Business Council of Australia

Submission to the Senate Standing Committees on Environment and Communications regarding the Environment Protection and Biodiversity Conservation Amendment Bill 2013

APRIL 2013

The Business Council of Australia (BCA) brings together the chief executives of more than 100 of Australia's leading companies, whose vision is for Australia to be the best place in the world in which to live, learn, work and do business.

About this submission

The Business Council of Australia is making this submission to the Senate Standing Committees on Environment and Communications in relation to the Environment Protection and Biodiversity Conservation Amendment Bill 2013 (EPBC Amendment Bill).

The House of Representatives has passed a Bill to amend the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) to create a new matter of national environmental significance (MNES) in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource (the 'water trigger').

The Bill means in effect that any coal seam gas or coal mining development, irrespective of size, will require federal government assessment and approval. The creation of a water trigger runs counter to the philosophy of the EPBC Act in that this amendment addresses an industry sector and not a matter of environmental significance as specified under any international treaty or obligation. The additional amendment proposed by the Independent Member for New England, Tony Windsor MP, will prevent state or territory governments from undertaking water resource related assessments if EPBC Act approval powers are devolved to each state under new bilateral agreements. Such an amendment fails to recognise that the states have constitutional responsibility for water resource regulation.

These amendments fail the test of good policy and regulation making and should not be passed.

Recommendations

The BCA recommends that:

- the Environment Protection and Biodiversity Conservation (EPBC) Amendment Bill 2013 be withdrawn
- the Council of Australian Governments (COAG) National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development and related Independent Expert Scientific Committee (IESC) should continue to be rolled out and their effectiveness assessed in 2014 as agreed.
- the government should ask the CSIRO to undertake research reviewing and building on the work of the IESC, previous research and assessments by organisations such as Geoscience Australia, state water authorities, etc. The research should identify the possible impacts of coal seam gas operations, coal mining and other commercial or agricultural operations on water resources, to assess what impacts there have been to date, the level and scale of risk, and options to ameliorate any impacts
- following the CSIRO's findings, COAG should:
  - examine the current federal and state legislation and its capacity to manage any identified risk on water resources associated with coal seam gas operations, coal mining and other commercial or agricultural operations
  - consult with stakeholders to devise appropriate responses that are proportionate to the risk/problem and that do not have unintended consequences for the industry or environmental legislation.

Key points

In providing this submission, the BCA makes these key points:

- The EPBC Amendment Bill is fundamentally bad law born of a poor regulation-making process.
- The problem that the EPBC Amendment Bill seeks to address has not been properly defined, and to the extent that a risk is extant, it is already dealt with by state government processes and the national partnership agreement, which establishes the Independent Expert Scientific Committee and requires a range of actions on the part of federal and state governments.
- The EPBC Amendment Bill will:
  - add additional costs to coal seam gas and coal projects through duplication
  - run counter to COAG's recent commitment to streamline approvals
  - capture a number of small projects that will have negligible impacts on the environment and would not have otherwise needed to go through a federal process
  - potentially impact on projects that have already been approved, posing sovereign risk issues
  - inhibit exploration for coal seam gas reservations.

EPBC Amendment Bill: poor regulation-making process

Federal government fails to meet its regulation-making commitments to business

The federal government is a signatory to the April 2012 COAG National Compact on Regulatory and Competition Reform. This is a compact between Australian governments and business designed to improve regulation making practices.

In recognising the benefits of good regulation making processes, the federal government made a number of commitments, including to:

- 'engage early, engage genuinely and consult at each stage of the reform process
- apply best-practice regulation impact assessment and ultimately be responsible for demonstrating that the benefits of regulations outweigh the costs, including having regard to the differential impact and experience of regulation on small and large businesses
- be flexible in the approach taken to regulation. Unnecessary duplication and overlap between jurisdictions will be avoided and national market approaches adopted when appropriate. However, in some circumstances, bilateral agreements, multilateral approaches or competition between jurisdictions will lead to the best outcome.'[1]

In introducing the Environment Protection and Biodiversity Conservation Amendment Bill 2013, the federal government has failed to meet its own commitments to business in relation to regulation making.

The development of the Bill fails the test of best practice regulation making

The purpose of regulation is to reduce risk – for example, risks to personal or public safety or risks to the economy and environment. A risk-based approach to regulation ensures that regulatory effort is directed at the areas where it will have most impact.

Adopting a risk-based approach to regulatory design, implementation and review is critical to lifting regulatory performance by ensuring that where regulations are introduced they are the appropriate lever for government to use to achieve a particular outcome efficiently and effectively.

The key principles underpinning best practice regulation taking a risk management approach are:

[1] Council of Australian Governments, National Compact on Regulatory and Competition Reform: Productivity Enhancing Reforms for a More Competitive Australia, at www.coag.gov.au.

