

ENVIRONMENTAL PROTECTION AMENDMENT (VALIDATION) BILL 2014

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 4: Part X inserted —

Debate was interrupted after the clause had been partly considered.

Mr C.J. TALLENTIRE: At this point of discussion on clause 4, I move an amendment that stands in my name on page 16 of today's notice paper —

Page 6, after line 11 — To insert —

- (2) Section 136 does not apply to the report and recommendations of the Environmental Protection Authority on Roe Highway Stage 8 extension (Report 1489, September 2013).

There are many reasons why we believe that this exemption is essential to the good operation of the bill currently before us. The Roe 8 proposal referred to is unique amongst the proposals that the minister has identified as being subject to a conflict of interest and therefore requiring some form of validation. It is unique because, to my knowledge, it is the only government-managed, run and owned project on that list. Also, the proposal is not in any way implemented, so it is not as though we would let down contractors who may have money at stake if we were to require the recommencement of the whole assessment process. We know there is a degree of taint that has come about on this particular project. I will use the words of Chief Justice Wayne Martin, who talked about assessment processes being vitiated by the participation of disqualified members.

The ACTING SPEAKER: Excuse me, members; there is a bit too much conversation in the house for consideration in detail.

Mr C.J. TALLENTIRE: “Vitiated” means tainted, spoiled, made invalid, so I think it is incumbent on us to ensure that there is a recommencement of the assessment process for the Roe 8 project. I will go into some of the environmental issues at stake with that project, but I want to say again—I think it came up in contributions to the second reading debate—that the Environmental Protection Authority itself had on two occasions made very strong comment against this project proceeding, yet we find in the report that came out in September 2013, so after Chief Justice Martin made his judgement, some really curious, strange wording that seeks to legitimise the current proposal. It acknowledged that previous reports by the EPA found negatively against the project, that there would be huge loss of biodiversity, that it would sever the Beeliar wetlands by putting a road reserve between North Lake and Bibra Lake, that it runs through Bush Forever site 244, that the area had been identified through the system 6 approach as worthy of conservation and that there is any number of studies and reports that highlight the environmental significance of this area. Through this proposal we have also seen the extent of environmental destruction that would occur—the clearing of 97.8 hectares of native vegetation, and the loss of 78 hectares of foraging habitat and 2.5 hectares of potential nesting habitat for Carnaby's black-cockatoos. This was the subject of the government's dorothy dixer earlier. This amendment makes it very clear that we acknowledge that Dr Chris Whitaker's involvement in the assessment process, as Chief Justice Wayne Martin said in reference to another proposal, has vitiated it.

Mr W.J. JOHNSTON: I am very much interested in hearing further from the member for Gosnells.

Mr C.J. TALLENTIRE: I will just continue a little further. I have colleagues who have strong knowledge of this area and of the community support that exists for the protection of the Beeliar wetlands, and who will outline why we believe we should exempt Roe 8 from the validation process. It is clear that the government has not begun this project. That is a matter of evidence—anyone who visits the site will see there is no construction underway. It is a very easy project for us to reopen and to consider the facts on. When there are two reports from the EPA saying that the project should not go ahead and another report with the taint of conflict of interest over it, I think there is clear justification for us to require that this report be annulled and that we ask the EPA to recommence its assessment of the proposal to construct the Roe 8 project. I know some members opposite are very enthusiastic about this project, but let us make sure that the environmental assessment process applicable to it is free of any vitiation. I hope that on this occasion the minister will accept our amendment. I also note that Labor members of the upper house, and I imagine Greens members and possibly National Party members, will be very concerned about this proposal. In the upper house there is always that potential for extended debate on bills and we know the urgency with which the government wants to pass this legislation through Parliament. I think it is important that the minister bears this in mind when seeking to negotiate through the relatively swift consideration of this bill. If the minister can exempt Roe 8 from this validation process, I think it will make life much easier for the government to get this bill through Parliament.

Extract from Hansard

[ASSEMBLY — Wednesday, 17 September 2014]

p6474b-6482a

Mr Chris Tallentire; Mr Peter Tinley; Mr Bill Johnston; Ms Simone McGurk; Mr Fran Logan; Mr Dave Kelly;
Mr Albert Jacob

Mr P.C. TINLEY: I will make a very quick comment. This amendment is actually quite valid for several reasons. The first is that the Roe 8 project is still on foot with the Appeals Convenor. The second is that one of the things that has changed with this project is that it is now far wider in scope than just the Roe 8 extension. It is far wider in its implications for the environmental fabric of the state of Western Australia—the natural environment, the built environment and the social environment—particularly for the south metropolitan area, than it was in its first scope. We are now talking about not only the Roe 8 extension, but also the Perth Freight Link, which is an entirely different prospect. It would require that this, as a total project, be considered quite separately from the previous consideration. The third point is that there are likely 24 other projects found to be invalid, causing the result of this amendment to the act. This project is without any direct commercial interest from other parties—it involves crown land and state money. On that basis alone, and for those three reasons, this project needs to be struck out and this amendment needs to be supported. It is quite simple and it is no problem for this government and the agency to strike out this project from this bill and deal with it under the normal processes. As the minister has said, there are already mechanisms in relation to straightening up the problems with conflicts of interest within the authority, so this particular project has no benefit from this revisionist legislation—it has no place in this legislation. I seek the minister's comments on those three points and I put it to him that this is a different project and it has economic, social and environmental implications.

