

11 April 2013

Australian Conservation Foundation (ACF)
Submission to the Senate Committee Inquiry into
The Environment Protection and Biodiversity Amendment Bill 2013

Summary

The Australian Conservation Foundation (ACF) supports the Bill to amend the Environment Protection and Biodiversity Conservation Act (EPBC Act) and urges the Parliament to ensure it is passed at the earliest opportunity.

As one of the driest continents on earth effective water management is key to Australia's long term national future. To manage water resources strategically, leadership from the national government is required. CSG and large coal mines have significant impacts on water. Therefore it is appropriate for these actions to be controlled by the national government. This would be achieved by including these impacts as the ninth Matter of National Environmental Significance (MNES) under the EPBC Act.

However, the Bill falls short in three key areas, which should be improved:

1. The same rationale that justifies the removal of the possibility for Commonwealth powers to be delegated to the State and Territory Governments in relation to the 'water trigger' also applies to other Matters of National Environment Significance. **This amendment must be extended to remove the opportunity for bilateral devolvement of Commonwealth powers under the EPBC Act to the states for all Matters of National Environmental Significance as well as for water impacts.**
2. The range of actions which are captured by the water trigger should be broader, including other forms of extractive industry which have similarly significant impacts on water to those of CSG and large coal mining.

3. The range of exemptions to the water trigger should be reduced to enhance protection for water resources, avoid favouring some projects over others, and improve community confidence in the management of local water resources.

Water should be protected as a Matter of National Environmental Significance

The Australian Conservation Foundation supports the proposed amendments to add the impacts on water of CSG and large coal mining (the 'water trigger') as a ninth Matter of National Environmental Significance to the Environment Protection and Biodiversity Conservation Act.

Water is a naturally scarce resource in Australia, and is likely to become ever scarcer into the future. As the driest inhabited continent on Earth, Australia has unique water management challenges to overcome, and the stakes are high. The impacts and potential impacts of CSG and large coal mining are nationally significant. CSG and coal mining exploration zones now cover 53% of the country¹. CSG and coal mining have multiple potential impacts, including:

- consumption of massive amounts of water which can reduce the availability of ground water to other uses;
- the potential for contamination of aquifers; and
- potential subsidence of overlying land as ground water is withdrawn.

These impacts will directly affect other interests, including local communities, agriculture and the environment. Water catchment areas, river and ground water systems do not follow state boundaries, and benefit from integrated national water management structures to ensure policy and law is consistent across states and the catchments within and shared by them. State and federal governments have already agreed to this principle by establishing the National Water Initiative which attempted to coordinate the establishment of consistent legislative frameworks for sustainable water management. However, states such as Western Australia and the Northern Territory, have still failed to implement sustainable water management legislation as required by the NWI.

In its 2011 assessment of the NWI, the National Water Commission urged all Australian governments to show "a broader commitment to adequately resourced compliance mechanisms that recognise the value of water".

(<http://nwc.gov.au/publications/topic/assessments/ba-2011/executive-overview>)

Management and protection of water resources should be strategic, undertaken at 'landscape scale' rather than determined by arbitrary state boundaries, and take into account the long term need to manage water sustainably because of the multiple benefits it provides the environment, many industries and communities.. This was a key principle underlying the establishment of the Commonwealth Water Act.

¹ Ben Cubby 'Industry feels the heat of coal seam gas regulations' *Sydney Morning Herald* 13 march 2013, p10



The Federal Government should retain final decision making powers in relation to all Matters of National Environmental Significance

Matters of National Environmental Significance under the EPBC Act include:

- listed threatened species and communities
- listed migratory species
- Ramsar wetlands of international importance
- Commonwealth marine environment
- world heritage properties
- national heritage places
- the Great Barrier Reef Marine Park
- nuclear actions

While it is triggered rarely, the EPBC Act provides critical oversight that ensures development proposals which are found to have an impact on Matters of National Environmental Significance are properly assessed to ensure adequate environmental protection. The EPBC Act as it currently stands allows the Commonwealth Government to 'delegate' its powers under the Act to state governments through the mechanism of bilateral agreement. The retention of direct involvement by the Commonwealth in decisions regarding developments which impact MNES is critically important for the health of the Australian environment, and for community confidence in the decision-making process. Some of the key reasons for this imperative include the following:

