



20 December 2011

Committee Secretary  
Senate Rural Affairs and Transport References Committee  
PO Box 6100, Parliament House  
CANBERRA ACT 2600  
*via email: [rat.sen@aph.gov.au](mailto:rat.sen@aph.gov.au)*

Dear Committee Secretary

**Submission: Environment Protection and Biodiversity Conservation Amendment  
(Protecting Water Resources) Bill 2011**

Xstrata Coal (XC) welcomes the opportunity to respond to the Committee's invitation to lodge a submission on the proposed Environment Protection and Biodiversity Conservation Amendment (Protecting Water Resources) Bill 2011.

Xstrata has retained its position as Mining Sector Leader in the annual Dow Jones Sustainability Index review 2011/12 for the fifth consecutive year. The company has also again been named as the Super Sector Leader for Basic Resources industries.

We balance social, environmental, ethical and economic considerations in how we manage our businesses. We believe that operating to leading standards of health, safety and environmental performance, contributing to the development of sustainable communities and engaging with our stakeholders in two-way dialogue, regardless of our location, enhances our corporate reputation and is a source of competitive advantage.

Within Australia, Xstrata currently has 23 operating mines in New South Wales, Queensland, Northern Territory and Western Australia, mining a range of resources including coal, copper, nickel and zinc. Xstrata currently employs approximately 13,000 people in Australia and provided approximately \$1.2 Billion in Commonwealth and State royalties in 2010. Xstrata currently has a planned investment pipeline identified for Australia of approximately \$10 Billion in projects currently in implementation and feasibility stages of planning.

We thank you for the opportunity for this initial comment and urge the Commonwealth Government to provide for further adequate consultation and consideration prior to finalising any legislative amendments. We would welcome the opportunity to participate in further consultation in relation to the Bill.

If you have any questions regarding this submission, please contact Lucy Roberts, General Manager, Sustainable Development, Xstrata Coal,

Yours sincerely

**Peter Freyberg**  
Chief Executive  
Xstrata Coal

## 1. EXECUTIVE SUMMARY

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Xstrata recognises that the operating context internationally and in Australia is increasing in complexity. The extent to which we are able to grow and act on investment opportunities will be influenced by a range of factors including; access to resources, access to capital, stable and predictable political and fiscal environment, recruiting the best people in a safe and healthy workplace, community support for our activities, open markets for our products and ability to manage the environmental impacts of our operations.

We understand that the purpose of the proposed Bill is to create a Federal assessment and approval process for mining activities that have a significant impact on water resources including quality, structural integrity or hydraulic balance of a water resource. The Bill proposes that this additional regulatory intervention should be included under an amendment to the existing Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

Xstrata agrees protecting water resources is a critical issue in Australia and should be part of the regulatory landscape. However we are deeply concerned that this proposed Bill duplicates existing initiatives and is a further example of a growing trend of ad hoc regulatory interventions that are being imposed at both a federal and state level of government.

Xstrata supports effective policy and regulatory reform on key issues; however we believe that this is best achieved through a process that includes the following:

- Understanding the current operational environment and a focus on continuous improvement
- A genuine consultation process with industry and other key stakeholders
- Clear articulation of the goals or objectives of the policy
- A gap analysis that ensures the policy will not duplicate existing initiatives or policies
- Assessing multiple policy options against a range of criteria (economic, social, environmental etc.)
- Developing policy using the latest up to date information and robust scientific methodology
- Adopting a long term perspective rather than ad hoc short term intervention
- Gives priority to reducing the regulatory burden on proponents and is effective and efficient
- Evaluation and review of the implementation of the policy

The introduction of a water resources trigger into the EPBC Act process is an important and substantial regulatory proposal, with major implications for not just the mining industry but all potential development that interacts with water resources.