The basis of the expanded scope of the project means it should be considered as a whole. This project is at \$1.6 billion now, and given the Minister for Transport's non-answers to questions on the escalations of railcars, I suspect it is the thin end of the wedge for a project of this size. We have to talk about the future of the ports' capacity and the Minister for Transport said by interjection yesterday when I was on my feet debating port capacity that he holds the conventional view that future port capacity is 1.4 million twenty-foot equivalent units, and we are currently at 700 000 TEUs. The reason that is important to this particular issue is that we do not know the scope of the impact on the environment. Will the Perth Freight Link move 1.4 million TEUs through that corridor or will it move upwards of 2 million TEUs, 1 million TEUs, or what?

The minister cannot tell us. How can the environmental agency charged with the protection of the environment and with making recommendations to the government about impacts on the environment make a meaningful assessment? The Perth Freight Link project is far wider than the agency originally scoped out, and it needs to be struck off. This amendment needs support.

Mr W.J. JOHNSTON: Roe stage 8 is an important issue in my electorate. People may not understand that Roe stage 8 is a debate about trucks on Leach Highway. Leach Highway is, and will remain, the shortest route from the industrial estate in Welshpool–Kewdale to the seaport. Even building Roe stage 8 does not change that fact. Roe stage 8 is sold to the community that I represent and neighbouring communities as the solution to heavy, noisy trucks on Leach Highway. It is never explained to people that building Roe stage 8 will not take one truck off Leach Highway because, given a choice, trucks will continue to use Leach Highway, as they do today, because it will still be the shortest route to port.

The federal government has a proposal for the Perth Freight Link project. I understand from the reports on that project that it is recommended that a toll road for trucks be introduced. Not only will it continue to be cheaper, quicker and easier for trucks to go down Leach Highway to get to the port from Kewdale, which is through my electorate, but also there will be a double penalty if they use the freight link because they will have to pay a toll whereas there is no toll on Leach Highway. Every day that I use Manning Road to cross Leach Highway, I see these huge trucks towing trailers with boxes going to the port. Many years ago, trucks longer than 25 metres were banned on Leach Highway. In the past, I have asked ministers for transport, not the current minister, what they were doing to enforce the truck ban. The government has no enforcement action in place for large trucks using Leach Highway in the suburb of Wilson. They keep residents awake, causing them disturbance and polluting the local environment with diesel fumes. The government says that building Roe stage 8 is the solution to the problems of the people in Wilson. It will build the most expensive road in the history of the state—eight kilometres of Roe Highway stage 8 for \$750 million.

Mr D.J. Kelly: What a bargain.

Mr W.J. JOHNSTON: Yes, that is a bargain. The government does not explain that that money could be better used to provide enforcement action to get trucks off Leach Highway past Orrong Road, which is where the ban comes into place to provide noise amelioration.

I understand that the member for Riverton promised to widen Shelley Bridge, which would cost much less than \$750 million and would solve the traffic problems for the people in Fern Road who suffer every morning and afternoon because of the traffic pushed off Leach Highway onto suburban streets. Building Roe stage 8 makes it worse for the residents in my electorate, and that is why I am opposed to the dumb idea. It does not deliver

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trucks to a future outer harbour proposal, which is much further south. Roads can be built through industrial areas further south and not affect residents. Roe stage 8 does not make any sense.

There is another issue. This decision has not been made. If the minister is convinced that there is a conflict with the decision of Chief Justice Martin in the other matter, there is no decision because it is invalid and it is not before him. Therefore, he cannot make a decision based on an invalid recommendation. The minister cannot have it both ways; he cannot make a decision if he knows it is invalid and then ask Parliament to validate it afterwards.

Mr C.J. TALLENTIRE: I would like to hear more from the member.

