AUSTRALIAN COAL ASSOCIATION

12 April 2013

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

Dear Ms Dunstone

Inquiry into the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*

The Australian Coal Association (ACA) welcomes the opportunity to provide a submission to the Senate Standing Committee on Environment and Communications inquiry into the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*.

The ACA does not support the Bill. The proposed water trigger in the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC)* Act discriminates against the coal industry and completely undermines the Government's commitment to streamline environmental regulation.

The Bill is entirely unnecessary as the water trigger duplicates State environmental processes and the Australian Government's newly-established Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Developments (IESC). The ACA does not accept that this process has failed or that further regulatory intervention is justified. Despite the fact that the NSW Government and the Commonwealth are yet to agree a protocol for the referral of projects to the IESC, almost half of all projects assessed by the IESC to date have been in NSW. More regulation does not equate to improved environmental outcomes and there is no evidence that these changes will deliver any additional environmental benefit.

The new requirements will significantly exacerbate regulatory compliance costs, delays and uncertainty for coal projects. Virtually all current and future coal developments, regardless of their size or scope, will now be subject to the additional step of Commonwealth approval based on the broad terms of the amendment. We regard the retrospective application of the new trigger on projects as completely unacceptable. Many are already well-advanced in the approvals process and the potential for proponents seeking minor amendments to existing (approved) mine plans to be subject to the new trigger is a presumably unintended consequence that must be rectified.

This regulatory instability and uncertainty could not come at a worse time for the Australian coal industry. We are already grappling with escalating cost pressures and falling commodity prices which have culminated in mine closures, project deferrals and substantial job losses. Reactionary policymaking, which further erodes the investment environment for coal developments, will inevitably add to this tally.

The ACA is particularly concerned with the manner in which these changes have been introduced. There is simply no justification for rushing through significant legislative reforms without prior consultation or a Regulatory Impact Statement which adequately assesses the costs and benefits. We recommend that the Australian Government undertake a genuine consultation process to examine the unintended consequences of this Bill before it is debated in the Senate.

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AUSTRALIAN COAL ASSOCIATION

Yours sincerely

Dr Nikki B Williams
CHIEF EXECUTIVE OFFICER

AUSTRALIAN COAL ASSOCIATION

SUBMISSION TO SENATE STANDING COMMITTEE ON ENVIRONMENT AND COMMUNICATIONS

Inquiry into the *Environment Protection and Biodiversity Conservation Amendment Bill 2013*

APRIL 2013

Supported by:

NEW SOUTH WALES MINERALS COUNCIL LTD

INTRODUCTION

The Australian Coal Association (ACA) represents the black coal industry which is Australia's second largest export earner with a value of over $48 billion in 2011-12. The industry directly employs over 50,000 people and is a major contributor to regional economies particularly in NSW and Queensland.

The ACA does not support the *Environment Protection and Biodiversity Conservation Amendment Bill 2013* and the proposed new matter of National Environmental Significance (NES). The introduction of a 'water trigger' targeted specifically at coal and coal seam gas (CSG) developments unnecessarily duplicates State assessment and approvals processes as well as the Australian Government's own Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mine Developments (IESC).

In targeting the coal industry, the trigger also fails to recognise that there are currently more than 120 coal mines operating across Australia under some of the world's most stringent environmental standards. Coal mining is not a new industry and the existing regulatory framework governing it, including in relation to water impacts, is comprehensive and well-established.

Virtually all current and future mining projects would require approval under the *Environment Protection and Biodiversity Conservation (EPBC) Act* if the amendment is passed. This will add significantly to project delays, costs and investment uncertainty in return for delivering no additional environmental benefit. Unfortunately, this new layer of green tape comes at the worst possible time for the industry, which is already grappling with escalating domestic cost pressures and declining commodity prices.

