THE SENATE

BILLS

Environment Protection and Biodiversity Conservation Amendment Bill 2013

Second Reading

SPEECH

Tuesday, 14 May 2013

BY AUTHORITY OF THE SENATE
Senator BIRMINGHAM (South Australia) (12:43): I rise to speak on the Environment Protection and Biodiversity Conservation Amendment Bill 2013, which the government has just rushed into the Senate chamber. It is noteworthy that the Senate committee report on this bill was only concluded and tabled this morning, but this of course is symptomatic of a government whose policy agenda is overwhelmingly driven by politics rather than by sound public policy, and in this case this legislation firmly fits that trend. This legislation has been driven completely by the politics of the government—in particular, the politics of the government’s precarious position in the House of Representatives, where they rely very much on the member for New England and other crossbenchers for support.

Just months ago the government rejected proposals similar to those contained in this legislation, which were essentially to establish a water trigger in the EPBC Act—that is, to add a water trigger to the range of triggers on matters of national environmental importance which exist in the Environment Protection and Biodiversity Conservation Act. It is not to be an all-encompassing water trigger, mind you. Instead, and this is an unprecedented step, it is a trigger specific to certain industries—in this case, the coal industry and the coal seam gas industry. The government had previously pilloried the idea that a water trigger needed to be added to the EPBC Act. It was not even a factor in the recommendations of the comprehensive Hawke review of the EPBC Act. Yet, all of a sudden, because Mr Windsor walked into the Prime Minister's office and said, ‘I demand this be done,’ here we are debating this legislation. It is an appalling way to make public policy. It is an appalling way for the government to change its mind and to change the rules and regulations that industry has to comply with.

We already have in this country very extensive and comprehensive environmental planning laws. They operate at the state and federal levels and they provide for the assessment and recognition of all manner of factors, including the impact on water. It is estimated that, on environmental planning, there are around 1,500 state conditions that must be complied with and 300 or so federal conditions that must be complied with. Within these conditions there is ample scope to address issues of water, and that is exactly what occurs already. This bill will add a new layer of regulation and a new level of duplication by which the federal government will find itself assessing things that state governments are already assessing and industry will have to go through and get approvals from the federal government just as they already have to get approvals from state governments. It will add to the cost and time frame of approvals, it will add to the delays and it will add to the risk that industry will simply take its bat and ball and invest elsewhere.

I acknowledge the community concerns. Such concerns were the reason that this parliament acted to set up the committee with its expert assessment process just last year. Yet now we have legislation which goes further than what was done last year without giving a fair go to what was done last year and to see whether it would have addressed the community concerns and whether it would have worked. At the time last year's measures were proposed, Mr Windsor was pushing his proposal for an environmental water trigger to the EPBC Act—and, at that time, the government rejected the idea. The question for the government to answer in this debate is: what has changed in the many times that the government rejected the proposal for it to now see the proposal as urgent?
Of course, what has changed is that Mr Windsor no doubt made acceptance of his proposal a condition of his ongoing support for the government.

There is clear evidence that this legislation was arrived at by a very dubious and questionable process. The department confirmed during a Senate inquiry into the legislation that consultation was not undertaken on the detailed text of the bill prior to its introduction and consideration by parliament. Indeed, any consultation on the general principles of this legislation was minimal at best. Even those who support it, such as the Australian Network of Environmental Defenders Offices, have said that the legislation came out of a bad process. We had, as I said before, a very comprehensive review—the Hawke review—of the EPBC Act. It did not recommend the change found in this legislation. It recommended a number of other changes, which the government has thus far ignored. The fact that it ignored them is symptomatic of a government which goes out, seeks advice for which it pays taxpayers’ money and then completely ignores the advice that it has been provided with and does the opposite or something else entirely. What is the point of undertaking reviews such as the Hawke review and getting a whole lot of advice and then ignoring it and doing something which was not even proposed by the Hawke review? It is quite remarkable.

Equally, the government in the lofty rhetoric of its earlier days, placed great importance on making sure that it did not impose undue regulation on industry. To make sure that there was not undue regulation on industry, the government would be handing down a regulatory impact statement on all new legislation or regulatory reform which could have an impact. Is there a regulatory impact statement for this legislation? No, there is not. The government, despite promising to do so and despite saying that it was essential to make sure that it minimised the level of regulation on the Australian economy and that the regulations were effective, has ignored its own processes once again.

As I stated, there are real concerns about how this reform creates a level of duplication with existing state laws. We should never forget in this place—and sadly in this the states' house it seems to be too often forgotten—that the states have a primary role when it comes to regulating land use and that the states have a primary role when it comes to regulating the exploitation of minerals and resources in those lands. That is how our Constitution was set up and that is how this country has effectively worked from the day of Federation: that the states take the lead in those planning roles. We do not have a planning minister at a federal level; states have planning ministers. They make the relevant decisions here. The resources are owned in essence by the people of those states. They are there for their benefit and their benefit to exploit as is appropriate.

Over the years, the Commonwealth has taken sensible steps to make sure that, where there are matters of national environmental importance, the Commonwealth has a say in regulating those. There were some proud reforms of the Howard government in that regard. They were important reforms that gave the Commonwealth a say in this regard, but that does not change the fundamentals that the states have extensive processes in place. The interesting thing that we saw in the Senate inquiry into this legislation was that, as Senator McKenzie in particular highlighted, all the criticisms seemed to be coming from just one state, and there is perhaps a good question to be asked here: whether the laws of that state are working effectively enough or not—whether they have provided sufficient confidence to their communities in their laws. But that does not mean that we should be coming in and imposing a new level of regulation that applies across all states—and applies right across the Commonwealth—and that will affect those states where there seems to be minimal or no community concern just as much as it affects those where there is very strong concern.