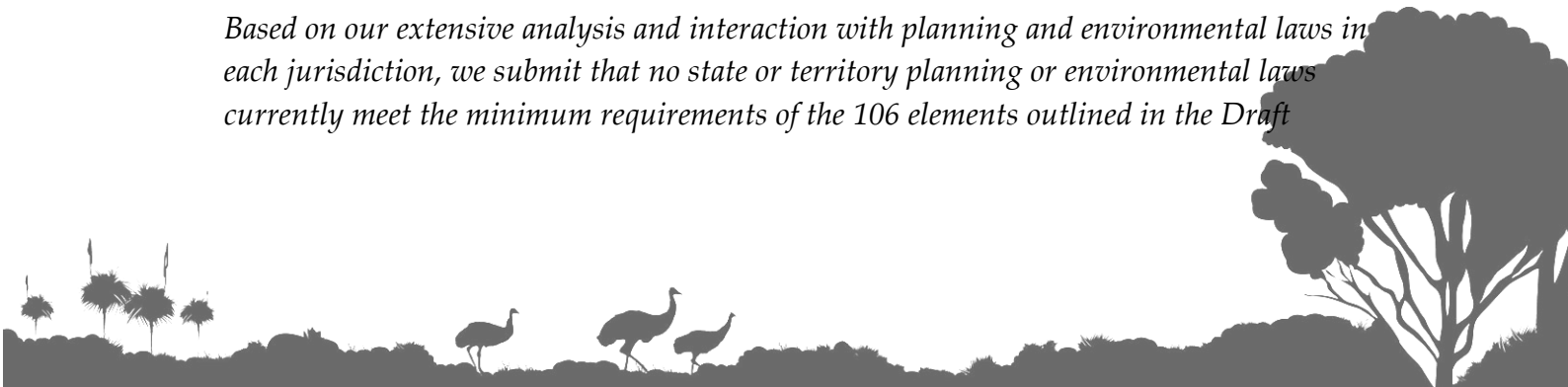
The States have limited capacity to take on delegated Commonwealth powers under the Act.

The exercise of the Commonwealth powers under the Act is a matter requiring significant resourcing and expertise, which ACF believes State and Territory environment departments are unable to deliver at current levels of resourcing – particularly in states where these departments have had staffing and budget levels cut in recent years.

States do not have the necessary legislative frameworks in place

The Commonwealth can only delegate its powers under the Act if the States which are to exercise the powers have the legislative and regulatory frameworks in place to enable them to do so. In 2012 the Commonwealth Government released draft standards which it said states would be required to meet before any bilateral agreements could proceed. These standards reflect the minimum requirements of the EPBC Act – the bar could not legally be set lower. However, analysis by the Australian Network of Environment Defenders' Offices concluded that:

Based on our extensive analysis and interaction with planning and environmental laws in each jurisdiction, we submit that no state or territory planning or environmental laws currently meet the minimum requirements of the 106 elements outlined in the Draft



Standards Framework, let alone the full suite of best practice standards that Australia should be striving to implement.²

Creating the regulation and legislation necessary to enable states to meet the minimum standards required to exercise powers under the EPBC Act is necessarily a complicated long-term project, excluding the possibility of delegation in the near future.

States are not responsible for international obligations

The matters that our national environmental laws seek to protect reflect international obligations under treaties and agreements dealing with areas such as threatened species, migratory species, wetlands and world heritage areas. It makes sense for the Commonwealth to retain responsibility for these areas, or Australia may find itself being held to account for failure to meet international obligations which it has signed away to the states and can no longer control.

State Governments do not answer to all of the Australian people on MNES within their borders

Matters of National Environmental Significance (MNES) under the EPBC Act are exactly that – *nationally significant*. As a matter of logic, and accountability, the decision-maker in relation to these matters should be the government which is answerable to the people of Australia.

States have particular conflicts of interest

If the Commonwealth Government were to delegate its decision making powers under the Act, it would create a situation in which a state government could be the proponent, assessor, decision-maker, and compliance enforcer, of a development proposal which impacts a MNES. States are in fact frequently the proponents of actions referred to the Commonwealth Minister under the Act, and the conflict of interest inherent in this situation could not be clearer. However even in cases where the state is not the formal proponent, the financial benefits to the state which would flow from projects proposed, whether through royalties, investments or other means, and the political relationships involved, very frequently are sufficiently strong incentives that is still clearly impossible for a state to make a decision at arm's length.

A recent case in point has been highlighted for CSG assessments in Queensland whereby the office of the Coordinator General, which helps support development proposals in Queensland, is also responsible for assessing the impacts of the proposal, and which it is alleged by a whistle-blower on ABC Four Corners, sought to cut corners in the assessment.