Xstrata Coal has a number of key concerns regarding the proposed Bill, they include:

1. Failure to consider the current regulatory and operational context
2. Lack of consultation with stakeholders and due process in the development of the proposed Bill
3. Poor definition and focus in the proposed Bill is likely to result in increased industry uncertainty and significant implementation issues
4. Clear duplication with existing Commonwealth and State initiatives related to water and mining
5. Inconsistency with the stated objectives and current reform process of the EPBC Act
6. Discriminatory nature of proposed application of the regulation and a focus on one particular activity rather than the desired environmental issue or outcome

At best the proposed Bill is inconsistent with Federal and State Government policy objectives of streamlining and reducing regulatory burden on business, at worst it represents a discriminatory regulatory intervention that will duplicate existing initiatives and pose significant practical implementation issues that will undermine stakeholder confidence and broader environmental policy reform processes.

## 2. KEY ISSUES

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Xstrata Coal also supports the Minerals Council of Australia (MCA) submission on this topic to the Committee.

### ***Current Regulatory and Operational Context***

Xstrata Coal is aware of the potential impacts coal production and use can have on the environment. We identify, reduce and where possible eliminate all significant impacts on the environment caused by our activities. We hold ourselves accountable for managing these impacts and for each project and operation have detailed and robust environmental management standards that guide our activities.

In addition to this we are required to develop detailed environmental impact statements in line with state and federal regulations. All of our operations have water management plans to identify and address potential challenges including water scarcity and flooding, these plans are supported by robust scientific studies on surrounding hydrological environment.

Xstrata Coal has a five year target of 10% water reduction across our business by 2011 and is on track to meet this goal. In 2010, our operations achieved reductions in water imported, potable water and raw surface water. We also manage our water consumption through reuse and recycling strategies.

### ***Consultation with Stakeholders and Discriminatory Nature of the Proposed Bill***

The lack of consultation with a range of stakeholders on the detail of the proposed Bill is evident. Xstrata Coal does not believe that there has been adequate consultation with stakeholders, particularly industry who will be significantly impacted by the proposed Bill.

Not only is genuine consultation with stakeholders a key tenet of good policy making but it also provides critical insight and learning's that assist in ensuring that proposed policy reform or new policy is relevant, addresses a gap and does not duplicate or contravene existing regulation or policy. The proposed Bill demonstrates a lack of knowledge in terms of the existing regulatory environment, lack of understanding in terms of what industry is already doing around water resources and lack of appreciation around the complexity of large scale project development.

Furthermore the proposed Bill seeks to single out the activities of a single industry sector rather than focus on the desired environmental outcome or objective. Water resource issues are relevant to sectors beyond just mining and to single out a particular sector for arguably punitive regulatory treatment represents a breach of equity policy principles.

### ***Duplication with existing Commonwealth and State Initiatives***

The proposed Bill would cut across a number of existing and developing mining and water related initiatives, creating increased uncertainty for project proponents, regulators and other stakeholders. For example the National Water Initiative (NWI) and work of the National Water Commission (NWC) has been established as the primary vehicle for developing a national framework for water reform in Australia, including issues related to water consumption and management.

Xstrata Coal supports this initiative and believes that water related issues in the mining industry are being effectively incorporated and considered as part of this process at both a state and federal level. We are concerned that there exists potential for the proposed Bill to undermine the progress on this initiative and increase uncertainty for industry.

### ***Inconsistency with the objectives of the EPBC Act and EPBC Act Review***

Xstrata Coal considers that the proposed Bill is inconsistent with the objectives of the existing EPBC Act and the current reform process of the EPBC Act following the Independent review conducted by Dr Allan Hawke. Inclusion of water extraction and consumption was considered and rejected under this process due to a

range of issues and the review concluded that the EPBC Act was not the best mechanism for effectively managing water resources.<sup>1</sup>

In addition the Bill is inconsistent with the existing objectives of the EPBC Act. Mining activities are already subject to and referable under the EPBC Act where they may impact on existing matters of national environmental significance (NMES). The Bill does not indicate clearly what matter or protected matter it is intended to protect or demonstrate that a “gap” exists within the current arrangements.