To ameliorate the worst impacts of this new measure on the coal industry, the ACA recommends:

1. The amendment prohibiting the use of bilateral approval agreements for this matter of national environmental significance be removed.
2. The new matter of national environmental significance should only apply to those impacts on a water resource which are significant from a *national* perspective. The significant impact guidelines being developed by the Department of Sustainability, Environment, Water, Population and Communities (SEWPaC) must ensure that impacts on lower order water resources remain beyond the scope of the EPBC Act.
3. The new provisions in the Bill must not commence until the significant impact guidelines have been finalised in consultation with industry.
4. That s24D of the Bill be amended to replace "*the action involves*" with "*the action is a*" (coal mining development) to ensure the new matter of national environmental significance only applies to those activities directly associated with the extraction of coal and not to associated infrastructure development.
5. That the Bill be amended so that the new requirements are not retrospective and that projects currently under EPBC assessment are exempt from the new matter of national environmental significance.
6. That the Bill be amended to ensure that projects seeking modifications to existing/prior State or Commonwealth approvals must not be subject to the new matter of national environmental significance unless the modification is associated with a major new development proposal.
7. The Australian Government must immediately undertake a genuine consultation process with industry to examine the unintended consequences of the water trigger.

The ACA submission to the Senate Standing Committee is supported by the Queensland Resources Council and NSW Minerals Council.

1. MORE REGULATION, NOT BETTER PROTECTION

The introduction of a targeted water trigger in the EPBC Act adds yet another layer of regulation over and above an already complex and onerous environmental approvals process. More regulation does not equate to better environmental protection outcomes. The fact that the water trigger duplicates existing State assessment and approvals processes, as well as the newly-established IESC process, makes it impossible to identify what additional environmental protection the Commonwealth will actually deliver.

1.1 Duplicating State Processes

The proposed new matter of NES will require the Federal Environment Minister to undertake a duplicate review of the same environmental assessment documentation and consider the same impacts on the same environmental value as the States.

Water use and entitlements are already heavily regulated through State environmental approval processes, including the extraction of water from rivers and aquifers, incidental take from groundwater and disposal of excess water.[1] For example, in NSW the water impacts of coal developments are considered under the *Environmental Planning and Assessment Act 1979 (NSW)*, the *Water Management Act 2000 (NSW)* and the recently implemented *NSW Aquifer Interference Policy*. Mines are required to be licensed for any water taken by their operations in accordance with relevant Water Sharing Plans, which ensure sustainable outcomes.

In Queensland, the primary legislation for planning, allocating and managing water is the *Water Act 2000 (Qld)*. The legislation establishes a system for the allocation and use of water within sustainable limits in Queensland and requires the development of water resource plans for river basins and aquifers.[2] These water resource plans are developed as a result of an intensive consultation process and are enacted as subordinate legislation, usually with a minimum 10 year life to provide sufficient certainty of water allocations for investments to be made.[3]

Coal mines are required to hold water allocations under the *Water Act 2000*, but are also separately assessed under the *Environmental Protection Act 1994* to ensure that the risks of any environmental harm are understood and managed. These assessments usually closely scrutinise the potential interactions with groundwater and downstream water users.

In addition, there are a further sixteen pieces of Legislation which cover specific aspects of water regulation in Queensland, as shown in Figure 1 (overleaf).

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[1] A detailed overview of State-based regulation is available in the National Water Commission *Integrating the mining sector into water planning and entitlements regimes*" Waterlines Report Series No 77 March 2012, p28-34

[2] Queensland Government, *Water in Queensland*, 2012

[3] *Understanding water resource planning* http://www.nrm.qld.gov.au/wrp/pdf/general/understanding_wrp.pdf

