# 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]

---

[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

---

[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.

---

[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**