The Senate

Environment and Communications Legislation Committee

Environment Protection and Biodiversity Conservation Amendment Bill 2013 [Provisions]

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Chapter 1

Introduction

Conduct of the Inquiry

1.1 The Environment Protection and Biodiversity Conservation Amendment Bill 2013 (the bill) was introduced and read a first time in the House of Representatives on 13 March 2013. The bill as introduced was amended by the House on 14 March on motions moved by the government and by the Member for New England. Also on 14 March, on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the bill to the Environment and Communications Legislation Committee for inquiry and report by 14 May 2013.

1.2 The Selection of Bills Committee's report stated that the reason for the referral was to give close scrutiny to this major change to the *Environment Protection and Biosecurity Conservation Act 1999* (the EPBC Act).[1]

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and in *The Australian* newspaper of 27 March 2013. The committee also contacted a number of organisations and individuals and invited them to make submissions. Some 235 submissions were received, as shown in Appendix 1. The committee also received a number of letters from interested individuals. The names of those individuals are listed in the appendix. Details of additional information received during the course of the inquiry are also contained in the appendix.

1.4 The committee held public hearings in Sydney on 17 April 2013 and in Canberra on 18 April. A list of witnesses who appeared at the hearings may be found at Appendix 2. A copy of the proof Hansard transcript of the hearing was posted to the committee's website. The references to the pages of the Hansard transcript in this report are to the proof Hansard, which may be different from those in the official transcript.

Purpose of the bill

1.5 The purpose of the bill is to amend the EPBC Act to provide for the establishment of a new matter of national environmental significance in relation to significant impacts of coal seam gas (CSG) development and large scale coal mining development on a water resource.[2]

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1 Senate Selection of Bills Committee, *Report No. 3 of 2013*, Appendix 3.

2 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment Bill 2013, p. 2.

Scope of the inquiry

1.6 In this inquiry the committee has concentrated on the provisions of the bill and has not sought to revisit the many technical and other issues surrounding the mining of CSG and coal mining.

Structure of the report

1.7 In the following chapters of this report the committee:

- provides some background to the bill, a summary of the current regulatory environment, and summaries of relevant recent Senate Committee reports (Chapter 2); and
- discusses key issues raised during the inquiry (Chapter 3)

Acknowledgements

1.8 The committee thanks those individuals and organisations who made submissions in the limited time available, and those who gave oral evidence. Their input greatly assisted the work of the committee.

Chapter 2

Background

2.1 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which is the primary Commonwealth Government legislation regulating environmental matters, has among its objects:

- to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.[1]

2.2 Matters of national significance currently covered by the EPBC Act are:

- world heritage properties;
- national heritage places;
- wetlands of international importance;
- threatened species and ecological communities
- migratory species;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park; and
- nuclear actions (including uranium mines).[2]

2.3 This bill would add another matter of national environmental significance to the Act, namely:

- protection of water resources from coal seam gas development and large scale coal mining development.[3]

2.4 A document published by the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC), states that the amendment to the EPBC Act is needed because:

- currently there is no direct protection for water resources under our national environment law;
- under existing legislation, projects with water related risks can only be regulated if they have flow on impacts to existing matters of national

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1 *Environment Protection and Biodiversity Conservation Act 1999*, s. 3.

2 EPBC Act, Part 3.

3 Environment Protection and Biodiversity Conservation Amendment Bill p. 3.

environmental significance, such as nationally endangered plants and animals;

- this proposed new matter of national environmental significance will allow the impacts of proposed coal seam gas and large coal mining developments on water resources to be comprehensively assessed at a national level;
- the Government is responding to community concern to ensure the long term health and viability of Australia's water resources and the sustainable development of the coal seam gas and coal mining industries; and
- our nation's water resources are among our most vital natural resources and it is important that we take reasonable steps to ensure they are protected.[4]

2.5 The minister, when introducing the bill, referred to three matters 'that people quite reasonably expect the minister for the environment and water to take into account, by law, when considering the impacts of coal seam gas and large coal mining on water resources', namely:

- if there is an irreversible depletion and contamination of our surface and groundwater resources;
- the impacts on the way critical water systems operate; and
- the related effects on our ecosystems.[5]

Current regulatory arrangements

2.6 The approval for coal seam gas (CSG) and large coal mining are matters primarily for the state governments, but the Commonwealth Government also has a role in the approval process. The Commonwealth, Queensland, New South Wales, South Australia and Victoria entered into a National Partnership Agreement (NPA) in 2012 to 'strengthen the regulation of coal seam gas and large coal mining development'. The Commonwealth has also established an Independent Expert Scientific Committee (IESC) to provide advice to the minister and to the states on CSG and large coal mining. (The legislation to establish that Committee was the subject of the Senate Committee's report which is discussed below.)

2.7 The IESC was established so that future decisions about CSG and large coal mining developments would be informed by substantially improved science and independent expert advice. IESC's advice is published on its website once a decision

4 *EPBC Act: 2013 Proposed EPBC Act amendment – Water trigger – Q and As*, pp 1-2 of 5, http://www.environment.gov.au/epbc/about/2013-amendments-q-and-a.html, (Accessed 15 March 2013).

5 The Hon. A Burke, Minister for Sustainability, Environment, Water, Population and Communities, *House of Representatives Hansard*, 13 March 2013, p. 8.

is made. Advices provided to the decision makers, but on which decisions have not yet been made, are listed on the website.

2.8 In the NPA, Queensland, New South Wales, South Australia and Victoria have committed to:

> seek the committee's advice at appropriate stages of the approvals process for a coal seam gas or large coal mining development that is likely to have a significant impact on water resources;
>
> ensure that decision-makers take account of the committee's advice in a transparent manner; and
>
> provide input into the committee's research agenda, including in relation to the committee's advice on priority areas for bioregional assessment.[6]

2.9 The Commonwealth agreed, among other things, to provide funds to the states to support the implementation of the NPA and to monitor and assess delivery of actions to ensure that outputs are delivered and outcomes are achieved within agreed timeframes.[7]

2.10 The parties jointly agreed to meet milestones for matters such as passing relevant legislation, regulations and guidelines.[8] The parties also agreed to commission an independent review of the operation and achievements of the NPA by 1 July 2014 with the report of the review being published by 31 December 2014.[9]

Previous Senate committee reports

2.11 In this inquiry the committee has taken into consideration three recent Senate committee reports relevant to the current inquiry, as follows:

- the Environment and Communications Legislation Committee's report on the Environment Protection and Biodiversity Conservation Amendment

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6 COAG Standing Council on Federal Financial Relations, *National Partnership Agreement on Coal Seam as and Large Coal Mining Development*, p. 4, http://www.federalfinancialrelations.gov.au/content/npa/environment/CSG_and_lcmd/NP.pdf, (accessed 5 April 2013).

7 COAG Standing Council on Federal Financial Relations, *National Partnership Agreement on Coal Seam as and Large Coal Mining Development*, p. 4, http://www.federalfinancialrelations.gov.au/content/npa/environment/CSG_and_lcmd/NP.pdf, (accessed 5 April 2013).

8 COAG Standing Council on Federal Financial Relations, *National Partnership Agreement on Coal Seam as and Large Coal Mining Development*, p. 5, http://www.federalfinancialrelations.gov.au/content/npa/environment/CSG_and_lcmd/NP.pdf, (accessed 5 April 2013).

9 COAG Standing Council on Federal Financial Relations, *National Partnership Agreement on Coal Seam as and Large Coal Mining Development*, p. 7, http://www.federalfinancialrelations.gov.au/content/npa/environment/CSG_and_lcmd/NP.pdf, (accessed 5 April 2013).

(Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012 [Provisions];

- the Rural and Regional Affairs and Transport Legislation Committee's report on the Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011; and
- the Rural and Regional Affairs and Transport References Committee's report on Management of the Murray Darling Basin Interim report: the impact of mining coal seam gas on the management of the Murray Darling Basin.

2.12 The committee also took into account its report of March this year on the Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012.

Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011

2.13 The Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011, a private senator's bill introduced by Senator Waters of the Australian Greens, sought to achieve much the same outcome as does the bill now before the committee. The purpose of Senator Water's bill was to include 'protection of water resources from mining operations' as a matter of national environmental significance in the EPBC Act, so that Commonwealth Government assessment and approval would be needed for mining operations that would be likely to have a significant impact on water resources.[10]

Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012

2.14 The Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012, sought to establish an expert committee to provide advice to the Commonwealth environment minister in cases where a proposed action would involve a coal seam gas development or a large coal mining development that was likely to have a significant impact on water resources or have an adverse impact on a matter of national environmental significance. The minister would be required to take into account all relevant advice provided by the IESC before deciding whether to approve or not approve an action that impacts on a matter of national environmental significance.[11]

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10 Senate Rural and Regional Affairs and Transport Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011*, February 2012, p. 1.

11 Senate Environment and Communications Legislation Committee *Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012 [Provisions]*, June 2012, p. 2.

Management of the Murray Darling Basin

2.15 The Rural and Regional Affairs and Transport References Committee's inquiry into the management of the Murray Darling Basin included consideration of:

> The economic, social and environmental impacts of mining coal seam gas on:
>
> • the sustainability of water aquifers and future water licensing arrangements;
>
> • the property rights and values of landholders;
>
> • the sustainability of prime agricultural land and Australia's food task;
>
> • the social and economic benefits or otherwise for regional towns and the effective management of relationships between mining and other interests; and
>
> • other related matters including health impacts.[12]

2.16 That report includes good non-technical descriptions of the processes for the extraction of CSG and canvasses the possible risks for water supplies in the Great Artesian Basin.

2.17 The committee recommended:

> … that the Commonwealth take the necessary steps to amend the *Environmental Protection and Biodiversity Conservation Act 1999* to include the sustainable use of the Great Artesian Basin as a 'matter of national environmental significance'.[13]

2.18 Although the Rural and Regional Affairs and Transport Committee's recommendation relates only to the Great Artesian Basin the recommendation is nevertheless relevant to the consideration of the bill before the committee.

2.19 The committee refers to these reports in the following chapter.

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12 Senate Rural and Regional Affairs and Transport References Committee *Management of the Murray Darling Basin Interim report: the impact of mining coal seam gas on the management of the Murray Darling Basin*, November 2011, p. 1.

13 Senate Rural and Regional Affairs and Transport References Committee *Management of the Murray Darling Basin Interim report: the impact of mining coal seam gas on the management of the Murray Darling Basin*, November 2011, p. 31.

Chapter 3

Issues

Support for the bill

3.1 The committee received many submissions supporting the bill, mostly from individuals with addresses in New South Wales, who expressed concerns about the possible impact of CSG or coal mining on the availability or quality of water obtained from aquifers. Some of those submissions, although they did not directly address the provisions of the bill, were nevertheless accepted by the committee because they addressed the underlying issues.

3.2 Individual submissions addressed many different issues in addition to those mentioned above, including: the value of clean water for consumption and the environment; health concerns; and availability of water for agriculture.[1] Submitters also expressed concerns related to the ability of farmers to prevent exploration and development activities on their properties; lack of thorough scientific studies; and a perception that the state authorities are more interested in approving developments rather than in thoroughly assessing their likely adverse effects.[2]

3.3 Submissions from a number of peak environmental bodies made many of the same observations as those set down above. These witnesses, who also addressed the provisions of the bill, supported the intent of the proposed amendments, but most were concerned about what they described as its limited coverage.

3.4 A submission from the Australian Network of Environmental Defender's Offices (ANEDO), for example, made a number of recommendations for additional matters that it considered should be included in the bill, as follows:

> (a) Broadening the "water trigger" to cover other forms of mining … in addition to CSG developments and large coal mining developments, the Bill should also apply to all large mines that excavate beneath the water table and to unconventional gas exploration and production activities.
>
> (b) Limiting the categories of mining development exempted from the "water trigger" to: (a) controlled actions that have been approved under the EPBC Act prior to the Bill's commencement and for which work has already commenced; and (b) mining projects (that were not controlled actions prior to the Bill's commencement) that fulfil the criteria outlined in Item 22 (3) and for which work has not yet commenced.

