



Supplementary Submission – recommendations for improving the Independence of the Committee

The Wilderness Society and Northern Inland Council for the Environment have received legal advice to clarify how the independence of the Independent Expert Scientific Committee be enhanced.

Independence must be defined and stipulated within the text of the Bill

Currently, the Bill provides for independence and impartiality through the proposed section 505C(5)(b), which requires: “each member's appointment is not being made to represent any particular body, group or community.”

While the title of the Bill and the proposed body carry the label of ‘independent’, this is **no legal guarantee as to the Expert Committee’s freedom from influence because there is no actual definition of independence in the Bill. Nor is the term included in the wording of the Bill.** The reference to independence is only mentioned in the name of the Bill. While this indicates some intention that the Committee be independent, given the lack of clear wording in the actual provisions of the Bill, it would be difficult to use that name as a constraint on the exercise of powers under the Bill.

Where a term is not defined in legislation, courts and others interpreting the law refer to the common definition of that term. Independence is defined as ‘free from the influence, guidance, or control of another or others; self-reliant: an independent mind’ and ‘not determined or influenced by someone or something else; not contingent’ (American Heritage Dictionary of the English Language, Fourth Edition).

To ensure that representatives on this Committee are independent in the sense of they are not compromised through significant work obtained through mining and CSG projects previously, more explicit statutory restrictions on such dealings are required within the Bill.

Independence is needed for community backing

A paper by Professor Cheryl Saunders on "The Role and Independence of Statutory Office-holders: The particular case of advisory bodies" in Papers on Parliament No. 7 (March 1990) provides some useful thoughts on such bodies. It states:

If the views of the advisory body are not formulated independently, within its terms of reference, their value as an element in the decision-making process is lost. From the standpoint of the community, at least, the exercise has been a waste of time and money.

FOI and public register needed to ensure transparency and preclude interest holders

A direct corollary of section 505C(5)(b) of the Bill that “each member's appointment is not being made to represent any particular body, group or community” is the need to disclose pecuniary interests and other conflicting matters of the Committee members. Ideally **these matters should be disclosed prior to the appointment of members and preclude persons from joining the Committee.**

We would advise that the application of FOI legislation is an important accountability mechanism to ensure transparency and facilitate public consultation. This would ensure that any impingement on the independence of the IESC can be scrutinised. It would also compliment the purpose to our submission's recommended public register of all contacts between the Committee, its members and the coal and gas industry.

Interdisciplinary breadth of membership helps build independence

The breadth of membership is also a factor that should not be overlooked by the appointing Minister in helping build independence. In the UK Royal Commission on Environmental Pollution (an autonomous committee of experts which existed from 1970 to 2011) experience:

"The very breadth of its membership conditioned its approach to its subjects, making for 'a degree of good and common sense that is rare amongst a scientific committee' and for much mutual learning during the 'evolutionary process' of writing reports."

This processes has been described as conducive to "the Commission's reputation as an authoritative body, with an ability to 'get to the bottom' of the issue at hand." By having a breadth of members, and interdisciplinary scrutiny and enhanced robust scientific dialogue, the Committee was respected as independent experts.

Independence for protection from liability

True independence also means freedom from fear of litigation for committee members. A new provision could be added to provide for protection from liability in a similar manner to section 109 of the ICAC Act (NSW):

(1) No matter or thing done by the Commission, the Commissioner, the Inspector or any person acting under the direction of the Commission, the Commissioner or the Inspector shall, if the matter or thing was done in good faith for the purpose of executing this or any other Act, subject the Commissioner, the Inspector or a person so acting personally to any action, liability, claim or demand.

This would ensure that the committee can exercise its proper functions without fear of litigation or liability where done in good faith for the purpose of scientific investigation of CSG impacts.

Term of the appointment – ensure a three year term for independence

The Bill also adds the proposed IESC to the end of section 506 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ['EPBC Act']. The current tenure is set out at section 507(1): "A member of a Committee holds office for the period specified in the instrument of appointment". It is therefore important that the Minister in setting such period has to consider a proper time period to allow for independence. We have strongly recommended three years, and encourage less discretion available to the Minister to set shorter periods.