The States Track Record on Environmental Protection is uneven, and poor at times.

Due in part to the conflicts of interest noted above the track record of States on protecting the environment gives no confidence that they would exercise additional powers responsibly.

² Submission on Draft Environmental Standards to accredit State/Territory approval processes under the EPBC Act *ANEDO* November 2012 p 3



ACF notes that on its passage through the House this Bill was amended such that the possibility for delegation of Commonwealth powers to the states would be removed in relation to the newly created ninth MNES, the water trigger.

ACF welcomes this amendment, as it does not make sense to create a new MNES, acknowledging the national significance of this matter, and to simultaneously contemplate the hand-back of responsibility for this matter from the Commonwealth to the states.

However, the current Bill creates a situation in which one MNES, water impacts of CSG and coal mines, would be provided a higher level of protection than the other eight. It is not clear why any one MNES should be viewed as more important, or deserving of more protection, than any other MNES. It would be preferable to have a consistent approach across all matters covered by the Act. **ACF therefore submits that the Bill should be further amended to remove the possibility for the Commonwealth to delegate its powers under the EPBC Act in relation to any of the MNES to the states, for the reasons outlined above.**

The Water Trigger should be strengthened

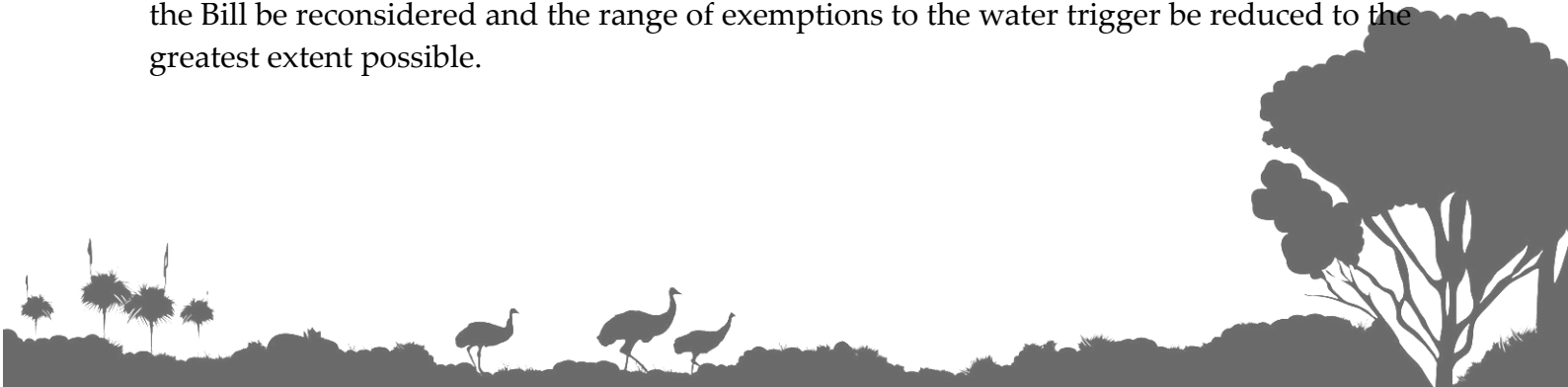
In order to ensure that the 'water trigger' that is created is actually one that can effectively protect and manage water resources, the following should be considered:

1. The range of actions encompassed by the water trigger should be broader

CSG and large coal mining are only two of the many extractive industries which have potentially significant impacts on water resources. Mining of other minerals, shale oil, and shale and tight gas, are other examples. The impacts of various industries will vary according to location and over time. A broader water trigger would manage impacts on water much more effectively, and create a more consistent and navigable regulatory regime.

2. The range of exemptions to the water trigger should be limited

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 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.



Conclusion

ACF supports the amendment of the EPBC Act as proposed by this Bill. We urge the Parliament to ensure that it is passed at the earliest opportunity. We further urge the Senate to amend the Bill to address the concerns raised in this submission, and outlined specifically in the summary at the top of this submission. With these changes, the passage of the Bill in question would be a major milestone in environmental protection, greatly enhancing Australia's ability to protect and manage the water resources that are central to our future prosperity and of such great concern to communities around the nation. It would also fix a longstanding problem with our flagship national environmental protection law, protecting decades of progress on a range of environmental issues. The responsibility for protecting matters of national environmental significance must stay where it rightly belongs, with the national government.

