Legislative Council

Hansard

Thursday 31 October 2024

The President, Mr Farrell, took the Chair at 11 a.m., acknowledged the Traditional People and read Prayers.

[excerpt…]

VALIDATION (STATE COASTAL POLICY) BILL 2024 (No. 37)

Second Reading

[3.57 p.m.]

Ms WEBB (Nelson) - Mr President, I rise to speak on the Validation (State Coastal Policy) Bill 2024 and thank other members for their contributions. It has been interesting to listen to them, as it was interesting to listen to the various motions that were attempted in relation to this bill throughout today.

It has given us a lot to think about and a lot of pause for thought, quite frankly. At the outset, it needs to be said this bill has been contentious as soon as it raised its head in the public arena. There is no denying that. It has been contentious in the community and it has been contentious throughout its journey in the other place, and during the consideration of the bill so far by this Chamber.

I have already indicated this morning that my preference is that this bill be sent to a committee for thorough examination within the context of the entire State Coastal Policy, and to tease out exactly what is meant by legal risk, real and hypothetical. Let us hear what Louise the Lawyer may be able to put on the table without hyperbole, hot air and pressure, for example.

However, I think it is worthwhile to ensure those concerns about appropriate process and consideration are being placed on the public record in a comprehensive manner. I want to take the opportunity to make my contribution to that now. I thank other members for the thoroughness of their contributions already.

One key area of concern that remains is the apparent haste with which the validation bill was driven through parliament: first, through the incredibly brief public consultation process; subsequently through the Assembly; and now here. Just to remind you, the exposure draft bill was out for public comment for barely 16 days. Despite that brief time frame, it garnered more than 400 public submissions. Yet barely six days later, two of which were a weekend, leaving three working days for the consideration of all those submissions, apparently, the government introduced a bill into the parliament.

It was notable that there was no change attributable to any of those 400-plus submissions between the draft exposure bill and the version tabled in parliament six days after the public consultation closed.

Mr Duigan - Through you, minister, I believe there was a change.

Ms WEBB - One, was there?

Ms O'Connor - It was a change to the date the validation came into effect. It was a date change.

Mr Duigan - Dealing with the uncertainty around the date, but there was a change. There was a change.

Ms WEBB - The point I am making stands.

Mrs O'Connor - Sure, okay, you changed the numbers.

Mr PRESIDENT - Order.

Ms WEBB - The point I am making stands: that I think it is notable and telling, the time frame of that consultation then the tabled bill and the unavoidable perception it presents to us about what consideration was given to public consultation.

As I flagged during the truncated September debate that we began, the government only has itself to blame for the degree of community angst and disquiet since then, after such a blatant and disrespectful manner in which that so-called consultation process was treated. It is on the government if people felt that the process had been reduced to nothing but a sham or a PR exercise, because that is exactly what it looked like and, I imagine, to many people, felt like.

Now that the Chamber has determined, in its wisdom, to recommence debate on this bill today, I recognise the government will keep pointing to the fact that the previous debate in this place was adjourned during the budget session as if that was some great gesture of compromise or generosity on the government's behalf to grant more time.

However, let us be clear: there was no great generous gesture by the government at the time. This Chamber actually put its foot down at that point and said it was inappropriate to bring on non-budgetary business during the formal State Budget consideration session.

This bill should not have been attempted to be brought on for debate until the budget deliberations were complete. Let us be very clear about events and facts here. The government tried to bring it on during the budget session, the Chamber was on the cusp of saying no and the Leader at the time, I think, actually used the phrase 'reading the room' and the pause button was pushed.

Many of us here subsequently sought to put to good use the intervening period of time by seeking further input and advice, also hoping that we might be provided the specific information many members here had requested and spoken about - namely that formal legal advice which precipitated the bill before us, and a list or audit or some form of indication of the current structures on our coastline which are now apparently at imminent risk, owned by unspecified persons, whose names may or may not include alliteration.

Apparently, these unidentified structures warrant urgent legislative redress and, as has already been identified by other members, this urgency happens to occur at the timing of a juncture of a specific private development proposal which is the subject of a court challenge, which is partly why there is consternation arising here.

