12 April 2013

Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: ec.sen@aph.gov.au

Re. Senate Committee Review – *EPBC Amendment Bill 2013*

Dear Ms Dunstone,

The Minerals Council of Australia welcomes the opportunity to provide a submission to the Senate Committee Review of the *EPBC Amendment Bill 2013*.

As you are aware, the Minerals Council of Australia (MCA) represents over 85% of minerals production in Australia. The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations. This submission is also endorsed by the Queensland Resources Council[1], South Australian Chamber of Mines and Energy, Chamber of Minerals and Energy, Western Australia and MCA – Victorian and Northern Territory Divisions.

MCA members have a long-standing commitment to sustainable development and the effective management of Australia's water resources. Although the minerals industry is a comparatively small user of waters, currently utilising 4% of consumptive use of water[2] nationally, the economic return provided from that use is significant at the national, regional and local level.

In this submission, the MCA does not seek in any way to diminish the importance of effective protection of the environment, but rather promotes improvements to the efficiency and co-ordination of legislation and planning regimes within and between jurisdictions to achieve an overall better environmental outcome, including the sustainable use of Australia's water resources.

The minerals industry has seen a considerable increase in regulation over the past several years, much of which has been duplicative of other processes, reactive and poorly defined in terms of objectives and outcomes. This despite clear evidence from the Hawke Review of the EPBC Act that additional layers of regulatory process and assessment do not necessarily translate into improved outcomes.

The MCA considers the proposed EPBC amendment to be unnecessary and unworkable. It is duplicative and disproportionate in light of existing initiatives at both the Commonwealth and State/Territory levels, (including the National Partnership Agreement) and the significant national water reform process under the National Water Initiative.

The MCA considers that greater certainty around the sustainable use of Australia's water resources can be provided through initiatives to deliver a more strategic approach to water resource and land use planning and a more appropriate role for the Commonwealth would be in facilitating and supporting these initiatives in a non-reactive manner, and in collaboration with industry.

The MCA is disappointed by the expeditious nature of the proposed amendment, in light of the slow progress on the broader suite of EPBC reforms.

The attached submission provides specific feedback with respect to the proposed *EPBC Amendment Bill 2013*.

[1] The QRC represents both its minerals and energy (coal and coal seam gas) member companies.
[2] Australian Bureau of Statistics National Water Account 2010-11

The MCA considers that further detailed consultation is required to fully understand the implications of the Amendment Bill and would welcome further opportunity to provide input into this process.

Yours sincerely

MELANIE STUTSEL
DIRECTOR – HEALTH, SAFETY, ENVIRONMENT AND COMMUNITY POLICY

MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE SENATE COMMITTEE REVIEW OF THE *EPBC AMENDMENT BILL, 2013*

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12 APRIL 2012

SUPPORTED BY:

QUEENSLAND RESOURCES COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINES AND ENERGY

CHAMBER OF MINERALS AND ENERGY OF WESTERN AUSTRALIA

MINERALS COUNCIL OF AUSTRALIA VICTORIAN DIVISION

MINERALS COUNCIL OF AUSTRALIA NORTHERN TERRITORY DIVISION

General Comments

The MCA does not support the proposed *Environment Protection and Biodiversity Conservation Amendment Bill*, 2013 (Amendment Bill) and has significant concerns regarding the focus, structure and implementation of the Amendment Bill, including:

- unnecessary encroachment of Commonwealth powers into State jurisdictions, raising concerns of sovereign risk – clear Constitutional responsibility for the management of waters rests with the States;
- the amendment will not necessarily establish community confidence, only complicate the regulatory environment;
- sets a poor precedent in using the Commonwealth EPBC Act to target individual industry sectors rather than clear matters of National Environmental Significance (mNES), leaving the Act open to misuse, which is in contrast to sound public policy development;
- duplication of existing Commonwealth and National Initiatives, including the National Partnership Agreement which already facilitates independent expert advice on the impacts to water resources of coal mining;
- duplication of existing and emerging State and Territory environmental regulation and policy – contrary to clear Government commitments to driving regulatory efficiency and creates the potential for conflicts between the Commonwealth and State/Territory approval decisions;
- inconsistencies with the objectives of the EPBC Act and Australia's international obligations which currently underpin the Act;
- inconsistencies with the EPBC Act reform process and COAG Commitments;
- lack of clear definition and focus within the proposed Amendment Bill which will render implementation cumbersome and possibly unworkable and open decisions to increased challenges and reconsideration; and
- may put at risk the certainty and longevity of approvals for existing projects, should the trigger, including transitional provisions and exemptions, be narrowly interpreted, thereby risking the viability of existing coal projects.

