRMAN: Are there any guidelines in place for determining whether a proposal is a derived proposal?

Mr Murray: Apart from the provisions under section 39B(4) of the act, no.

The CHAIRMAN: Okay. The second reading speech states that the EPA's reasons for declaring a proposal a derived proposal would be included in the public notice. What provisions of the EP Act require publication of a notice in respect of a declaration that a proposal is a derived proposal?

Mr Murray: As I said earlier, the application for a proposal to be treated as a derived proposal is a referred proposal under section 38, so the provisions of section 39B(5)(a) apply, and that is the same as if it is a normal referral where the EPA is required to give public notification of its decision.

The CHAIRMAN: It is noted that section 39B(5)(a) and (b) of the EP Act respectively provide that the declaration of a proposal as a derived proposal is to be recorded in the public record and kept, pursuant to section 39(1), and that the written notice of the declaration is to be given to the minister. It is also noted that in the event that the derived proposal is to be assessed pursuant to section 46(4), section 39(1)(b) would permit regulations prescribing the reasons for the declaration to be recorded on the public record. However, we note that the second reading speech refers only to administrative procedures and not regulations. Also, section 46(4) of the EP Act provides that the EPA "may" inquire into whether any implementation condition should be changed, and not that it "shall" do so, so that not all derived proposals may be assessed. I would appreciate your comments on those views.

[1.00 pm]

Mr Murray: We have already discussed the issue of whether administrative procedures could be regulated or not. In terms of the "may" versus "shall" provision under 46(4), the structure of the Environmental Protection Act in most cases is that the EPA may do something; the EPA "may" assess, not "shall" assess. So there is the consistency through the act that the EPA is an independent authority making an independent decision about relevance and significance.

The CHAIRMAN: That now takes us to clearing of native vegetation, works approvals and licences. You will be relieved to know that I do not intend asking you all the questions because a lot of those have already been asked of the DEC officers earlier this morning. There are just three questions I would like to ask in relation to it. What is the basis or the criterion on which the EPA determines that a proposal will not be assessed by it but should be assessed by the CEO pursuant to part V, division 2 of the EP act? That is question 6.6.

Mr Murray: One of the tests that the EPA looks at on receiving a referral is the capacity of other legislation to deal with all of the relevant issues. Where there are issues outside of other legislation that cannot be addressed, then the default is that the EPA has to make an overt decision, and if it chooses to assess, it has to assess all of the issues. The primary test is that it is a proposal that would be subject to the veg clearing permit process and also that they are capable of dealing with it in full.

The CHAIRMAN: This is question 6.10. Section 39(1) of the EP act requires the public record to set out whether or not the proposal is to be assessed under this part—that is, part IV of the EP act; and, if that proposal is to be assessed under this part, the level of that assessment and such other details as are prescribed. What provisions of the act empowers the making of regulations to prescribe the keeping of a public record pursuant to section 39(1) of recommendations made in respect of a proposal that is not to be assessed under part IV of the EP act? Are you able to identify the relevant regulations?

Mr Murray: Yes; the act provides for the power to make regulations under section 123.

The CHAIRMAN: If the EPA recommendation as to part V assessment is not part of the public record kept pursuant to section 39, how is the public made aware of that recommendation?

Mr Murray: The way the EPA publishes its record is to inform people of not just the decision whether to assess or not, but also provides information if it is going to assess what is the level of assessment and what is the public comment period, if it is not going to assess whether the EPA is also saying there is another statutory process place which it believes can deal with that and so at that point it would flag that a proposal referred could be addressed and should be addressed through a permit clearing.

The CHAIRMAN: What are the differences in the assessment process—this is 6.7—carried out by the EPA in respect of the clearing of native vegetation implications of a proposal and the inquiry undertaken by the CEO pursuant to part V?

Mr Murray: The CEO addresses applications for clearing in accordance with the principles, which are set out in section 51O and schedule 5 of the EP act, and they are the primary tests; that the assessment is required to be undertaken. The EPA will take account of those principles; it may choose to set some additional principles—some broader principles—which it may also look at, but it would largely be guided by those principles, which are principles in the act.

