TRANSCRIPT

ENVIRONMENT AND NATURAL RESOURCES COMMITTEE

Subcommittee

Inquiry into environment effects statement process

Perth — 31 May 2010

Members

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Witness

Mr A. Sutton, appeals convenor, Office of the Appeals Convenor.
The CHAIR — I welcome you, Anthony. Just as a formality, all evidence taken at this hearing is protected by parliamentary privilege, as provided by the Victorian Constitution Act 1975 and is further subject to the provisions of the Victorian Parliamentary Committees Act 2003. Any comments you make outside the hearing will not be afforded such privilege. You are aware that all proceedings today are being recorded. As a witness, you will receive a transcript of today’s discussion in the next couple of weeks. We thank you for joining us and ask you to present and, if you are happy to take some questions later we would appreciate it.

Mr SUTTON — Thanks for your time. I have had put round a quick presentation that is really just to provide some context. I also have your terms of reference that were sent through with the sorts of questions that you want answers to, so I will try to address those as well.

I will start from the basics, if you like, and just why we have an appeals process in Western Australia, then work through both the appeals and ministerial condition-setting phase. I am sure Michelle and company from before would have gone through some of that as well, so you will stop me if I repeat what they have said. I have some statistics, just to give you a feel for the processes we have in place and what sort of workload we have, and then, building on your requirement to look at improvements, the sorts of things we are looking at now to improve the appeals process.

The first one there, no. 1, is: why have an appeals process? I am sure you have the same sorts of things in Victoria. We have rebuilt around natural justice, but the very basics and what I see is very much the process of making sure that it is a belts and braces. You have the EPA doing its work, but it has time frames and constraints, and there will always be some opportunities for even mistakes or there might be something that is unjust in the process. That is really where the appeals process comes in, and we take fairly seriously the right to be heard.

Just on the next page, the appeals process is open to anyone, third parties, the proponent, government agencies, whoever has an issue with what has been released. My position is independent, the person is appointed by the governor but really answerable to the Minister for Environment. I guess that is similar to the role of the Environmental Protection Authority, in that you are independent.

Broadly the principles under that that guide our approach are very open-ended, if you like. So it is a unique process in that it is quite flexible, with equity, good conscience and substantial environmental merits. It is very much a merits-based, not a judicial review, process.

The next slide has the document there. Our powers come from part VII of the Environmental Protection Act. You would have heard Michelle and company from the office of the EPA talk about part IV, which is very much the environmental impact assessment, part V being on licensing, and then part VII being about the appeals. Moving on, my report to the minister is only advisory, so it has recommendations to her. What she will normally have in front of her is a recommendation from the Environmental Protection Authority, and if it is appealed, she will have a report and a recommendation from myself.

Her decision is final. I will run through that later on with some of the diagrams. But if it is an appeal against the ministerial condition at the end of the process, then she cannot hear an appeal — in our case, it is a lady minister — against herself, and that is when an appeals committee will need to be set up. I will run through that later, if you like. The minister is then actually bound by that decision; she cannot have a different decision from the appeals committee. I will show you how that works with the next couple of slides.

This one here is very detailed. I thought I would show you everything on there so you have it all on one slide, if you like. I will run through this briefly. My apologies that the word ‘setting’ has come down on top of it. Along the top in blue you have the EPA’s process, if you like. Underneath that writing it says ‘Assess/not assess’. I will move along quickly. Moving across the top, then ‘Level of assessment’, then ‘EPA report’, which is really the business end of things where they have actually looked at the project and made a recommendation, and then to the right of the dotted line is the condition-setting process that the minister runs. I will go through that in more detail later, if you like. It is just to show you the whole process on one slide.

Next down is the appeals process. You will note that there are four appeal points, if you like, in the environmental impact assessment process: at the beginning, assess or not assess, then the level of assessment to which the proposal may be set against the EPA’s report, and then finally, a proponent only against the conditions at the end. As I spoke about before, the minister cannot hear an appeal against herself at that stage.
and that is when you would have an appeals committee. You can see that down the bottom is also the minister’s decision making.

I thought that, rather than continuing in detail, I would simplify that to deal with just projects that have been formally assessed, where there would be a report from the EPA and the minister would be making a decision. That is really the next slide. Just simplifying it, going from left to right — tell me if it does not make good sense — you have the EPA releasing its report; there is then an appeal period open for 14 days. As I mentioned previously, that can be open to third parties and the proponents, and then appeals are received.

The first thing we do when we have received the appeal and the $10 fee is to put that appeal back out to the EPA for its comments on the appeal against its decision and what it thinks of the merits of the appellant’s grounds, and also to the proponents. The proponents get an opportunity to look at the types of issues that have been raised and to provide comments back to us. Then as a matter of process we usually go on site, meet the appellants, and then — there is the arrow there — my appeals report goes through to the minister, with a recommendation included in that. You will have the EPA report, you will have the appeals committee’s report, and then the minister makes the decision. Once she makes the decision she also has what we call a ministerial appeals determination, which is another document. If you were to look at the accountability of the process, what you would see on the website would be the EPA’s report, the appeals committee’s report and the minister’s decision and the links between the three documents.