The MCA considers that the Amendment Bill will impact both Government and industry in tying up crucial resources in unnecessary referrals and duplicative processes that will lead to considerable delays in the development and implementation of major projects, with little or no substantiated environmental benefit.

Specific Comments

1. Absence of due process

Despite the significance of the proposed amendment, there has been a lack of engagement as part of its development with key stakeholders including the mining industry, the wider agricultural sector, scientific community and government departments which would be responsible for its implementation.

Further, in the Government's rush to pass this legislation, the Amendment Bill has been granted exemption from the usual Regulatory Impact Statement (RIS) requirements. The absence of a RIS removes due scrutiny of:

- the problem or issues which give rise to the need for action;
- the desired objective(s).
- the options (regulatory and/or non-regulatory) that may constitute viable means for achieving the desired objective(s); and
- an assessment of the impact (costs, benefits and, where relevant, levels of risk) on consumers, business, government and the community of each option.

The Department of Finance and Deregulation states that:

"*A Regulation Impact Statement (RIS) is required, under the Australian Government's requirements, when a regulatory proposal is likely to have an impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements."*[3]

In the absence of the RIS, the financial implications of the Bill appear not to have been considered. These implications extend not only to the pressure on already under-resourced government departments, and their capacity to resource the Amendment Bill's implementation, but also on the financial/business impact on industry.

The absence of a RIS is indicative that this amendment is being driven not by sound policy development but by other short term imperatives. If the amendment is warranted, it should be able to stand up to independent scrutiny. Accordingly, the MCA recommends that a RIS be undertaken prior to the Amendment Bill being passed.

2. Duplicative and Unnecessary

The MCA considers that the Amendment Bill risks simply duplicating existing regulation and emerging initiatives at both the Commonwealth and State/Territory Level. This is further compounded by the fact the Commonwealth level assessment does not allow for accreditation of jurisdictional processes. This issue was clearly recognised in the findings of the Hawke Review as a central process needed to improve the operational efficiency of the Act.

All State and Territory environmental assessment processes have a focus on water use and impacts to water resources. This is in addition to the water access/licenses required in most jurisdictions. These ass essments require a robust scientific analysis of the impacts on both surface and groundwater resources at both a local and catchment scale, which often include the development of detailed water balance models. Additionally, through social and economic studies a proponent must consider the impacts that a project will have on affected communities and industries. Water usage is one of the factors that are considered in these social impact assessments.

As the Senate Committee is aware, there is a clear commitment from Australian Governments, through the Council of Australian Governments (COAG) process, to streamline and reduce regulatory burdens on business[4], and to implement best-practice regulatory approaches[5]. The Amendment Bill is clearly contrary to both these commitments.

The implementation of actions under the Amendment Bill will consume already scarce government resources in undertaking unnecessary duplicative assessments and in managing the potential complications caused by the uncertainty over its interaction with water planning processes and environmental regulation within the relevant State jurisdictions. In addition, uncertainty in the interpretation of the Amendment Bill may lead to an increase in challenges to decisions and requests for reconsideration of projects based on inconsistent application of the assessment process. Accordingly, the Amendment Bill is unlikely to add value to the existing water management and approval regimes, while also creating a requirement for significant additional and ongoing resources required for its implementation.

2.1 The National Partnership Agreement is already Operating Effectively

In 2012, the Independent Expert Scientific Committee (IESC) on Coal Seam Gas and Large Coal Mining Development was established as a statutory advisory body under the EPBC Act. The IESC provides advice to Commonwealth and State governments on potential water impacts of Coal Seam Gas and large coal developments. Supporting the IESC is a National Partnership Agreement[6], which Queensland, New South Wales, South Australia and Victoria are signatories, with the

[3] http://www.finance.gov.au/obpr/ris/gov-ris.html
4 COAG Principles of Best Practice Regulation http://www.finance.gov.au/obpr/proposal/coag-requirements.html
5 http://www.finance.gov.au/obpr/about/
[6] http://www.federalfinancialrelations.gov.au/content/npa/environment.aspx

Commonwealth. The Agreement and the work of the IESC are supported by funding of $150 million for the purposes of providing advice, undertaking research and development and rolling out bioregional assessments.

