ENVIRONMENTAL PROTECTION AMENDMENT (VALIDATION) BILL 2014

Introduction and First Reading

Bill introduced, on motion by **MR A.P. Jacob (Minister for Environment)**, and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR A.P. JACOB (Ocean Reef — Minister for Environment) [12.21 pm]: I move —

That the bill be now read a second time.

The Environmental Protection Act 1986 establishes the Environmental Protection Authority as an independent body of five members, appointed by the Governor, who have an interest in and experience of matters affecting the environment.

One of the principal functions of the authority is to conduct environmental impact assessments of proposals that are likely, if implemented, to have a significant impact on the environment. The authority is required to prepare a report on the outcome of its assessment. The authority's report informs the decision of the Minister for Environment and other decision-making authorities as to whether environmental approval should be granted; and, if so, the conditions to which that approval should be subject. The act emphasises the requirement for the authority and its members to act independently in the performance of that function. Section 8 of the act specifically provides that neither the authority nor its chairman shall be subject to the direction of the Minister for Environment. Section 10 of the act gives members of the authority the responsibility of determining the manner in which the business of the authority shall be conducted, subject to the act. Sections 11 and 12 of the act contain important provisions for the conduct of meetings by the authority. Section 12 prohibits members with a direct or indirect pecuniary interest in a matter before a meeting of the authority from taking part in the consideration or discussion of the matter, or voting on the matter. Section 11 establishes the quorum for a meeting at three unconflicted members.

Prior to 2003, the act allowed members with a pecuniary interest in a proposal being assessed by the authority to take part in the consideration or discussion of the matter, but not to vote on the matter. That position changed in 2003, when the act was amended to provide that members were wholly excluded from discussions about a matter in which they had a pecuniary interest.

On 19 August 2013, the Supreme Court delivered its decision on a challenge to the validity of environmental approvals for the Browse LNG precinct. The court upheld the challenge on the basis that the authority had failed to comply with sections 11 and 12 of the act. The Supreme Court found that the authority failed to comply with section 12 of the act when members who held shares in companies with a commercial interest in the outcome of the Browse LNG precinct assessments participated in the process. Because the shareholding members were sometimes required to form a quorum, there was also a failure to comply with section 11 of the act. As a consequence of the failure to comply with these provisions, the court held the environmental approvals, which followed the authority's purported assessment, to also be invalid.

Following the Supreme Court's decision, the government sought legal advice in relation to other matters in which there may have been a failure to comply with the requirements of the act relating to conflicts of interest. Advice was provided by the State Solicitor's Office, and was recently reviewed by David Bennett, Queen's Counsel, who is a former commonwealth Solicitor-General, and Andrew Tokley, Senior Counsel. Having considered this legal advice, the government has identified 25 cases where there is a risk that state environmental approvals for projects other than the Browse LNG precinct proposal could be held to be invalid. Broadly, those cases involved members of the authority who held shares in companies with a commercial interest in the outcome of the authority's assessment participating in the assessment.

The review of EPA assessments undertaken to inform the SSO advice identified a change in the internal governance practices of the authority from late 2008 to 2012, whereby conflicted members were allowed to participate in the assessment process, in spite of the 2003 act amendment disallowing the practice. The ministers at the time were not advised of this change to the authority's internal governance practices. Other cases, including two examples in 2005, were also identified where a member failed to disclose an interest. There were also some occasions on which the authority responded to a conflict by purporting to delegate the decision to particular members when no applicable delegation was in place. As a result of this practice, the validity of environmental approvals for projects involving significant capital expenditure is now subject to doubt. Legal advice has determined that there is potential for these projects to be disrupted or delayed if legal challenges are mounted to the validity of the relevant environmental approvals. In the event that a challenge was successful, the

environmental approval would be set aside by the court and the implementation of the project would need to be suspended while a new environmental assessment was undertaken.

At the conclusion of this speech I will table a list of the environmental impact assessments by the authority that have been identified as being exposed to a significant risk of challenge. Those cases are principally large mining projects where very large sums of money have been invested in the state.

There has been no suggestion that any member of the authority was in fact influenced by any shareholding or other pecuniary interest they may have had in the outcome of the assessment. There is nothing to indicate that the authority did other than assess the environmental factors relating to proposals on their merits.

In the interests of promoting certainty in investment in Western Australia, particularly in the resources sector to which most of the doubtful approvals have been given, it is proposed to enact legislation to validate approvals that may be invalid by reason of the failure by the authority to comply with statutory requirements relating to conflicts of interest. Approvals where conflicts were dealt with by relying on a delegation that was not available will also be validated.

The bill effectively provides that the rights, obligations and liabilities of all persons shall be the same as if each relevant action of the authority and subsequent environmental approval had been validly done. The relevant actions to which the validating legislation will apply will be those actions that are invalid by reason of a failure to comply with section 11 and/or 12 of the act; the existence of a reasonable apprehension of bias by authority members; or the response to a perceived conflict of interest being to rely on a delegation when no delegation was in fact available. That validating mechanism has been adopted in other cases, and the constitutional validity of that approach is well established.

The bill will not prevent a court from setting aside an approval if it finds that the authority's assessment was actually influenced by the interest of one or more of its members. The validating legislation will not prevent decisions being challenged on grounds which do not concern conflicts of interest.

Because the assessment of the Browse LNG precinct proposal has already been the subject of a judicial determination, the government has decided that the bill should not validate actions and decisions taken in the assessment of that proposal. The bill does not affect the decision of the Supreme Court in that matter. Three delegates of the authority, who had no involvement in the process held to be invalid by the Supreme Court, are currently undertaking a fresh assessment of the Browse LNG precinct proposal.

In light of the court's decision on 19 August 2013, I asked the authority in September last year to provide me with written advice regarding its treatment of perceived and actual conflicts of interest, including the status of the authority's code of conduct and procedures, and the regularity with which the code was reviewed and updated. I requested that the authority seek advice from the Public Sector Commissioner regarding its governance arrangements in preparing this advice for me. As a result of my request the authority undertook a detailed review of its governance arrangements and in April this year it adopted a revised code of conduct, which took into account advice from the Public Sector Commissioner. The code of conduct is considered to fully address the legal requirements of the Environmental Protection Act 1986 and all public sector and government requirements for boards and committees.

Although this review has seen steps taken to ensure compliance with the conflict requirements of the act in the future, the fact remains that the past failings could only be cured either by undertaking a reassessment of the affected proposals, some of which are already in the course of being implemented, or by validating legislation. As well as the considerable public expense which would be involved in a reassessment of all those matters, significant investment in private and public works that underpin the state's economic development would be put at risk. The reputation of the state as a secure place for substantial capital investment could also be compromised. The government has decided that validating legislation is necessary to avoid these outcomes.

I table a list of the assessments by the authority that have been identified as being at significant risk of legal challenge.

I commend the bill to the house.

[See paper 1989.]

Debate adjourned, on motion by **Mr D.A. Templeman**.