If the project is to proceed, the minister then moves into the condition-setting phase. That is when she consults with other ministers. As I mentioned previously, at the end of that process there is also an appeal point, which is where the proponent can actually appeal. Then, as you picked up from the office of the EPA, it is back to the office of the EPA for the compliance and management of those conditions. That is all the process on one page. If there are no questions, I will just keep moving.

The next slide gives you an idea of the considerations. The only thing that is changed on this slide is down below, where you can see that in the environmental appeals process there are environmental considerations only. So if you can raise social or economic issues, they are not really to be dealt with there. I will give just one example of how economic or social issues may be considered. This is a case that has occurred in Western Australia. A cement company was dredging in Cockburn Sound, which is close to here, the sand off the ocean floor. It had to remove the seagrass. That was then potentially impacting on the fish communities, which would impact on the local fishermen. It is through that process. We were not considering the economic viability of the cement company, but considering the downstream, if you like, impacts on the fishermen. We can consider those types of downstream social and economic issues, but primarily it has to do with environmental matters.

We move across to the right to, in the golden colour, the ministerial condition-setting phase, when the minister is consulting with other ministers. Clearly if she is consulting with the Minister for Transport she is seeking his or her comments on factors primarily environmental but there might be other social and economic issues that are coming through and again, with the minister for mines, looking at what other social and economic issues may be considered as well. It broadens out once it reaches the ministerial phase. Then the project implementation is very much the proponent and the office of the EPA. They are the, if you like, constraints and opportunities for decision making.

I thought I would give you an understanding of the timing and of what it might take. It is the same diagram again, just looking at the timing down the bottom. For the appeals process, it is approximately nine weeks: there is the 14-day appeal period, we generally give proponents and the EPA 21 days to get their comments back to us, and then we tend to take approximately a month to go through that. That gives you nine weeks. Then if the project is proceeding, very much on behalf of the minister we also coordinate the ministerial condition-setting phase. Again we give decision-making authorities, like other ministers, 21 days to get back to us and then seven days for a decision, giving 28 days to when the statement is finally issued.

Just to provide some statistics, again, this is appeals and it varies each year, as you can imagine. I am sure it is the same in Victoria. You might have one controversial project which brings in a lot of appeals, so it can be very variable from year to year. That is just to give you an idea of what it has been like for the last three years.

Mrs FYFFE — Where you have the number of 562 for appeals finalised in 2009, does that mean there were quite a few carried over to 2010 or have they all been cleared?
Mr SUTTON — Yes, very much so. It is just the ones that are finalised in that year. You might even have some that are a couple of years old and have been in the system for a while.

Mrs FYFFE — But your time line has not been met?

Mr SUTTON — It would not have met the time frame. For our time frame, we generally say that 80 per cent of the time we can meet that time frame. There are 20 per cent of cases where you just will not.

Mrs FYFFE — You have the ability to stop the clock?

Mr SUTTON — In our Environmental Protection Act there are no constraints on us for timing other than the 14-day appeal period.

Mrs FYFFE — So this is what you try to work to?

Mr SUTTON — Correct. It is not written in concrete or anything like that; it is just what we try to work to.

Moving along, then, to give you an idea probably about the business end, slide 6 is the ministerial statement, once you have finished the appeals process through to finalising the conditions. There you would have a protest by Gorgon, major final proposals — and it is all the large proposals that it would have to attract ministerial conditions.

Just to give you a feel for what it means day to day in the appeals office, at any one stage we would have between 50 and 60 proposals, usually dealing with five to eight ministerial offices at the same time, trying to get conditions back or feedback to our office. With a staff of five to six, it costs approximately $750 000 a year to run the appeals office.

I do not know whether this is of benefit or not, but one of the things that you notice by having an appeals process that is open to third parties is that the minister’s workload is quite large as well because they were all coming across her desk. At any one time she will have 10 to 15 appeal letters and a ministerial statement or two, so there are constraints on the minister and her time as well, as you would appreciate.

Just looking at your scope of improvement, clearly we are doing the same sorts of things as to how we can better improve the processing. What I have shown you is that, most of the time, it has been a sequence of events to get to a decision. What we try to do generally is parallel that process as much as we possibly can, so doing the appeals process but also doing some early consultation with the ministers to get an understanding of what their thoughts are.

We are in the process of developing our own procedures. We have internal procedures but what we want to do is have them externally available on the website so that people can see how we do our business. Consulting with ministerial decision-making authorities only: in the past we have really broadened the consultation out to other departments and people of interest, but we are now coming right back to who we need to get agreement with and focusing on that.

You heard evidence earlier from Michelle from the office of the Environmental Protection Authority. We are working with them very much to make sure that in the conditions, if the minister makes a decision on day 10 and a similar proposal comes through the next week, we are picking up the learnings from the last project and incorporating them into the new conditions for the new project, if you like, so very much trying to have feedback loops involved in that process. We are also moving towards previous performance reporting. Again, as I mention there, we would be looking at trying to, for our guideline, meet those time frames 80 per cent of the time.