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1 See, for example, Ms Eloise Fisher, *Submission 3*; Ms Anne Hodgson, *Submission 87*; Ms Aroha Watson, *Submission 172* and Andrew and Helen Strang, *Submission 215*.

2 See, for example, Ms Trish Mann, *Submission 31*, and Ms Sarah Luckie, *Submission 221*.

(c) Including "water trigger" specific assessment criteria … in Part 9 of the EPBC Act. Specifically, the criteria should include a requirement to "not act inconsistently with" the Convention on Biological Diversity.

(d) Providing for existing bilateral assessment agreements relating to controlled activities that are likely to have (or have already had) a significant impact on water resources to be varied in light of the "water trigger."[3]

3.5 ANEDO also submitted that:

> … the "significant impact guidelines" for the "water trigger" [should] take into account the notion of "environment sustainability" outlined in the Water Act 2007. Specifically, the guidelines should define "significant impact" as any relevant mining development that individually, or in combination with other developments, would compromise:
>
> (i) key environmental assets of the water resource; or
>
> (ii) key ecosystem functions of the water resource; or
>
> (iii) the productive base of the water resource; or
>
> (iv) key environmental outcomes for the water resource.[4]

3.6 ANEDO supported the amendments made to the bill in the House of Representatives on the motion of the Member for New England. The witness stated that the amendments would preclude activities declared "controlled actions" for the purposes of the "water trigger" being subject to a bilateral approval agreement under the EPBC Act.[5]

Opposition to the bill

3.7 Opposition to the bill was largely confined to companies involved in CSG and coal mining activities and their industry associations. The concerns of these witnesses included: that the bill is unnecessary because there is no failure of the current processes; that regulation will be duplicated by the involvement of another level of regulation, with associated delays and costs, for no additional environmental benefit; that the bill discriminates against particular industries; that the bill contradicts the Government's commitment to less regulation; that the bill is inconsistent with previous advice and government decisions: that important matters are not defined: and that there had been no prior consultation with the affected industries.

3.8 The Minerals Council of Australia (MCA) was opposed to the bill for some of the above reasons, but it also made the following suggestions for amendments that it

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3 Australian Network of Environmental Defender's Offices Inc., *Submission 46*, pp 3-4.

4 Australian Network of Environmental Defender's Offices Inc., *Submission 46*, p. 4.

5 Australian Network of Environmental Defender's Offices Inc., *Submission 46*, p. 4.

stated 'would seek to improve the workability of this amending bill and, in so doing, minimise the adverse consequences which we trust are unintended:

> Firstly, revise the definition of a water resource to ensure that consideration is given to the materiality and context of the resource, including factors such as water quality, the connection of the water resource to environmental values, the size and variability of the water resource and whether there are any other competing users.
>
> Secondly, properly define 'significant impact' to ensure that it is related to environmental values being protected, the scale of the impact of the proposed coalmine development within the context of other existing water uses and the time frame of the proposed impact.
>
> Thirdly, revise the definition of 'large coalmining development' to ensure that there is differentiation of coal projects depending on the size of their ecological footprint and throughput and to exclude ancillary activities undertaken by a coalmine.
>
> Fourthly, reverse the onus of proof for contraventions as drafted. This one really does not sit well in the context of Australia's adherence to the notion of innocent until proven guilty. The idea that a project proponent is required to defend themselves from claims of breaches of the act without that being supported by evidence has all the hallmarks of the absolute liability provisions that formerly existed under the New South Wales Occupational Health and Safety Act.
>
> Fifthly, remove the retrospective application, the trigger for projects not undergoing EPBC Act referral. This is not a good point of law, to have retrospectivity applying in a situation where it creates great uncertainty for projects which may be currently undertaking activities, including ancillary activities. The legislation should clarify the grandfathering exemptions provided in 22(3) and 22(4) to expressly acknowledge that changes to grandfathered projects do not impact on the status of prior environmental authorisations of unchanged components or where changes are immaterial to the significance of or impact on a water resource.
>
> Finally, removal of the so-called Windsor amendment, which removes the ability for the government to enter into an approval bilateral agreement for the new matters of national environmental significance to ensure consistency with any MNES detailed in the act'. [6]

3.9 The above matters and other issues raised in the evidence are discussed in this chapter of the report.

Is the bill needed?

3.10 A submission from the National Farmers Federation (NFF) argued that the bill is premature because there is nothing to suggest that the arrangements made through COAG's National Partnership Agreement, which was established to respond to

6 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 18 April 2013, p. 2.

community concerns, have failed. The NFF stated that the arrangements were given very little time to commence 'before the drastic action was taken by the Federal Government to introduce this Bill'.[7]

3.11 General Electric (GE), a major technology and services provider to the CSG industry in Queensland, submitted that governments are continuing to work with the CSG and coal mining industries to harmonise regulation in the different jurisdictions:

> The [COAG] Standing Council on Energy and Resources (SCER) is preparing the Draft National Harmonised Regulatory Framework for Coal Seam Gas, which has been focussing on issues impacting on investment in resources exploration and development, including land access, community, infrastructure and labour. In GE's view this co-operative approach to harmonise and fill any "gaps" in the existing regulatory framework is preferable to developing new regulation in an ad hoc basis either by the Australian Government or State/Territory Governments.[8]

3.12 The NFF informed the committee that the Council is close to finalising the publication and submitted that:

> The intergovernmental framework does not support or suggest that the introduction of legislation is required. This is relevant considering the framework was developed during the water trigger debate over the last year.[9]

3.13 GE also submitted that the Australian Government has established the IESC to provide advice for all levels of government on water-related aspects of CSG and coal mining developments; that state governments have recently updated policies pertaining to management of CSG-produced water; and that the Australian Government has referred a Major Project Development Assessment Processes inquiry to the Productivity Commission 'in a bid to redress "inefficient and duplicative regulatory arrangements are imposing unnecessary costs" associated with development assessment and approval processes'.[10]

3.14 The Association of Mining and Exploration Companies (AEMC) submitted that:

> … the existing regulatory frameworks, skills and local knowledge and experience currently reside in the states and territories regulatory agencies and therefore there is no need for Commonwealth regulatory duplication.[11]

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7 National Farmers Federation, *Submission 5*, p. [1].

8 General Electric, *Submission 44*, pp 1-2.

9 National Farmers Federation, *Submission 5*, p. [3].

10 General Electric, *Submission 44*, pp 2-3.

11 Association of Mining and Exploration Companies, *Submission 20*, p. [1].

3.15 The Australian Coal Association (ACA) listed the major state government acts that regulate the industry. In Queensland for example the industries are regulated the *Water Act 2000* and the *Environmental Protection Act 1994* and a further 16 pieces of legislation that cover specific aspects of water regulation.[12]

3.16 The Australian Petroleum Production and Exploration Associated Limited (APPEA), informed the committee that while it is obvious that some sectors of the community find coal seam gas development a major problem, in the areas in Queensland where it has it major activity it also has its strongest support.[13]

3.17 The ANEDO submitted that states and territories do not adequately regulate the impacts of mining on water resources:

> … drawing on our extensive experience as environmental lawyers, we developed 10 best practice standards for planning and environmental regulation in response to COAG's proposal to streamline environmental assessment. We then evaluated relevant laws in each State and Territory against these standards. Based on our analysis, no State or Territory currently has a regulatory regime that reflects ANEDO's 'best practice metric'.[14]

3.18 As stated earlier in this chapter many submissions from individuals, including many farmers and conservation bodies, referred to a perceived failure of the state regulators adequately to protect water resources. Dr Chris McGrath, a senior lecturer in environmental regulation at the University of Queensland, who appeared in a private capacity quoted from a report of the Queensland Coordinator-General on the approval of the Santos GLNG project that, he submitted, reflected poor decision making and demonstrated a need for Commonwealth oversight for water resources affected by CSG development.[15] Dr McGrath and many others supported the Commonwealth Government's intention to include the 'water trigger' in the Act.

Committee view

3.19 The committee acknowledges that the state governments have established legislation to regulate the CSG and coal mining industries and that, in relation to matters of national environmental significance, the EPBC Act is also relevant. The committee also acknowledges that the CSG and coal mining industries support the current legislative arrangements.

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12 Australian Coal Association, *Submission 224*, pp [2]-[3].

13 Mr Rick Wilkinson, Australian Petroleum Production and Exploration Association Limited, *Committee Hansard*, 18 April 2013, p. 13.

14 Australian Network of Environmental Defender's Offices Inc., answer to question on notice, 30 April 2013.

15 Dr Chris McGrath, Additional Information, 2 May 2013, pp 5-6.

3.20 Nevertheless, the committee considers that the bill is necessary. The committee is persuaded not only by the evidence submitted by peak environmental bodies such as ANEDO but also by the large number of submissions received that were critical of the current arrangements. These submissions demonstrate a lack of confidence in the community that the current regulatory arrangements for the protection of water resources are adequate.

3.21 The committee considers that, if the CSG and coal mining industries are to have a 'social licence' to operate, this bill is needed and, to the extent that the bill alleviates widespread public concern, both the community and the industries would benefit if it were to be passed.

Industry specific provisions

3.22 Some witnesses suggested that targeting specific industries would lead to inclusion of other industries within the ambit of the EPBC Act. The NFF submitted that:

> The precedent of targeting an industry rather than an environmental matter of environmental significance opens the door to application in other areas, e.g. land clearing or the use of agricultural chemicals and fertilisers.[16]

3.23 The NFF further submitted that although it recognised the concerns of farmers within areas affected by CSG it considered that the 'water trigger' presents an unreasonable future risk to all farmers.[17]

3.24 NSW Farmers does not share this concern. The organisation submitted that:

> NSW Farmers is aware of concerns that this level of oversight on mining and CSG marks the potential for that level of regulation to extend to agricultural uses of water. However NSW Farmers is confident that the rigorous and well-established frameworks already in place for agricultural water use would leave no impetus for future governments to expand these provisions.[18]

3.25 The ACA commented on the targeting of specific industries, as follows:

> The Australian Government has also committed to a more proactive, strategic approach to environmental protection, rather than a focus on project-by-project assessments. Yet the broad terms of the new trigger require the Commonwealth to provide approval for virtually every activity associated with coal mining.[19]

16 National Farmers' Federation, *Submission 5*, p. [2].

17 National Farmers' Federation, *Submission 5*, p. [3].

18 NSW Farmers, *Submission 41*, p. 3.

19 ACA, *Submission 224*, p. [4].

3.26 The committee noted earlier in this chapter that many submitters requested that the bill should cover not only CSG and coal mining developments but other mining development proposals. ANEDO's recommendation that the water trigger should be broadened to apply to mines that excavate below the water table and to unconventional gas exploration and production activities is but one of many such recommendations. (See paragraph 3.4 above.)

3.27 SEWPAC informed the committee that the scope of the bill is limited to the impact on water resources of the industries and that this is also the scope of the NPA and the IESC.[20]

Committee view

3.28 The committee has noted submitters' concerns that the 'water trigger' has only limited application. However, the rapid and extensive development of coal mining and CSG mining in particular and the great community concern that these activities have raised require that concerns about these activities should now be addressed.

Consistent with the EPBC Act?

3.29 Some witnesses argued that the targeting of specific activities is not consistent with the objectives of the EPBC Act. APPEA submitted that:

> Matters of NES must be on the protected matter, rather than a specific industry or activity. By no standard are coal seam gas developments and large coal mines the largest users of water resources nor do these industries have the most significant impact on water resources. The unilateral creation of an industry specific trigger is inconsistent with the EPBC Act matters of NES that focus on impacts to protected matters. The management of a water resource is more appropriately managed through regional assessments undertaken by the relevant States with oversight and input from the Commonwealth through the National Partnership Agreement.[21]

3.30 The Business Council of Australia submitted that 'The creation of a water trigger runs counter to the philosophy of the EPBC Act in that this amendment addresses an industry sector and not a matter of environmental significance as specified under any international treaty or obligation'. [22]

3.31 The ACA submitted that the proposals go well beyond the intended reach of the EPBC Act, and quoted the Hawke Review as follows:

> It is important to remember that the Australian Government's role is to act in Australia's 'national' interest. The focus of the Act must therefore

20 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard*, 18 April 2013, p. 61.