Mr W.J. JOHNSTON: I am just finishing on this issue. Let me make it clear that if the minister is convinced that the decision that has been referred to in report 1489 of September 2013 on Roe Highway stage 8 and he is telling us that the recommendation made to him is invalid, he cannot make a decision based on that invalid recommendation. It is not a question of validating it later because he has not made the decision. This is why we raised the question of validation earlier in debate on the short title of the Environmental Protection Amendment (Validation) Bill 2014 because the decision has not been made. There is nothing to be validated. If the minister is telling us that the recommendation from the EPA to him was not competently made and not made in accordance with the law, what is he reviewing? If he is convinced that the EPA has not done the right thing, he has nothing to review. The minister says that these are technical matters and have nothing to do with the science. That is all irrelevant because he does not have a recommendation in front of him. That is not according to me but according to the minister, because he is telling us in that tabled paper that this is an invalid decision. I make it clear that that is probably what happened on 22 August 2013 regarding the Turee Syncline iron ore project but not the other decisions that are on this paper. All those other decisions were made before the decision of the Supreme Court. We are not validating those decisions; we are overturning the law of the state to get the minister off the hook for the fact that he made an invalid decision, which is completely different from him making a valid decision when the EPA had not properly acted. This is not the same as the other 23 projects; perhaps we could throw that in as the twenty-fourth one.

The minister is saying that there was a conflict of interest in the decision-making process of the EPA in making the recommendation on Roe Highway because procedures were not properly carried out by the chairman of the EPA. We can refer to paragraph 58 on page 21 of His Honour's decision and all his reasons on those issues. If the minister is saying that he is convinced about the EPA's recommendation on the Roe Highway stage 8 extension, he cannot make a decision because there is no recommendation in front of him and we cannot validate anything because he has not made a decision. If he is not worried that that is the case, there is nothing for us to worry about because he can make his decision and we do not need to be troubled by the legislation. The simple, best approach for everybody in Western Australia is to pass the member for Gosnells' amendment because that will just put Roe stage 8 back where it should be and there can be a proper assessment according to the laws of Western Australia rather than an invalid assessment, which is what the minister says has taken place so far. Then we can get on and instead of spending \$750 million on eight kilometres of road, we can spend \$750 million on making life better for the constituents in my electorate who suffer because of trucks that are improperly and illegally using Leach Highway. The government will not enforce the truck ban. That is the solution: enforce the truck ban and then residents in Wilson and other parts of my electorate will not have to put up with those trucks.

Ms S.F. MCGURK: I, too, would like to take the opportunity to speak in favour of this amendment. Most members in this house would be aware—certainly, the minister would be aware—of how strongly people in my electorate feel about the Roe 8 proposal. It has been a hugely controversial proposal for years. To have a proposal that is currently before the Appeals Convenor retrospectively invalidated is an insult to any members of the Western Australian community who care about this issue. They have every right to expect that there will be independent and thorough environmental consideration of this proposal about which they care passionately—that is, the environmental implications of the extension of Roe Highway across the Beeliar wetlands. If the government cared one iota for what the community thinks about the rigours of environmental assessment on this issue, it would accept the amendment and would not seek to validate this particular EPA consideration—that is, the extension of Roe Highway, Roe 8. But I suspect that the government does not particularly care about those concerns; what it cares about is the opportunity it has been given by having a coalition government in the federal Parliament that is committed to, come hell or high water, putting in a massive road from Kwinana Freeway and taking the extension of Roe Highway through those wetlands down to Stock Road. The government says that will move truck traffic away from Leach Highway, but it will simply move the problem to another community. As the member for Cannington said, it is highly questionable whether that will solve the problem of truck congestion or whether it will shift truck traffic away from Leach Highway because tolls will be associated with Roe 8 and the Perth Freight Link. In fact, there are significant design problems with the Perth Freight Link to which I will refer in a minute and to which I referred last night when I spoke during the second reading debate on this bill.

Extract from Hansard

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First of all, the idea to retrospectively validate a decision of the EPA that is currently with the Appeals Convenor is extraordinary. A decision is in the middle of being made, and the member for Cannington referred to those particular issues and whether this decision could be validated. When a decision is before the Appeals Convenor, it is extraordinary that Parliament is being asked to reconsider the original decision and validate any possible concerns about the conflict-of-interest provisions. Unlike any other decisions that we are being asked to validate through this bill, I think that for any number of reasons, but amongst them is the fact that it is with the Appeals Convenor at the moment, it would be fair for the government to err on the side of caution and allow a reconsideration of this very controversial decision.

We also know that this particular proposal was considered previously by the EPA and that the outcome of decision 1489—that is, the decision we are being asked to validate—was contrary to previous decisions that were made by the EPA on this proposal. As I said, it was a very controversial proposal and one that the community that I represent in Fremantle and many others outside my electorate care very passionately about. Considering the history of this particular issue, it is not appropriate that the Parliament is expected to validate that decision by the EPA, given all those complications. It is inappropriate and, as I said, it insults people who care very much about this particular issue.

Dr A.D. BUTI: I wish to hear more from the member for Fremantle.