Figure 1: Queensland Water Regulation

Source: Queensland Government, Water in Queensland, 2012

- *Fisheries Act 1994* — Conservation and use of fisheries resources
- *Plumbing & Drainage Act 2002* — Regulate plumbing & drainage activities
- *Wild Rivers Act 2005* — Preserve rivers with natural values intact
- *Coastal Protection & Management Act 2009* — Coordinate management of coastal resources
- *Vegetation Management Act 1999* — Regulate vegetation clearing
- *Nature Conservation Act 1992* — Conservation of nature particularly in protected areas
- *Water Act 2000* — Sustainable management of water resources
- *Water Fluoridation Act 2008* — Safe fluoridation of public potable water supplies
- *Disaster Management Act 2003* — Assist communities and government prepare for and respond to disasters
- *Queensland Competition Authority Act 1997* — Establish the Queensland Competition Authority
- *South East Queensland Water (Distribution & Retail Restructuring) Act 2009; South East Queensland Water (Restructuring) Act 2007* — Facilitate restructure of the South East Queensland water industry
- *Sustainable Planning Act 2009* — Ecologically sustainable development
- *Wet Tropics World Heritage Protection and Management Act 1993* — Conserve this natural heritage area
- *Great Barrier Reef Protection (GBR) Amendment Act 2009* — Reduce impact of agriculture on GBR
- *Water Supply (Safety and Reliability Act 2008* — Safety and reliability of water supply and dams
- *River Improvement Trust Act 1940* — Protect beds and banks of rivers
- *Environmental Protection Act 1994* — Protect Queensland's environment (and waters)
- *Public Health Act 2005* — Protect and promote the health of the Queensland public

1.2 Duplicating the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Developments (IESC)

The Australian Government established the IESC in 2012 and Queensland, New South Wales, Victoria and South Australia have all signed on to the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development. The Agreement requires State Governments to refer CSG or coal mining developments that are likely to have a significant impact on water resources to the IESC. They must also take into account the advice of the IESC in the decision making process "in a transparent manner".[4]

Section 131AB of the EPBC Act further requires the Federal Environment Minister to seek the advice of the IESC in assessing large coal mining developments where the development is likely to have a significant impact on water resources. In practice, this means that the Commonwealth can refer almost all coal developments which require EPBC approval to the IESC without the need for the new trigger.

The establishment of the IESC and the National Partnership Agreement obviates the need for this water trigger. In less than 18 months of operation, over 30 projects have already been referred to the IESC and the interim IESC. Contrary to some media reports, this process has not failed because the Commonwealth and NSW have not yet agreed a protocol for the referral of applications to the IESC. On the contrary, 15 projects located in NSW have already been referred to the IESC, demonstrating that the absence of the protocol has not prevented the IESC from fulfilling its intended role.[5]

1.3 Protecting Australia's Water Resources?

The ACA considers that if the priority of the Australian Government was the protection of Australia's water resources, this amendment would be a genuine water trigger. Rather, it appears to be an attempt to use the EPBC Act to regulate specific industries, namely coal mining and CSG. This approach is at odds with the conclusions of the Rural and Regional Affairs and Transport Legislation Committee which considered a similar Bill proposed by the Greens earlier this year:

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[4] National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development , s15 (b)ii

[5] See http://www.environment.gov.au/coal-seam-gas-mining/project-advice/index.html

> *Matters of National Environmental Significance should focus on the environmental outcome, rather than a specific industry.*[6]

The particular focus on coal mining is unwarranted on environmental grounds. Unlike CSG, coal mining is neither a new nor emerging industry. Coal mining has been a feature of the Australian economic landscape for 200 years. Accordingly, and as outlined above, the regulatory framework governing coal mining is comprehensive and well-tested at all levels of government.

Further, the impact of coal mining on Australia's water resources is not more significant than many other industries, and in some instances relatively less significant. For example, all mining activity across Australia (not just coal) accounts for less than 4 per cent of water consumption, compared with 5 per cent for manufacturing and 54 per cent for agriculture.[7] The industry has been proactive in reducing its impact on water resources, including through participating in initiatives such as the Hunter River Salinity Trading Scheme[8] in addition to greater water reuse and recycling, use of water filtration and treatment systems, better management of evaporation losses and improved mine design to reduce overall water requirements.[9]

1.4 A Step Backwards for Environmental Reform

Streamlining Approvals

The introduction of the water trigger represents a major step backwards for reform of Australia's environmental law. The fact that the trigger duplicates State processes and that of the IESC makes it completely contrary to COAG's reform objectives and the commitment to "*eliminate duplication, avoid sequential assessment and delayed approval processes*".[10] It is also at odds with the Government's stated intention to streamline environmental regulation and deliver increased certainty for business.[11]

The last-minute amendment by Tony Windsor MP to prevent the use of bilateral approval agreements in relation to the new matter of NES is particularly concerning as it removes an important mechanism to avoid duplication with State governments. The ACA previously welcomed COAG's commitment to fast-track the development of these agreements and we consider that implementation of assessment and approval bilaterals should remain a high priority for the reform process.