21 Australian Petroleum Production and Exploration Association Limited, *Submission 47*, p. 10.

22 Business Council of Australia, *Submission 48*, p. 1.

> continue to be on matters of national environmental significance and nationally important biodiversity and heritage, leaving other environmental matters of importance at a State, Territory or local level to those State, Territory and Local Governments as the more appropriate managers.[23]

3.32 The MCA submitted that:

> At the core of the EPBC Act is the fulfilment of Australia's international obligations. Indeed all the current mNES have linkages with International Treaties or Conventions…
>
> Unlike existing mNES, the proposed inclusion of a new mNES for "…large coal mining developments" on water resources has no obvious connection with any of Australia's Global environmental commitments. This puts the amendment at odds with both the intended role of the EPBC Act and its principal relationship to the External Affairs provisions of the Australian Constitution.[24]

3.33 SEWPAC informed the committee that a number of the objects of the EPBC Act do not specifically refer to international treaties and that:

> … in relying on the corporations power and the interstate trade and commerce powers under the Constitution we are doing something that is already done in the EPBC Act for the nuclear trigger and for the national heritage powers.[25]

Committee view

3.34 The Government has not relied on the external affairs powers to legislate in this area. As noted above, the bill relies on the corporations and interstate trade and commerce powers (see proposed ss24D and 24E), and this is not new. Concerns about the validity of the bill therefore seem to be misplaced.

Duplication of regulations

3.35 As discussed in Chapter 2, the CSG and Coal mining industries are regulated at the state and federal government levels, most recently through a National Partnership Agreement on Coal Seam and Large Coal Mining Development (NPA). The NPA, which was signed by the Commonwealth, Queensland, New South Wales and South Australian Governments, requires the states to refer any CSG or coal mining development to the IESC and to take account of the Committee's advice in their decision making in a transparent manner.

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23 Hawke A, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, October 2009, p 58, quoted by ACA, *Submission 224*, pp 4-5.

24 Minerals Council of Australia, *Submission 222*, p. 10.

25 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard*, 18 April 2013, p. 61.

3.36 Witnesses involved in the mining of coal informed the committee that, given this and other regulations imposed by state governments, additional regulation was unnecessary. They expressed concern that the bill would add another level of regulation in the approval processes for these activities for no apparent advance in environmental protection. ACA, for example, submitted that:

> The introduction of a targeted water trigger in the EPBC Act adds yet another layer of regulation over and above an already complex and onerous environmental approvals process. More regulation does not equate to better environmental protection outcomes. The fact that the water trigger duplicates existing State assessment and approvals processes, as well as the newly established IESC process, makes it impossible to identify what additional environmental protection the Commonwealth will actually deliver.[26]

3.37 QGC estimates that, based on its experience of the Water Monitoring and Management Plan approvals and implementation, the new water trigger could add two or more years to the EIS process.[27]

3.38 GE submitted that the bill will add to the regulated timeframes for assessing projects, even those well through the approval processes and closest to achieving approval … and commencing job-generating construction and operation. The company quoted from a report of the Productivity Commission:

> In 2009, the Productivity Commission released its final Review of Regulatory Burden on the Upstream Petroleum (Oil & Gas) Sector [that] found:
>
> "Significant regulatory costs are associated with approval delays that potentially lead to increased project expenditures, reduced flexibility for responding to market conditions, inflated capital costs, increased difficulty of financing projects, and reduced present value from resource development. Expediting the average approval process by one year could increase the net present value of projects by 10–20 per cent simply by bringing forward income streams. Given the sector contributes 2 per cent to GDP, the potential income gains for Australian residents could be in the billions of dollars each year".[28]

3.39 APPEA stated that there are significant administrative costs in complying with regulation and that delays result in the greatest costs.[29] APPEA submitted that, due to fundamental differences between the assessment processes of the states and the

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26 Australian Coal Association, *Submission 224*, p. [2].

27 QGC, *Submission 228*, p. [4].

28 General Electric, *Submission 44*, p. 4.

29 Australian Petroleum Production and Exploration Association Limited, *Submission 47*, p. 8.

Commonwealth, the introduction of the 'water trigger' will require two different approval processes.[30]

3.40 In relation to coal mining developments, ACA stated that one of its members had incurred costs of more than half a million dollars a day due to delays in obtaining EPBC approval.[31] The Association submitted that:

> Unfortunately, the additional costs and uncertainty presented by the water trigger could not come at a worse time for the Australian coal industry. The industry is already grappling with an increasingly challenging operating environment. Coal prices have plummeted and capital and operating costs are nearly double those of competitor countries. Growth in exports from our major competitors, including Indonesia, Canada, United States, South Africa and Colombia, is now having a real impact on Australia's market share. In 2011, Australia lost its position as the world's largest coal exporter by volume – a title we've held consistently for almost three decades to Indonesia.[32]

3.41 ACA informed the committee that delays may also affect the taxes collected by government. It stated that a recent report had indicated that the cost to government taxation revenue of a two year delay in a CSG to LNG project would be between $360 and $730 million.[33] Mr Knowles, Director, Economists at Large Pty Ltd, commenting on the cost in lost revenue to governments informed the committee that most analyses include the entire tax revenue that is deferred as a cost, when it is really only the opportunity cost of that deferred revenue. 'And, if you take an intergenerational perspective, future generations will still derive that benefit'.[34]

3.42 Dr McGrath stated that the new trigger is unlikely to cause significant additional costs or delays for industry. He argued that state and local government approvals are far more numerous, and their requirements are far more extensive, costly and time consuming than those imposed by the EPBC Act. Dr McGrath referred to the Wandoan coal mine development which began its approval process with the Queensland State Government in 2007 and has still not completed it, and contrasted that with the Commonwealth EPBC Act approval process which began in 2008 and was completed in 2011.[35]

3.43 Mr Tristan Knowles in response to a question concerning the costs of regulation to proponents of mining developments stated that:

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30 Australian Petroleum Production and Exploration Association Limited, *Submission 47*, pp 7- 8.

31 Australian Coal Association, *Submission 224*, p. [5].

32 Australian Coal Association, *Submission 224*, p. [5].

33 Australian Coal Association, *Submission 224*, p. [5].

34 Mr Tristan Knowles, *Committee Hansard*, 18 April 2013, p. 39.

35 Dr Christopher McGrath, *Committee Hansard*, 17 April 2013, p. 29.

> … there are two costs you need to consider. One is the compliance cost and one is a delay cost. I think the bigger picture here in terms of the industry is that the profitability of the industry is a factor of capital costs, or capex, and operational costs, or opex. Potential environmental concerns and processes under, say, an EPBC Act trigger do not impact capex and opex enough; it is market prices, cost of capital, cost of technology and cost of labour. These are where the big impacts are felt. So I think you firstly have to put it into that perspective and say the marginality of projects is driven by internal costs and market prices; it is not driven by what the industry has recently been referring to as 'green tape'.[36]

3.44 In his second reading speech on the bill the minister stated that 'the sort of information that would be needed for the new matter of national environmental significance already gets collected in different ways for state approvals, and for the work of the Independent Expert Scientific Committee'.[37]

Committee view

3.45 The committee acknowledges the concerns of the industry that relate to increased compliance costs and possible delays in obtaining approvals. It considers, however, that any additional costs or delays should be viewed in the context of the need for the industries to allay community concerns about their operations. The committee also considers that any additional costs would be relatively small compared with the total cost of viable projects, and would be unlikely to dissuade any but the most marginal developers.

The 'Windsor amendments'

3.46 As stated earlier in this chapter MCA requested the removal of the 'so-called Windsor amendments' from the bill.

3.47 SEWPAC explained the likely effects of these amendments as follows:

> The proposed amendments would prevent the accreditation of state and territory frameworks under a bilateral agreement, so that a state or territory could not undertake approval of proposed actions that are likely to have a significant impact on the new water resource matter of national environmental significance. This item would mean that the Australian Government would have an ongoing requirement to assess, and make decisions on, coal seam gas and large coal mining proposals that are likely to have a significant impact on water resources.[38]

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36 Mr Tristan Knowles, *Committee Hansard*, 18 April 2013, p. 38.

37 The Hon. A Burke, Minister for Sustainability, Environment, Water, Population and Communities, *House of Representatives Hansard*, 13 March 2013, p. 8.

38 Department of Sustainability, Environment, Water, Population and Communities, *Submission 223*, p. 3.

3.48 The MCA was not the only industry body to express concern about the amendments. ACA submitted that:

> The last-minute amendment by Tony Windsor MP to prevent the use of bilateral approval agreements in relation to the new matter of NES is particularly concerning as it removes an important mechanism to avoid duplication with State governments.[39]

3.49 BHP Billiton submitted that:

> We are also concerned with the lack of due process in the development of the amendments, in particular those provisions which remove the ability of the Government to enter into Approval Bilateral Agreements. The manner and timing in which they were introduced, and the acceptance of the amendments without consideration, explanation or the opportunity for consultation with affected stakeholders, could lead to public policy outcomes that diminish the competiveness of the Australian resources sector and without any benefits in improved environmental standards.[40]

3.50 Many submitters supported the amendments on the grounds that the state governments lack the resources properly to assess proposals or, more commonly, on the grounds that the relevant state government authority has an interest in approving projects, rather than thoroughly assessing them. For example, Mrs Loan from the Nature Conservation Council of New South Wales stated:

> … it is important to recognise that the states do not necessarily have the national interest at heart when they are assessing these types of proposals. States can often directly benefit from projects that they are assessing, whether it is through royalties on mining and gas resources or through direct income to state-owned agencies that are carrying out projects within their own state.[41]

3.51 In a previous report the committee has commented on the ability of the states' approvals processes and has found that:

> … there is a high degree of concern that state and territory governments simply do not have the ability to exercise the standards of decision making required.[42]

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39 Australian Coal Association, *Submission 224*, p. [4].

40 BHP Billiton Limited, *Submission 229*, p. [3].

41 Mrs Cerin Loane, Environment Liaison Officer, Nature Conservation Council of New South Wales, *Committee Hansard*, 17 April 2013, p. 61.

42 Senate Environment and Communications Committee, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2013*, March 2013, p. 24.

Committee view

3.52 The committee considers that there is sufficient concern and evidence about the inadequacy of state approval processes to warrant the involvement of the Commonwealth Government. It is cognisant of the fact that some witnesses have suggested that if the problem lies with the states then it should be addressed by the states. However, given concerns about conflict of interest where states desire the investment and taxation provided by mining developments and also approve those developments, it seems reasonable that the assessment of proposed CSG and coal mining developments should be undertaken by the Commonwealth Government.

A broad trigger?

3.53 Witnesses involved in the industry suggested that all development proposals were likely to be caught by the water trigger. ACA, for example, taking into account the legislative definitions of 'large coal mining development', 'water resource' and 'significant impact' submitted that:

> … virtually all current and future coal developments, regardless of size, will now be subject to the costs, delays and uncertainty associated with seeking Commonwealth EPBC approval.[43]

3.54 If in fact the 'water trigger' does apply to virtually all developments this will have resource implications for the Commonwealth. However, ACA quoted a statement made by the minister in an address to the National Press Club:

> In terms of water resources, I want to make sure that we don't end up in a situation where for no significant environmental benefit we are suddenly putting the Federal Government in charge of absolutely every application…It's hard to find a mining application of any sort that doesn't have some sort of impact on water resources.[44]

Definitions

3.55 It is important therefore that the definitions of 'significant impact', 'water resource' and 'large coal mining development' be well understood and accepted. These definitions are discussed below.