All partner states, with the exception of New South Wales have in place agreed protocols for identifying projects which will be referred to the Committee for advice. New South Wales is understood to have completed a protocol however this has not yet been accepted and approved by the Commonwealth Government.

Since its inception (including the interim phase) the IESC has been operating as intended in assessing and providing advice on projects. A review of available data[7] indicates that in just over 12 months, the Committee has provided advice on:

- New South Wales – provision of IESC advice on eight (8) CSG developments and six (6) coal mining developments.
- Queensland – provision of IESC advice on three (3) CSG developments and 15 coal mining developments.

While the bulk of projects have been referred to the IESC through the Commonwealth process, the significant number of projects across both New South Wales and Queensland reviewed by the IESC since its inception speaks to its effective operation.

The creation of the IESC body under the EPBC Act, the development of State referral protocols and amendments to State legislation, regulation and guidelines in line with the National Partnership Agreement are relatively recent developments. In particular, the milestone for the states to amend relevant legislation, regulations and guidelines of 31 March 2013, has only just passed. While the IESC is clearly operating, time is now needed to allow the Agreement to more fully function. In the case of NSW, the MCA understands that discussions are continuing between the Commonwealth and the NSW Government on finalising the referral protocol.

In addition to project advice, the IESC is involved in a significant body of research[8], which will ultimately add value to the existing body of knowledge on groundwater and industry impacts. The Committee is also involved in undertaking five bioregional assessments across key coal bearing areas of eastern Australia.

Given the IESC is functioning and protocols/guidelines for referral by the states have by and large been developed, the MCA considers the proposed amendment of the EPBC Act to include a coal mining specific referral and assessment trigger is simply duplicative of the existing National Partnership Agreement. The MCA considers that greater effort should be placed on finalising any outstanding matters in the operation of the National Partnership Agreement, before an additional layer of regulation is considered.

2.2 Intersection/Overlap with Water Reforms under the National Water Initiative

The MCA strongly supports the principles contained within the Intergovernmental Agreement on the National Water Initiative 2004 (NWI), which is the flagship water reform initiative for Australia. The NWI provides the national blueprint for water reform and maps out Australia's water use and management objectives. The development of water planning and entitlement regimes, including water markets, is integral to the NWI reforms.

A key objective of the water planning and entitlements process is to improve the sustainability of water resources, cognisant of environmental requirements, and encourage productive and efficient use of water resources and equitable access arrangements for water users.

The mining industry is increasingly being incorporated into the water planning and entitlement regimes managed by the States and this trend is likely to continue. To further enhance this process, the National Water Commission has recently completed a review into the fuller incorporation of the minerals industry under the NWI, recognising the role of Clause 34 of the NWI in reflecting the unique circumstances of the minerals industry, including the significant regulatory (non-market) hurdles which limit its ability to participate equitably in water markets.

[7] http://www.environment.gov.au/coal-seam-gas-mining/project-advice/index.html
[8] http://www.environment.gov.au/coal-seam-gas-mining/research-projects/index.html

Given the further inclusion of the mining industry within the water sharing planning process, and the increasing requirements on existing and proposed operations to secure water within a planning regime (including purchasing water from within a water market) it is unclear how the EPBC Amendment Bill will intersect with these arrangements. If water has been purchased through a water market or an entitlement granted through an existing water planning process, it would seem inconsistent that mining, by nature of the activity undertaken, would also require further assessment and approval through a Commonwealth EPBC process to confirm an enduring and secure access to that water. This discrimination is likely to extend further to regulating the same activities which may be undertaken by different industries (i.e. coal mining and agriculture).

2.3 Intersection /Overlap with State Responsibilities

The mining industry already works within a comprehensive regulatory framework for both environmental and water matters. In addition there are a number of emerging policies and regulations which have been developed specifically in response to extractive industries. Examples of these initiatives include: the NSW Aquifer Interference Policy[9] released in 2012; the Queensland CSG Water Management Policy, Water Resource Plans, Resource Operational Plans and Regional Water Supply Strategies.

Outside of the Murray-Darling Basin, the States have primary responsibility for the management of water. Impacts on water and its connection with the environment and/or other users are central to any jurisdictional environmental approval process. Further information on mining and water regulations is provided in the 2012 National Water Commission report - *Integrating the mining sector into water planning and entitlement regimes (*March 2012*)*[10]*.*

Accordingly, an EPBC water trigger referral and approval process must be cognisant of the State's responsibilities in environmental regulation, water planning and activity specific policies (such as the NSW Aquifer Interference Policy), and seek only to supplement, not duplicate or override any such regulation. Significant variation or duplication would only result in confusion and may lead to potential conflicts in the conditioning of projects.