We have been told by the government that there is a considerable degree of urgency regarding this bill. However, the specifics of why it is urgent and for whom it is urgent remain somewhat oblique - in September, when we began discussing this, and it remains so now as we recommence.

I still believe the actual validation bill was pulled together in an unconscionable rush by the government in an attempt to undo potentially certain mistakes when it came to a certain planning authority and regulator's failure to consider the State Coastal Policy when determining a development application. Subsequently, parliament is being asked to stamp its approval on this attempt to undo that error, and for that reason alone I hold serious concerns about the bill itself, its impetus and also the process by which it brings us to this point here and now.

That leads me to the concern which I believe was the crux of the matter during the previous debate and during the numerous briefings that we have had on this bill: whether we are confident beyond a shadow of doubt about the need for this holus bolus validation.

We have been told the reason for, and the catalyst behind, this retrospective validation bill is legal advice received by the government from the office of the Solicitor-General. We have been told there is a serious and unacceptable degree of legal risk that has now been identified. However, we have only been told about that serious and unacceptably high degree of legal risk, second hand, as it were.

Members here previously today reiterated numerous requests that have been made for access to that legal advice to enable us to assess it firsthand to assist us in being able to evaluate whether the validation bill appropriately addresses and resolves all matters identified in that legal advice. The legal advice, we are told, is the catalyst for the bill and, therefore, the reason we are all having to spend valuable time and energy here today on the matter.

I do not need to remind members of the oaths that we all take upon entrance to this place to make decisions to the best of our ability on behalf of the Tasmanian community and in the public interest. Those oaths and commitments place the responsibility squarely on each and every one of us here to make decisions that are as fully informed as possible, and I know that we all take that very seriously, and to interrogate assertions made by those on the government benches, no matter which party stripe. When they come to us saying this is needed and for these reasons you must not stand in our way, we must interrogate such assertions.

We have a responsibility ourselves to ensure that we have left no stone unturned when we are evaluating the merits or otherwise of legislation put through this place. It must be noted there is precedent, as has been already mentioned today, in this place of the government attempting to facilitate that interrogative responsibility we hold by the facilitation of briefings relating to bills coming through this place.

That is a very good practice and I acknowledge that. However, I am sure I am not alone when I state that there is a growing sense of frustration over the convenient blocking of access to the most fundamental justification plank of the government's argument for a particular course of action, and that plank being their legal advice.

It is no surprise that we have received responses and advice from a range of stakeholders with legal qualifications and expertise, from the Environmental Defenders Office through to UTAS Law School academics Ms Anja Hilkemeijer, Professor Jan McDonald, Dr Emille Boulot and Ms Cleo Hansen-Lohrey. I thank Ms Anja Hilkemeijer and Professor Jan McDonald for the briefing they provided in person to members last month and, likewise, most recently, Dr Rachel Baird for providing us with information and a briefing yesterday.

However, these legal experts have all had to qualify their input into this debate, particularly when faced with hypothetical legal scenarios and queries regarding the legal uncertainty versus certainty, which were put to them by members during briefings. The reason I think many of us have attempted to run these queries and scenarios by the legal experts is

because of the glaring absence at the core of the fundamental material provided to justify not only the alleged need for the validation bill but the timing of the bill's debate.

Basically, members and those legal experts who have provided us with their time and expertise via the briefings have had to resort to shadowboxing that formal legal advice withheld from us. Could you imagine how much more constructive those briefings could have been with, for example, Professor Jan McDonald, Ms Hilkemeijer and Dr Baird if questions based on speculating about the unknown, at worst, or second-hand information, at best, which is the case with the government's relied-upon formal legal advice?

If those questions were indeed unnecessary and we actually had that more fundamental information, in an appropriate manner, members might have been able to utilise those briefings to interrogate whether and how well the validation bill addresses the matters in the government's legal advice. For all we know, the legal advice may have fully clarified some or all of the range of questions that we have been raising so far throughout briefings and the like.

This palpable frustration over the government's intransigence on this matter of providing confidential access to critical legal advice is also fuelled by what we know is an indisputable fact that there is a precedent of the government providing similar access on other occasions, and in particular when it is in its interest to do so. We have the established precedent of confidential access being provided to sensitive documents where they were secured, for example, in the Clerk's office, with MPs being able to view that on a strictly confidential basis. As far as I am aware, as I mentioned earlier in a contribution, there has been no concern raised or accusation made that any MP who utilised that confidential access mechanism at other times ever leaked or misused the information.