Definition of 'significant impact'

3.56 The MCA submitted that 'significant impact' should be defined to ensure that it is related to environmental values being protected, the scale of the impact of the

43 Australian Coal Association, *Submission 224*, p. [7].

44 The Hon A Burke, Minister for Sustainability, Environment, Water, Population and Communities, quoted by Australian Coal Association, *Submission 224*, p. [7].

proposed coalmine development within the context of other existing water uses and the time frame of the proposed impact.[45]

3.57 The New South Wales Irrigators' Council also referred to this matter in its evidence to the committee. The Council's Chief Executive Officer stated that:

> The fact that there is no clear and objective definition of what a significant impact is after that act has been in place for so long—and indeed since the Federal Court gave a virtually indefinable interpretation of it—is a massive weakness of the act and as a result is going to be visited upon the water trigger as well.[46]

3.58 The term is defined in the NPA as follows:

> Significant impact on water resources is caused by a single action or the cumulative impact of multiple actions which would directly or indirectly:
>
> (a) Result in a substantial change in the quantity, quality of availability of surface or ground water;
>
> (b) Substantially alter ground water pressure and /or water table levels;
>
> (c) Alter the ecological character of a wetland that is State significant or a Ramsar wetland;
>
> (d) Divert or impound rivers or creeks or substantially alter drainage patterns;
>
> (e) Reduce biological diversity or change species composition;
>
> (f) Alter coastal processes, including sediment movement or accretion, or water circulation patterns;
>
> (g) result in persistent organic chemicals, heavy metals, or other potentially harmful chemicals accumulating in the environment such that biodiversity, ecological integrity, human health or other community and economic use may be adversely affected; or
>
> (h) substantially increase demand for, or reduce the availability of water for human consumption.[47]

3.59 The Nature Conservation Council of NSW observed that the EPBC Bill 2013 does not seek to include the above definition in the Act. The Council submitted that:

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45 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 18 April 2013, p. 2.

46 Mr Andrew Gregson, New South Wales Irrigators' Council, *Committee Hansard*, 17 April 2013, p. 45.

47 COAG Standing Council on Federal Financial Relations, National Partnership Agreement on Coal Seam as and Large Coal Mining Development, p. 8, http://www.federalfinancialrelations.gov.au/content/npa/environment/CSG_and_lcmd/NP.pdf, (accessed 5 April 2013).

> … under Part 9 of the EPBC Act, requirements are provided for the Minister to consider when making his decision about an activity for each of the existing controlling provisions. However, the EPBC Bill 2013 does not seek to introduce any requirements under Part 9 in relation to water resources. The ability to protect water resources in the future will depend on the provision of a strong definition or requirements under Part 9 for water resources.[48]

3.60 Also, as the committee noted earlier in this Chapter, ANEDO made suggestions for the definition of 'significant impact'.

3.61 SEWPAC informed the committee that it would be consulting industry and environmental stakeholders groups on the significant impact guidelines.[49]

Definition of a water resource

3.62 A water resource is defined in the Commonwealth *Water Act 2007* as follows:

> water resource means:
>
> surface water or ground water; or
>
> a watercourse, lake, wetland or aquifer (whether or not it currently has water in it);
>
> and includes all aspects of the water resource (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource).[50]

3.63 Mr James Cameron, Chief Executive Officer, National Water Commission, suggested that:

> … there are a myriad of distinct water resources across the country that are managed having regard to the economic, social and environmental relevance of those individual resources. Some of them—many of them—are certainly of national significance, but not every single water resource across the country.[51]

3.64 The MCA proposed that the definition of a water resource should be revised to ensure that consideration is given to the materiality and context of the resource, including factors such as water quality, the connection of the water resource to environmental values, the size and variability of the water resource and whether there are any other competing users.

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48 Nature Conservation Council of NSW, answer to written question on notice, 24 April 2013.

49 Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard*, 18 April 2013, p. 62.

50 *Water Act 2007*, s.4.

51 Mr James Cameron, Australian Water Commission, *Committee Hansard*, 18 April 2013, p. 56.

3.65 Ms Tracey Winters, Vice-President, Environment, QGC Pty Ltd, stated that:

> … the effect of this bill is to extend water resources—for example, a dry gully, every dry gully in the country, because a watercourse is defined as every watercourse, whether it is flowing or not. So this bill would make every dry gully in the country a matter of national environmental significance.[52]

Committee view

3.66 Although a water resource could include a dry gully, it should be noted that the provisions of the bill will only apply if a CSG or coal mining development is likely to have a significant impact on that water resource. It is most unlikely that all dry gullies would be included.

3.67 The committee notes that the minister in his second reading speech on the bill stated that the bill 'does not seek to invoke the Commonwealth in all water decisions and that the trigger would not capture small projects such as farm dams'.[53]

Definition of a Large Coal Mining Development

3.68 'Large coal mining development' is defined in the s 528 of the EPBC Act as:

> … any coal mining activity that has, or is likely to have, a significant impact on water resources (including any impacts of associated salt production and/or salinity):
>
> in its own right; or
>
> when considered with other developments, whether past, present or reasonably foreseeable developments.[54]

3.69 The MCA recommended that the definition should be revised to ensure that there is differentiation of coal projects depending on the size of their ecological footprint and throughput and to exclude ancillary activities undertaken by a coalmine.[55]

3.70 Dr Mudd, in response to a question from the committee, stated:

> … how do you define large-scale coalmining? At what point does something become large versus small? And, just because it is small, it does not mean it has no impact on water resources. All of those issues are very

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52 Ms Tracey Winters, Vice-President, Environment, QGC Pty Ltd, *Committee Hansard*, 18 April 2013, p. 21.

53 The Hon. A Burke, Minister for Sustainability, Environment, Water, Population and Communities, *House of Representatives Hansard*, 13 March 2013, p. 8.

54 Mr Dean Knudson, *Committee Hansard*, 18 April 2013, p. 62.

55 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 18 April 2013, p. 2.

> real, and the problem is that all of these things are site-specific and variable.[56]

Exploration activities

3.71 An issue raised by a number of companies was that the bill might apply to exploration activities as well as to development. Santos, for example, submitted that:

> Most concerning to Santos is a seemingly unintended consequence of the amendments that "exploration" and "appraisal" activities will be captured …Traditionally the Act has been interpreted to regard "development" as referring to a defined project already committed to by the proponent.[57]

3.72 The company submitted that development can only follow after the proponent has a 'sound understanding of the resource it is targeting …'[58]

3.73 The Australian Petroleum Production and Exploration Association (APPEA) submitted that:

> The proposed amendment bill utilises the definition of coal seam gas development activity used by the existing Independent Expert Scientific Committee gateway. Coal seam gas development means any activity involving coal seam gas extraction that has, or is likely to have, a significant impact on water resources (including any impacts of associated salt production and/or salinity).
>
> This is a broad definition that is likely to extend to petroleum exploration activities, which involve small amounts of coal seam gas extraction. The inclusion of exploration activities in the scope of activities covered by the amendment will result in situations where exploration cannot proceed. This is despite the fact that it is the act of exploration that informs the assessment of a water resource. This paradox is particularly concerning in remote areas where little or no information already exists.[59]

3.74 APPEA submitted that the bill should expressly exclude exploration activities from the definition of coal seam gas development.[60]

3.75 The committee was informed that the bill will cover exploration and appraisal activities. Dr Kimberley Dripps, Deputy Secretary, SEWPAC, informed that committee that:

> The way the EPBC Act operates is that it is based on a 'significant impact' on one of the listed matters. So the stage of the activity, whether it is an

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56 Dr Gavin Mudd, *Committee Hansard*, 18 April 2013, pp 43-44.

57 Santos, *Submission 38*, p. 2.

58 Santos, *Submission 38*, p. 2.

59 Australian Petroleum Production and Exploration Association, *Submission 47*, pp 8-9.

60 Australian Petroleum Production and Exploration Association, *Submission 47*, p. 9.

> early exploratory stage or an actual production stage, is not relevant in considering whether or not there is a significant impact.[61]

Reverse onus of proof

As stated earlier in this chapter of the report, the MCA requested that the reverse onus of proof for contraventions should be removed from the bill. Mr Hooke argued that:

> This one really does not sit well in the context of Australia's adherence to the notion of innocent until proven guilty. The idea that a project proponent is required to defend themselves from claims of breaches of the act without that being supported by evidence has all the hallmarks of the absolute liability provisions that formerly existed under the New South Wales Occupational Health and Safety Act.[62]

3.76 In relation to this matter in a response to a question taken on notice SEWPAC provided the following information:

> Proposed section 24D(4) sets out a number of circumstances in which the civil penalty provisions in proposed section 24D will not apply to an action even where a person has taken an action as described in section 24D that has had, will have or is likely to have a significant impact on a water resource. Proposed section 24D(5) places an evidentiary burden on the person seeking to show that one of the matters in section 24D(4) exists.
>
> Proposed section 24D(4) therefore operates as an exemption from liability for a civil penalty. It is not specified in the EPBC Act who bears the evidential burden of showing that an exemption from the civil penalty provisions relating to other matters of national environmental significance. It is current drafting practice, where a civil penalty provision contains an exception, to specify whether relying on the exception is something for the prosecution or the defendant needs to prove.
>
> The proposed provision places the evidentiary onus on the person seeking to show that an exception exists. This is because the matters which a person would have to show to rely on proposed section 24D are easily adduced by the person wishing to rely on those matters and the effort required for discovery would not place an onerous burden upon that person. [63]

Role of the IESC

3.77 There was much discussion during the hearings about the role of the IESC. The critical role played by the IESC under the NPA has been described earlier in this

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61 Dr Kimberley Dripps, Deputy Secretary, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard,* 18 April 2013, p. 61.

62 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard,* 18 April 2013, p. 2.

63 Department of Sustainability, Environment, Water, Population and Communities, answer to question on notice, 2 May 2013.

report. Generally, although the industries had not seen the need for the establishment of the IESC they were able to work with it.[64]

3.78 Some witnesses considered that the role of the IESC should be strengthen to give it more power. The Lock the Gate Alliance submitted that:

> The Committee still has only a weak, advisory role under the new scheme. The IESC should be required to advise on whether a project should be approved, and that advice should be binding on the Minister. Failing that, the IESC should be given a decision making role. IESC advice should be required to be made public prior to a final decision being made on a project.[65]

3.79 If the bill is passed the IESC expects that it will continue to provide advice on water related impacts of coal seam gas and large coal mining projects that are referred to it by the governments that are signatories to the NPA but similar projects in other States may also be referred to it.[66]

3.80 As stated in Chapter 2, the advices provided to the minister by the IESC that relate to proposed CSG and coal mining developments are published on that committee's website once the decision has been made on them. The advices include relevant data and information, whether appropriate methodologies have been used and applied correctly and reasonable values and parameters have been used in calculations.[67]

Committee view

3.81 The committee supports the practice of publishing IESC advices in full, but considers that there is scope to additionally publish a simplified summary of the reports in all cases so as to make them more accessible for interested lay people. The committee will recommend that the Commonwealth Government should consider the merits of this proposal.

Recommendation 1

3.82 The committee recommends that the Commonwealth Government consider whether simplified IESC advices in all cases should be published for the information of interested persons.

Consultation

3.83 A number of industry witnesses submitted that the government had not followed normal practice in introducing the bill. This complaint was made in relation

64 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 18 April 2013, p. 6.

65 Lock the Gate Alliance, *Submission 25*, pp 1-2.

66 IESC, answer to a question on notice, 2 May 2013.

67 IESC, answer to a question on notice, 2 May 2013.

to lack of consultation with the industry and in relation to the government's decision not to produce a Regulatory Impact Statement.

