

Chapter 2

Key Issues

2.1 This chapter considers the main provisions of the Environment Protection and Biodiversity Conservation Amendment (Protecting Australia's Water Resources) Bill 2011 (the bill), and looks at issues raised by submitters in relation to the bill. Submitters to the inquiry raised issues in relation to the commencement of the bill, its consistency with existing legislative responsibilities, water as a matter of national environmental significance and a need for further clarification of terms and definitions within the bill.

Commencement

2.2 It is proposed that commencement for the bill will be the date that the bill is introduced in the Senate, rather than the date of royal assent. The explanatory memorandum (EM) states that this is to ensure that approvals for mining operations are not fast-tracked following the introduction of the bill. The EM further states:

The intention is to ensure all mining operations commencing after the day this Bill is introduced are subject to Commonwealth assessment and approval where these operations are likely to have a significant impact on Australia's water resources.¹

2.3 Some submitters told the committee that the retrospective commencement date creates uncertainty for mining projects with incomplete approval processes during the interim period between the introduction of the bill and the vote on the bill.²

Consistency with the existing legislative framework

2.4 State and territory governments have primary responsibility for regulating mining and exploration in Australia, as well as the management of water resources. The Commonwealth, through the EPBC Act, can regulate any activity that has, will have, or is likely to have a significant impact on any matters of national environmental significance listed within the EPBC Act.

2.5 Under the EPBC Act there are no matters of national environmental significance (NES) which are industry-specific, except for 'nuclear actions'. Submitters both supporting and opposing the bill query the benefit of adding a new matter of national environmental significance which is industry-specific. Submitters supporting the bill argue that:

1 Explanatory memorandum, p. 2.

2 Department of Resources, Energy and Tourism, *Submission 5*, p. 4; Xstrata, *Submission 3*, p. 4.

...it should be any activity that might have a significant impact on the water resource. It should not really matter whether it is mining, coal seam gas or some major dam project. It is the impact and the need to protect the water resource that is important.³

2.6 The Association of Mining and Exploration Companies (AMEC) argues that the mining industry should not be 'singled out', and that a number of industries have the potential to significantly impact on Australia's water resources:

...yet they have been exempted from the Amendment Bill, the most obvious being irrigated agriculture and horticulture. It has been clearly shown that land clearing has been the major factor in the spread of salinisation of Australia's agricultural land. Given the goal of the Amendment Bill is to protect Australia's water resources surely such activities should be included.⁴

2.7 The National Farmers' Federation (NFF) told the committee that while the bill is specific to the mining industry, if passed, there is concern that a precedent will be set that could result in the agriculture sector being targeted in the future.⁵

2.8 The committee notes the independent review of the EPBC Act conducted by Dr Allan Hawke (the Hawke review) that looked into, among other things, water extraction and use. The Hawke review found that there is scope within the EPBC Act to complement other water initiatives, however:

including water extraction or use as a matter of NES under the Act is not the best mechanism for effectively managing water resources.⁶

2.9 While this refers to water extraction and use specifically, the committee finds that the complications the Hawke review found in implementing such measures are also relevant to the bill, especially in relation to water that is extracted in the process of coal seam gas extraction. As stated in the Hawke review:

The size of water resources and catchment areas, the scale of existing and predicted future pressures on these resources, and the environmental flow requirements of these resources vary dramatically across Australia...it would be almost impossible to accurately predict whether a particular water extraction pursuant to a water access entitlement would have a significant impact on the water resource over the longer-term.⁷

3 Ms Joanne Bragg, Australian National Environmental Defenders Office, *Committee Hansard*, Tuesday 7 February 2012, p. 18.

4 Association of Mining and Exploration Companies, *Submission 8*, p. 7.

5 Ms Deb Kerr, National Farmers' Federation, *Committee Hansard*, 7 February 2012, p. 1.

6 The Australian Environment Act: Report of the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2009, p. 109.

7 The Australian Environment Act: Report of the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2009, p. 109.

Definitions

2.10 Many submitters, both supporting and opposing the bill, express concern regarding the clarity of a number of terms and definitions within the bill.

Exploration

2.11 The Minerals Council of Australia (MCA) notes that the definition of 'mining operations' includes 'exploration for minerals'. The MCA states that exploration can occur in remote locations, where there is little or no water resource information, meaning that the impact cannot be assessed without exploration being undertaken in the first place.⁸ Section 24G(7)(a)-(d) of the bill lists exemptions from offences, however the committee notes that it is unclear if any of these exemptions would apply in this situation.