Given the above coverage of State and Territory responsibilities, (and existing use of the IESC), the MCA considers the case for introducing a sector specific EPBC water trigger is weak and an additional regulatory approvals 'layer' is not needed. This is further supported by the Government Chaired February 2011 inquiry into the previous proposal by Senator Waters to include a water trigger, which found that:

> *"… the committee agrees with the Hawke review's findings that while there is scope within the EPBC Act to complement water initiatives, including it as a matter of national environmental significance is not the best mechanism to achieve such a result. The Committee also finds that* ***current Commonwealth and State initiatives render the bill duplicative and unnecessary*** [emphasis added][11]."

3. Water Trigger and the EPBC Act

3.1 Intersection with the Broader EPBC Act Reform Process

As the Senate Committee is aware, the Government is currently undertaking major reforms of the EPBC Act. Key to these reforms was the completion of the Independent Review of the EPBC Act by Dr Allan Hawke[12]. The review provided a comprehensive analysis of the operation of the Act as informed by an extensive consultation process in which 220 written submissions and 119 comments were received.

The inclusion of water extraction and use as a new matter of mNES was raised and discussed within the EPBC Independent Review Report. However, it was concluded that the Act is "not the best mechanism for effectively managing water

[9] www.water.nsw.gov.au
[10] http://www.nwc.gov.au/__data/assets/pdf_file/0005/21857/Integrating-the-mining-sector.pdf
[11] Report of the Rural and Regional Affairs and Transport Legislation Committee – EPBC(Protecting Australia's Water resources) Bill 2011
[12] www.environment.gov.au/epbc/review

resources"[13], due to uncertainty surrounding the nature, scale and variability of water resources and the difficulty in predicting future pressures.

The Report adds that water extraction is already accounted for in the EPBC Act where water use has, will have or is likely to have an impact on an existing mNES. The MCA considers that this remains the most appropriate focus for the EPBC Act as this directly links to the objectives of the Act and the Australian Government's international obligations.

The Amendment Bill is in direct opposition to the Hawke Review finding described above. The Bill also fails to recognise that the EPBC Act already provides sufficient scope for the assessment and conditioning of coal mining impacts on water resources, where there is intersection with the existing matters of national environmental significance.

3.2 Inconsistency with the Objectives of the EPBC Act

To justify the inclusion of a new matter of National Environmental Significance (mNES), there must be an identified policy 'gap' or failure in the current protected matters and this has not been demonstrated in the proposed Amendment Bill or accompanying explanatory memorandum. Nor will this be revealed, given to the Bill's exemption from RIS requirements.

Coal mining activities are already referrable under the EPBC Act where they may impact on existing mNES. This includes assessing the impacts on water resources upon which the mNES may depend.

The inclusion of an activity specific EPBC 'trigger' for assessment and approval of the impacts of coal mining on water resources appears contrary to the objectives of the EPBC Act. These objectives are provided below:

(1) The objects of this Act are:

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

There is no clear connection between an activity specific trigger and the above stated objectives of the Act. With the exception of 'Nuclear Actions', which is specifically linked to Australia's international obligations under the Nuclear Non-Proliferation Treaty, none of the mNES refer to an 'activity' or industry but rather focus on protected matters and any activity which may impact on those protected matters.

[13] Paragraph 4.71 – Report of the Independent Review of the EPBC Act, 1999

3.3 A Sector Specific matter of National Environmental Significance

The current mNES are:

- World Heritage properties;
- National Heritage places;
- wetlands of international importance (protected under the Ramsar Convention);
- listed threatened species and ecological communities;
- listed migratory species protected under international agreements;
- the Commonwealth marine environment;
- nuclear actions; and
- the Great Barrier Reef Marine Park.

As previously discussed, the focus for a mNES must be on the protected environmental matter and not an industry or activity. It would seem inconsistent to suggest that a specific activity requires assessment, rather than focussing on the impacts on the protected matter, which would be more aligned with the objectives of the EPBC Act and Australia's international obligations.