3.84 APPEA stated that:

> We believe that the bill requires far greater consideration than what has been able to be given to date. The process that has led to the bill entering parliament has not provided satisfactory consultation with the industry. It is important for detailed consultation to be the centrepiece where significant regulatory changes are envisaged, such as the one contained in this bill. Key policy-making processes designed to test the full impacts and implication of the bill have been deficient in the process to date. APPEA notes that the House Standing Committee on Climate Change, Environment and the Arts has not provided a report on the bill and that no regulatory impact statement has been prepared, despite government commitments in the past that this should rarely occur and only in urgent and unforeseeable events, and no meaningful consultation with industry or other affected stakeholders was undertaken prior to its introduction.[68]

3.85 SEWPAC informed the committee during the public hearings that consultation had taken place in relation to the bill. In answer to a question on notice the department provided details of attendees at consultations on the EPBC Bill that took place on 18 and 20 March 2013 and 1 May 2013.[69]

Retrospectivity

3.86 Certain activities that are at different stages of the current assessment and approval processes have been exempted from the provisions of the bill. These exemptions were summarised by Mr Barker, SEWPAC, as follows:

> There are a number of exclusions in the bill as to what the trigger will not apply to. It includes projects that have already had approval under the EPBC Act. It includes projects that have already been determined in the past not to be a controlled action under the EPBC Act. It also similarly includes proposals that were determined not to be a controlled action because they were undertaken in a particular way and for which there was a Commonwealth decision that that project did not at that time trigger the EPBC Act. There is also an exclusion in relation to projects that have had advice from the independent expert scientific committee and for which there is a proposed decision on whether to approve the project under part 9 of the EPBC Act or if the proposal has already got what is called a prior authorisation. That is essentially the projects that have received an approval, including prior state approval. In that respect the exclusion is

68 Mr Rick Wilkinson, APPEA, *Committee Hansard*, 18 April 2013, p. 10.

69 Department of Sustainability, Environment, Water, Population and Communities, answer to a question on notice, 2 May 2013.

> based on pre-existing conditions of the EPBC Act that were put in place when the act first commenced— [70]

3.87 The minister stated in his second reading speech that the new trigger will apply to projects already being assessed under national environmental law if the IESC has not given him its final advice.[71]

3.88 The exemptions in the bill do not cover all CSG and coal mining activities that are in the process of assessment and approval and this is of concern to the industries. Mr Hooke stated:

> Remove the retrospective application, the trigger for projects not undergoing EPBC Act referral. This is not a good point of law, to have retrospectivity applying in a situation where it creates great uncertainty for projects which may be currently undertaking activities, including ancillary activities. The legislation should clarify the grandfathering exemptions provided in 22(3) and 22(4) to expressly acknowledge that changes to grandfathered projects do not impact on the status of prior environmental authorisations of unchanged components or where changes are immaterial to the significance of or impact on a water resource.[72]

3.89 ACA had similar concerns as to whether projects which are well advanced would be affected and was also concerned that the bill would apply to established developments:

> Industry is also concerned with the retrospective application of the new trigger to projects that are already well advanced in the approvals process. These projects now face further uncertainty and potential delays. There is also the potential for the water trigger to capture established coal developments even where there are no significant changes to their operations. The exemptions should clarify that new provisions apply only to existing projects where there is a major new development proposal.[73]

3.90 A number of witnesses considered that the bill contained too many exemptions. The ACF submitted:

> The current proposal includes a number of exemptions to the application of the water trigger. While it is understandable that some exemptions may need to be made in the interests of stakeholder certainty and due process, the current proposal goes too far. Too many exemptions necessarily reduce the actual protection of water resources, create an unwarranted advantage for selected projects over others, and will fail to restore community

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70 Mr James Barker, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard*, 18 April 2013, p. 63.

71 The Hon. A Burke, Minister for Sustainability, Environment, Water, Population and Communities, *House of Representatives Hansard*, 13 March 2013, p. 8.

72 Mr Mitchell Hooke, Minerals Council of Australia, *Committee Hansard*, 18 April 2013, p. 2.

73 ACA, *Committee Hansard*, 17 April 2013, p. 35.

> confidence in the management of local water resources. ACF recommends that the Bill be reconsidered and the range of exemptions to the water trigger be reduced to the greatest extent possible.[74]

3.91 Some other submitters were concerned about specific developments that they considered would affect them. Lock the Gate Alliance submitted:

> We want to ensure that the exemptions contained in the Bill are minimised, and that key projects for which applications have already been submitted and referred to the IESC, such as the Arrow Coal Seam Gas project in Qld and the Camden Gas Project in Sydney, are not exempt from it. Therefore, we would still like to see minor amendments to remove s22 2 b) and d).[75]

3.92 The IESC has provided advice to the minister in relation to the Arrow development but the minister has not issued a proposed decision. Mr Barker explained:

> … the minister needs to make an active decision as to whether to apply the trigger to projects that are currently going through the process of EPBC Act assessment. The Arrow project would be one of those projects. So this is the 60-day period that Mr Knudson referred to. There is a transitional period. If the bill were to commence in its current form, the minister would be required to make a decision within 60 business days as to whether the new water trigger did or did not apply …[76]

3.93 The Nature Conservation Council of New South Wales submitted that:

> There are exemptions currently contained within the Bill that would allow several major projects to proceed without full and proper consideration of their impact on water resources. Exclusions include any project that has been deemed not a controlled action for other provisions and any development for which the IESC has already given advice to the Minister. Furthermore, the meaning of Section 22 (2e) remains unclear, but it has the potential to exempt most existing applications from the water resource trigger. The changes should apply to all current applications that are likely to have a significant impact on water resources.[77]

Conclusions

3.94 The committee received much evidence which demonstrated that there is a high level of concern in the community, especially in rural areas, about the possible adverse effects of CSG and coal mining on the availability and quality of water

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74 Australian Conservation Foundation, *Submission 198*, p. 5.

75 Lock the Gate Alliance, *Submission 25*, p. 1.

76 Mr James Barker, Department of Sustainability, Environment, Water, Population and Communities, *Committee Hansard*, 18 April 2013, pp 63-64.

77 Australian Conservation Council of New South Wales, *Submission 456*, p. [2]

resources. There is also a strong feeling that the assessment and approval processes for these developments are inadequate.

3.95 Given that water is the most important of the nation's natural resources it is both necessary and appropriate that the assessment and approval of these activities should be at the national level. The committee will recommend that the EPBC Bill 2013 be passed by the Senate.

Recommendation 2

3.96 The committee recommends that the bill as amended by the House of Representatives be passed by the Senate.

Senator Doug Cameron
Chair

Coalition — Additional Comments

Questionable process

1.1 Coalition Senators are concerned at the absence of sound process in arriving at the introduction of this legislation. Not only has this legislation been drafted without consultation, such legislation was not recommended by the most recent thorough independent review of the principal act (the Hawke Review) and to which the Government responded as recently as August 2011.

1.2 The absence of consultation was confirmed by the Department in response to a question taken on notice.

> Consultation was not undertaken on the detailed text of the Bill prior to its introduction and consideration by the Parliament.[1]

1.3 The absence of appropriate consultation or identification by the Independent review of the Environment Protection and Biodiversity Conservation Act 1999 (or Hawke review) was outlined by the Australian Network of Environmental Defenders Offices.

> **Ms Walmsley:** I think the clear example of an ideal process would be the Hawke review. That was a 10-year review of the act. It was independent. The panellists on the Hawke review interviewed hundreds of industry, farmer and environmental groups. They did a thorough, independent review. They put out 71 recommendations. The government put out a response. There were so many great things in that package that could strengthen the bill and address a lot of these issues that are being incrementally addressed by really specific small bills that deal with really small issues, whereas I think that waiting in the wings for two parliamentary sessions now we have potentially had a solution to make the EPBC a better act, clarify the Commonwealth role and address inefficiencies. We have had the opportunity to do that.
>
> So, no, I do not think it is ideal that the EPBC Act is being amended by piecemeal bills. I think we should embrace the opportunity to follow the Hawke review and actually do a proper amendment of the act itself to strengthen the Commonwealth role. The problem with that is that the government response cherry-picked aspects of the Hawke review and did not support some of the more important reforms that were recommended. But, in terms of ideal process, the Hawke review was based on extensive consultation with experts. So that is our benchmark for EPBC reform rather than dealing with these piece-by-piece bills.[2]

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[1] Department of Sustainability, Environment, Water, Population and Communities, answer to a question on notice, 'sewpac 13'.

[2] Ms Rachel Louise Walmsley, Australian Network of Environmental Defenders Offices, Hansard, Sydney, 17 April 2013, p. 17.

1.4 Among other organisations considering themselves to be qualified to offer feedback but expressing concerns at not being consulted were AGL:

> **Ms McNamara:** AGL operates across the supply chain with investments in energy retailing, coal- and gas-fired generation, renewables and upstream gas exploration and production projects. AGL is also one of Australia's largest retailers of gas and electricity, with more than three million customers across the eastern states and South Australia. AGL is an experienced developer and operator of a number of CSG exploration and development projects. Accordingly, AGL believes it is well place to provide feedback on the issues raised in the bill.[3]
>
> **…**
>
> **Senator BIRMINGHAM:** Did the government consult AGL in the drafting of this bill?
>
> **Mr Ashby:** No. Absolutely not.[4]

1.5 In expressing concerns at inadequate processes, both the Australian Coal Association and the Australian Petroleum Production and Exploration Association also drew attention to the absence of a Regulation Impact Statement that might have identified both issues needing to be addressed and the relative merits of possible solutions.

> ...we are particularly concerned with the way this legislation has been rushed into parliament, without any consultation or the preparation of a regulatory impact statement. There is no justification that we can see for such a gross failure of process and, accordingly, we welcome the Senate committee's close scrutiny of the bill.[5]
>
> ...if there were an actual problem to be addressed we would actually know what that was if we had been through a regulation impact assessment process, the first part of which is to identify the problem and then to identify the costs and benefits of addressing the problem and how they relate to the overall public policy outcome we are trying to achieve. We are here today because of a fundamentally flawed process."[6]
>
> "We believe that the bill requires far greater consideration than what has been able to be given to date. The process that has led to the bill entering parliament has not provided satisfactory consultation with the industry. It is important for detailed consultation to be the centrepiece where significant regulatory changes are envisaged, such as the one contained in this bill. Key policy-making processes designed to test the full impacts and implication of the bill have been deficient in the process to date. APPEA notes that the House Standing Committee on Climate Change, Environment and the Arts has not provided a report on the bill and that no regulatory impact statement

[3] Ms Sarah McNamara, AGL Energy, Hansard, Sydney, 17 April 2013, p. 19.

[4] Mr Paul Ashby, AGL Energy, Hansard, Sydney, 17 April 2013, p. 21.

[5] Mr Greg Sullivan, Australian Coal Association, Hansard, Sydney, 17 April 2013, p. 35.

[6] Mr Greg Sullivan, Australian Coal Association, Hansard, Sydney, 17 April 2013, p. 37.

> has been prepared, despite government commitments in the past that this should rarely occur and only in urgent and unforeseeable events, and no meaningful consultation with industry or other affected stakeholders was undertaken prior to its introduction.
>
> As the industry can see that no additional environmental benefit is established by implementing the proposed amendment, it is difficult to understand, particularly from a policy perspective, why such important legislation has missed these standard processes. Conversely, there are considerable risks associated with the heightened uncertainty, increased cost and project delays."[7]

Duplication with state legislation & role of Independent Expert Scientific Committee

1.6 Coalition Senators acknowledge evidence given to the committee that measures given effect by this bill potentially duplicate processes already in place. Further, these changes add new regulation on top of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development that was established as part of a national partnerships agreement between state and federal governments only late last year, with no evidence that this new process has yet proven to be ineffective.

1.7 Further, Coalition Senators note that evidence to the inquiry tended to focus on just one state, despite exploration and extraction activities occurring or planned across several states. This seems to suggest that if there is a regulatory gap it should be addressed in jurisdictions where it may occur, rather than having a new layer of regulation imposed across all jurisdictions, including those where current regulations appear to be working without significant concerns.

1.8 The introduction of this bill is symptomatic of an *ad hoc* policy process by this Labor Government that does not properly assess the need for reform before legislating in response and also has not afforded sufficient time to allow proper assessment of the effectiveness of newly implemented measures.

> **Mr Sullivan:** The trigger ... duplicates already comprehensive state assessment and approvals processes. The establishment last year of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development obviates the need for the trigger. The IESC has already provided advice on over 30 projects and there is no evidence that this process has failed or that additional regulatory intervention is justified ... The fundamental point I would make is that we are essentially talking about an issue of duplication here to start with, because these water issues are the subject of regulatory frameworks in the states and territories. For example, New South Wales has comprehensive and elaborate legislative arrangements to protect water, the use of water, extraction of water and the environment in relation to all aspects. So this is a duplication of existing

[7] Mr Rick Wilkinson, Australian Petroleum Production and Exploration Association, Hansard, Canberra, 18 April 2013, p. 10.

regimes.