The CHAIRMAN: This is not a question you have already been provided with. The committee understands that the activities involving clearing of native vegetation may take place under the authority of legislation other than the EP act—for example, the clearing of aquatic vegetation under the fisheries resources management act; the taking of flora authorised under licence of the Wildlife Conservation Act; and clearing in accordance with the Planning and Development Act. Does the EPA decide not to assess a proposal on the basis that assessment under these provisions is sufficient? You might want to take this one on notice.

Mr Murray: I will, please.

The CHAIRMAN: I do not mind you doing that.

If so, what is the rationale for the amendment to section 100(1)(a) of the EPA act being restricted to recommendations for assessment under part V, division 2 of the EP act? We are just trying to work out the relationships that are happening there because we are not very clear on how that all fits in together.

Just moving on to works approvals, under section 63A of the EP act—this is 6.12 on your list—the CEO is to publish particulars of works approvals from time to time in the prescribed manner. Can you identify the regulations stipulating the manner in which the public is to be informed of the particulars of a works approval and what the process is for making a member of the public aware of the CEO's decision to grant a works approval licence?

Mr Murray: I think this question is better put to the Department of Environment and Conservation.

Ms Andrews: The DEC administers this part of the act.

The CHAIRMAN: Okay. What provisions of the EP act or regulations made pursuant to it set out the process for the EPA to consent to minor or preliminary works?

Mr Murray: Section 41A(3) of the Environmental Protection Act has the provision for minor and preliminary works.

The CHAIRMAN: What constitutes minor or preliminary work?

Mr Murray: We rely on the dictionary definition because the act has not specified different definitions. The type of thing that is in mind is where there is a requirement to undertake some fairly routine but non-significant ground disturbing activity related to geophysical testing, sampling or something like that, which is not about implementing the project; it is simply about acquiring information that would better inform the assessment by the EPA.

The CHAIRMAN: So are there guidelines in place in terms of defining what is a minor or a preliminary work or is it simply assessed case by case?

Mr Murray: It is assessed on a case-by-case basis because it is difficult to actually know what might be there but we are giving thoughts to better defining what "minor" and "preliminary" would be from an EPA perspective.

The CHAIRMAN: How does a person apply for consent and how is consent advised?

Mr Murray: A person applies to the Environmental Protection Authority seeking approval under the provision of the act and it is then considered and they would receive a written letter from the chairman of the EPA authorising or not.

The CHAIRMAN: What is the EPA investigation process for consenting to minor or preliminary works? What opportunity is there for public scrutiny of the process for granting consent to a minor or preliminary work?

Mr Murray: The requirement would be for the applicant to specify what it is that they intend to do, why they need to do it, what the context is of the assessment and to give an outline of what they believe to be the impacts resulting from that because, as I say, the whole idea is that there would be minimal impact resulting from this. We would normally go to some of the key decision-making authorities who have knowledge about it, particularly if it is related to a mining project we would go to the Department of Mines and Petroleum, to get advice about their understanding of both the need for it and also the significance of it. Quite clearly, if the application relates to a proposal that may have a significant effect on the environment, then in fact it should be coming in through section 38 and not as minor or preliminary works.

Ms Andrews: In fact, it cannot be considered.

The CHAIRMAN: What appeal rights, if any, are there in respect of this process?

Mr Murray: There are none.

The CHAIRMAN: How will a decision-making authority be advised that the EPA is considering or has consented to particular minor or preliminary works?

Mr Murray: Decision-making authorities will be identified and they will also be written to.

The CHAIRMAN: What is to occur if the EPA and the decision-making authority disagree on whether what is proposed are minor or preliminary works?

Mr Murray: It is the EPA's call.

The CHAIRMAN: Okay. How will the CEO be advised that the EPA has consented to minor or preliminary works?

Mr Murray: As I said, we would advise decision-makers of that.

The CHAIRMAN: A query has been raised with the committee as to whether the terms used in the proposed amendments to sections 51F, 54 and 57 of the Environmental Protection Act when compared with the proposed amendments to section 41 have the unintended effect of restricting the implementation of works approvals, clearing permits and licences more broadly than proposals. Would you please respond to this concern?