ACA Recommendation:
1. The amendment prohibiting the use of bilateral approval agreements for this matter of national environmental significance be removed

A Strategic Approach to Environmental Protection

The Australian Government has also committed to a more proactive, strategic approach to environmental protection, rather than a focus on project-by-project assessments.[12] Yet the broad terms of the new trigger require the Commonwealth to provide approval for virtually every activity associated with coal mining. This goes well beyond the intended reach of the EPBC Act, as highlighted by the independent Hawke Review:

> *It is important to remember that the Australian Government's role is to act in Australia's 'national' interest. The focus of the Act must therefore continue to be on matters of*

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[6] Rural and Regional Affairs and Transport Legislation Committee "Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011", February 2012

[7] Australian Bureau of Statistics, 4610.0 - Water Account, Australia 2010-11

[8] Refer NSW Department of Environment and Heritage.

[9] Case studies of the industry's management of water are available in the *Leading Practice Sustainable Development Program for the Mining Industry: Water Management 2008*

[10] Council of Australian Governments Communique 7 December 2012

[11] Department of Sustainability, Environment, Water, Population and Communities, *Reforming National Environmental Law: An Overview*, 2011

[12] Ibid, p6

national *environmental significance and* nationally *important biodiversity and heritage, leaving other environmental matters of importance at a State, Territory or local level to those State, Territory and Local Governments as the more appropriate managers.*[13]

Further, the Hawke Review concluded that "*including water extraction and use as a matter of NES under the Act is not the best mechanism for effectively managing water resources*". The Review found there was limited value in attempting to regulate individual extractions of water and instead recommended strategic assessment of water plans.[14]

2. THE COST OF REGULATORY DUPLICATION AND INSTABILITY

Australia can ill-afford the major regulatory uncertainty and additional costs for the coal industry that the proposed water trigger introduces. Specifically, it will add to:

- Delays in the assessment and approvals processes
- Uncertainty regarding new Commonwealth approval conditions
- The potential for inconsistency in State and Commonwealth approvals
- Costs associated with preparing and progressing applications
- Costs associated with complying with approval conditions

Policymakers continually underestimate the enormous cumulative impact these added costs and uncertainty have on multi-million and multi-billion dollar mining investments. Even where projects are assessed under State bilateral agreements, the experience of the industry is that the additional delay in seeking EPBC approval can be anywhere from one month to 128 business days. These delays translate to significant losses for projects. For example, one ACA member reports incurring costs of over half a million dollars per day due to delays in obtaining EPBC approval. Further, a one month delay in commissioning a large greenfield open-cut coal mine can cost in the order of $10 million in forgone revenue. Case Study #1 (overleaf) highlights the delays experienced by an ACA Member in seeking EPBC approval.

Ergas and Owen explain the impact of regulatory delays for mining projects in their report "*Rebooting the boom: Unfinished business on the supply side*":

> *These processes are not only costly in themselves: they add sovereign risk and translate into delays over which companies have little or no control, disrupting supply chains and making it difficult for the myriad players involved in major resource projects to plan and deliver. These effects can make the difference between a project which is viable and one which is not. And they tarnish Australia's reputation as a location in which to invest.*[15]

Unfortunately, the additional costs and uncertainty presented by the water trigger could not come at a worse time for the Australian coal industry. The industry is already grappling with an increasingly challenging operating environment. Coal prices have plummeted and capital and operating costs are nearly double those of competitor countries. Growth in exports from our major competitors, including Indonesia, Canada, United States, South Africa and Colombia, is now having a real impact on Australia's market share. In 2011, Australia lost its position as the world's largest coal exporter by volume – a title we've held consistently for almost three decades – to Indonesia.