…

Certainly one of the things I became well aware of in almost 20 years in the regulatory space was that regulation is not necessarily the best tool to use when you are after particular outcomes. Incentives, collaborative initiatives and programs into research all play an important role. The Commonwealth has those programs. So we would say that there is certainly no need for this amendment. My colleague may wish to add to that.

Ms McCulloch: Section 131AB, I believe, of the EPBC Act requires the Commonwealth to refer coalmining or coal seam gas projects that are likely to have a significant impact on a water resource to the IESC. Our advice from the department is that they do take into account the advice of the IESC in relation to impacts on water resources insofar as they are linked to other matters of national environmental significance, and in issuing approval conditions they factor in the water impacts and respond to the water impacts in those conditions. To reiterate, this is unnecessary duplication of a process that is already in place.[8]

1.9 AGL also expressed concerns at the interaction with existing processes.

My understanding in relation to the independent scientific commission is that it advises both state and federal governments in terms of the application of the environmental approval process and would therefore have had input into the current processes that we have to satisfy to get our projects going forward. So my understanding is that it is not just limited to the federal government; it is state and federal governments that are advised by that body. We welcome scientific perusal and study of our projects, and we are very happy to make all that data available.

So our understanding is that they already have a good interaction at the state and federal levels in the formulation of, for instance, our development conditions. For that reason, we think that that is very good and should be encouraged. We think therefore that this EPBC Act amendment could undermine that process by legislating where it is not necessary to do so.[9]

1.10 The IESC process is still in its relative infancy. It is a transparent process that provides advice to both state and federal governments. The publication of this advice means that governments will clearly be exposed should they ignore such expert advice. As recently as last year the Government argued this process was sound and would address community concerns, rejecting independent and Greens attempts to amend the EPBC Act in a way that this legislation proposes. Evidence by the NFF highlighted this about face by the Gillard Government:

Ms Kerr : I can certainly do that, but I will go back to the original bills introduced by Tony Windsor and Senator Waters. We had some engagement with both the opposition and the government when they were

[8] Mr Greg Sullivan and Ms Samantha McCulloch, Australian Coal Association, Hansard, Sydney, 17 April 2013, pp 35-36.

[9] Mr Paul Ashby, AGL Energy, Hansard, Sydney, 17 April 2013, p. 22.

> introduced and we were advocating that these bills not be supported. We made those representations to the opposition as well, and there was general support at that point in time for the NFF position and the reason for our position.
>
> **Senator McKENZIE:** Can I just clarify whether the government was supportive of that position at that time?
>
> **Ms Kerr:** The minister's office—not the minister himself—was certainly indicating support for that particular position, as was the opposition and the people who we talked to. Coming to the introduction of this particular bill by the minister, we were not consulted on the introduction of the government's bill.
>
> **Senator McKENZIE:** I really want to be clear on that. So the government supported not introducing the water trigger to the EPBC Act. How long ago was that?
>
> **Ms Kerr :** That was early in 2012 or mid-2012. The reason I believe at that point in time was that the national partnership agreement had been signed in the previous December and was only just being rolled out. It certainly needed time to be implemented and the states and the Commonwealth needed to implement their obligations under the national partnership agreement.[10]

1.11 While Coalition Senators are concerned at unnecessary duplication in and of itself, and at legislating in the absence of a need to do so, Coalition Senators are particularly concerned that such duplication has the potential to cause additional costs and delays associated with additional regulation, as canvased by numerous stakeholders, including the Australian Petroleum Production and Exploration Association,[11] which as discussed earlier have not been explored by a Regulation Impact Statement.

Targeting a specific industry

1.12 The majority report canvases arguments, notably from the National Farmers' Federation and the Australian Petroleum Production and Exploration Association, against the precedent of targeting specific industries as being subject to controlled action provisions, as distinct from the Act's currently stated objectives and focus on matters of national significance exclusively concerned with environmental outcomes, not the means or cause of any potential impact.

1.13 The inconsistency in approach that would be created by this bill was also highlighted in inquiry hearings by the Minerals Council of Australia.

> If we are managing impacts on water resources, and quoting from the results of the Namoi model, where they model something like 24 open cut coalmines, seven underground coalmines and eight CSG fields will be in place in the Namoi region.' Analysis of model water balance for that

[10] Ms Deborah Kerr, National Farmers' Federation, Hansard, Canberra, 18 April 2013, p. 24.

[11] Mr Rick Wilkinson, Australian Petroleum Production and Exploration Association, Hansard, Canberra, 18 April 2013, p. 10.

> extreme scenario shows that within the groundwater within the lower and upper Namoi alluvium will experience a relatively low impact when compared to existing anthropogenic water use impacts'. What is the rationale behind targeting a sector when it is just a drop in the ocean in terms of potential impacts? It makes no sense whatsoever. If water is going to be a matter of national environmental significance you need to manage, in line with the other matters of national environmental significance, the impacts on that matter, not just target a specific industry, regardless of what activity that industry is undertaking.[12]

1.14 Concern at the bill's approach in targeting an industry rather than an environmental outcome was also expressed by The Australian Coal Association, including the further inconsistencies this action creates with the findings of the Hawke Review:

> The industry does not support the proposed inclusion of a water trigger for coalmine developments in the EPBC Act. The bill discriminates against the coal and coal seam gas industries rather than focusing on a clear environmental objective. This is inconsistent with the intent of the EPBC Act and, particularly, is inconsistent with the Hawke review, which highlighted that the focus of the act should be on matters of national environmental significance and not on the regulation of specific industries.[13]

1.15 Similarly, conservationists have advanced arguments in favour of extending the 'water trigger' to other industries, including agriculture and any other industries with similar potential impacts on water resources to those captured by the bill.

> **Senator WATERS:** You talked a bit about how you think the bill before us could be improved and expanded and you talked about the fact that it should apply to other forms of extractive industry with similar impacts. Are you talking about things like shale gas, tight gas and underground coal gasification?
>
> **Ms Zomer:** I think so. We do not really know what turns the unconventional mining industry will take. I guess any industry that is going to have a significant impact on water resources should be treated equally, and I think, yes, probably shale gas and tight gas are examples of industries that I would think are appropriate.[14]
>
> **Senator McKENZIE:** Do you think that this trigger should be applied across industries that are significantly impacting water resources?
>
> **Mr Knowles:** Yes, I think that is the logical and equitable approach to take.
>
> **Senator McKENZIE:** Would that include agriculture?
>
> **Mr Knowles:** It could. Agriculture is the largest consumer, I believe, of water in Australia, although the resource industry is a big user of water. But

[12] Mr Christopher McCombe, Minerals Council of Australia, Hansard, Canberra, 18 April 2013, p. 5.

[13] Mr Greg Sullivan, Australian Coal Association, Hansard, Sydney, 17 April 2013, p. 35.

[14] Ms Saffron Zomer, Australian Conservation Foundation, Hansard, Canberra, 18 April 2013, p. 35.

> in the national accounts for water there is a distinction between consumption and use and discharge back into the environment. They are both big users and consumers of water.[15]
>
> Other industries, such as agriculture, can also have significant impacts on water quality and quantity. There would therefore be merit in considering extending the water trigger to other industries and projects that would have a significant impact on water resources.[16]

1.16 Coalition Senators are concerned that this bill creates an inconsistent approach within the EPBC Act, which has the potential to be highly problematic and sets a dangerous precedent for the singling out of industries. The Coalition would certainly not want to see farmers or other water users facing the same regulatory duplication this measure appears to create, but are equally unhappy with the singling out of the coal and coal seam gas industries. Coalition Senators believe these issues could have been avoided had a proper consultation process been undertaken prior to the introduction of this legislation.

Definitions

1.17 As the majority report canvases, a number of organisations have expressed concerns at definitional issues. Of particular concern to Coalition Senators is that "exploration" and "appraisal" activities could themselves be captured by way merely of the potential impact of the later activity for which such exploration and appraisal is conducted.

1.18 As outlined in the majority report, these concerns appear to have been confirmed in evidence given by the Department of Sustainability, Environment, Water, Population and Communities.[17]

1.19 Coalition Senators have sympathy with suggestions that the bill should be amended to expressly exclude or clearly limit the inclusion of exploration activities.

1.20 Coalition Senators are also concerned about the breadth of definition that may apply to a water resource. In their response to Questions on Notice the NSW Irrigators Council confirm that this definition remains entirely subjective and will have the potential to cause uncertainty. Andrew Gregson, Chief Executive Officer, states that under the current construction, "we think it would apply to all water resources".

1.21 Concerns were also raised by the Minerals Council of Australia about the consequences of the water resource definition:

> Are we talking dry creek beds, are we talking dams, are we talking tailing dams, are we talking water coal seam gas, what are we talking—surface, groundwater, the lot? What is a large coalmine? What and where do mining

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[15] Mr Tristan E Knowles, Economists at Large Pty Ltd, Hansard, Canberra, 18 April 2013, p. 39.

[16] Nature Conservation Council of New South Wales, answer to question on notice, 30 April 2013.

[17] Dr Kimberley Dripps, Department of Sustainability, Environment, Water, Population and Communities, Hansard, 18 April 2013, p. 61.

> related activities fit in the equation? Are we talking about the building of housing and amenities, roads, pipelines, other sorts of things that are related to the mining activity that may, in fact, fall in that prospect? Are we talking about projects that are currently working within the context of the state laws? If there is even a minor change, that would then trigger a referral to the EPBC Act. One could imagine the consequences of that in Victoria, for example, where coalmines are busily providing power to the state. If they make what is a largely immaterial change to their workplan, that triggers a referral to the EPBC Act and everything stops. So, too, do the lights. This is not over-the-top conjecture. This is quite serious.
>
> There is no bureaucrat or regulatory agency who can possibly know and understand the implications and consequences of what is being proposed from the context of the practitioners on the ground. Unless there is an 'opening of the books' and unless there is constructive and proper dialogue you will not get to the kind of outcomes that are necessary to avoid what I hope are unintended consequences. As I said, we will do that within the context of the frame of this bill. The easiest thing for us to do is to say 'no' and let it fall where it falls. But, as I said, we can count and we are not naive to the processes that are before us and, therefore, we will engage.[18]

1.22 Environment organisations also acknowledged the ambiguity this creates and highlighted the comprehensive definition of a significant impact on water resources included in the National Partnership Agreements signed between state and federal governments in relation to coal and coal seam gas mining:

> In principle, we would not have a problem with clarification of definitions. Obviously it depends on the detail, but we would be open to tightening up the language of the bill.[19]
>
> However, the EPBC Bill 2013 does not seek to include that definition in the EPBC Act. Furthermore, under Part 9 of the EPHC Act, requirements are provided for the Minister to consider when making his decision about an activity for each of the existing controlling provisions. However, the EPBC Bill 2013 does not seek to introduce any requirements under Part 9 in relation to water resources. The ability to protect water resources in the future will depend on the provision of a strong definition or requirement under Part 9 for water resources.[20]

1.23 Coalition Senators encourage the government to clarify the definition of water resources in the legislation.

Retrospectivity

1.24 As outlined in the majority report, a number of organisations have expressed concerns that the legislation will have retrospective application and potentially apply to projects either already partially underway or in advanced stages of assessment.

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[18] Mr Mitchell Hooke, Minerals Council of Australia, Hansard, Canberra, 18 April 2013, p. 3.

[19] Ms Saffron Zomer, Australian Conservation Foundation, Hansard, Canberra, 18 April 2013, p.32

[20] Nature Conservation Council of New South Wales, answer to question on notice, 24 April 2013.

1.25 Coalition Senators believe the potential retrospective application of this bill to projects either underway or already in advance stages of assessment should be removed.

Bilateral agreements (the 'Windsor amendments')

1.26 Coalition Senators strongly oppose amendments made in the House of Representatives, and opposed there by Coalition Members, that would prevent the use of accreditation under bilateral agreements for assessments.

1.27 Coalition support for approvals bilateral agreements has previously been outlined at length, including in Coalition Senators' Dissenting Report of 12 March 2013 to this same committee's inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* that specifically sought to prevent such approvals bilaterals.