As I have also said, the independent expert scientific committee process is still in its relative infancy. This is still a fairly new process. It is a process that we supported. It is a process that we believe can and should provide greater rigour to assessments at a state level as well as a federal level. If there are legitimate concerns about the impact on water resources, it should ensure that state ministers have to take those into account when they are approving these developments. So, the changes to make sure that those with the power are well informed and well educated on these issues have already been made. The information is now being provided and the information is then made available to the public, as I said before. So why on earth is it now necessary, while this new process is still so young, to apply another different process on top of that? The government has given no justification for that, and that, of course, is because it is such a politically driven process.

There are also grave concerns about the fact that this legislation targets specific industries. This is a whole new world of activity for the EPBC Act, which traditionally has said that there are broad matters of national environmental significance that should be considered, regardless of what industry is proposing to undertake a
development. If this legislation passes, we are putting in place a new area of assessment, but only as it relates to the coal industry or the coal seam gas industry, only as it relates to those sectors. Anybody else is still subject to the state laws or to the original areas of the EPBC Act assessment. This targeting of specific industries is again a terribly flawed approach to legislative process in this place. It is a real concern that the government has decided to target these sectors and, beyond the immediacy of those sectors targeted, there are genuine concerns in many places, particularly in the farming sector, that, if one industry group can be targeted with specific environmental laws, what is to say that other industry groups in future cannot be targeted with specific environmental laws? There is genuine concern there about the precedent this bill sets and the distortion in terms of the universality of application of the EPBC Act.

We also heard during the Senate inquiry numerous concerns about the definitions applied to this legislation. The coalition senators have made some requests for the government to think about how it deals with those definitions. First and foremost, there are concerns about whether applications may be required simply to undertake exploration activities—not to undertake production, not to undertake the types of activities that could be highly disruptive to communities or to water resources but simply to undertake exploration activities. As many sectors of industry said during this inquiry, if they cannot do the exploration in the first place, they cannot undertake the thorough assessment to see what the environmental impacts will be. They need to be able to drill test sites in the first place so that they have a comprehensive understanding of the geography and geology of the circumstances they are working in. That is why the government should look very closely at how it defines what activities are captured by this bill. It should be excluding those that relate to exploration activities, and I urge the government to consider doing so. Equally, there were concerns expressed about the breadth of the definition that may apply to a water resource. The New South Wales Irrigators' Council, for example, argued that they believed that it could apply to all water resources. The Minerals Council asked the question: are we talking dry creek beds? Are we talking dams? Are we talking tailing dams? Are we talking water, coal seam gas? What are we talking—surface, groundwater, the lot? What is a large coalmine? What and where do mining related activities fit in the equation?

These questions seem to be left unanswered by this bill. The government should answer these questions clearly and should, ideally, amend its legislation to ensure it clarifies these concerns.

There are also concerns about the retrospectivity aspect of this legislation. This legislation would mean that, even if you are already undergoing an assessment process—even if you are already part of the way through your assessment—you are going to have to meet a new standard. You have already invested your money and you have already started to go through the very expensive and time-consuming process of getting your environmental approvals, but now, halfway through, the rules are going to be changed on you. That is not good enough. If this bill has to pass, it should only apply to new applications and not to those where the process is already underway.

Most remarkable is that during the debate on this legislation in the House of Representatives the government once again completely contradicted their own previous position by adopting at the last minute—while they were yet again in a complete state of turmoil over their leadership—amendments moved by Mr Tony Windsor. Those amendments serve to prevent bilateral approvals processes in this area. The government have previously rightly rejected pushes by the Greens to rule out bilateral approvals processes—processes where the states can be authorised to make approvals on behalf of the Commonwealth, subject to certain criteria. The government have previously ruled out Greens attempts to universally ban bilateral approvals, but now, halfway through, the rules are going to be changed on you. That is not good enough. If this bill has to pass, it should only apply to new applications and not to those where the process is already underway.

... what we want to work towards here is a streamlined system, so that projects don’t go through two layers of assessment for no real gain.

She was arguing for increased use of bilaterals at that stage. By December, she had changed her mind and had ditched that proposal. Now the government are proposing to outlaw bilaterals in certain circumstances. Talk about a complete about-face! Now they do not even want the legislation to include provision for bilaterals to possibly exist. The coalition will move an amendment to remove the change to the bill inserted by the House of Representatives. I urge the government, in the cold light of day, after having had a couple of months to think
about it, to support the coalition’s change in that regard. I also urge them to ensure that there is at least some level of consistency of application across the EPBC Act, rather than a complete hotchpotch.

We have many concerns about this legislation. As I said, though, we understand the concerns of the community as well. We hear those concerns and we are not, by opposing this legislation, going to allow the government to politicise this issue. We will work to fix these issues should we succeed later this year. We want to work to ensure that we get community confidence for this important industry, because it is an important industry. It is generating billions of export dollars and thousands of new jobs and is very important to the economic wellbeing of all states of Australia—to securing, in particular, our future gas supplies. (Time expired)