Xstrata Coal believes that the Bill is inconsistent with the stated objectives of the EPBC Act which include the following

The objects of this Act are:

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage; and
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- (e) to assist in the co-operative implementation of Australia’s international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
- (g) to promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

### **3. SPECIFIC COMMENTS ON PROPOSED BILL**

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Below are further details in relation to the concerns outlined in the executive summary, with a particular focus on the technical aspects contained in the proposed Bill. The key area of the proposed Bill is noted in bold text, with our comments provided below in normal type.

#### **Commencement**

There is uncertainty created by the commencement date of the Bill of prior to Royal Assent which binds proponents to the requirements of the Bill without adequate consultation and due process;

As detailed in the explanatory note the proposed Bill,

*The amendments set out in the Schedule of the Bill are to commence on the day the Bill is introduced into the Senate. Under normal circumstances commencement on Royal Assent would apply, however this retrospective commencement is required to ensure approvals for mining operations are not fast-tracked following introduction of this Bill. The intention is to ensure all mining operations commencing after the day this Bill is introduced are subject to Commonwealth assessment and approval where these operations are likely to have a significant impact on Australia’s water resources.*

Xstrata considers that focus on the mining industry is inequitable and that the commencement of the Bill prior to being legislated circumvents due process. Given that the proposed Bill has not passed through the Senate, there is the potential that the Senate Committee may require further amendments to the proposed Bill prior to passing it into law. Accordingly any mining project that refers a proposed action in this interim phase has no certainty with regards to the obligations prescribed in the proposed Bill or any subsequent amendments, as it may be subject to change as a result of the Senate Committee review.

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<sup>1</sup> Para 4.71 – Report of the Independent Review of the EPBC Act , 1999

Furthermore, Xstrata considers that the proposed Bill should be included in the broader suite of EPBC reforms that are currently being reviewed by the Government. By separating the proposed Bill from the review of the broader suite of reforms, there is the potential for a serious disconnect between this reform and other reforms currently being considered by the Government, particularly in the areas of administration and resourcing within the Department of Sustainability, Environment, Water, Population and Communities (DSEWPC).

Xstrata strongly believe that the commencement date as currently prescribed in the proposed Bill should be removed and that the Government maintain due process by commencing any amendment on Royal Assent, and in conjunction with the broader suite of reforms currently being considered by the Government.

#### ***SECTION 24D: Requirement for approval of mining operations with a significant impact on water resources***

The inequitable application of the requirements of the Bill to the mining industry which is considered inconsistent with intent of controls provided by the EPBC Act;

Xstrata has serious concerns regarding the inequitable application of the procedures under the proposed Bill on the mining industry and mining approvals. It should be noted that industries other than mining may have the potential significant impacts on water resources and, in accordance with the other Matters of National Environmental Significance (MNES), the need for an approval should be based on potential impact on MNES rather than a blanket requirement for specific industry sectors.

It is also essential that the broad and general definitions of “likely to” and “significant impact”, as stated in the proposed Bill, are clearly defined by the Government. As the proposed Bill has currently commenced in accordance with Section 2, it is extremely difficult for a proponent to be certain of whether a proposed action is likely to have a significant impact and accordingly must be referred under the proposed Bill.

The lack of certainty has the potential to result in the submission of excessive referrals for proposed actions to reduce the potential liability for proponents. The submission of excessive referrals is at odds with the Government’s objective to reduce the number of referrals it receives as part of the broader EPBC Act reforms. Accordingly Xstrata strongly urges the Government to determine definitions of “likely to” and “significant impact”, based on sound scientific assessment, in addition to immediately providing guidelines to provide the mining industry with the certainty that is required for mining projects.