Basically, this refusal by the government places members here in an invidious position of being told by the government, 'Trust us, take it on trust that this contentious bill that is causing considerable community angst and disquiet, trust us that it is needed. We are not going to trust you, though, with the evidence justifying our claim that this bill is needed and it is needed now.' That is the crux of the particular matter. We are being asked by the government to trust it while at the same time it is telling us that it does not trust us.

Ms O'Connor - That is right. Very good.

Ms WEBB - I have a specific question on this matter for the Leader for which I would like a specific answer. Why cannot the government's legal advice be provided to members in the same restricted and confidential manner as we have precedent for regarding other sensitive documents requested by parliament, other than the stock standard excuse of legal privilege, which, as we know, can be waived by the client? Why is this particular request on this particular bill and matter different to those other instances of precedent where access was provided?

It could be an interesting test of the government's resolve should this place require access to the legal advice - which was such an instrumental catalyst for this bill's very existence - before we are prepared to vote on it, but it should not have to come to something as extreme as that. It is disrespectful what has occurred here, quite frankly, and unhelpful in achieving good outcomes for the community. In a broader sense, I do think that the government needs to rethink its belligerence when it comes to the blanket application of legal privilege and proactively develop a more nuanced range of options. We know matters of public policy are becoming more complex. As a community, we are becoming more sensitive to a range of intertwining and overlapping ramifications, including legal considerations, and it will assist this place in being able to work effectively and efficiently if we proactively develop inclusive protocols that facilitate access to even sensitive information upon which informed decisions

are required. Obviously, that broader protocol development is beyond today's debate, but I did want to make that point and plant that seed.

To reiterate, nobody wants to trivialise the significance of legal privilege, not by any means. However, at the same time, as stated previously, we also took a binding oath to make fair and informed decisions to the best of our ability. It is just as important that we are not hamstrung when attempting to deliver on that responsibility. I think this refusal to provide access to that critical catalyst for the bill - as I have already stated - is hamstringing this debate. In my mind, this is a critical issue that still remains unresolved.

Many of us here will recall instances of governments of all persuasions berating political opponents for wanting to 'move the goalposts' - as is often the phrase used - or of seeking to 'change the rules mid-course' would be another. Yet, any form of retrospective validation is by definition a legislative move of the statutory goal posts. This is also linked to the concerns over the critical legal advice. However, even if the matter of access to that advice is resolved to everyone's satisfaction, the matter of appropriate retrospective validation would remain as a separate consideration. Parliament tends to, and rightly so, take a cautious approach to retrospective validation as it is a form of state-endorsed moving of the statutory goalposts. We should not take that sort of move lightly.

The irony of retrospective validation is that, in its quest to provide certainty born of hindsight, it can actually foster greater uncertainty. However, the outstanding concern in relation to this particular validation bill - just as it was in September and which remains the case now - is the glaring absence of an itemised list of coastal infrastructure apparently identified to now be at legal risk. This audit has been requested on numerous occasions, yet it does not appear to exist. Again, this raises considerable questions over the actual, and degree of, identified uncertainty warranting the bill.

Yesterday, Dr Baird raised the point that should the assessment of the State Coastal Policy issues be correct, then there is a risk that now-identified unapproved developments could decrease in value and be difficult to insure. Despite that point, providing potentially justified retrospective validation would only justify those developments that have been constructed and therefore have value and are insurable.

Yet, concerns have been raised that the current bill is designed to specifically target the only development to have been challenged on this basis in the last 30 years, it would appear, which has not even been constructed and is not insurable at this point, a classic example of potential overreach.

It raises the point of what other developments might be in the pipeline that have either been given planning approval, or will get planning approval before the royal assent is received in the knowledge of this uncertainty about the actively mobile landforms which could now receive the benefit of this retrospective validation process, even though construction has not commenced and nor are there yet any insurance concerns.

It is a matter of legislative and policy coherence that any retrospective validation should apply only to those developments which fall into specifically defined categories. For example, substantially commenced; or, if not existing, those which are itemised by a compiled audit which should receive the benefit of legislative retrospective validation. It appears a nonsensical tautology for a retrospective validation bill to also apply to currently non-commenced structures and developments.