It is important to note that many of the infrastructure activities associated with coal mining including amenities/sanitation facilities, piping, water diversion, dams, power lines, roads, housing etc. are not mining-specific activities and are frequently undertaken by other sectors within the same catchment areas. The MCA respectfully requests that the Committee consider the merits of a likely future situation where similar development activities are being undertaken side by side and both activities have an equal impact on a water resource. Under the proposed trigger, should one of those activities be associated with a major coal mining development, it would trigger the EPBC Act. Meanwhile, the other activity by virtue of not being associated with coal mining would not trigger the EPBC Act. Under this possible scenario, it cannot be reasoned that the objective of the trigger is to protect a particular environmental value; rather it simply serves to limit the operational capacity of a single sector, namely coal mining developments.

It could be reasonably argued that a coal mining and CSG industry specific EPBC referral trigger is more about arbitrarily halting or delaying exploration and mining for coal and CSG rather than protecting environmental values of national significance. If a water resource is intended to be the protected environmental matter, then it should seek to regulate the environmental impact, regardless of the specific activity which may have a 'significant' impact. This of course would result in the inundation of the regulating agency with referrals with little obvious benefit in terms of improved environmental outcomes. State regulatory agencies will attest to the enormity of this task.

A mining specific water trigger has already been debated more than once. Specifically, a similar EPBC Amendment Bill *(Protecting Australia's Water Resources - 2011),* which created a sector specific water trigger, was reviewed by the Senate Rural and Regional Affairs and Transport Committee. The report concluded that:

"The committee does not support the passage of the bill. The committee concurs that matters of national environmental significance should focus on the environmental outcome, rather than a specific industry [emphasis added]. *Furthermore, the committee agrees with the Hawke review's findings that while there is scope within the EPBC Act to complement water initiatives, including it as a matter of national environmental significance is not the best mechanism to achieve such a result. The committee also finds that current Commonwealth and state initiatives render the bill duplicative and unnecessary"*[14]

[14] Report of the Senate Rural and Regional Affairs and Transport Committee – En*vironment Protection and Biodiversity Conservation Amendment (Protection Australia's Water Resources) Bill 2011*

3.4 No Connection with Australia's International Obligations

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. Those of most relevance include:

- *Antarctic Treaty;*
- *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention)*;*
- *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)*;*
- *Convention on Biological Diversity* (Biodiversity Convention)*;*
- *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention)*;*
- *International Convention for the Regulation of Whaling* (International Whaling Convention)*;*
- Migratory Bird Agreements
- *Rio Declaration on Environment and Development;* and
- *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention).

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.

3.5 Removal of Option for Accreditation

A last minute amendment introduced by Tony Windsor MP removes the option for the Government to enter into an Approval Bilateral Agreement for the new mNES. This is clearly contrary to the April 2012 COAG Commitments[15], the objects of the EPBC Act (...to promote a co-operative approach to the protection and management of the environment involving governments..) and the Hawke Review Recommendations[16].

The existing provisions relating to an approval bilaterals in the EPBC Act make very clear the standards and requirements that must be met before the Minister can enter into a bilateral agreement. These provisions, which include a legislative process that adequately assesses the impacts on mNES, ensure that the necessary checks and balances are in place to ensure bilateral agreements are appropriate and rigorous. The Windsor Amendment ignores these provisions and sets an unnecessary restriction that will constrain efforts to improve environmental assessment practices overtime.

The MCA therefore considers that the Windsor Amendment which removes the option for the Commonwealth to enter into approval bilaterals for the water resource mNES is inappropriate. Should the Bill be passed, the MCA strongly recommends that Windsor Amendment be removed to ensure consistency with the other matters detailed in the Act and COAG commitments. Further, it is not clear why the Government has agreed to the Windsor Amendment given the recent Government chaired inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* did not support the removal of these provisions.

4 Sovereign Risk

Targeting a specific industry for an EPBC Act trigger in disregard of other activities sets a dangerous precedent in terms of increasing the sovereign risk on investment. The introduction of the trigger, particularly with retrospective application, creates significant investment uncertainty not only for coal mining, but for other industries which may be captured by future ill-conceived policy driven by short term imperatives.

The MCA considers that water is a critical issue and the community should have confidence in the way water resources are managed and regulated. However, government/regulator response to community concerns should always be measured, based

[15] COAG Communiqué, 13 April 2012

[16] Chapter 1 (pp12-13) and Chapter 2 (p63) of the Report of the Independent Review Report.

on sound science and be developed through an engagement process with all stakeholders, including the impacted industry. Due process in policy development will help to ensure that matters of sovereign risk are not a limiting factor on major investment decisions in Australia.

