

Response to Call for Submissions to Legislative Scrutiny Committee Territory Coordinator Bill

I make this submission to the Parliamentary Scrutiny Committee as someone who has been a resident of the Northern Territory for 36 years. I hope that the points made can contribute to your discussions of this draft Bill.

Elsabe Bott

(i) whether the Assembly should pass the Bill

No

(ii) whether the Assembly should amend the Bill;

Yes

(iii) whether the Bill has sufficient regard to the rights and liberties of individuals;

No

Natural Justice

In my discussion of this I am bearing in mind the following definition of natural justice from the Australian Government Law Reform Commission;

“The common law recognises a duty to accord a person procedural fairness—a term often used interchangeably with natural justice—when a decision is made that affects a person’s rights, interests or legitimate expectations.”

A major concern for me is around section 62 of the draft Bill.

62 Effect of statutory decision made under step-in notice

- (1) A statutory decision made by the Territory Coordinator under this Subdivision, including a decision to impose a condition:
 - (a) is taken to be a decision of the original entity, but a person may not apply for a review of, or appeal against, the Coordinator's decision under this Act or the relevant law; and
 - (b) takes effect when the applicant for the decision and the original entity are given notice, under section 63(1), of the Coordinator's decision.
- (2) If the original entity subsequently imposes a condition in relation to the statutory decision, it is of no effect to the extent that it is inconsistent with a condition imposed by the Territory Coordinator.

I consider this aspect of the draft Bill to be an action against natural justice, due to the fact that there is no right of appeal against the decision of the Territory Coordinator (unless this is taken to the Supreme Court) and, that the original statutory body can try to bring in protections against the decision that has “no effect” if it is “inconsistent”. Essentially, if an individual or entity affected by a step-in notice does not have the financial resources to take a decision to the Supreme Court, then how can the process of natural justice occur? Members of the community can currently take concerns to the Northern Territory Civil and Administrative Tribunal, under this Bill, at greater cost, they will have to take their appeal or request for review of any decisions to the NT Supreme Court. This is clearly disempowering the very people that this Bill purports to be benefitting and therefore appears to be denying them “procedural fairness”. It also raises the question of why this is deemed to be necessary, the assumption that can be made is that this change is

simply an attempt to find a deterrent to any appeals, in order to facilitate the development being proposed, clearly putting Territorians last and the interests of big business and industry first. The fact that this exists within the Bill does not engender confidence in the Bill as a whole. In effect it leaves the NT community powerless and surely infringes on their rights.

Additionally, under the new revision of the draft Bill the limitation provision that prevented the Territory Coordinator from exercising powers that would interfere with an agreement between the Territory and the Commonwealth, has been removed. This would have prevented actions by the Territory Coordinator under the Northern Territory Aboriginal Sacred Sites Act 1989, and the recognition and protection of native title rights. How is this change, natural justice for Aboriginal people of the Northern Territory? Must we go back in time in the Territory to when protests and actions needed to be taken to protect sacred sites and to acknowledge native title rights? Surely the Territory has matured enough to have moved on from such disregard for such things. These limitations should be reinstated.

Ambiguity

The draft Bill is lacking any form of definition of ‘economic prosperity’ I note that the Consultation Report states;

“Some stakeholders argued that the Primary Principle and the term ‘economic prosperity’ were unclear, and that an emphasis on economic prosperity might lead to decisions that neglect broader sustainability goals or fail to account for community, ecological and cultural impacts.”

I understand that in a new draft of the Bill, the words ‘economic prosperity’ have been changed to ‘economic development’. It is still unclear; however, what criteria the Minister and the Territory Coordinator would use to make their decision. Upon what evidence would it be decided that a project would provide ‘economic development (prosperity)’, what test would be provided to ensure this? The Act does not require this to be proven. How can the Office of the Territory Coordinator or the Minister reassure the community that this will be an outcome, particularly if exemptions are granted that allow checks and balances to be pushed to one side? This is a risk to the community of the Northern Territory. I note that Section 4 does refer to amongst other things, job creation and population growth within an attempt at creating a meaning of ‘economic significance’. I further note the following reporting in relation to Inpex which was and is still, presented to the public as boosting the population and growing the economy.

“At peak construction about 8,000 workers were employed; 1,000 were local residents, according to the 2016 Census. Soon, just 270 workers will be left at the Blaydin Point site as the project enters its 40-year operational phase.” ABC News Sat 29th Sept 2018

Additionally;

“Despite the presence of two large LNG facilities in Darwin (Santos’s Darwin LNG and INPEX’s Ichthys), only around 1,000 people are employed by the gas industry in the Northern Territory. This is only around 0.7% of the workforce. Put another way, 99.3% of Territorians work in industries other than the gas industry.” (Australia Institute)

If this is an example of how a project would contribute to population growth and job creation, then it does not engender much hope. By pushing aside statutory bodies with expertise in their area, through the use of a step-in notice and in not allowing appeal or review, this Bill seems very heavy handed in its approach and it is not one that can guarantee the outcomes under its definition of ‘economic significance’.

Scrutiny

While the draft Territory Coordinator Bill does state that if the Minister is to grant an exemption, this must be taken to the Legislative Assembly and voted on, how is this anything other than simply a process whereby the government of the day can ‘tick a box’ in terms of democratic process by stating that it has the approval of the Assembly? If a conscience vote was allowed, so that MLAs could canvas their constituents and vote as they want, this check, might have some validity, otherwise, voting will simply be on party lines. In a situation such as we have at the moment with such a large majority and little genuine debate of Bills, this can be described as a very toothless protection that is being provided to reassure the people of the NT that democratic processes are being followed.

Changes that have been made to the Bill in the new draft, also reduce the opportunity for the community to scrutinise what is happening under the powers given to the Territory Coordinator by this Bill. There is no longer a requirement under the new draft of the Bill for the Office of the Territory Coordinator to publish on their website prioritisation, progression or decision-making requests. These are now apparently to be published on a public register, although no details are given as to where this register will be held or how the community access it. As with the details around changes to rights of appeal, referred to earlier, this step also disempowers the community. It also appears that decisions are almost being hidden from the community, who in the end, are the ones who are going to have to bear the brunt of any decision that impacts negatively.

(iv) whether the Bill has sufficient regard to the institution of Parliament.

Many of the Bills that are attached to the draft Territory Coordinator Bill, already give Ministers far reaching powers. Given this, it is unclear why there is a need for an additional position that can remove a Minister from the administration of a Bill attached to their portfolio, particularly when this position is one that is an unelected official.

As stated previously, the fact that the Legislative Assembly vote on exemptions does not guarantee rigorous examination of the proposed exemption, due to a Government normally having a majority who would vote in favour. It also does not allow for the community to have any input into the decision of whether an exemption should be granted. Perhaps consideration could be given to the role of the Scrutiny Committee, or some other committee in this space, so that submissions from the community, particularly those who will be impacted by any exemption, can be sorted.

Conclusion

This Bill has extensive powers and while it is being presented as having a major positive impact on the Territory, unsaid is the potential negative impact that can also flow from this Bill, not the least of which is a total disregard and disempowerment of the community at large and the placement into the hands of an unelected public servant, enormous and potentially unchecked powers. As superficial and lacking in gravitas, as the Consultation Report is, it is hard to reconcile some of the changes that have been made to the original draft Bill, with the Consultation Report. My hope is that this Committee listens without bias to all the submissions that are made to it.