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.
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> (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:
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> (i) key environmental assets of the water resource; or
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> (ii) key ecosystem functions of the water resource; or
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> (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.
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> 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:
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> "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
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> (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:
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> surface water or ground water; or
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> 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