

THE SENATE INQUIRY INTO THE CONTINUATION OF CONSTRUCTION OF THE PERTH FREIGHT LINK IN THE FACE OF SIGNIFICANT ENVIRONMENTAL BREACHES

Submission from Bruce Armstrong and Patricia Harris, co-convenors of The Beeliar Group: Professors for environmental responsibility

The Beeliar Group is a multidisciplinary group of professors committed to the values of environmental responsibility and social justice. A number of its members have been identified as possible expert witnesses to this Inquiry. In this written submission, the co-convenors of the group, Professor Bruce Armstrong and Professor Patricia Harris, place the environmental breaches at the centre of the Inquiry in the wider contexts of democratic accountability and the protection of biodiversity. They propose that the abuses outlined in Senator Ludlum’s 19-page letter to Minister Frydenberg¹—the failures to survey the nesting hollows of black cockatoos, the lack of time given to the trapping of the southern brown bandicoot; the misplacing of the fencing, and the partial and ineffective netting—are not accidental features of an otherwise feasible development, but rather symptoms of a venture and a system that are flawed both environmentally and democratically.

Let us first explore the legal principles designed to safeguard the environment from serious harm. The *WA Environmental Protection Act (1986)* aims to “protect the environment of the State” having regard to (*inter alia*) “the principle of the conservation of biological diversity and ecological integrity” where “conservation of biological diversity and ecological integrity should be a fundamental consideration”.² How far are these notions upheld in the case of Beeliar Regional Park? The question is particularly pertinent because, since September 2016, the Banksia Woodlands of the Swan Coastal Plain have been listed as an endangered ecological community in accordance with the Commonwealth’s *Environment Protection and Biodiversity Conservation Act (1999)*. The relevant Commonwealth document notes that:

[Banksia woodland] was once common and formed an almost continuous band of large bushland patches around Perth and other near coastal areas, but has been lost by almost 60% overall, with most remaining patches small in size. This fragmentation is leading to the decline of many plants, animals and ecosystem functions. Therefore, it is very important to protect, manage and restore the best surviving remnants for future generations.³

The principle that “the conservation of biological diversity and ecological integrity should be a fundamental consideration”, as stated in the *WA Environmental Protection Act (1986)*, requires that the preservation of the Beeliar woodlands and wetlands is of the utmost importance and that any further fragmentation should be avoided at all costs. But as many witnesses to this inquiry will attest, destruction has marked the construction of the new Roe 8 highway extension. The damage inflicted on the wetlands and woodlands is exacerbated by a major failure relating to offsets. Under EPA policy, offsets should aim to be “like for like” and “local”. That is, wherever possible, they should ensure that the offset replaces the same type of ecosystem as that damaged by the proposed development, and, wherever possible, is in the vicinity of that ecosystem, thus ensuring that there is no net loss of the conservation estate in that region. Neither of these principles was followed in choosing the

offset for the Beeliar wetlands and woodlands as represented by the purchase of a 1000 hectare offset in the Shire of Waroona.

Lamenting the loss and the destruction, a long-time Beeliar neighbour notes that:

Underneath the once shady and beautiful trees were live turtle eggs, artefacts from Whadjuk Noongar culture and shelter for the thousands of local people who pass by on their walks or rides around Lake Walliabup or Bibra Lake as it is widely known.⁴

This reflection speaks to the WA Government's continued failure to take the historical and social importance of the Beeliar woodlands and wetlands into account. The matter is particularly significant as far as the local Aboriginal people are concerned, for Waugal, Firestick and Children Spirit Dreaming stories are an integral part of the Beeliar history, and the wetlands and woodlands are of historical significance as important camping areas and sources of food. More broadly, for both Aboriginal and non-Aboriginal people, the area is a source of sustenance, retreat, enjoyment, memory, solitude and communal activities. That such a resource should be protected for present and future generations is explicitly recognised in the *WA Environmental Protection Act (1986)*, which lists the principle of "intergenerational equity" as its second major guiding consideration, whereby:

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.⁵

Let us now consider the principles and practices underpinning the state's assessment of proposed developments. Following the intergovernmental Agreement on the Environment (1992), the precautionary principle was added to environmental legislation, and incorporated in the *WA Environmental Protection Act (1986)* in 2003. The precautionary principle states that:

Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.⁶

The Act also states that in the application of the precautionary principle, decisions should be guided by:

- (a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and
- (b) an assessment of the risk-weighted consequences of various options.⁷ ^a

^a The precautionary principle is also recognised in the State's recently proclaimed *Biodiversity Conservation Act (2016)*, parts of which have yet to come into operation. As stated in the preamble, the Objects of this Act are to "conserve and protect biodiversity and biodiversity components in the State" and "to promote the ecologically sustainable use of biodiversity components in the State". In pursuing these Objects, decision makers must take the following principles into account:

The integration of long and short-term economic, environmental, social and equitable considerations; the precautionary principle; intergenerational equity; conservation of biological diversity and ecological integrity; and, improved valuation, pricing and incentive mechanisms.

The longer-standing practice of Environmental Impact Assessment (EIA) has been the principal means for protecting the environment across Australia, at both Commonwealth and State levels since the early 1970s. It informs environmental decision-making and addresses the need for environmental protection by requiring the monitoring of environmental impacts that occur once an action has been approved and implemented. Of particular importance to this Inquiry is that the implementation of a proposal must comply with the approved conditions. Section 47 of the WA *Environmental Protection Act (1986)* is adamant that:

- (1) If a statement has been served under section 45(5) and the proponent does not ensure that any implementation of the proposal to which the statement relates is carried out in accordance with the implementation conditions, the proponent commits an offence.⁸

The environmental breaches at the core of this Inquiry indicate just how carelessly, and with what devastating consequences, the principles guiding the legislation and the importance of environmental conditions can be put aside. In an Open Letter to Albert Jacob, WA Minister for the Environment, Piers Verstegen, Director of the Conservation Council of Western Australia, describes “a total loss of faith by the community in the EPA” and continues:

Today, clearing again took place in an area where wildlife trapping had not been undertaken or completed according to the requirements of the EPA-approved Fauna Management Plan (FMP). Bandicoots have been seen fleeing from bulldozers and have been photographed being removed from sites on the same day clearing has occurred, in blatant contravention of the FMP requirement for two days of trapping without a capture before any clearing is undertaken.⁹

How has this state of affairs come about? In the first instance, we suggest that the combination of commercial and short-term political interests produce the situation in which governments are “increasingly able and willing to ignore evidence and push agendas despite, rather than because of, scientific advice and environmental policies”.¹⁰ Thus, for example, the claim that Roe 8 affects only 0.49% of the “entire Beelihar wetlands” ignores the fact that wetlands must be contiguous and substantial if their fauna and flora are to survive, and takes no account of the damage that diesel particulates are likely to cause as they build up over time. We also note the disturbing situation in which blatantly political advertising, costing many tens of thousands of dollars, does not clearly reveal its interests but instead masquerades as disinterested “information” using a question and answer format. In a flagrant example, three “pro Roe 8” wrap-arounds have recently appeared in *The Fremantle Herald*, with the political authorisations only appearing in tiny print to the side of the main article.^b Such propaganda seeks to undercut the patient work of science by

(West Australian *Biodiversity Conservation Act 2016*. Available from <https://www.dpaw.wa.gov.au/plants-and-animals/468-biodiversity-conservation-act-2016>)

^b As acknowledged by the editor of *The Herald*, ‘Under the guise of an informative Q&A, the political advertising wrapped around all 83,000 *Herald* newspapers over the past two weeks has not carried

statements based on half-truths and misinformation, a situation our members seek to redress.¹¹