Ms S.F. McGURK: I also spoke last night about the other flaw in this proposal—the member for Willagee also referred to this—that is, the design issues that are outstanding and not resolved in this proposal. How can the EPA give proper consideration to the Roe 8 proposal when we do not know what the design will be or what the road will look like? It does not even know whether the road will go literally through the wetlands or be a flyover over the wetlands—that is, some sort of bridge system over the wetlands. They are very basic questions about the design proposals for Roe 8, yet that detail was not outlined in the proposal put to the EPA. Nevertheless, a proposal was put to and considered by the EPA in a process that we now know was flawed. This government has managed that flawed process since 2008. We do not know the final aspects of that design, and that is another reason that this government should err on the side of caution and demand that the Roe 8 proposal be considered further. In fact, I think the government should wait until there is a known proper design proposal for the Perth Freight Link. That would be the best proposal to put for proper environmental consideration. That is yet another reason that this decision should be excised from the validation bill before us and the amendment should be agreed to. In fact, we know, as I said, that this is really a political consideration—a political proposal, by this state government in cahoots with the federal Liberal government. While their political stars are aligned and state and federal coalition governments are in power, this government has an opportunity to progress Roe 8, which it has desperately wanted to for a number of years, no matter whether it does not resolve congestion issues, no matter that it takes freight away from our existing rail infrastructure, which is already in place and already fully capable of taking significantly increased amounts of freight from the port than it does now, and no matter that it takes a road through and destroys some very significant wetlands, despite the fact that we do not have much of this sort of wetland left, particularly in the southern metropolitan area. We know that the government will disregard any of these issues because, for political reasons, it is hell-bent on working through and making sure that that road is built. I think the community will continue to see through that rationale of this government. A real indictment of the government about the environmental concerns that people have is that proper consideration is not being given by to the EPA.

Last night I spoke about the other design flaws that we know are involved in the Perth Freight Link proposal. We are talking about a ridiculously high investment of \$1.6 billion in the Perth Freight Link and \$750 million in the Roe 8 component, which will lead to a bottleneck at Stirling Bridge—which will have four lanes—and Tydeman Road. It is an absolutely absurd design fault. We know that by the time it is built, Fremantle port will be at capacity, despite what the Minister for Transport says. It is clear to anyone who has been following the issue of freight management that that is the case. I urge reconsideration of the Roe 8 proposal and support the amendment.

Mr F.M. LOGAN: I rise to also question the Minister for Environment along the same lines as the member for Cannington. I am not sure whether the minister responded to the issues I raised during the second reading debate last night. I referred to the conflict that arose with validating this element that deals with Roe Highway whilst the appeals process from the recommendation of the Environmental Protection Authority is still underway. I said we would end up with a conflict between two pieces of legislation—that is, the existing Environmental Protection Act and the ability for the appeal process to proceed, and the new piece of legislation that is before the house at the moment validating a recommendation of the EPA prior to that recommendation being fully delivered to the minister.

Although that recommendation from the EPA on Roe Highway is there for the minister, it is not finished until such time as the minister has accepted that recommendation. There is an appeals process underway and the

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minister may well either amend or reject the recommendation from the EPA. How that process can be overridden, which is what would occur with this validation process, is beyond me. I am not sure whether the minister responded to that point. That point was made by the member for Cannington and by me in my speech in the second reading debate. The member for Cannington's point is a very good one: no decision has been made on the Roe Highway environmental approval process; it is only a recommendation from the EPA, and it has not been concluded because the appeal process is underway. I find it mystifying—I ask the minister to elaborate to clear it up for me—that the Roe Highway stage 8 recommendation is included on the list of recommendations to be validated because of a possible conflict of interest. In my speech in the second reading debate, I asked what was Dr Whitaker's conflict of interest. I presume that it is something relating to his consultancy —

Mr D.J. Kelly: It was that he was an employee of James Point Pty Ltd.

Mr F.M. LOGAN: Yes—James Point Pty Ltd. It is a fairly long bow for that matter to have to be brought before the house to be validated. There is no direct relationship between James Point Pty Ltd and the building of Roe Highway stage 8. For example, if a James Point Pty Ltd port were built, Roe Highway stage 8 would not take freight to it. The whole purpose of Roe Highway stage 8 is to take freight to Fremantle, not Kwinana. It has to be remembered that Roe Highway stage 7 finishes at the freeway. If freight were to go James Point Pty Ltd's private port in Kwinana, the trucks would turn left off Roe Highway stage 7 and go straight down the freeway.

[Member's time extended.]