- Before government seeks to regulate, it must understand the problem or policy priority in depth and test the case for regulation, along with the risks and consequences of not regulating a particular activity.
- The costs of new regulation are thoroughly assessed and tested with the community through cost–benefit analysis, which includes an explicit understanding of the costs to the community including business
- Regulation is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business (see the Attachment for a more detailed checklist).

Understanding the problem

The government has failed to clearly identify or measure the risk that it seeks to address with this regulation. Nor has it provided any explanation as to why the Bill is the appropriate choice of intervention. Not all risks can be reduced by regulation, and even when it is possible to do so, regulation may not be cost-effective.

While there has been much conjecture, there has been no comprehensive risk-based assessment undertaken with regard to the possible impacts on Australia's water resources of coal seam gas operations, coal mining and other commercial or agricultural operations

The federal government has already, in consultation with state governments, established the IESC and requires it to oversee a research program and establish a process through the IESC to assess possible risks of coal seam gas and large mining developments, and is working with state governments to ensure relevant assessment processes are in place. The IESC will be reviewed in 2014.

The EPBC Amendment Bill 2013 has been introduced into parliament ahead of the IESC being able to complete its work and in the absence of the review. Consideration of any amendments to the EPBC Act should be deferred until after the IESC has done its work.

Understanding the costs of regulation

The second critical question to answer is the rigorous assessment as to whether the costs of regulatory intervention are appropriate given the likely impact or reduction in risk.

This can be achieved through strict adherence to the preparation of thorough regulatory impact statements by all agencies early in the policy development process, before any final policy decision is made by the relevant decision maker, and in consultation with business and the community. It should include an assessment of the costs of regulation to business.

The EPBC Amendment Bill 2013 was introduced into the parliament in the absence of consultation with business and without a regulatory impact statement being prepared, meaning the amendment has not been subjected to a cost–benefit analysis.

In the absence of such analysis the community can have no confidence that the regulation proposed is the most effective policy lever to use.

Targeting regulation

The third question that must be answered is whether the regulation proposed is carefully targeted to achieve its stated objectives and minimise the cost impacts on the community including business.

The insertion of a water trigger in the EPBC Act does not reflect such an approach. The creation of a water trigger in the EPBC Act runs counter to the philosophy of the EPBC Act in that this amendment addresses an industry sector and not a matter of national environmental significance as specified under any international treaty or obligation.

The COAG Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment (1997)[2] identified seven matters of national environmental significance:

- World Heritage properties
- Ramsar listed wetlands
- places of national significance
- nationally endangered or vulnerable species and ecological communities
- migratory species and cetaceans
- nuclear activities
- management and protection of the marine and coastal environment.

These were again confirmed in the independent review of the EPBC Act in 2009 by Alan Hawke. This review did not support the creation of a water trigger, citing the range of other legislative and policy levers available.[3]

In introducing this amendment the federal government has failed to identify why the range of alternative approaches through other state and federal mechanisms have not been considered.

Processes and regulations exist to address environmental risks

In introducing the EPBC Amendment Bill 2013, the federal government failed to identify how such amendments improve on the current environmental protections, nor did it acknowledge the range of processes and regulations already in place to consider the possible impacts of coal seam gas and coal mining or provide clear evidence of deficiencies in these arrangements.

Environmental protections

Under the EPBC Act the minister has only two options – either agree to or not agree to a proposal. This is in sharp contrast to the responsibilities a state or territory government has in regard to a project. State governments have an ongoing role assessing and monitoring the impacts of projects and requiring mitigation of impacts. To do this, states primarily use adaptive management practices, which allow the conditions and management of an activity to change as technology, information or other matters change. The EPBC Amendment Bill 2013 will not add environmental benefits to what is already in place through state legislation and the recently established IESC.

Independent Expert Scientific Committee on coal seam gas and coal mining

Following an announcement in late 2011 the federal and state governments have progressively entered into a national partnership agreement to ‘strengthen the regulation of coal seam gas and large coal mining development by ensuring that future decisions are informed by substantially improved science and independent expect advice.’[4] Negotiations continue between the federal government and the New South Wales Government on aspects of requirements under the agreement.

The agreement commits the federal, state and territory governments to take account of the advice of the Independent Expert Scientific Committee on coal seam gas and large coal mines in their relevant regulatory decisions.

[2] COAG, Heads of agreement on Commonwealth and State Roles and Responsibilities for the Environment, http://www.environment.gov.au/epbc/publications/coag-agreement/, November 1997.

[3] A. Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation (EPBC) Act 1999*, Commonwealth of Australia, October 2009.

[4] COAG, National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development, 9 March 2012, p. 1.