Ms Andrews: We probably do not need to respond as to whether it is intended or unintended, but it does have the effect of being more restricting, yes, because it is "related proposals" and not just "proposals".

The CHAIRMAN: Sorry, what is the rationale for making it more restrictive?

Ms Andrews: This is not a part of the act that we deal with in terms of works—part V of the act—we only bump into it, if you like, in relation to this consideration here. We can take it notice and come back to you in terms of the rationale behind it —

The CHAIRMAN: Okay, that would be great.

Ms Andrews: — but, yes, it is different.

The CHAIRMAN: Also, are you able to inform the committee whom the government has consulted on the proposed amendments and what was the response received from each individual or organisation consulted?

Ms Andrews: I can see me answer the question there. We have outlined the process within government that has overseen the development of these amendments, and there is a wider package of amendments being made to other acts as well, which this is part of—the ministerial task force and a directors general working group and some officers' groups underneath that. As I mentioned before, the amendments are broadly consistent with a number of other reviews that are being conducted with stakeholders in terms of the outcome, the objectives, of those reviews. Since the amendments were tabled in Parliament, there have been some briefings provided to a number of peak bodies, which I have attended with our representative from the minister's office.

The CHAIRMAN: But there was no direct consultation on the amendments comprising the amendment bill prior to it being tabled in Parliament?

Ms Andrews: No.

The CHAIRMAN: Now, I have a few other questions that you have not been given any notice of and feel free to take these on notice if you need to. I am just looking at clause 5(2)(b), clause 6(1)(e) and clause 6(3)(c) which propose amendments to the act by inserting the word "or" at the end of various subsections. I am just wondering why someone has decided that this is necessary when it is pretty self-evident from the reading of the clause that they are ors. These clauses have three or four subsections; before the last subsection—the subsection before it has an "or" at the end of it—for some reason someone has decided you need to insert the word "or" after every single subsection.

Ms Andrews: We will have to take that on notice.

The CHAIRMAN: I have just been provided with the answer: drafting practice by the PCO.

Ms Andrews: Good on you; I am sure there is a very good reason, and you have done it already—fantastic!

The CHAIRMAN: This is a bit of a long question so if you want it on notice and want it provided to you in writing, I am happy to do so. I was just having a closer look at section 100(1)(c), which refers to the content of instructions under section 48B(1). I was interested because clause 5(1)(b) deletes the right of appeal on the content of any instruction set out in a public record under section 48B(1).

(a) For each of the last 10 years, or however many years you are able to provide the data, how many appeals were received under section 100(1)(c)?

(b) For each of the last 10 years, how many of these appeals were launched by the proponent; a third party, being a non-government third party; and, a government agency, department or local authority?

(c) What is the average length of time taken for determining an appeal lodged under section 100(1)(c)?

(d) What is the process engaged by the EPA in determining the content of any instruction set out in a public record under section 48B(1)? Does the EPA consult with other government departments and the relevant local authority as part of this process?

(e) What is the reason for deleting this appeal right?

(f) I note that clause 6(2) deletes sections 101(2a), (2b) and (2c) of the act. These provisions require the environment minister in relation to section 100(1)(c) appeals to consult and attempt to reach agreement with the responsible minister on the decision of the appeal and if agreement cannot be reached, it sets out the process by which that can be resolved.

[1.15 pm]

It appears to me that the deletion of section 100(1)(c) appeals and the need to consult with the relevant minister on any appeals lodged under section 100(1)(c) greatly diminishes the check and balance on the EPA to ensure that the views of other government departments and agencies and relevant local authorities are incorporated in the content of any instructions set out on the public record under section 48B(1). I would like your comments on that conclusion that I have reached and whether you agree; and, if you do not agree, what check and balance remains in the EP act to guard against the EPA ignoring or not incorporating the views of other government departments and relevant local authorities on the public record under section 48B(1)? Also, it appears to me that, again, the deletion of this appeal and the need to consult with the relevant minister on any appeals lodged under section 100(1)(c) greatly diminishes—in fact, removes—the requirement for the environment minister to consider and seek agreement with other relevant ministers, thereby providing greater unilateral authority in the hands of the environment minister without any check or balance in place. Again, I would like your views and whether you agree with that comment; and, if you do not agree, what check or balance remains in the EP act to require the environment minister to consult and reach agreement with other relevant ministers?