Mr F.M. LOGAN: The trucks would turn left at the freeway on their trip from Kewdale or Kenwick and go south to the supposed new access road that would be built through the Hope Valley–Wattleup redevelopment area and directly into the James Point Pty Ltd private port—should it ever be approved and built, given that the two main instigators have both passed away. I cannot see how the minister or his advisers have concluded that Dr Whitaker had a conflict of interest in this matter simply because he may well have been a consultant or an employee of James Point Pty Ltd, and the private port at Kwinana. That has absolutely nothing to do with the recommendation on Roe Highway stage 8. It is nowhere near Roe Highway stage 8. I would like to hear from the minister how he sees a conflict of interest over Dr Whitaker's involvement with James Point Pty Ltd. I would also like to hear how the minister thinks this legislation relates to the existing appeal rights under the Environmental Protection Act.

As I have said before, I am bitterly opposed to the building of Roe Highway stage 8. Even before I was elected to this house, I was opposed to the building of Roe Highway stage 8 and I was involved in protests against it. As we have heard before, it is a road to nowhere. The member for Fremantle just put the icing on the cake: even if all the environmental, economic and social issues are taken away and the road is built, there is still a pinch point in getting freight beyond Stirling Bridge into Fremantle. The government will spend \$1.6 billion bringing the road to somewhere near Stock Road, and then it cannot get into the harbour because the existing road network will bottleneck before crossing Stirling Bridge. To fix that end up and address that bottleneck, the government will probably have to spend another half-billion dollars or more. That is another very, very good reason against the Roe Highway stage 8 proposal, over and above the social issues it creates, including cutting communities in two. The member for Willagee did not touch on this, but the new road will cut Coobellup, Hamilton Hill and parts of Willagee completely in two. It will destroy acres and acres of cocky-infested woodland, which the minister has just been on his feet answering questions about. Black cockatoos are found throughout that wetland area. Of course, the economics of it simply on a straight business case do not stand up. For all those reasons, Roe Highway stage 8 should never go beyond where it is at the moment. I would like answers from the minister to the questions that I posed.

Mr D.J. KELLY: I want to raise a couple of issues about the Roe 8 project being included in the Environmental Protection Amendment (Validation) Bill 2014. It does not fit with the other projects and what the minister said in his second reading speech. That rings alarm bells. In his second reading speech, the minister said that this bill was necessary to promote certainty in investment in Western Australia, particularly in the resources sector, and that the failure to validate these approvals could cause serious issues on confidence and the like. None of that seems to apply to Roe 8. Roe 8 is a government project that is not yet underway and there is no money allocated for it in the budget. None of the considerations that apply to projects in the resources sector that are underway apply to Roe 8, but the minister did not mention Roe 8 in his second reading speech. In the absence of a clear explanation from the minister about why the Roe 8 decision needs to be validated, he should support this amendment. The courts have found that the Roe 8 Environmental Protection Authority decision is invalid. There is absolutely no reason for the minister not to simply go back and go through the process a second time.

I said in my contribution to the second reading debate that for the Environmental Protection Authority to do its work, it must be independent and it must be seen to be independent, and to do that its processes must be squeaky

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clean. It is not good enough for the minister to say that he has looked at the science on which the EPA made the Roe 8 decision and that it is robust so there is no need to go back and redo the assessment. That is not good enough, minister. People feel very strongly about the Roe Highway extension and they are most concerned about the environmental grounds on which the decision was based. If the EPA made the decision unlawfully, people will not be satisfied with glib assurances from the minister that everything is hunky-dory; they will not be satisfied with anything less than the process being recommenced, and that is what the minister should do.

There are two other aspects of concern around the Roe 8 decision, the first is that the EPA's report on Roe 8 actually came out after Chief Justice Martin made his decision. Chief Justice Martin made his decision on 18 August 2013 and the EPA report was finalised in September 2013. Due to the timing of Chief Justice Martin's decision, the minister knew that the EPA's processes had been conflicted, yet he allowed the EPA to go ahead and make the decision. That is what distinguishes the Roe 8 decision from all the other projects on the list. Once the minister realised that the EPA's processes were conflicted, he should have put a stop to it and made sure that the process was recommenced. The minister must address that issue.

The second matter is the conflict of interest with Chris Whitaker. The minister indicated that the conflict of interest was in the nature of him being employed by James Point Pty Ltd. I am happy for the minister to clarify this, but I understand that he was in fact the chair of James Point, and not just an employee; that is a much more senior role than simply an employee. I know that there is debate around what exactly that means and how that conflict then arises, but my understanding is that there is an argument that the Roe Highway extension benefits the James Point company because of the impact it would have on that private port development. The minister needs to explain exactly what that is. This is a matter that causes great community concern. It is simply not acceptable for the minister to validate that decision in the way that he has and he should support the amendment.

Mr C.J. TALLENTIRE: I would like to hear more from the member.