The RBA has noted that resource prices peaked more than a year ago and that Australia has entered the second phase of the mining boom – resource sector physical investment. This means that the costs of expanding production capacity in Australia, relative to competitor countries, *"are a much more important factor in investment decisions than they were a couple of years ago".*[16] Yet capital costs for Australian thermal coal projects are 66 per cent above the

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[13] Hawke A, Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, October 2009, p58
[14] Ibid, p109-110
[15] Ergas H & Owen J, Rebooting the boom: Unfinished business on the supply side, December 2012, p8
[16] Glenn Stevens, 'Producing Prosperity', Address to the Committee for Economic Development of Australia (CEDA) Annual Dinner, Melbourne, 20 November 2012, *Reserve Bank Bulletin,* June Quarter 2012, p. 83.

global average according to a study by Port Jackson Partners.[17] The execution of new investments is also taking longer here, with the average Australian thermal coal project now postponed by an additional 1.3 years relative to overseas projects (3.1 years, compared with 1.8 years internationally). Each year the average delay increases by a further 3-4 months.[18]

The challenges confronting the industry were recently put in context by Mr Keith DeLacy, former Chairman of Macarthur Coal and former Queensland Treasurer. He noted Macarthur's first mine in Queensland's Bowen Basin took 15 months to build and when it opened in 1999 it had a total development cost of $100 million. Mr DeLacy estimates "*that same project now would take a minimum of five years and cost $1 billion*". He went on to state "*there's no doubt in my mind that what's driving the enormous increase in costs is the regulatory burden*".[19]

The deteriorating economic conditions have already resulted in the loss of over 9,000 jobs in the coal industry in the last 12-15 months. Major multi-nationals have also signalled their intention to divest a number of Australian thermal coal projects in a stark reminder of the competitive nature of global investment and the fact that the benefit of mining investment will not automatically flow to Australia. Australia simply cannot afford to be complacent and governments must seriously assess the cumulative impacts of new regulations on our international competitiveness.

Case Study #1: Approval process for a new medium-sized coal mine in Queensland.

The original application for approvals for this mine commenced in 2010. The project was subject to both state and federal approvals. The requirement for a federal approval under the EPBC Act was the result of an assessment that the proposed mining activities may affect the habitat of an endangered species and Brigalow community on the project area.

In mid-January 2012, the company and SEWPAC agreed the conditions of the draft environmental approval. Federal authorities advised that they would hold off issuing the approval in final form until the environmental authority (EA) from the Queensland Department of Environment and Resources Management (DERM) was issued in final form. On 29 February, 2012 the company received the State Government's final EA. On 5 March the company advised the Department of Sustainability, Environment, Water, Population and Communities (SEWPaC) that the EA had been issued in final form by State authorities. Based on previous undertakings, it was expected that the issues of the final approval was imminent.

Through March and April, the company repeatedly sought an update on progress from federal authorities without response. On 20 April, when undertaking a search on another matter, the company discovered that the project had been referred to the Independent Expert Scientific Committee (IESC) for advice on its water impacts. The company was not formally advised of this referral. On 26 April, federal authorities advised that the project had been referred to IESC 'a little while back' and that that advice would be considered when finalising its conditions for the project.

The company was surprised at the referral to the IESC given that its terms of reference focus on CSG and large mining projects 'likely to have a significant impact on water resources.' None of the issues or conditions raised or covered in the draft SEWPaC approval for the project concerned impacts on water resources. The State Government's EA contained standard conditions with regard to impacts on water resources. The referral added extra delays to a project that had been subject to State and Federal approvals processes for nearly 3 years.

The IESC did not consider the project until late May. In its report on the project, the IESC gave a strong signal that the project should not have been referred to it. The Committee requested:

...that when referring projects to it for advice, the Commonwealth give careful consideration to the likely significance of impact on water resources and relevant matters of national environmental significance <u>to ensure that only those projects that would benefit from the scientific expertise of the Committee are referred</u>. (Emphasis added)

[17] Port Jackson Partners, *Opportunity at Risk: Regaining our competitive edge in minerals resources* – Report commissioned and prepared for the Minerals Council of Australia, September 2012, pp. 10, 28, 52f.
[18] Ibid, p10
[19] *Australian Financial Review*, "Coal Sector Suffers from Perfect Storm", 5 April 2013

The final federal approval was not received until 29 May 2012 approximately 3 months later than expected. This delay was completely unnecessary, as evidenced by the fact that the IESC made clear that the project should not have been referred to it in the first place.