The fact this bill is about amending the State Coastal Policy to facilitate the proposed pilitika/Robbins Island wharf project is evident by the fact it is framed as a validation bill, not specifically as a retrospective validation bill, because the proposed suspension of the specific outcomes of the State Coastal Policy looks forward as much as it looks back to 16 April 2003, as specified in clause 3 of the bill. Again, I still consider the question surrounding the lack of clearly identified coastal structures deemed to be at legal risk without this validation bill has yet to be adequately resolved.

Another key consideration that has been raised numerous times this morning and still remains pertinent, to my mind, is the very real question over the appropriateness or otherwise of the timing of this validation bill in light of the current related Supreme Court action underway. This is another step that some may argue is not that unusual for governments to seek to do in attempts to clarify laws for specific and usually commercial reasons, while legal cases are underway. However, it is another step which should not be taken lightly.

Therefore, despite it already haven been raised earlier today, it still warrants being revisited in the context of this substantive second reading debate and contribution, and I note many other members have raised this similar concern. The separation of powers is a fundamental principle upon which our system of governance is built and depends.

Again, the government's formal legal advice may have discussed appropriateness or otherwise of seeking parliamentary intervention in this matter while related cases are before the courts. However, we do not know whether that was included in the legal advice provided because we have not seen it.

The written submission provided by UTAS law school academics mentioned previously - Ms Anja Hilkemeijer, Professor Jan McDonald, Dr Emille Boulot, and Ms Cleo Hansen-Lohrey - states:

> The Tasmanian Government's explanation of this Bill is that Parliament should pre-empt the Supreme Court's decision and retrospectively remove the operation of Outcome 1.4 of the State Coastal Policy because of uncertainty as to the scope of its application. The Government points to two things as evidence of that 'uncertainty': first, that that Outcome 1.4 in the State Coastal Policy does not include a 'definitive description' of 'actively mobile land forms'; and second, that there is no accepted map of those land forms.
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> Turning to the first of these, it is important to note that uncertainty always exists within the law and that it is the role of the courts to construe terms in legislation.

To reiterate, it is the role of the courts to construe terms in legislation, so nothing to panic about. In this context, the courts' processes are a baked-in component of our legislative system. Therefore, why has the government gone into this panic, it would seem, as that is what the rushed development of this bill and the pressure applied on this place in the parliament to not delay debate on it demonstrates? It feels like some form of panic.

As we have heard, their speculation is to shore up - no pun intended - the proposed pilitika/Robbins Island wind farm, despite the protestations of the government that it is due to the sudden and urgent risk faced by all the unidentified currently existing coastal structures.

Suffice to say, we may not need to wait too much longer to find out what the Supreme Court has to say on the matter. That decision may prove that no validation is necessary, or it may provide a published justification for law reform that we hear, as legislators, is currently being denied by pre-empting that decision.

There is no guarantee that even with this validation bill we will not find ourselves here again with further amendments required. As has also been previously stated, but worth reiterating, the government has already flagged a review of the State Coastal Policy. In fact, we know that there is every likelihood further amendments are going to come through this place at a later date. Yet again, we are being asked to take a piecemeal and ad hoc approach to this significant component of our statutes, planning, and environmental protection frameworks; potentially unnecessary, and definitely looking somewhat irresponsible. On this outstanding and significant question regarding the appropriateness or not of seeking to pre-empt a live matter before the courts, I remain unsatisfied.

When looking at the bill before us, it is a slight thing, physically, a few pages. Anyone familiar with public debate and context and who just happened to pick up the document could be forgiven for wondering, 'Is this it?' However, we have heard via stakeholders outside the Chamber, as well as raised during members' contributions, the crux is in the detail regarding the actual or potential developments on actively mobile landforms. We have heard various degrees of assertions from the government that this validation bill will not alter or amend the actual State Coastal Policy 1996. However, what it does seek to do is to override outcome 1.4 of the policy in so much as it relates to developments and structures on actively mobile landforms and which have LUPAA permits.