1.28 In particular, however, Coalition Senators can see no justification for the assessment of one particular national matter of environmental significance being treated differently to assessments of other such matters.

1.29 Coalition Senators are also not persuaded that arguments put by some regarding the perceived present capacity of states to undertake assessments under such bilateral arrangements should preclude them from doing so at any time in the future under properly constituted and mutually agreed arrangements not yet in place but for which provision exists under the EPBC Act.

1.30 Some arguments in favour of retaining at least the capacity for bilateral arrangements have been canvassed in the majority report but were also given voice in inquiry hearings by the Australian Coal Association:

> ...broadly, our position is that there should be a reduction in duplication and that where it is possible to accredit state processes they should be accredited. Ideally, where approval bilaterals can be put in place, they should also be pursued in order to streamline the process and reduce the inefficiencies. It certainly does not mean that there is any reduction in environmental protection. It just means that the process is more efficient."[21]

1.31 Coalition Senators are strongly of the view that the 'Windsor amendments' passed in the House of Representatives regarding bilateral agreements should be removed from the bill.

Conclusion

1.32 Coal seam gas requires a comprehensive policy approach that addresses its environmental, community and economic impacts. The principles underpinning our approach take a measured, rational and balanced assessment of mining and its management.

[21] Mr Greg Sullivan, Australian Coal Association, Hansard, Sydney, 17 April 2013, p. 38.

1.33 Managed properly, coal seam gas has the potential to revitalise parts of regional Australia, delivering a new economic boom. Poorly managed, it could produce serious environmental and social problems.

1.34 Coalition Senators believe the development of Australia's coal seam gas resources should be based on certain core principles, specifically that:

- No coal seam gas development should proceed where it poses a significant impact to the quality of groundwater or surface water systems. It must be absolutely clear that no coal seam gas development should occur unless it is proven safe for the environment;
- Prime agricultural land is an increasingly important natural asset. It must be protected from activities that harm its capacity to deliver food security – not only for our nation, but for a hungrier world, for generations to come;
- Coal seam gas development must not occur close to existing residential areas. People who have bought homes, with a reasonable expectation of being well away from gas extractions, must not be thrown into turmoil by coal seam gas operations springing up on their doorstep;
- Landowners are entitled to appropriate pecuniary returns for access to their land. Remuneration for landowners should not be merely compensation; and
- The regions that deliver much of the wealth from coal seam gas developments deserve to see a fair share of the generated revenues reinvested in their communities. There is an opportunity to grow our nation and encourage a lasting legacy from coal seam gas developments.

1.35 Given the above principles and the Coalition's strong appreciation for community sentiment on this matter we did not oppose this legislation in the House of Representatives and will similarly not do so in the Senate. However, given the terrible failings of process and numerous concerns with this legislation identified in these comments, we urge the government to adopt appropriate amendments that may remedy at least some of the concerns raised.

Senator Simon Birmingham
Deputy Chair

Senator Bridget McKenzie

Senator Anne Ruston

Australian Greens — Additional Comments

1.1 The Australian Greens have long raised the serious concerns of the Australian community about the rapid and destructive expansion of the coal and coal seam gas industries. For far too long governments have privileged resource corporations over the well-being of local communities, and Australia's long term future. The unbridled acceleration of these fossil fuel industries is worsening climate change, risking valuable farmland, damaging our precious water resources, and putting pressure on regional towns.

1.2 We welcome this bill, however note it is too late to save the many Queensland communities now finding themselves surrounded by coal seam gas developments. The current Environment Minister, on announcing this bill recognised that "Australia's water resources are among our most vital natural resources and it is important that we ensure they are protected". Yet within the month prior to that statement, the Minister had approved three coal mines (Boggabri, Maules Creek and Tarrawonga) and the large coal seam gas mining project at Gloucester. Within only two months of becoming national Environment Minister, Minister Burke approved the first two huge coal seam gas mining projects in Queensland, despite significant scientific uncertainties about the impacts of coal seam gas on our groundwater.

1.3 In 2011 the Australian Greens introduced a bill that would protect our national water resources. Our bill, *the Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011*, would require that mining operations require Commonwealth approval if they will have, or are likely to have, significant impact on the quality, structural integrity or hydraulic balance of a water resource; and impose penalties. The Government refused to support this bill, and now 18 months of additional assessments and approvals have been allowed to pass without national protection for our water.

1.4 The Government had a clear opportunity to act to nationally protect water when they introduced the bill to establish the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development in 2012. During consideration of that bill the Greens called on the Government to step up and put in place proper national protection for our water resources. They did not.

1.5 Clearly this national protection for our nation's water resources is long overdue.

1.6 The Greens particularly welcome the amendment adopted by the House of Representatives that will ensure that this new national protection for water must remain the responsibility of the national Environment Minister. This will ensure that this new federal protection for Australia's water resources cannot be handed straight back to the states, who have mismanaged these fossil fuel industries and ignored the potentially devastating water impacts for years. The states cannot be trusted to act in the national interest - which is why this amendment needs to be extended to all nationally protected places and species, to ensure the Commonwealth continues to have the final say on Australia's most environmentally damaging developments.

1.7 The huge, potentially irreversible risks of handing responsibility for protecting our most precious species and wild places to the states (under arrangements called 'approvals bilateral agreements') to state governments were extensively explored in the Senate's recent inquiry into a private members bill proposed by the Greens: the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*. The inquiry into this bill heard from the community, environment experts, economists and lawyers alike - all called for federal environment responsibilities to remain with the federal Environment Minister.

1.8 The committee inquiring into that bill found that:

- Most submitters expressed grave concern about the risks to the environment associated with granting approval powers to the states and territories. [para 2.1]
- The committee was presented with no compelling evidence to show how an approval agreement would improve business efficiency [para 2.12]
- The committee is concerned that if the Commonwealth were to lose its oversight and approval power in relation to matters for national environmental significance, this may encourage competitive federalism [para 2.28]

1.9 And most importantly:

- The committee's view is that it is not appropriate for the states and territories to exercise decision making powers for approvals in relation to matters of national environmental significance. [para 2.47]

1.10 In supporting the House of Representatives amendment to ensure this new national protection for Australia's water resources cannot be handed straight back to the states, the Government confirmed the crucial importance of ongoing national responsibility for protecting our most precious environmental resources.

1.11 Protection of our most precious species and wild places is no different to protection of Australia's water resources - these responsibilities must remain with the federal Environment Minister.

1.12 The Coalition, however, has a stated commitment, that should it win government among the first order of business will be handing this crucial responsibility of assessing and approving Australia's most environmentally damaging projects to state governments. This policy commitment, reiterated regularly, is set out clearly in the Coalition's recently released *Our Plan: Real solutions for all Australians*.[1]

1.13 In light of the Coalition's clear commitment to abandon our environment to the states, failing to act now makes the Labor Government complicit in any such handover should Mr Abbott win government later this year.

1 See p. 22.

1.14 The Australian Greens have circulated an amendment that, if adopted, would ensure that responsibility for all nationally protected species and wild places remains with our national Environment Minister.

1.15 For consistent treatment of all nationally protected environment matters, and critically, for the protection of these species and wild places for generations to come, the Greens implore all Senators to support this amendment.

1.16 The Australian Greens have a number of other concerns which we will be seeking to address through amendments.

1.17 We are proposing an amendment which makes aspects of this bill apply retrospectively to a number of major coal seam gas projects and coal mines that Minister Burke has already approved. This is important as only one month before introducing this bill the Minister approved four big potentially very risky projects in New South Wales-the Gloucester coal seam gas mine, and the Maules Creek, Boggabri and Tarrawonga coal mines. Work has not yet commenced on these projects, so it is not too late for the water impacts of these massive projects to be properly assessed under our national environment laws. For the three big Queensland coal seam gas projects approved by the minister more than two years ago, work has already commenced. However what is needed is for the water impacts of those projects to be properly assessed and publicly reported. The Government and decision makers can then use that information about water impacts to inform future decisions about any further coal seam gas developments.

1.18 We are also proposing an amendment which would give landowners and occupiers across Australia the right to say no to coal seam gas and large coal mines on their land.

1.19 Using the corporations power under the Constitution, this amendment would stop the federal Environment Minister from approving a coal or coal seam gas project being assessed under our national environment laws unless the Minister was satisfied that the landowner and any occupier of the land had:

- obtained independent advice in relation to the likely impacts of the taking of the action;
- had obtained independent legal advice; and
- had freely given informed consent in relation to the coal or coal seam gas project.

1.20 Importantly, this amendment would not change the principle that ownership of minerals rest with the crown. The state will continue to own minerals, however this amendment would give landholders the right to protect their land from the uncertainty of long term impacts on water resources should they decide the risks are simply too great. If governments want to extract the resource, they can still use their acquisition powers to buy out the landholder, so the amendment would not prevent development of these resources at all costs - but it does lift the bar to better protect our agricultural communities.

1.21 As stated above, as all coal and coal seam gas projects can be expected to be developed by constitutional corporations there is no Constitutional obstacle to the Commonwealth using that head of power to put in place nationally consistent protection for Australia landholders. We are sadly very confident that if left to state governments our landholders will be without this basic protection for decades to come.

1.22 It is also important to note that this landholder rights requirement is additional to, rather a substitute for, the thorough impact assessments that are needed to ensure that both on-farm and off farm impacts of coal seam gas and coal projects (on our agricultural communities and the natural environment) are properly considered by decision makers.

1.23 In addition to allowing landholders the right to deem the risk of coal and coal seam gas as too high, this bill would also greatly strengthen the negotiating position of Australian landholders who chose to negotiate with multinational resource companies about resource development on their land. Far too many of Queensland's farmers have been forced to negotiate without having the choice to walk away.

1.24 There is community outrage across Australia about the grossly inequitable situation far too many Australian farmers currently face when multinational companies come knocking, seeking to develop coal and coal seam gas projects on their land.

1.25 Amending this bill is a clear opportunity to deal with this issue, and ensure farmers across Australia have the right to say no.

1.26 The bill currently limits the extent of this water protection to significant impacts from coal and coal seam gas activities. The Greens are proposing that this new water protection should extend to impacts from shale and tight gas mining, and underground coal gasification. We are concerned that these nascent fossil fuel industries also pose significant risks to our water resources requiring proper national scrutiny. Western Australia for example, is estimated to hold 288 trillion cubic feet of shale gas - approximately twice the gas that is held in Western Australia's extensive offshore areas.

1.27 Rather than being on the back foot yet again, scrambling to patch together protections after significant projects have already been waved through without adequate scrutiny, the Government should act now to protect our water from these industries. This amendment would see us take a precautionary approach to new, potentially high risk industries. However the Gillard Government's proclivity to embracing high risk approaches to regulating high risk industries (such as the questionable use of 'adaptive management' and their love of 'conditional approvals') suggests that national leadership on this issue is sadly very unlikely.

Recommendations

1.28 The Australian Greens support this bill, however recommend that the Senate adopt amendments proposed by the Greens which:

1. Ensure consistent treatment of all nationally protected species and wild places, and ensure that responsibility for assessing and approving Australia's most environmentally damaging projects must remain with the federal Environment Minister.

2. Give landholders the right to say no to coal and coal seam gas developments proceeding on their land.

3. Require that the water impacts of recently approved coal and coal seam gas projects which will significantly impact our water resources are subjected to proper scrutiny under our national environment laws.

4. Extend this protection for our national water resources to include significant impacts from shale and tight gas mining, and underground coal gasification.