3. IMPACT ON AUSTRALIA'S COAL DEVELOPMENTS

The Hon Tony Burke MP has previously acknowledged that almost all mining developments will impact on a water resource, while highlighting the potential for regulatory overreach in this space which delivers little environmental benefit:

> *In terms of water resources, I want to make sure that we don't end up in a situation where for no significant environmental benefit we are suddenly putting the Federal Government in charge of absolutely every application…**It's hard to find a mining application of any sort that doesn't have some sort of impact on water resources***[20]

The ACA believes this is precisely the situation the coal industry is facing with the introduction of the water trigger. We assess that virtually all current and future coal developments, regardless of size, will now be subject to the costs, delays and uncertainty associated with seeking Commonwealth EPBC approval.

3.1 Coal Developments and "Water Resources"

The water trigger amendment prohibits the taking of an action if:

a. the action involves:
- *i. coal seam gas development; or*
- *ii. large coal mining development; and*

b. the action:
- *i. has or will have a significant impact on a water resource; or*
- *ii. is likely to have a significant impact on a water resource[21].*

The key definitions have been expressed in the broadest possible terms, as summarised below.

EPBC Amendment – Key Definitions

Legislative Definitions	
"Large coal mining development"	Proposed coal mine activities that are likely to have a significant impact on water resources either in their own right or through their contribution to the cumulative impact of development activities on water[22]
"Water resource"	▪ Surface water or groundwater; or ▪ A watercourse, lake, wetland or aquifer (whether or not it currently has water in it); and includes all aspects of the water resources (including water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource)[23]
SEWPaC Guidelines (Indicative only - from National Partnership Agreement)	
"Significant impact"	On water resources is caused by a single action or the cumulative impact of multiple actions which would directly or indirectly: I. result in a substantial change in the quantity, quality or availability of surface or ground water II. substantially alter ground water pressure and/or water table levels

[20] Burke, A, Transcript of National Press Club address, 24 August 2011
[21] *Environment Protection and Biodiversity Conservation Amendment Bill 2013*, s24D(1)
[22] *Environment Protection and Biodiversity Conservation Act 1999*, s528
[23] Definition taken from the *Water Act 2000* and the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development

	III. alter the ecological character of a wetland that is State significant or a Ramsar wetland IV. divert or impound rivers or creeks or substantially alter drainage patterns V. reduce biological diversity or change species composition VI. alter coastal processes, including sediment movement or accretion, or water circulation patterns VII. 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 adversely affected, or VIII. substantially increase demand for, or reduce the availability of water for human consumptions[24]

Of particular note is that the definition of 'large coal mining development' is completely unrelated to the size or scale of the development, but rather the size of the impact on the water resources. 'Large' is a misnomer. Every coal development regardless of size has the potential to be captured by the new trigger.

The key determinant will therefore be the nature of the impact on the 'water resource', which is defined to include virtually any source of water. Everything from a small seasonal stream to the Great Artesian Basin is a 'water resource'. The proposed amendment does not attempt to distinguish between water resources with significant social or environmental value and those with limited environmental value.

This presents one of the major flaws of the new matter of NES in terms of its reach and practicality:

- Firstly, the smaller the 'water resource', the more likely the impact on that water resource will be relatively significant. For example, if the mining activity involved removing a small watering hole or dam on a property, the impact would undeniably be significant with reference to that particular resource.
- Secondly, all mining activity, by its nature, will have some impact on a water resource. The coal seam itself will typically contain brackish groundwater which will naturally and unavoidably be disturbed as part of the process of extracting the coal. This alone may be sufficient to require a referral to the Commonwealth based on the current drafting of the amendment.

The ACA understands that SEWPaC is drafting new guidelines for 'significant impact on a water resource'. We consider it essential that these guidelines clarify that the new matter of NES only relates to those impacts on a water resource that are significant from a *national* perspective. Impacts on lower order water resources must remain beyond the scope of the EPBC Act. Further, it is important that the new guidelines for 'significant impact on a water resource' undergo adequate consultation with industry and are finalised before the new provisions of the Bill commence.