I refer to section 101(1) and section 101(2e) and section 107(2) of the EP act, which state that the minister's decision is final and without appeal. Is it correct that the amendment bill does not amend these provisions? You can probably answer this now.

Ms Andrews: Yes, that is correct.

The CHAIRMAN: What is the effect of these provisions? Is it the intent that these provisions stop any recourse to legal action in the courts by an aggrieved party against the decision of the minister on appeal?

Mr Murray: No. This does not remove the capacity of parties to take action in the courts against the minister, but that action is on a merit base rather than a decision base. It is simply to say that the appeals process has to have an end point, and that provision, as I understand it, defines that end point.

The CHAIRMAN: With the deletion of the various appeal rights as proposed in the amendment bill, will the effect of these provisions be to stop any legal action in the courts by third parties or the proponent in place of those abolished appeal rights? Will a third party or the proponent still be able to appeal to the Supreme Court against a decision not to assess or the level of assessment or the content of instructions under section 48B(1)?

Ms Andrews: It is not our understanding that these amendments in any way change what rights currently exist. But if we can get some legal advice around that, that would be great and we will get back to you.

The CHAIRMAN: Thank you for that. If the proposed amendments are endorsed by Parliament and come into effect, what rights and in what circumstances would an aggrieved proponent be able to take legal action against the EPA or the minister on a decision made by the EPA or the minister at any step during the environmental approvals process?

Mr Murray: Again, it is our understanding that these do not affect other rights that people have.

The CHAIRMAN: Then I ask the same question in relation to third parties. That covers it. I will give those questions to Susan and I will get Susan to send them across to you so that you can have a look at them. I apologise that they are a bit late in coming, but in reviewing the paperwork last night I was a bit intrigued by section 100(1)(c) because I do not have much knowledge of it. Members, do you have any questions that you would like to add to that very long list of questions?

Hon LIZ BEHJAT: No, I do not.

The CHAIRMAN: Nigel, there was a question that you had earlier.

Hon NIGEL HALLETT: That was on the timing.

Ms Andrews: That was back on —

Hon NIGEL HALLETT: On 3.8. If you could give us some reasoning why, when you look back at 2004-05, you have 55 days and then you go out in 2008-09 to 81 days. I would have thought it would have been the reverse.

The CHAIRMAN: Can I just explain? Nigel, the question here is asking why is it taking the proponent so long to submit environmental assessment documents back to the EPA.

Hon NIGEL HALLETT: Yes, that is right. Is it becoming too hard for proponents to get through the paperwork?

Ms Andrews: That was one of the things we were touching on earlier. Why this reform process started two years ago was that we did see some blow-outs happening in certain stages in the process for proponents and around proposals. The time they were taking did not match the complexity of the project in that scoping phase and then the preparation of documentation and so on. That was one of the motivators, one of the drivers, for the reform process that we are now in. We believe that the package of administrative reforms is very much going to deliver improvements around those time lines. Having said that, in the end we do not control when proponents put their documents in. There can be other reasons that proponents delay putting their documents in to us—around the market and all sorts of other things that are going on. We do what we can to make the process work efficiently and effectively, but we are also subject to other things happening in the wider environment.

The CHAIRMAN: It is the case that where some of those time lines really blew out, Nigel, was during the time of the economic boom. Most consultants had a lot of work on and so the turnaround time for consultants was slow because they simply had so much work on at the time. Would you agree?

Ms Andrews: Yes. Everyone was stretched. It was a double whammy really: there were not enough consultants out there and also the standard of the documentation coming in dropped as well. There were actually repeat events—going back out for fixing up documents and that sort of thing. It was a very tough time for us in dealing with projects because of that, not to mention our staff leaving for much better pay as well.