Senator Larissa Waters
Australian Greens spokesperson for mining

Appendix 1

Submissions, form letters, tabled documents, additional information and answers to questions taken on notice

Submissions

1 NSW Irrigators Council

2 Mrs Perri Wain

3 Ms Eloise Fisher

4 Miss Marnie Cotton

5 National Farmers' Federation

6 Dr Peter Wesley-Smith

7 Mr Alain Brousse

8 Mr Allan Glassop

9 Ms Frances Petrou

10 Revd Roger Reid

11 Name Withheld

12 Ms Diane Davie

13 Ms Michele Lockwood

14 Ms Megan Jack

15 Mr Roger Graf

16 Ms Louise Young

17 Chairman, Coal Seam Gas Committee, Caroona Coal Action Group

18 Mr Keith Bale

19 Rivers SOS Alliance

20 Association of Mining and Exploration Companies

21 Ms Teresa Heal

22 Ms Dolores Neilley

23 Name Withheld

24 Mrs Moyra Burke-Smith

25 Lock the Gate Alliance

26 Mr Simon Chance

27 Mr Steve Smith and Ms Kristie Lucas

28 Caroona Coal Action Group Inc

29 Councillor Vanessa Ekins

30 Clarence Valley Conservation Coalition Inc

31 Ms Patricia Mann

32 Barrington-Gloucester-Stroud Preservation Alliance

33 Ms Aina Ranke

34 Humane Society International

35 Mr Michael Gudgeon

36 Conservation Council of WA

37 Ms Joanna Gardner

38 Santos Ltd

39 Mr Michael Daly

40 The Wilderness Society Newcastle

41 NSW Farmers

42 Nature Conservation Society of South Australia

43 Sydney Food Fairness Alliance

44 GE

45 Nature Conservation Council of NSW

46 Australian Network of Environmental Defender's Offices Inc

47 Australian Petroleum Production and Exploration Association

48 Business Council of Australia

49 Ms Marion McClelland

50 Mr Kasper Hagen

51 Name Withheld

52 Name Withheld

53 Name Withheld

54 Ms Vicki Godfrey

55 Name Withheld

56 Ms Alice Nagy

57 Name Withheld

59 Name Withheld

60 Name Withheld

61 Name Withheld

62 Ms Eleanor Smith

63 Mr Julian Beaman

64 Ms Tara Blackman

65 Ms Lisa Wray

66 Name Withheld

67 Mr Anthony Poutsma

68 Ms Mary Lyons-Buckett

69 Name Withheld

70 Mr Gary Patton

71 Name Withheld

72 Mstr Marcus Kuhn

73 Mr Blair Maxwell

74 Dr Rosemary Webb

75 Dr Pauline Roberts

76 Name Withheld

77 Mr John Heaton

78 Dr Clement Stanyon

79 Ms Susanne Hopfner

80 Ms Vivien Langford

81 Name Withheld

82 Name Withheld

83 Mrs Jane Stevenson

84 Ms Annie Kia

85 Ms Emma Murphy

86 Mrs Diane Call

87 Mrs Anne Hodgson

88 Mr Anthony Gleeson

89 Ms Beverley Crossley

90 Mr Mick Barker

91 Ms Frances Fagan

92 Mr Wallace Warden

93 Ms Petra Liverani

94 Ms Susan Russell

95 Ms Deborah Noyce

96 Name Withheld

97 Ms Julia Hall

98 Mr Alan and Mrs Ruth Genders

99 Ms Jill Adams

100 Ms Marilyn Scott

101 Ms Danielle Carlisle

102 Ms Claire McKinnon

103 Ms Jenny Moore

104 Ms Lorraine Vass

105 Mrs Jennifer O'Neill

106 Mr Richard Vaughan

107 Ms Catherine Woolnough

108 Ms Michelle Fisher

109 Ms Vivian Spadaro

110 Ms Julie McCarthy

111 Name Withheld

112 Ms Jillian Reid

113 Name Withheld

114 Miss Johanna Evans

115 Ms Megan James

116 Mr Jack Claff

117 Ms Barbara Edmunds

118 Mr Paul McGannon

119 Ms Amanda Bennett

120 Name Withheld

121 Name Withheld

122 Name Withheld

123 Ms Barbara Thomas

124 Mrs Glynnis Brown

125 Mr Sean Corrigan

126 Ms Susan Disney

127 Mr Brendan Shoebridge

128 Mr John Llewellyn

129 Mr David M Palmer

130 Ms Fiona Sim

131 Ms Jenny Chester

132 Mr Scott Walters

133 Ms Nanette Nicholson

134 Dr Gerald McCalden

135 Ms Sharon Shostak

136 Ms Dianne Ellis

137 Ms Leanne Sheppard

138 Mrs M Norman

139 Mr Ross Phillips

140 Mr Mark Rich

141 Ms Diane Evers

142 Dr Geralyn McCarron

143 Mr David Hauseman

144 Mr Adam Aitken

145 Ms Tess de Quincey

146 Mr Colin Duncan

147 Mrs Amala Boumans

148 Ms Judi Summers

149 Mr Guy Sim

150 Ms Shaunti Sun

151 Mrs Donella Peters

152 Ms Narelle Jarvis

153 Ms Solveig Larsen

154 Mrs Denise Gilbert

155 Mrs Louise Somerville

156 Ms Jesse Curmi

157 Ms Susan Stock

158 Ms Gabrielle O'Shannessy

159 Mr Christopher Aitchison

160 Name Withheld

161 Mr Alan Graham

162 Mr Jeremy Engel

163 Name Withheld

164 Mr Peter Moloney

165 Ms Astrid Sweeney

166 Name Withheld

167 Name Withheld

168 Mr Brian Feeney

169 Mr Walter Lampe

170 Dr Chris James

171 Ms Denise Ewin

172 Ms Aroha Watson

173 Ms Judith Deucker

174 Ms Michele Lalor

175 Ms Tania Hibbert

176 Name Withheld

177 Mrs Clare Heaton

178 Mrs Jacqui Hastings

179 Ms Elizabeth Ryan

180 Name Withheld

181 Ms Jacquelyn Maree Harris

182 Ms Melody Popple

183 Mr Brett Sanders

184 Ms Michelle Lowe

185 Ms Jasmine Scheidler

186 Ms Caroline McDougall

187 Ms Karen Hoinville

188 Mr Alan Nurthen

189 Mrs Colleen C

190 Ms Jodie Karaitiana

191 Mr Duncan Dey

192 Mrs Sharyn Proctor

193 Mr Nigel Greenup

194 Mrs Prudence Woods

195 Mrs Ruth Nielsen

196 Mr Douglas Bryce

197 Ms Barbara Groom

198 Australian Conservation Foundation

199 Cotton Australia Limited

200 NSW Minerals Council

201 Wildlife Preservation Society of Queensland

202 AGL Energy

203 Shell Development (Australia) Proprietary Limited

204 Ms Melanie Gates-Manar

205 Mr Andre Munckton

206 Name Withheld

207 Ms Roz Cheney

208 Mr Darren Holmes

209 Dr Tracie Hendriks

210 Ms Sue Wilmott

211 Miss Sarah Gaskin

212 Mrs Jo Deller

213 Mrs Pam Pike

214 Ms Lisa Norman

215 Andrew and Helen Strang

216 Ms Anne Picot

217 Ms Amanda Albury

218 Name Withheld

219 Mr James Richardson

220 Mr Denis Wilson

221 Ms Sarah Luckie

222 Minerals Council of Australia

223 Department of Sustainability, Environment, Water, Population and Communities

224 Australian Coal Association Limited

225 Centre for Mined Land Rehabilitation

226 Arrow Energy Pty Ltd

227 BirdLife Australia

228 QGC

229 BHP Billiton

230 Name Withheld

231 Mr Rob Higgins

232 Conservation Council of South Australia

233 Ms Sharon Wilkinson

234 Namoi Water

235 Mr Jeffrey Kite

Form letters

1 Form letter A - 76 people submitted this letter.

2 Form letter B - three people submitted this letter.

Tabled documents

Maps: Figure 1.1 Namoi catchment location map; and Figure 5.6 Long term predicted maximum impacts on groundwater levels (Scenario 3), tabled by Namoi Water (at public hearing, 17 April 2013, Sydney)

Mining Law in New South Wales A guide for the community, tabled by Australian Network of Environmental Defenders' Offices (at public hearing, 17 April 2013, Sydney).

Copy of the Australian Network of Network of Environmental Defenders' Offices submission on the *Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* to the COAG Standing Council on Energy and Resources (at public hearing, 17 April 2013, Sydney)

Approval Conditions 49 to 52: Stage 2 CSG Water Monitoring and Management Plan, 2nd revision to 23 April 2012 Submission, 7 December 2012 tabled by QGC (at public hearing, 18 April 2013, Canberra)

Additional information

North West Alliance (incorporating Inland Council for the Environment) - Additional information received following public hearing, Sydney, 17 April 2013

Answers to questions taken on notice

New South Wales Irrigators Council - Answer to a written question taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

New South Wales Farmers - Answer to a written question taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

Dr Gavin Mudd - Answers to written questions on notice (from public hearing, Canberra, 18 April 2013)

New South Wales Irrigators Council - Answer to a further written question taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

New South Wales Farmers - Answer to a further written question taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

Nature Conservation Council of NSW - Answer to a question taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

Nature Conservation Council of NSW - An answer to a written question on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

Australian Network of Environmental Defender's Offices Inc - Answers to questions taken on notice (from public hearing, Sydney, 17 April 2013)

Australian Coal Association - Answer to a question taken on notice (from public hearing, Sydney, 17 April 2013)

Department of Sustainability, Environment, Water, Population and Communities - Answers to written questions taken on notice

Independent Expert Scientific Committee - Answers to written questions taken on notice

Dr Chris McGrath - Answers to written questions taken on notice from Senator McKenzie (from public hearing, Sydney, 17 April 2013)

Appendix 2
Public hearings

Wednesday, 17 April 2013 – Sydney

Caroona Coal Action Group

Mr Timothy Duddy, Chief Executive Officer

Mrs Rosemary Nankivell, Chair, Coal Seam Gas Committee

Namoi Water and Namoi Community Network

Mr Hugh Price, Member, Namoi Water and
Chairman, Namoi Community Network

Australian Network of Environmental Defender's Offices

Ms Emma Carmody, Policy and Law Reform Solicitor

Mr Nariman Sahukar, Policy and Law Reform Solicitor

Ms Rachel Walmsley, Policy and Law Reform Director (EDO, NSW)

AGL Energy

Mr Paul Ashby, General Manager Commercial Development

Ms Sarah McNamara, Head of Government Affairs

Dr Chris McGrath – Private capacity

Australian Coal Association

Ms Samantha McCulloch, Director, Policy

Mr Greg Sullivan, Deputy Chief Executive Officer

New South Wales Irrigators' Council

Mr Andrew Gregson, Chief Executive Officer

Mr Mark Moore, Policy Analyst

New South Wales Farmers

Mrs Fiona Simson, President

Lock the Gate Alliance

Ms Sarah Moles, Secretary

North West Alliance

Mr Phillip Laird, Member

Nature Conservation Council of New South Wales

Mrs Cerin Loane, Environment Liaison Officer

Thursday, 18 April 2013 – Canberra

Minerals Council of Australia

Mr Mitchell Hooke, Chief Executive Officer

Mr Chris McCombe, Assistant Director, Environmental Policy

Australian Petroleum Production and Exploration Association

Mr Keld Knudsen, Associate Director, Environment

Mr Matthew Paull, Policy Director Queensland

Mr Rick Wilkinson, Chief Operating Officer, Eastern Region

QGC Pty Ltd

Mr Rob Millhouse, Vice-President, Policy and Corporate Affairs

Ms Tracey Winters, Vice-President, Environment

National Farmers' Federation

Ms Deborah Kerr, Manager, Natural Resource Management

Mr David McKeon, Manager, Rural Affairs

Australian Conservation Foundation

Ms Saffron Zomer, National Liaison Officer

Economists at Large Pty Ltd

Mr Tristan Knowles, Director

Dr Gavin Mudd – Private capacity

National Water Commission

Mr James Cameron, Chief Executive Officer

Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development

Ms Lisa Corbyn, Chair

Professor Craig Simmons, Member

Ms Suzy Nethercott-Watson, Member

Department of Sustainability, Environment, Water, Population and Communities

Mr James Barker, Assistant Secretary, Environmental Assessments and Compliance Division

Dr Kimberley Dripps, Deputy Secretary

Mr Dean Knudson, First Assistant Secretary, Environmental Assessments and Compliance Division

Ms Suzy Nethercott-Watson, Acting First Assistant Secretary, Office of Water Science