The government is arguing that we, as legislators, should pre-empt the upcoming Supreme Court decision and retrospectively remove the operation of outcome 1.4 in these contexts due to apparent advice highlighting uncertainty on the scope of outcome 1.4's application, but technically outcome 1.4 will remain in the policy in print, but not in effect for these structures or developments as defined in the bill.

This means the government is relying, as we have heard through briefings from the department and others, upon convincing us, as legislators, that the policy does not contain a sufficient definitive description of 'actively mobile landforms' and, further, we do not have a definitive map of such landforms. It is the basis of the apparent identified uncertainty.

However, as we have heard from stakeholders with legal expertise, wording of the Tasmanian State Coastal Policy along with other technical documents should be sufficient to define 'actively mobile landforms' and that extensive mapping of hazardous coastal areas in Tasmania already exists. Further, we have only just this week been provided with visual evidence of such landforms. This was in a video link circulated to all members by Mr Grant Dixon. His credentials were detailed in an accompanying email. I appreciated the opportunity to view that and to hear from him.

For those listening, I am going to take the opportunity to summarise Mr Dixon's credentials and the footage provided. Mr Dixon is an earth scientist with 35 years of expertise in geoconservation and land management and is a published author of multiple papers in those areas of study. The brief barely two-minute video clip provided shows an active and erodible shoreline. This is the location covered by the pilitika/Robbins Island wind farm permit, which will be validated by the validation bill.

Mr Dixon describes this area as consisting of:

> A sand cliff up to 5 metres high, scattered with toppled vegetation from the dune system behind, extends the 10-kilometre length of the beach. The dune system itself, while partially vegetated, cannot be considered stable. Furthermore, dune sand mobility can change significantly over short time periods. Incipient sand

> blows already exist near the proposed wharf site and blowouts elsewhere have developed rapidly.

Even if we are to accept the government's assurances at face value that this validation bill is not about the pilitika/Robbins Island wind farm development proposals, any changes to the scope of the application of outcome 1.4 of the State Coastal Policy will definitely have an impact on that development proposal as it is currently conceived and for the location proposed. How could it not? We have seen a tangible example of an actively mobile landform in the vicinity of an actual development proposal, unlike the apparent list of other structures and developments that could be at risk but for which we have not been provided with equivalent tangible examples.

Mr Dixon also states:

> The State Planning Office presented a map suggesting a relative paucity of actively mobile landforms on Robbins Island, but there are a range of technical, spatial and scale issues with this present dune mobility GIS layer such that it is not accurate nor fit for purpose.
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> Also, percentage of vegetation cover is not a reliable indicator of existing or potential dune mobility and dunes are also not the only coastal landform that may be actively mobile in any case. Actively mobile landforms on the east coast of Robbins Island are far more extensive than the map presented by the State Planning Office suggests.

He was referring there to maps that we were shown during briefing sessions that we had on this bill.

Clearly, it is all very well for the government to try to claim this validation bill will not have any bearing on the current Supreme Court action underway. It will definitely have consequential bearing for this one particular wind farm development proposal and the court action that is occurring.

While I am discussing the footage, I also wish to place on record the fact that this visual evidence was obtained via drone footage just this weekend gone. I think it is important to clarify that point as apparently it has been inferred by the government that Mr Dixon has had plenty of time to provide members a briefing on this footage and its implications. Yet, the footage was only obtained this last weekend. In fact, it was new and very timely. I appreciate his efforts.

Ms O'Connor - Good on him.

Ms WEBB - As we have heard it raised numerous times, the government has relied upon unsubstantiated claims that there are a range of structures built on actively mobile landforms, including boat ramps and jetties and the like, that are at legal risk and require validation. We have not been provided with one single identified example of a structure such as a boat ramp or a jetty that may be at legal risk and requires validation of its permit. Yet, ironically, we do now have a clear visual example of a landform at risk which the coastal policy explicitly is meant to protect, which it is hard to argue otherwise is at risk of further damage should the validation bill in its current form be passed and that particular development validated. This is a very serious potential ramification. I could stand here and cite swathes of significant evidence and expertise-based submissions and other material that raised, considered and substantiated concerns about the bill. However, I am aware that members have had access to the same materials, and many have already cited quite a lot of them during the debate so far.

I do not want to repeat too much from others' contributions and thank you for the indulgence where I have overlapped already.