Further, the use of the term "involves" in the phrase *"the action involves…(CSG or large coal mining developments)* in s24D may have the effect of capturing all activity incidental to a coal development. For example, if a coal mining development proposed to extend a small accommodation or amenities block which involved a 'significant impact on a water resource', this would become a matter of NES. There is also a lack of clarity around whether infrastructure associated with a coal mine development would be subject to the new trigger. Section 24D should be amended to replace "involves" with "is a" to remove this ambiguity.

ACA Recommendations:

2. The new matter of national environmental significance should only apply to those impacts on a water resource which are significant from a *national* perspective. The significant impact

[24] Department of Sustainability, Environment, Water, Population and Communities, "What is a significant impact on water resources?"

guidelines being developed by SEWPaC must ensure that impacts on lower order water resources remain beyond the scope of the EPBC Act.

3. The new provisions in the Bill must not commence until the significant impact guidelines have been finalised in consultation with industry.
4. That s24D of the Bill be amended to replace *"the action involves"* with *"the action is a"* (coal mining development) to ensure the new matter of national environmental significance only applies to those activities directly associated with the extraction of coal and not to associated infrastructure development.

3.2 Coal Developments under EPBC Assessment

The proposed introduction of the water trigger is retrospective in that it is intended to capture those projects that are already well advanced in the EPBC assessment and approval process. As discussed below, it may also capture existing projects. Retrospective policy changes heighten concerns of sovereign risk and discourage future investment and as a rule should be avoided. In the present case, changing the rules of the game mid-way through the process will be at significant additional cost for coal developments.

The proposed amendment allows the Minister to include the water trigger as a controlling provision where the Minister has decided that the coal mining development is a controlled action and:

a) the controlled action has not been approved; or
b) the Minister has not informed the applicant of his decision; or
c) the Minister has not referred the action to the IESC.[25]

Coal projects which are otherwise close to receiving approval may now be required to obtain a further approval under the new controlled action. This may necessitate the collection of additional data which can add considerable expense and uncertainty as well as creating delays as the data is collected and then assessed by the IESC prior to Commonwealth approval, as outlined in Case Study #2.

SEWPaC has estimated that around 30 coal projects currently under EPBC assessment are likely to be impacted by the new trigger. Only around 10 of these projects have already been referred to the IESC, however under s131AB of the EPBC Act the Minister will be required to refer all 30 of these projects to the IESC for advice. This will be in addition to projects which have not already been referred to the Commonwealth but which may now be captured by the water trigger. This creates potential for a backlog in the assessment process with significant delays for projects, particularly as "*time does not run while awaiting advice from the IESC*".[26] The IESC also only meets once a month and has a broader work program relating to bioregional assessments and research projects to oversee.

Case Study #2 – Impacts of New Water Trigger

Centennial Coal has assessed that almost all of its projects (current and future) will be captured by the proposed amendments to the EPBC Act. A 'significant impact' could include a number of matters however the two areas that would automatically capture Centennial's projects are a) change in the quantity, quality or availability of surface or ground water and b) alter groundwater pressure and/or water table levels.

The IESC guidelines require the use of a water balance, generally at a regional scale, as the evidence required to support impact assessments on water resources. Until the guidelines were released in February, none of the Centennial's projects were assessing impacts to water with the level of information requirements in the guidelines. While the company has recognised this early and has already commissioned regional water balances this has been at a significant additional cost (well in excess of $1million) to original budgets.

[25] *Environment Protection and Biodiversity Conservation Amendment Bill 2013* s23(1)
[26] *Environment Protection and Biodiversity Conservation Act 1999* s130

Centennial Coal has four projects that will immediately be captured by the proposed amendments. One of these projects is at higher risk as it currently does not have any groundwater data. However, the greatest threat to all these projects is the time it will take for the IESC to assess the information put to it for advice. At a minimum this could be a 3 month delay (which in itself incurs a real cost) or, based on past experience, it could take 12 months based on the complexity of the information and the overlay of the bureaucratic process.

ACA Recommendation:

5. That the Bill be amended so that the new requirements are not retrospective and that projects currently under EPBC assessment are exempt from the new matter of national environmental significance.