Sincerely,

Naomi Hogan, The Wilderness Society

Carmel Flint, Northern Inland Council for the Environment



Supplementary Submission – application of the Precautionary Principle

The Independent Expert Scientific Committee must enact the Precautionary Principle

Section 391(2) of the Act outlines:

The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

This statement can be interpreted to encourage the action of measures to prevent threats of serious or irreversible environmental damage, even when there is not full scientific certainty regarding the threat.

Precautionary Principle failure: case study of Dart Energy PEL 458 assessment

The recommendations the Interim Committee provided in the case of the Dart Energy PEL 458 assessment provides evidence that the Committee used lack of full scientific certainty as *no* reason to postpone a measure that could *create* degradation of the environment where there are threats of serious or irreversible environmental damage.

Under their advice on *Dart Energy, Coal Seam Gas Exploration Pilot Appraisal Program* changes to water quality and hydrological character of the nearby Hunter Estuary Ramsar Wetlands, the committee noted:

*1b. as the **exposure and activation of acid sulphate soils could cause acidic run-off into the wetlands site**, the full implementation of the Acid Sulphate Soils Management Plan should be a specific requirement of any decision to approve the proposed activity.*

*2. The Interim Committee suggests that in light of the **lack of data about potential impacts of coal seam gas operations on the Ramsar site**, the proponent should be required to gather and make available to commonwealth and state regulators data on water quality, quantity and geochemistry characteristics, as well as flow rates in the area of their proposed action.ⁱ (emphasis added)*

The Federal Government's interpretation and application of this advice resulted in no requirement to gather data or prevent a threat of serious environmental damage, despite the risks and lack of data. Their referral decision stated:

"All data collected regarding the water quality, quantity, geochemistry and flow rates in the area of the proposed action will be made available, within 2 months of collection, to the Federal Government."ⁱⁱⁱ

Further to this case study, at roughly the same time the Committee made their recommendation for Dart Energy PEL 458 to take charge of the monitoring and data collection of impacts on the Ramsar site, a NSW government audit of this company operating at this site found:

*“Two NC1 level non-compliances were reported for PEL 458 and Resources & Energy agree with the classifications. One of these related to the **failure to properly rehabilitate a site**. Resources & Energy note the audit findings in relation to drill site rehabilitation and the status of these sites will be reviewed prior to completion of the title and release of the security deposit. The other related to possible **acid sulphate soil issues** and the **lack of appropriate surface water and groundwater monitoring**.”*ⁱⁱⁱ

NB: Category 1 (NC1) - a total absence of planning or implementation of a required operations element which presents an immediate risk or an isolated lapse in control in the implementation of an operations element which will lead to a significant risk.^{iv}

The Bill must be strengthened to explicitly require application of the precautionary principle

The recommendations of the Interim Committee and the results of the NSW audit do not bring relief or certainly to the community that this industry is safe. It is our opinion that this advice for coal seam gas drilling to proceed despite the risks, lack of data and no commitment for any independent monitoring or data collection was a poor decision that did not apply the precautionary principle.

This decision could jeopardise and erode public trust in the Scientific Committee. The Bill must explicitly outline how the precautionary principle is to be used in order to avoid these situations reoccurring.

Sincerely,

Naomi Hogan, The Wilderness Society

Carmel Flint, Northern Inland Council for the Environment

ⁱ <http://www.environment.gov.au/coal-seam-gas-mining/pubs/iiesc-advice-dart-energy.pdf> Accessed 14 June 2012

ⁱⁱ http://www.environment.gov.au/epbc/notices/assessments/2011/6154/2011_6154_decision_notice.pdf Accessed 14 June 2012

ⁱⁱⁱ http://www.resources.nsw.gov.au/_data/assets/pdf_file/0004/429610/Report-on-audit-of-coal-and-petroleum-exploration-licences.pdf Accessed 14 June 2012

^{iv} Ibid.