

**ENVIRONMENTAL PROTECTION AMENDMENT
(VALIDATION) BILL 2014
EXPLANATORY MEMORANDUM**

On 19 August 2013, the Supreme Court of Western Australia delivered its decision on a challenge to the validity of State environmental approvals for the Browse LNG Precinct. The Court upheld the challenge on the basis that the Environmental Protection Authority had failed to comply with sections 11 and 12 of the *Environmental Protection Act 1981*. Section 12 prohibits members with a direct or indirect pecuniary interest in a matter before a meeting of the Environmental Protection Authority from taking part in the consideration or discussion of the matter, or voting on the matter. Section 11 established the quorum for an Environmental Protection Authority meeting at 3 unconflicted members.

The Supreme Court found that the Environmental Protection 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 assessment. Because the share-holding members were sometimes required to form a quorum, there was also a failure to comply with s. 11 of the Act. As a consequence of the failure to comply with these provisions, the Court held that the environmental approvals which followed the Environmental Protection Authority's purported assessment were invalid.

The purpose of this Bill is to amend the *Environmental Protection Act 1986* to effectively provide 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 which 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 where no delegation was in fact available.

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, the Authority was asked in September last year to provide written advice to the Minister for Environment regarding its treatment of perceived and actual conflicts of interest, including the status of the Environmental Protection Authority's Code of Conduct and Procedures, and the regularity with which the Code was reviewed, and updated. The Authority was requested to, and sought advice from, the Public Sector Commissioner regarding its governance arrangements in preparing this advice.

As a result of this advice the Authority undertook a detailed review of its governance arrangements and in April 2014 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 *Environment Protection Act 1986* and all public sector and government requirements for Boards and Committees.

While 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 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 which underpin the State's economic development would be put at risk. The reputation of the State as a secure place for substantial capital investment would be compromised. The Government has decided that validating legislation is necessary to avoid these outcomes.