In the second instance, the legal process itself appears increasingly unable to defend the environment. Many submissions to the Environmental Protection Authority (EPA) drew attention to the dangers of fragmentation of the Beelihar wetlands and woodlands. The EPA admitted it could not provide a suitable offset to compensate for the environmental losses that Roe 8 entails, but nevertheless concluded that Main Roads WA's proposal met its environmental objectives. This was a key issue in the successful Supreme Court challenge (December 2015); only to be later overturned in the Court of Appeal on the basis that the EPA was not bound to follow its own policies (July 2016); a decision later affirmed by the High Court. These rulings indicate there is little or no opportunity for citizens to hold governments to account for decisions or actions that damage or destroy the environment. Where it was previously thought that binding environmental conditions could be enforced through judicial processes, this is clearly not so at present, with this being directly counter to section 47 of the *WA Environmental Protection Act (1986)* as cited above.

Third, the construction of Roe 8 rides rough-shod over the measures democracies typically use to protect due process: most particularly, its appeals processes and commitments to transparency and freedom of information. The WA Government has consistently refused to release details of its \$1.9 billion Perth Freight Link business case, thus avoiding any public review of whether the expenditure of such large sums of money can be justified in cost-benefit terms. This lack of transparency and accountability is mirrored at the federal level. Despite the Administrative Appeals Tribunal (AAT) ruling in 2015 that the details of the Perth Freight Link (PFL) business case be made public, the Department of Infrastructure and Regional Development has only now, late in the day, released the documents. Further illustrating these major failings in transparency and accountability, the WA Government's environmental management plans for Roe 8 have not been open to any feedback or peer review, and the process of negotiating the offsets required by the project remains unclear. Hence there has been no independent assessment of whether the implementation plans meet the criteria the Government has stipulated for the offsets.

In conclusion, we return to the relationship between democratic process and biodiversity protection. Both are underpinned by a respect for plurality and individual difference; both require that dominant or majority interests should not overrule the rights of social minorities and those unable to defend themselves. Failures in democratic process thus present a direct threat to biodiversity, for the protection of biodiversity depends on the safeguards of democratic law. Hence, if repetition of the environmental breaches at the centre of this Inquiry are to be prevented, WA's environmental law must be greatly

any Liberal Party insignia The only visible link ...was a small authorisation by new federal MP for Tangney Ben Morton—as required under electoral laws' (*The Herald*, 18/02/17, p.7).

strengthened to ensure that application of its principles in practice is a legal obligation. Failing that, the Commonwealth should seek to strengthen its powers to protect biodiversity in the interests of all Australians.

¹ Ludlum, S. Letter to Minister Frydenberg Roe 8 Breaches. Available from <http://scott-ludlam.greensmps.org.au/articles/letter-frydenberg-breaches-conditions-beeliar>

² West Australian Environment Protection Act 1986, p. 19. Available from <https://www.slp.wa.gov.au/pco/prod/FileStore.nsf/Documents/MRDocument>

³ *Banksia Woodlands of the Swan Coastal Plain ecological community: listing assessment consultation guide March 2016*; [p 3-5] Available from <https://www.environment.gov.au/biodiversity/threatened/nominations/comment/banksia-woodlands-ecological-community>

⁴ <https://www.facebook.com/Save-Beeliar-Wetlands>

⁵ West Australian Environment Protection Act 1986, p. 19 (op cit.)

⁶ West Australian Environment Protection Act 1986, p. 19 (op cit.)

⁷ West Australian Environment Protection Act 1986, p. 19 (op cit.)

⁸ West Australian Environment Protection Act 1986, p. 72 (op cit.)

⁹ Verstegen, P. Open letter Albert Jacob, Minister of Environment; Jan 2017. Available from <https://www.facebook.com/piers.verstegen/posts/1929329100621649>

¹⁰ Hobbs R. British Ecological Society Bulletin, issue 1, 2017, p. 17

¹¹ <https://thebeeliargroup.files.wordpress.com/2017/01/the-perth-freight-link-fact-and-fiction.pdf>