In slide 9, probably not dissimilar to yourselves, for the medium to long term there is a number of task force and stakeholder reference groups looking at improvements. There is a bill before Parliament at the moment looking at how the appeals process might be streamlined as well. I can go through that, if you choose.

Finally, at the back there are the top five things that we are looking at as far as improving the process. You probably would have heard this from the office of the EPA as well. We are looking to focus on early scoping, not picking up issues through the appeals process at the very end but making sure of those issues and that the community has an opportunity to be involved earlier on in the process.
In having good policy so that there is a consistent approach, the appeals process very much relies on having good policy in place. I am looking at how you focus the appeals process not just to be another bureaucratic process but how you might get solutions out of it as well — that is, if you come to the end of the process and there are a number of key issues that have not yet been resolved, how can the appeals process help resolve those issues so that the minister can make a sound decision?

The consistent approach to conditions and making sure that, working with the office of the EPA and the state solicitor’s office, conditions are robust and legally enforceable as well, and, as I mentioned before, making sure that from those ministerial statements when they are issued any learnings are fed back to the office of the EPA.

Mrs FYFFE — How much does it cost to lodge an appeal?

Mr SUTTON — It costs $10 in the environment impact assessment process, for a licence it is $50, for native vegetation it is free and for clearing permits it is free. So it is a very open process.

The CHAIR — Are there any costs issues or is it just totally informal?

Mr SUTTON — To have a valid appeal, they definitely need to pay the costs and I guess in the days of email and those sorts of things, it is really to make sure that people formalise their appeal more than anything else. When there is a fee attached, they have to take it a little bit more seriously.

The CHAIR — If they lose an appeal, costs can be issued against them?

Mr SUTTON — No.

The CHAIR — It is a very informal process?

Mr SUTTON — Very much so.

The CHAIR — What constitutes an appeal? Is it a formalised document, can it be just a simple letter appealing a decision, do they have to be deemed to be a relevant third party?

Mr SUTTON — The only real requirements are that it comes in within the 14 days from when the EPA releases its report; it hast grounds within the appeal, so it is related to the process and the grounds are X, Y and Z; and they pay their fee.

Under the act those are the three things that are required. We have an appeals form which tries to guide people through what their grounds are, what is the basis of their argument and what is the outcome they are seeking. We try to focus them on the outcome rather than just complaining about an issue — that is, what outcome they are seeking from that. It is fairly open.

The CHAIR — Quite concise questions have been given to you, so all our questions have actually been answered in your documentation.

Mr SUTTON — Good. I was not quite sure.

Mr MURPHY — In terms of the appointment by the governor, does the governor receive advice from the minister?

Mr SUTTON — Really it is through the cabinet — from the minister through the cabinet and then through to the governor.

Mrs FYFFE — Do you actually get people approaching you, sounding you out about making an appeal? Do you have those loose discussions?

Mr SUTTON — We do, and probably that is usually the proponent more than anyone else because clearly the process does save some time. They are going to consider their options before they put in an appeal against their project, if you like, so primarily from the proponent.

The CHAIR — How do you ensure transparency in the whole appeals process?
Mr SUTTON — Probably the key one is that we do an appeal commenced report. That will have all the grounds for appeal. We really try to put into that all the information that appellants have given us. It will be in the report in an appendix so that they can see their appeal ground, how the EPA has responded to their appeal ground and how the proponent has responded to their appeal ground, and then our consideration, to follow that through. A summary of that, if you like, really comes through to the minister’s appeal determination, particularly if she takes on board our recommendation. Then we will create a summary version of that which might be, say, three or four pages long at the most.

The CHAIR — In terms of the time frame, in slide 4 you said it can be nine weeks and four weeks, so up to a total of 13 months, so in effect an appeal can delay a decision for up to 3 months.

Mr SUTTON — Correct.

The CHAIR — On average, how long does it take an appeal to go through? Do all appeals take three months just by process?

Mr SUTTON — No. As we have put there, we are aiming for 80 per cent of projects to hit that target. What we find for the more complex ones is that you will not usually have the proponent complaining too much because they are usually part of that process. They are trying to resolve some of the issues in their project, so probably 50 per cent of proposals that are appealed are the proponent looking at the conditions and saying, ‘I would like to have these changed in some way, shape or form’.

You will have others which are just plain difficult and will take longer. We might, for example, need to get advice from the health department if it is an environmental-health type issue, which we take very seriously, and then that can add to the time frame as well.

The CHAIR — In terms of your resources, I note you said there are five to six staff and approximately $750 000 per year. Is that your total office budget, including your salaries?

Mr SUTTON — It is, yes.

The CHAIR — Thank you very much for being very precise. I know we did not give you a huge amount of time, but we very much appreciate it. As we said earlier, a transcript of the hearing today, with instructions, will be forwarded to you.

Witness withdrew.