5 Concerns with Implementation of the Amendment Bill

5.1 Definitions

The MCA considers the very nature of introducing an amendment in the absence of providing the criteria essential in determining how it will be applied speaks to its ill-conception. The absence of clearly defined criteria creates significant uncertainty for proponents and investors. In addition, other criteria are so broadly defined as to allow for highly conservative interpretation and great uncertainty, which will in turn lead to variations in the way in which the Act is administered by the Department. This ambiguity provides the potential for approval decisions to be subject to increased challenges and possible re-consideration, in turn creating further business risk and cost. This may also expose proponents to vexatious claims with the risk of heavy penalties for proponents who have reasonably not referred projects to the Commonwealth.

Should the Bill be progressed, the MCA considers it is critical that Industry is a partner with Government in defining/contextualising the following terms:

Water resource:

A water resource is defined within the EPBC Act as having the same meaning as in the *Water Act 2007:*

"water resource" means:

(a) surface water or ground water; or
(b) 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).

The definition of water resource is very broad. There is a danger that the lack of context around water resource, while suitable in terms of interpretation of the Water Act, may inadvertently broaden the capture of CSG and coal mining activities where the materiality of the water resource is not considered. The materiality of a 'water resource' is as an important factor when considering potential impacts and as such the necessity to refer activities. These important considerations include:

- the quality of the water resource (in some instances, mining operations may be accessing highly saline aquifers, unsuitable for environmental or other anthropological purposes);
- whether there is a connection to environmental values;
- whether there is a connection to other water users; and
- the size and variability of the water resource (which may include very small, highly variable water sources which remain dry for most of the time).

The high level definitions referred to in the Bill could be broadly interpreted and, taken literally, could apply to any mining related activity (mining, construction of water impoundments, processing, piping or other infrastructure related) which has any impact on any water resource. Further, the Act may perversely impact with water resources which are historical storages created by the proponent and in no way represent water which is available to the environment, or to other industrial users.

Significant Impacts

The EPBC Act Significant Impact Guidelines[17] define a significant impact as one *"which is important, notable, or of consequence, having regard to its context or intensity*". The Department of Sustainability, Environment, Water, Population and Communities website[18] provides the following commentary on significant impacts as relevant to the Amendment Bill:

A significant impact on water resources may be caused by one development action relating to coal seam gas or large coal mine, or the cumulative impact of such actions. Factors which may directly or indirectly bring about a significant impact on water resources could include those that:

- *change in the quantity, quality or availability of surface or ground water;*
- *alter ground water pressure and/ or water table levels;*
- *alter the ecological character of a wetland;*
- *result in rivers or creeks diverted or impounded;*
- *alter drainage patterns;*
- *reduce biological diversity or change species composition;*
- *alter coastal processes, including sediment movement or accretion, or water circulation patterns;*
- *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 substantially adversely affected, or*
- *substantially increase demand for, or reduce the availability of water for the environment.*

These 'factors' are extremely broad and would effectively capture all coal operations. Using the above factors, should the trigger be applied outside of the coal sector almost every land based industry and development which intersects with a 'water resource' (dry or otherwise) could potentially be captured.

A definition of 'significant impact' in regards to the water resource trigger has not been provided with the proposed Amendment Bill. This is in line with other mNES, which are supported by the Significant Impact Guidelines. However, without clear guidance on what constitutes a 'significant impact', the implications and scope of the water trigger cannot be understood.

It is important to note that a sector specific assessment for 'significant impact' does not recognise that a coal mining activity may be situated in areas alongside other industries, whose intersection with the same water resource is not subject to an equivalent level of regulatory scrutiny even in circumstances where these other activities have a much greater impact on the water resource.

A key example of this is the Namoi Catchment Water Study, initiated by the NSW Government in response to community concerns regarding possible effects on the area's ground and surface water flows from future coal mining and CSG which found that: "*At current levels of development, extensive regional scale impacts on water resources are unlikely*." Further, the report went on to note that even with the most expansive growth scenario for major coal and CSG projects in the Gunnedah Basin, the impact of development on the water resource would be "*a relatively low impact when compared to existing anthropogenic water impacts*", i.e. agricultural use. How would the influence of 3rd parties (including non-mining activities), not covered by the EPBC Act, but which may influence the characteristics/variability of the water resource under scrutiny, be accounted for?