3.3 Existing Coal Developments

A consequence of the new water trigger is that existing coal developments may be required to seek EPBC approval for their future mining activities, even where the activity has previously been determined not to be a controlled action.

The exemptions in the Bill are very narrow and the new water trigger will apply to existing coal mining developments unless the action satisfies one of the conditions set out in s22(2) of the *EPBC Amendment Bill*, including having 'prior authorisation'.[27] However, a prior authorisation (which must be a 'specific environmental authorisation'[28]) may no longer be in effect if a renewal or extension is sought, since this would most likely be taken to be a new specific environmental authorisation.

The ACA is concerned that the prior authorisation exemption would therefore not apply in many common situations, including where a project:

- had an overarching State environmental authorisation with lower level details contained in mine plans which require regulatory approval but where those specific approvals have not been received
- is conducted in stages, and so specific environmental authorisations are obtained for stage 1, but not for later stages
- has all necessary specific environmental authorisations for the whole of the project, but these are changed over time as the project develops (including because the proponent changes an aspect of the project to improve environmental outcomes).

The prior authorisation exemption also creates unacceptable ambiguity and uncertainty for industry. For example, if a coal mine development which impacts on groundwater (and which did not previously require EPBC approval), applies to amend the noise conditions of its State approval, does the change in noise conditions mean that the prior authorisation no longer continues in force? Is the entire project now required to seek EPBC Act approval despite the fact that it has been operating for over 10 years?

The ACA is concerned that the approach of the Bill to existing projects does not adequately address the complexity of the approvals process facing most coal mining projects over very long periods of time. The broad scope of the water trigger coupled with the limitations of the exemptions means it is very likely that established coal developments will be subject to the additional costs and delays associated with seeking EPBC approval even where there are no significant changes to their operations.

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[27] *Environment Protection and Biodiversity Conservation Amendment Bill 2013* s22(3)

[28] *Environment Protection and Biodiversity Conservation Amendment Bill 2013* S22(4)

ACA Recommendation:

6. That the Bill be amended to ensure that projects seeking modifications to existing/prior State or Commonwealth approvals must not be subject to the new matter of national environmental significance unless the modification is associated with a major new development proposal.

4. A FAILURE OF PROCESS

The ACA is extremely concerned with the manner in which the new trigger has been introduced. There is simply no justification for rushing through such a significant legislative reform without prior consultation with industry, particularly where the new requirements are retrospective in applying to projects currently under assessment.

In particular, the failure to prepare a Regulatory Impact Statement which attempts to assess the costs and benefits of this reform is inexcusable. Just last year, the Government agreed with the recommendation of the Independent Review of the Australian Government's Regulatory Impact Analysis that Prime Ministerial exemptions from the need to undertake a RIS should be provided only in exceptional circumstances, including where truly urgent and unforeseen events arise or there is a matter of Budget or other sensitivity[29]. The ACA does not believe there are any exceptional circumstances in this case.

The ACA recommends the government undertake a genuine consultation process with industry to examine the unintended consequence of the water trigger. Further, with the failure of due process in introducing the Bill, we strongly support the requirement for a Post-Implementation Review within 2 years – or preferably sooner.

ACA Recommendation:

7. The Australian Government should immediately undertake a genuine consultation process with industry to examine the unintended consequences of the water trigger

CONCLUSION

The ACA opposes the proposed introduction of a water trigger in the EPBC Act specifically targeted at the coal mining and CSG industries. The new matter of NES duplicates existing environmental assessment and approval processes, including the Australian Government's own IESC. The extra layer of green tape will exacerbate the costs and delays experienced by coal developments in securing environmental approvals while delivering no discernible additional environmental protection.

The coal industry makes an enormous contribution to Australia's economy but this contribution cannot be taken for granted. If Australia is to continue to benefit from investment in our coal resources, then the Government must refrain from making radical policy changes that are reactive, lacking in consultation and contrary to the Government's express commitment to streamline environmental regulation.

[29] Department of Finance and Deregulation, "Australian Government Response to the Recommendations of the Independent Review of the Australian Government's Regulatory Impact Analysis Process", December 2012, p5