Before I close, I want to highlight concerns raised regarding the risk of unintended legal consequences as raised by some stakeholders. This is an important line of examination, and it would be remiss of us not to acknowledge on the public record as, again, it is an area of this debate that has not been fully addressed by the government.

I remind members of the EDO submission of 1 August, which articulated these concerns quite succinctly. As such, I will quote from the submission:

> EDO is concerned that the proposed validation of permits under the Bill may endorse permits for developments on actively mobile landforms that were never properly assessed by planning authorities or implemented by developers. This may have unintended negative consequences for lutruwita/Tasmania's coasts and communities, potentially exposing them to harm or impacts from developments that should never have been built. A correlated issue is that, where developments have been built on these actively mobile landforms and result in some harm or loss to life, property or the environment, it is unclear who will be held liable for the remediation or mitigation of those harms. Will it be the councils that erroneously approved the permits for the developments? The developers? Or will the Tasmanian Government ultimately pick up the tab for those losses given that, through the Bill, it proposes to 'validate' the permits?

The EDO then went on to formally recommend that further information concerning the legal liability for harms arising from development on actively mobile landforms should be released before the bill is tabled in parliament. Well, good luck with that. We cannot even get that information before the bill. We certainly have not been provided with that information before the bill is debated in parliament.

Planning Matters Alliance Tasmania (PMAT) also highlights these concerns by raising the following three points:

> Firstly, liability associated with structures that have been built on actively mobile landforms may be transferred from the proponents or local councils to the state government with financial implications for Tasmanian taxpayers.
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> Secondly, does the validation bill apply to works that have occurred illegally during the validation period or future works that do not obtain a planning permit?
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> And thirdly, uncertainty existed about permits issued before the validation period, say, for example from 1996 to 2003, and what the status of that is.

I hope the Leader, in her summation, will be able to answer the following specific question for the government: Can the government provide any evidence demonstrating whether and how it may have considered and/or consulted on the potential risks of unintended legal consequences of the implementation of this validation bill?

To conclude, I believe there are key and pertinent matters still unresolved regarding this bill. To reiterate, I specifically hold reservations regarding the purported legal justifications for both the need for the validation bill and its timing. The lack of legal advice could have been resolved by the government one way or the other if it had chosen to do so.

Having a formal legal advice void on the one hand makes me feel the need even more urgently to not pre-empt a judicial process currently underway. Nothing the government has said has convinced me that this debate could not be deferred until after the upcoming Supreme Court action, nor that this debate may not be further informed by any Supreme Court decision and determination.

Further, I hear the considerable concerns raised by the range of community-based stakeholders, academics and individuals in relation to this bill and particularly those concerns regarding the broad sweep and scope of the bill - that it will be applied beyond just those unidentified current alliterative coastal structure owners and will be also applying to proposals yet to have their approvals confirmed and also yet to have commenced substantially, such as the proposed wind farm development on pulitika/Robbins Island.

Therefore, I cannot support the bill in its current form. However, I will foreshadow my intention to move an amendment should the bill pass into the Committee stage. That amendment has been circulated to members this afternoon, I will not detail the argument in support of that amendment now. Suffice to say it intends to clarify that the validation only applies to those types of established coastal structures we have heard are the urgent reason we need to deal with this bill, but it will exclude those developments that have not substantially commenced. This may also assist in mitigating the pervasive sense of unease held by many of us in this Chamber of interfering with a court action currently underway. It is also consistent with the government's stated priority purpose of this bill and its necessity to provide certainty to minimise legal risk for those existing structures. However, as I said, I only wish to foreshadow my potential amendment now, and will leave my substantive prosecution of that argument for the appropriate time should it arise.

To conclude, I wish to state and place on the public record my deep appreciation and thanks for the time and effort made by all stakeholders and members of the community who contacted me directly as well as those who made themselves available to provide briefings and materials for consideration of this Chamber. I have personally found the high level of committed engagement, professionalism and generosity by individuals and community groups on this matter inspiring and informative. Equally, the expertise and the information provided by people in their professional capacity and those advisers from the department are also greatly appreciated.

To reiterate, I will not be supporting the bill in its current form and, therefore, although I will not be voting in support on the second reading, I do reserve the right to seek to amend the bill should it progress to the committee stage for consideration.