Mr D.J. KELLY: While this question of a conflict of interest remains unclear, it is simply not acceptable to go through over the next couple of days in this house and validate that decision. The Roe Highway extension is too important a project for the minister to gloss over the errors that have been made and validate the project. People have reasonable concerns about whether Roe 8 is a good expenditure of money, and the member for Cannington has gone through those issues quite well; he knows those issues far better than I do. The questions that revolve around the conflict of interest of Dr Whitaker have absolutely not been clearly explained. The minister's answer yesterday that he was an employee of James Point simply does not cut the mustard. If the minister is going to speak against this amendment, I expect him to go into much greater detail about exactly what Dr Whitaker's role in James Point was and why, in the view of the State Solicitor's Office, that created a conflict of interest.

For a range of reasons it is simply not appropriate for the Roe 8 project to be lumped in with the other 24 projects in that list. This is the minister's opportunity to do the right thing by those people who have strong environmental concerns about the Roe 8 project. The Minister for Environment does not have to always agree with people who have conservation concerns about projects, but he has to be a ruthless defender of the processes that the EPA goes through in order to make assessments. If he is seen to be an environment minister who is prepared to fudge the process, no-one will ever have any confidence in anything he does on environmental issues. Whenever people are not happy with the decisions that the government makes, the minister will not be able to say, "As the Minister for Environment, I rigorously ensure that there is a straight bat and that the processes are clear."

The minister will forever have hanging over him comments such as, "Look what the minister did to Roe 8. That project was conflicted and highly controversial, and he could have sent it back through a clean assessment process and everyone would have been happy, but, no, what did this minister do? He just slipped the Roe 8 project back into the deck of other projects that needed to be ratified because they had massive commercial concerns. He just slipped it in and pushed it through when none of those things applied to Roe 8." I urge the minister to seriously consider this amendment so that at least those who feel strongly about the environmental concerns that the Roe 8 project raises will not be left forever thinking that not only was the wrong decision made, but also the process was bastardised by a government that really does not care about their environment concerns.

Mr C.J. TALLENTIRE: I would like to thank members on this side who spoke in support of the amendment in my name. I want to reiterate that with the Roe 8 proposal, we have a unique situation—I do not know whether this point has been highlighted enough—in that the scoping document was influenced through this conflict of interest. That was the identified conflict of interest. The minister must not diminish at all the idea that a scoping document is a vital part of the assessment process. The scoping document is integral in determining the environmental factors that are important in an assessment. If that early stage of the assessment process is

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compromised, we will get a faulty assessment, which is potentially what we have here. I am not sure, but I thought I heard the minister say earlier that he thought that the compromise may have occurred in the scoping document phase, and perhaps he can clarify that. Perhaps it was a conflict of interest all the way through as well and that there were contributions from Dr Whitaker throughout the deliberations on other aspects of the proposal. This is a serious issue, and other members highlighted very well what it will mean to their communities and to the confidence of Western Australians in our environmental impact assessment process if this project is allowed to go through. We have seen that it has been compromised. Chief Justice Wayne Martin has deemed that this involvement, or when members participate in projects, vitiates the process. His judgement stated —

... the assessment process which was vitiated by the participation of the disqualified members ...

We cannot allow that to taint a proposal before the Appeals Convenor at the moment. We must not allow projects that have been tainted to that degree to proceed.

Mr A.P. JACOB: I will address a couple of matters. As the member for Gosnells picked up on, I will not be in a position to debate the merits of, or the science or the research around, this project; it is still with the Appeals Convenor. Through this process, there has been no question or doubt about the science or the research that has gone into the Environmental Protection Authority project. If any issues are later found—I have said this on a number of occasions—this legislation will not validate that aspect of the assessment either. The project at large will be determined by me on its merits at the conclusion of the appeal process.

In addressing the matter of Dr Whitaker's involvement—I am picking up on the earlier query from the member for Gosnells—Dr Whitaker was chair of James Point Pty Ltd at the time of the approval of the environmental scoping review. The records indicate, and the advice I have received is, that there was no further participation from Dr Whitaker; however, he did participate at that juncture, and the concern in this instance arises from his involvement at the earliest stage of this assessment only. Some may think it is not a conflict necessarily, and I will address the member for Cockburn's comments in that space. I think the member for Cockburn said that this one is a long bow, and I think that is a fair comment. JPPL was not necessarily an immediate beneficiary; in fact, the argument that could well be mounted is that this could have negatively impacted on it given that it will open up a main artery into Fremantle and be a direct competitor of JPPL. I make two observations about that. A conflict under section 12 of the Environmental Protection Act is a conflict. It is immaterial whether the conflict would have a positive or negative effect; it is still a conflict, and that is why we are addressing it. Again, that goes to my comments earlier about the composition of the board more generally.