The interpretation of the water trigger rests heavily on the definition of significant impact (which in turn rests heavily on the definition of a water resource). How 'significant impact' is determined could vary depending on the proposed assessment timeframe. What may be 'significant' over the short term (i.e. 6 months), may not be 'significant' over a longer timeframe (i.e. 1-10 years). It is also unclear how seasonal variability (on an annual or decadal basis) in water resources would be accounted for

[17] Matters of National Environmental Significance – Significant Impact Guidelines 1.1, Commonwealth of Australia
[18] http://www.environment.gov.au/epbc/about/2013-amendments-q-and-a.html

as this would affect the perceived significance of impacts. What may be significant during periods of drought may not be significant during high rainfall periods and vice-versa. The linkage between the interpretation of the water trigger and the risk assessment methodology is very unclear. Without a definition to provide context, a reasonable assessment cannot be undertaken within a reasonable time.

Large Coal Mining Development

What activities are captured or not captured in as part of a large coal mine development is currently unclear. A large coal mining development is currently defined in the EPBC Act as:

large coal mining development means 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):

(a) in its own right; or

(b) when considered with other developments, whether past, present or reasonably foreseeable developments.

The current definition proposed for a large coal mining development, and particularly in the absence of a robust definition for 'significant impact' and 'water resource', will risk capturing all future coal mining activities. Such an approach will lead to over-referral of coal projects and will in turn further stretch the already limited resources and capability of the Department to make efficient and effective decisions on referral.

Further, as previously stated, many coal mining related ancillary activities have a non-mining component. Accordingly, the MCA recommends that all activities which may have a parallel activity outside the coal industry be expressly removed from capture by the water trigger (when considered independently).

The Exploration Paradox

The definition of a mining activity is currently very broad and may be interpreted as to include prospecting and exploration. Should exploration activities be captured, this would create a paradoxical situation. Minerals industry exploration activities are often undertaken in remote locations where there is little or no water resource information and the impact (significant or otherwise) on a 'water resource', cannot be assessed without exploration being firstly undertaken. Accordingly, in these circumstances, it is not clear how an assessment of the impacts of exploration could reasonably be completed. This is particularly the case where it may be required to be completed prior to the nature of the mineral resource in the region being understood and therefore in the absence of clear concepts within the company about the nature and scale of any potential minerals development. This issue is further compounded by the potentially subjective approach to defining 'significant impacts'. Furthermore, the significant penalties proposed for proponents who do not refer activities would be likely to lead to a large number of precautionary referrals in situations where there is no information available for the IESC to make an assessment.

Exploration impacts can be very low and in some cases be regulated through Codes of Practice. It is not reasonable that such projects would trigger the EPBC Act. Accordingly, the MCA considers exploration activities should be clearly excluded from the water trigger.

5.2 Reversing the Onus of Proof for Contraventions

The Water Resource trigger for CSG and Large Coal Mining developments creates conditions unlike any other mNES; that is the onus of proof is reversed for a contravention of the civil penalty provisions for unauthorised coal mining developments (which may significantly impact a water resource). Where proceedings are instigated for a contravention of the proposed section 24D, it is up to the proponent to prove that the action is authorised. This reverse onus of proof creates a potential situation of moral hazard and may expose the proponent to potentially vexatious claims.

The MCA considers that a consistent approach to the evidential requirements for contraventions should be undertaken for all mNES. Accordingly, the MCA considers that this unique provision be removed.

5.3 Risks to Existing Projects/Projects under Assessment

Interim Period Retrospectivity

The MCA does not support retrospectivity (the proposed trigger applies to all projects from 13 March 2013). The retrospective application of the Amendment Bill creates great uncertainty for projects which may currently be undertaking activities, including ancillary activities (such a piping or other infrastructure), which may otherwise not require referral under the EPBC Act or which may have been referred and determined not to require further assessment (i.e. no significant impact on a mNES).

The retrospectivity of the Bill creates serious doubt and business uncertainty on whether projects approved post 13 March 2013, but prior to Royal Assent previously referred or not referred would now need to be (re)submitted. Some projects may have commenced in the interim period and if required to be referred would need to cease operations as the Act has severe penalties for undertaking an action that is subject to a current referral or assessment.

The potential delay to projects approved in the interim period before the Amendment receives Royal Assent could be several months or longer. This would also open up projects approved during that period at the State level to challenge and potential penalties. It should be noted that it is neither simple nor an inexpensive exercise to stand down planning teams and defer contract dates while awaiting the potential passage of a Bill and then the consideration by the IESC and Commonwealth. This represents a significant risk as may lead to significantly increased delay and opportunity costs which not only impacts on the net present value of projects, but which in the economic climate, particularly for coal, may halt project development.