#### ***SECTION 24E: What are mining operations?***

The use of general and broad definitions within the Bill to describe key elements including what constitutes ‘significant impact’, ‘mining operations’ and ‘water resources’. The inadequate definition of these key terms within the Bill creates significant uncertainty in the application of any impact assessment process required as part of the provisions of this Bill, which has substantial implications for Xstrata’s project planning and delivery processes.

The Bill includes a broad and excessively inclusive definition of mining operations and associated ancillary works, In particular, Section 24E 1 (b) of the proposed Bill describes mining operations as including activities such as:

*the construction and use of towns, camps, dams, pipelines power lines or other structures for the purposes of operations or activities.....*

Xstrata consider that the definition of these activities is very prescriptive and has serious implications for mining projects in Australia. Currently, the proposed Bill does not provide any certainty regarding how, and to what level of detail these ancillary infrastructure need to be presented in a referral. Planning for mining operations is an inherently difficult and very time consuming process.

Historically, mining assessments are based on concept plans that are refined as detailed mine planning progresses. Xstrata is seeking clarity from the Government regarding the DSEWPC interpretation of this

clause in an assessment and approval process context. The identification of final designs and locations for ancillary infrastructure is not possible at the referral stage as this is completed during detail mine design.

Xstrata strongly considers that there needs to be some level of design flexibility for ancillary infrastructure, provided impacts are commensurate or reduced with those assessed during the approvals process. Moreover without this flexibility, project design would have to be substantially advanced prior to the submission of a referral, which is not consistent with the Government's stated objective (as part of the broader suite of reforms to the EPBC Act) of referring projects early in the approvals process.

This design flexibility also needs to be available to reduce the potential need for the submission of the excessive referrals over the life of a Project. Given the current limitations to modify an EPBC approval, defining ancillary infrastructure at the referral stage would result in the potential for number EPBC approvals over one site over the course of a 20-30 year mining project as design is regularly reviewed to meet the current day best practice requirements. Xstrata consider that this is unworkable in its current form and we urge the Government to ensure that this flexibility is explicit in the proposed Bill.

#### **SECTION 24F: What is a water resource?**

Section 24F of the proposed Bill identifies as water resource as

- (a) *the whole or any part of a river, lake, aquifer or other place where water occurs naturally on or below the surface of the ground, whether permanently, seasonally or during unusually wet seasons; or*
- (b) *any recharge zone or system for such a place.*

Xstrata considers that the definition of water resources is inappropriately broad and encompasses a range of situations that would be increasingly difficult to adequately identify through the impact assessment process. For example, a literal interpretation of "other place"... "during unusually wet seasons", or "any recharge zone or system for such a place" could in extreme be applied to most land within Australia.

Xstrata consider that the definition of water resources, as defined in the Bill, cannot be reasonably identified during the impact assessment process. Accordingly, Xstrata strongly urges the Government to provide an adequate definition of water resources for the purposes of the EPBC Act that enables the appropriate identification and assessment of these resources throughout the impact assessment process. Moreover, certainty in this definition needs to be provided to ensure that there is no ongoing liability for proponents for areas that cannot be reasonably identified as being a water resource at the time a proposed action is assessed.

The uncertainty of the proposed requirements within the Bill has the potential to result in increased number of referrals under the EPBC Act, which may not have otherwise been required, and is considered inconsistent with the stated intent of the recently released EPBC Act reforms.

#### **4. RECOMMENDATION**

Xstrata Coal supports a transparent and genuine consultative process to discuss critical water resources issues. The Federal and state governments already have a number of regulatory and review processes in train that should be considered before any additional layer of regulation is introduced. We do not believe that the proposed Bill represents good policy development nor do we believe it is the most effective mechanism to achieve its policy objective.

We would urge the Commonwealth to consider the following in terms of adding value to further regulatory reform in this area:

- Establish an ongoing consultative dialogue for all impacted stakeholders
- Provision of adequate resourcing and technical expertise on water resource issues
- Facilitate the alignment as far as possible the regulatory requirements between states and federal
- Development of best practise guideline for industry