I think those are absolutely fair comments to make, member for Cockburn. However, what has occurred in this instance—this is a reflection of how thoroughly we have gone back over this—is that Dr Whitaker declared it. At the end of the day, in assessing it, he declared that that was an interest and then he participated in the matter following on from that. Hence, that is why it was picked up in a risk assessment of the earlier projects and why it is here.

A lot of conversation has been about the list. I by no means put out the list to confuse anybody. The list is part of my full disclosure in approaching this matter.

Mr D.J. Kelly interjected.

Mr A.P. JACOB: I have addressed that many times.

It would have been very easy for me to even try to play with the list. At no point have I done that; I have just very openly declared the 25 projects that we believe are at potential risk of being challenged, and there is a range of different reasons why each of those projects could be challenged. But the list does not directly relate to the bill. The bill seeks to validate those actions or decisions that were taken prior to the decision date—19 August 2013. The reason that there is a list is that I was being open and transparent. It was an attempt by me, in taking this matter forward, to put out there the potential level of risk given the extent of the projects and also to be fully frank, open and honest. I find it interesting that that then leads to conspiracy theories. I think Jim Hacker had it right when he said that honesty gives you the advantage in politics.

Mr F.M. LOGAN: The minister did not respond to the issue I raised during the second reading debate and also this afternoon about the relationship between the two pieces of legislation—the one that the minister has introduced and the appeals right that is underway under the EP act.

Mr A.P. JACOB: My comment earlier was that the bill stops actions being invalidated by reason of conflict. I addressed that at two points when I spoke. This bill will not address the grounds of the environmental assessment or science. The bill also does not address anything post 19 August 2013. It addresses only those decisions that were taken prior to that point or the assessment decisions that were taken by the EPA up until that point. This does not seek to validate into the future; indeed, it does not seek to validate beyond the decision date.

Mr D.J. KELLY: One of the central issues with this amendment is why the minister believes it is necessary to retrospectively validate the Roe 8 project. Having been made aware that the decision is invalid because of Wayne Martin's decision, the minister could decide to put it through a new environmental assessment process, but instead he has decided to use this legislation to retrospectively validate it. We understand the reasons he has given for the other projects, but those reasons do not apply to the Roe 8 project. Therefore, why is the Roe 8 project included in this process rather than the minister requiring a re-run of the environmental assessment process for the Roe 8 project? What is the urgency around this project that requires it to be retrospectively validated?

Mr A.P. JACOB: My scope of consideration for this bill relates specifically to actions that could potentially have been invalidated by sections 11 and 12 following on from the Browse decision. If I apply that specifically to Roe 8, it is not the merits of the projects itself at large; it is looking at where those actions have been taken along the way and what the declaration was, and in this instance I have outlined what that is. Looking at this purely from the point of lapses under sections 11 and 12 of the act, this would probably be at the lower end of the scale, and we have reasonably outlined that as well. However, the bill seeks to address those projects on an individual basis. It will validate those particular actions for that period. I cannot debate the project at large at this point; no doubt we will have opportunities to do that beyond this point.

The conflict-of-interest provisions that apply to this project do not apply any differently from the way they apply to the other 25 projects. In fact, the member for Cockburn mounted the argument that they could be somewhat lesser, but it is immaterial to me in my consideration in that way. The fact of the matter is that, like all 25 projects, this is an example in which someone with a conflict or a perceived conflict that they either declared or did not declare participated, but in this instance he declared and then participated in the initial decision on the environmental scoping review.

Ms S.F. McGURK: The minister has said that he does not want to exclude Roe 8 because it occurred within the period when there were suspect considerations by the EPA. A flawed process was adopted by the EPA under this government whereby people who had declared a conflict were then allowed to participate in the deliberations, if not the final decision, of the EPA. As I understand the minister, it is because the Roe 8 deliberations occurred in the period that the other decisions that require validation took place. The minister has made the decision to exclude the Browse decision specifically under this legislation, and he has said that that is because it was controversial and was the subject of a Supreme Court decision, but he does not apply the same logic to the Roe 8 decision. That decision is in the midst of being considered by the Appeals Convenor. So, as I have said before, I think it is absurd that this Parliament is being asked to retrospectively validate an original decision while it is in the process of being appealed. I find that extraordinary.

The other issue that I would like to hear the minister's views on is the period that the member for Bassendean referred to, and I referred to it last night as well. The Supreme Court decision on Browse was made in August 2013, but the Roe 8 recommendation by the EPA was made a month later; that is, there was a window in which the EPA and the government should have been aware that there was a flaw in the process. That was made crystal clear in the Supreme Court decision of Chief Justice Martin. Why did the minister allow that final determination by the Environmental Protection Authority to take place when he knew that the process that had been adopted was flawed all along?