Pre-existing or 'Grandfathered' Projects

Within the Amendment Bill, an exemption is provided to existing projects and operations which have all necessary specific authorisations prior to the commencement of the Bill. The exemption however only applies while the specific authorisation is in place and may be lost if the authorisation is renewed or extended at any point in the future. The MCA considers it is important to ensure that these 'grandfathering' provisions are not interpreted so narrowly that renewals and amendments to existing licences, permits or authorities are deemed to extinguish the exemption.

Discrete changes to an already existing and operating action should not impact on the application of grandfathering provisions to the unchanged components of an action. What was previously approved should be allowed to be implemented with minor variations where these do not pose different or additional risks to the environment.

There remains an unintended but significant risk that existing/brownfields projects seeking an extension or renewal of an environmental authorisation (without material change in the operation in terms of impacts on water resources) particularly under state legislation may be interpreted as triggering the EPBC Act. Should this occur and therefore result in the stoppage of an existing operation, this delay may critically impact on the feasibility of some coal operations and associated services, such as power generation. The need to halt an existing operation while an assessment is undertaken would have significant negative ramifications on mine owners, customers, employees, contractors, local communities and revenue streams.

On this basis, the MCA considers that should the Bill be implemented, the grandfathering exemptions provided in item 22(3) and 22(4) should be improved by expressly acknowledging that changes to grandfathered projects do not impact on the status of prior environmental authorisations of unchanged components.

6 A Better Way

MCA members are committed to the responsible use of water resources in Australia, including ensuring that activities do not compromise their long term sustainability. However, the MCA considers that the introduction of an additional layer of regulation is not an appropriate nor efficient way to achieve this objective.

In line with the Prime Minister's November 2011 statement in announcing the National Partnership Agreement, it will be better to focus on regional assessments in priority areas and improve the science and information feeding into existing regulatory schemes.

The MCA supports a regional approach to managing water resources and integrating this with a strategic land use assessment and planning approach, and which considers all activities affecting water resources, not just a specific sector.

The Commonwealth can add significant value to this process through:

- continued provision of funding for water resource assessments;
- greater investment in the development of water planning undertaken by the States and Territories;
- support for further inclusion of the resources sector within the water planning and entitlements process;
- development of leading practice guidance, as necessary, for emerging industries; and
- promotion of cumulative impact management approaches implemented by the States and Territories.

This would allow the Commonwealth investment to complement existing approaches including the National Partnership Agreement, NWI Reforms, and emerging State initiatives without compromising the purpose of the EPBC Act and the significant reform process which is underway.

7 Summary

- The Bill requires far greater detailed consideration and should not be passed in the absence of appropriate scrutiny. This should include independent analysis through the undertaking of a Regulatory Impact Statement and the application of best practice regulation principles and due consultation with affected stakeholders.
- The water trigger is duplicative of existing arrangements at both the State and Commonwealth levels. The National Partnership Agreement, which has the same intent as the Amendment Bill, has not failed. Greater effort should be made to finalise IESC referral arrangements with NSW and allow sufficient time for the agreement to work effectively.
- The proposed water trigger is inconsistent with the objectives and intent of the EPBC Act as well as existing mNES.
- A water trigger has been previously rejected as inefficient and/or inappropriate by the Hawke Review and subsequent Parliamentary Inquiries.
- A sector specific water trigger is inconsistent with the purpose of the Act by focussing on an activity and not a protected matter.
- The sector specific water trigger sets a dangerous precedence in terms of sovereign risk.
- Ambiguity in the Bill creates a significant risk for proponents in terms of costs, delays and the vulnerability of decisions to legal challenges and potential re-conditioning of approvals.
- Should the Amendment Bill be passed, the MCA strongly recommends that the Bill be amended to:
    - Remove the prohibition of accreditation of the State processes.
    - Provide clarification around key definitions to avoid confusion and legal challenge.
    - Remove the reverse onus of proof (section 24D) in line with other mNES.
    - Clearly remove the trigger as it applies to activities which have a non-mining component.
    - Remove the retrospectivity in the application of the Bill.
    - Grandfathering exemptions provided in 22(3) and 22(4) should be improved to ensure that the water trigger does not inadvertently capture existing brownfield developments seeking an extension or non-material (as relevant to water resources) amendment of an existing authorisation. Where an amendment does impact the water resource trigger, it should not apply to those actions undertaken under an existing authorisation.