The CHAIRMAN: Also, from my own knowledge, the standard of the number of reports really dropped. I think I have mentioned to committee members before that in some cases where management plans were asked for, what were being submitted were comments that if this trigger happens, we will prepare a management plan, which really is not what a management plan is supposed to do. It is actually to address how they are going to deal with the incident if it occurs. In terms of monitoring data, the reports that are supposed to be tabled are supposed to actually provide an analysis of that monitoring data. In a lot of cases, reports were being tabled with just the outcome of the monitoring and without any analysis at all, so that was having to be sent back as well.

Mr Murray: Agreed.

Hon NIGEL HALLETT: Are there time frames in place for you and the proponents to work towards, or do you put that in place now?

Ms Andrews: It is normal practice for us, particularly for the proposals that are going through that public review process and the more complex projects. At the very beginning with proponents we sit down and start with, if you like, a generic time line for the steps in the process. We reach agreement on a time line with them and that is very much informed by their needs and expectations as well as ours. We have got to manage our internal resources and staff. Each project has a time line negotiated. We start with the generic and then we negotiate an individual one. That will get revisited at times during the process. Sometimes, as I have said, proponents will delay projects for their own reasons or there are some additional difficulties they are having and so on, so we renegotiate those time lines as we go through the process.

Hon NIGEL HALLETT: Could I take the example of an extraction licence? Does that come under you guys?

Ms Andrews: No, not unless it is a —

Mr Murray: Some do.

Ms Andrews: Some do because they are particularly significant; otherwise, it might be going through regulatory processes under part V of the act with the Department of Environment and Conservation. Extractive industries are an interesting industry because they do not always fit neatly in the approval process through state government. Sometimes local governments are managing all of the environmental issues around them as well. It is an area for us.

The CHAIRMAN: Did you want to pose the question anyway in case Colin and Michelle can answer the question?

Hon NIGEL HALLETT: It is just a general comment. It causes a lot of grief in our region, which is the same as Adele's. It does seem to get shuffled around, whether they want to get sand or gravel out or whatever. Both of you get blamed and a hold-up of three years is not uncommon. It is far too long. When you have got trucks having to take sand from, say, Busselton to Pinjarra, it is crazy. It is all costing. Somewhere it has got to be fixed.

Ms Andrews: That is right. I would suggest, if you like, that the strategic view of what is happening with that industry at both state and local governments is that maybe that is where the

solutions might lie. By the time you get down to the individual operator, who is perhaps not all that sophisticated in trying to work their way through government approval processes and so on, then you run into problems. I think there is probably scope for us doing a bit more up-front in terms of identifying resources and an easy path through the approval process. They do not have all the complexities around clearing native vegetation and whatever other environmental matters sometimes come up with these industries—proximity to incompatible land uses and those sorts of things. Then you have got the truck movements. It is an industry where, if we were doing something more perhaps a little earlier on in the process, we might not be running into the problems in just the approval and regulatory process. That probably does not answer your question directly, I think. The EPA is not often in the space at the individual proposal level, but we do try and resolve issues at a strategic level sometimes through some of the planning processes and some of the schemes and so on that come through. Some of those matters get resolved.

The CHAIRMAN: Are there any final comments you would like to make?

Ms Andrews: One is just a clarification from me. In terms of the process from here, will you send to us fairly quickly a consolidated list of additional questions you want us to respond to?

The CHAIRMAN: We have got a number of bills before the committee at the moment. We have got another hearing on a different bill this afternoon and we have got two hearings tomorrow on two separate bills. I hope to get to you the questions that you have not already got that I read out at the end hopefully within the next couple of days. At least by the end of business on Wednesday we should be able to manage that. In terms of the other matters, how soon will they get a copy of the Hansard transcript?

The Committee Clerk: Hopefully tomorrow.

The CHAIRMAN: Hopefully tomorrow or by the end of business on Wednesday you will have a copy of the Hansard transcript, which will identify all the other matters that you have said that you will come back to us on.

Mr Murray: We have noted them, but just to make sure that we cover and are addressing all of the ones that you want.

The CHAIRMAN: On behalf of the committee, thank you very much. I know it was a very long list of questions and I thank you for your forbearance and patience in enlightening us to help us consider the bill and make an informed decision. It is greatly appreciated. Thank you very much for your time.

Ms Andrews: Thank you very much. It was very interesting for us too.

Hearing concluded at 1.27 pm