Mr A.P. JACOB: The answer to both those questions is essentially the same. With the exception of the project before us—albeit that a decision has not yet been reached on it—neither the assessments of nor the decisions for any of these projects are currently held to be invalid when they apply. They are not; they are held to be valid until such time as there is a determination that finds them to be invalid. Browse has been excluded for the reason that there has been a determination invalidating Browse. That is why we have excluded that; we have accepted that determination and it has gone back for a full assessment. However, as I said, all these other projects are held to be valid until such time as they are found to be invalid. The reason I have presented them and the reason for this bill is that, in reviewing previous actions over the past 13 months and following on from the Browse decision, we believe that these projects could have the potential to be challenged along similar lines. If they were found to have anything beyond a potential, it would have to be tested in the courts.

Mr D.J. KELLY: I simply do not accept the minister's arguments for including the Roe 8 project in this bill. He has essentially said, "Well, the bill validates projects that were called into question and fell within a certain time period, and we're simply not going to assess them on an individual basis, we're going to deal with them collectively, all the same, and that's why Roe 8 is in there." That is putting the principles of good public administration completely in reverse. The principle that the minister should be applying is that the processes of an organisation such as the EPA should be squeaky clean, and having received advice that a whole range of EPA decisions were questionable, the minister's first response should have been that if the decisions were questionable, they should have been done again. For the purposes of good public policy, those processes should

Extract from Hansard

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Mr Chris Tallentire; Mr Peter Tinley; Mr Bill Johnston; Ms Simone McGurk; Mr Fran Logan; Mr Dave Kelly;
Mr Albert Jacob

be repeated. An exception to that would be a situation in which asking the EPA to go back to square one would create circumstances that would cause great consequences for the community or the economy, and would therefore not be an option. That case could be made for projects that have large economic consequences, and the argument could certainly be made that exceptions to the rules should be applied after projects have already commenced and are up and running. That is why we are in a position in which people on this side of the house are saying, “All right, we will agree that there are circumstances where the rule of good public policy of, ‘If it hasn’t been done properly, it should be done again’, can be set aside for a number of projects.” But that does not apply in the case of Roe 8. The minister is saying that because these others will be done retrospectively, we can just throw Roe 8 into the pack because it was dealt with within the same time frame. That is putting it completely in reverse. The minister is using the exception to cover a project that I suspect the government wants to progress for reasons of political expediency. Let us face it: the minister’s government wants the Roe 8 extension to go ahead because it has members on that side of the house who have made commitments based on that project proceeding, so the minister is quite happy to try to slip Roe 8 into this process, have it validated, and thereby protect it from any future challenge. It is simply not acceptable for the minister to say that because the government has made an exception for the other 24 projects because there would be significant economic consequences if they were now to be found invalid, it is therefore acceptable to also include Roe 8. The minister needs to justify why Roe 8 meets the test that should be applied if the government is going to retrospectively validate the project, and he has not done that. There are no matters of urgency to prevent Roe 8 simply being put back through a full, thorough and proper EPA process, and I would like to hear the minister’s reasons for not doing that.

Division

Amendment put and a division taken with the following result —

Ayes (19)

Ms L.L. Baker
Dr A.D. Buti
Mr R.H. Cook
Ms J.M. Freeman
Mr W.J. Johnston

Mr D.J. Kelly
Mr F.M. Logan
Mr M. McGowan
Ms S.F. McGurk
Mr M.P. Murray

Mr P. Papalia
Mr J.R. Quigley
Ms M.M. Quirk
Ms R. Saffioti
Mr C.J. Tallentire

Mr P.C. Tinley
Mr P.B. Watson
Mr B.S. Wyatt
Mr D.A. Templeman (*Teller*)

Noes (31)

Mr P. Abetz
Mr F.A. Alban
Mr C.J. Barnett
Mr I.C. Blayney
Mr I.M. Britza
Mr V.A. Catania
Mr M.J. Cowper
Ms M.J. Davies

Mr J.H.D. Day
Ms W.M. Duncan
Ms E. Evangel
Mr J.M. Francis
Mrs G.J. Godfrey
Dr K.D. Hames
Mr C.D. Hatton
Mr A.P. Jacob

Dr G.G. Jacobs
Mr R.F. Johnson
Mr S.K. L’Estrange
Mr R.S. Love
Mr W.R. Marmion
Mr P.T. Miles
Mr N.W. Morton
Dr M.D. Nahan

Mr D.C. Nalder
Mr J. Norberger
Mr D.T. Redman
Mr A.J. Simpson
Mr M.H. Taylor
Mr T.K. Waldron
Mr A. Krsticevic (*Teller*)

Pairs

Ms J. Farrer
Mrs M.H. Roberts

Mrs L.M. Harvey
Ms A.R. Mitchell

Amendment thus negatived.

Mr C.J. TALLENTIRE: The proposed amendment was defeated, and I think disgracefully so. It reflected on the minister.

Debate adjourned, pursuant to standing orders.