As well as providing advice, the IESC has a further role to oversee research to address key questions about managing the impacts on water resources from coal seam gas and large coal mining projects and bioregional assessments for priority regions.

While there was a delay in the creation of IESC it has now commenced it work. There has not been any suggestion or evidence that this committee is not operating as required. Projects are being referred and assessed and details can be accessed on the IESC website.

The operation of the committee is to be reviewed in 2014. The assessment of the effectiveness of the national partnership agreement and the IESC should then be an input into a proper risk management assessment prior to consideration of any further amendments to the EPBC Act

In the absence of such a review there is no evidence that the committee is not fulfilling its important role or that the national partnership agreement is at risk of not achieving its goal of strengthening the regulation of coal seam gas and large coal mining development by ensuring that future decisions are informed by substantially improved science and independent expect advice.

Current state assessment processes

Assessment processes exist at the state level which consider water resource management issues. An example of this is the processes in Queensland where potential impacts on both surface and ground water are assessed. For example, potential impacts on surface and ground water related to a project developed in Queensland, are regulated and/or assessed by:

- the Water Act 2000 (Qld)
- the Queensland Office of Groundwater Impact Assessment which prepares underground water impact reports addressing cumulative impacts of projects developed in areas of intense development
- the Environmental Protection Act 1994 (Qld) – conditions imposed on environmental authorities regulate impacts to groundwater and surface water, e.g. by requiring the preparation of CSG Water Management Plans and Groundwater Management Plans
- conditions of approvals issued under the EPBC Act generally require that proponents prepare Water Monitoring and Management Plans which address impacts to surface and ground water.

Ensuring informed policy and regulation making

Coal seam gas and coal mining are mature industries and despite several studies, no systemic threats to water resources have been identified.[5]

The work of the IESC includes further research on coal seam gas and large mining projects.

There would be benefit in commissioning the CSIRO to undertake further work to bring together the research, including that being overseen by the IESC, on the possible impacts of coal seam gas operations, coal mining and other commercial or agricultural operations on water resources. This work should include an assessment of what impacts there have been to date, the level and scale of risk and options to ameliorate any impacts.

Such a study should build on the work of Geoscience Australia and studies by state water authorities. Examples of previous studies that would be relevant include existing assessments and work undertaken, such as the former Queensland Water Commission's *Underground Water Impact Report for the Surat Cumulative Management Area* in 2012.

The provision of independent advice will provide the basis for regulation based on sound evidence and a clear understanding of the costs and benefits of any intervention.

[5] Queensland Water Commission, *Underground Water Impact Report for the Surat Cumulative Management Area*, July 2012, at www.dnrm.qld.gov.au.

Conclusion

The BCA recommends that:

- the Environment Protection and Biodiversity Conservation Amendment Bill 2013 be withdrawn
- the COAG National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development and related Independent Expert Scientific Committee should continue to be rolled out and their effectiveness assessed in 2014 as agreed
- the government should ask the CSIRO to undertake research reviewing and building on the work of the IESC, previous research and assessments by organisations such as Geoscience Australia, state water authorities, etc. The research should identify the possible impacts of coal seam gas operations, coal mining and other commercial or agricultural operations on water resources, to assess what impacts there have been to date, the level and scale of risk, and options to ameliorate any impacts
- following the CSIRO's findings, COAG should:
  - examine the current federal and state legislation and its capacity to manage any identified risk on water resources associated with coal seam gas operations, coal mining and other commercial or agricultural operations
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Attachment: Detailed Checklist for New Regulation

This checklist is based on the Business Council of Australia Standards for Rule Making.

Standard
1. Government conducts an early up-front risk assessment
2. Government has clear objectives for considering regulation
3. All options that are proportionate to the problem at hand are considered, including non-regulatory options
4. Preliminary analysis and the need for regulation are tested with stakeholders
5. Cost–benefit analysis that includes a detailed understanding of the costs to business is the centrepiece of regulatory impact assessment processes
6. The depth of assessment is proportionate to the impact of the proposed regulation
7. The benefits of any new regulation are demonstrably assessed to outweigh the costs
8. Impact assessments ensure that proposed regulation does not unnecessarily restrict competition
9. Government and business regulatory treatment is neutral (where applicable)
10. Regulatory impact assessments are mandatory for significant regulations, with exceptions confined to very limited circumstances
11. Regulatory impact assessments are subject to adequate public consultation
12. Impact assessments have an eye to implementation
13. Regulation is generally drafted to be outcome-focused rather than prescriptively defining the inputs to regulatory compliance
14. Regulation is drafted in plain language and actually reflects the policy intent
15. Before drafting new regulation, governments test whether existing regulations or other Australian governments already address the same or related problem
16. Regulatory powers are designed to be proportionate to the problem being managed
17. All new regulations are introduced with a sunset clause

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