Significant impact

2.12 Many submitters argue that the definition of 'impact', within the EPBC Act is too broad and needs further clarification to be specifically applied to mining operations.⁹ Furthermore, the MCA argues that:

there is no definition available in existing guidance to assess or understand how 'significant' is defined in terms of mining impacts on water resources.¹⁰

2.13 Xstrata echoes this concern, arguing that without a more specific definition, it is 'extremely difficult for a proponent to be certain of whether a proposed action is likely to have a significant impact'.¹¹

Water resource

2.14 Section 24F of the bill defines a 'water resource' as:

(a) the whole or any part of a river, lake, aquifer or other place where water occurs naturally on or below the surface of the ground, whether permanently, seasonally or during unusually wet seasons; or

(b) any recharge zone or system for such a place.

2.15 The Commonwealth Scientific and Industrial Research Organisation (CSIRO) told the committee that the terminology around 'recharge zones' is 'somewhat confusing'. The CSIRO states that in the case of groundwater resources, such as aquifers, the term 'recharge zone', whilst commonly used, has no consistent definition and that:

8 Minerals Council of Australia, *Submission 6*, p. 9.

9 Xstrata, *Submission 3*, p. 5; Holcim, *Submission 4*, pp 3–4; Minerals Council of Australia, *Submission 6*, p. 8; AMEC, *Submission 8*, p. 6.

10 Minerals Council of Australia, *Submission 6*, p. 8.

11 Xstrata, *Submission 3*, p. 5.

Due to the complexity of groundwater recharge processes, and the inconsistent definitions outlined above, we stress the need for caution when formulating legislation to address impacts of groundwater extraction on recharge zones.¹²

2.16 Xstrata argues that the definition of 'water resource' is too broad, and without further clarification, it leaves proponents open to ongoing liability.¹³ The committee notes that it is unclear how the bill proposes to treat an approval that is only found to be near a water resource after the assessment process. AMEC adds to this point, arguing that:

The definition has the potential to have unintended and widespread implications, not only in flood prone areas of Australia, but also in areas which experience almost any measurable change to their water resources, as the result of rain fall events in 'recharge zones'. The locations or sources of 'recharge zones' are not always well known, can be geologically complex and hence are difficult to define.¹⁴

Mining operations and minerals

2.17 Some submissions argue that further clarity is needed in the definition of 'mining operations' provided in the bill. Section 24E(1)(a)(i)(ii) and (iii) of the bill lists mining operations as:

operations or activities connected with, or incidental to, the mining or recovery of minerals (including petroleum or gas) or the production of material from minerals, including:

- (i) Prospecting and exploration for minerals;
- (ii) milling, refining, treatment and processing of minerals; and
- (iii) storage and disposal of minerals and materials produced from minerals

2.18 Holcim and Cement Concrete & Aggregates Australia (CCAA) state that this definition, combined with the bill's definition of a 'mineral' would mean that a range of activities would require approval if they are in the vicinity of a water resource. This would include minor activities such as earthworks to remove soil as well as significant underground coal mining operations.¹⁵

2.19 These submissions also state that the definition of 'mineral' in the bill is inconsistent with the definition under NSW legislation. If the definition of 'mineral' were more closely aligned with the NSW legislation, it would, in effect, remove extractive industries from the definition of 'mining operations' within the bill. Holcim and CCAA argue that as extractive industries are very different to operations that

12 CSIRO, *Submission 9*, p. 2.

13 Xstrata, *Submission 3*, p. 6.

14 AMEC, *Submission 8*, p. 7.

15 Holcim, *Submission 4*, p. 2.

involve 'the extraction of coal, petroleum, hydrocarbons, uranium, and other potentially toxic and harmful materials', and therefore, the two should not be dealt with in the same manner.¹⁶

2.20 Without clarification on these matters, the committee finds the definition of 'mining operations' is impractical and unworkable.

Duplication of responsibility and regulation

2.21 The Department of Resources, Energy and Tourism (DRET) outlines a number of policy developments and Australian Government initiatives that highlight the duplicative nature of this bill.¹⁷

2.22 The establishment of an independent scientific committee, announced by the Government in November 2011 will provide:

...advice to governments about relevant coal seam gas and large coal mining approvals, where they have significant impacts on water; oversee research on the impact of water resources from coal seam gas and large coal mining projects; and commission and fund water resource assessments for priority regions.¹⁸

2.23 This framework will apply to future licences, and although the Commonwealth will seek agreement to a new National Partnership Agreement through the Council of Australian Governments, it leaves the administration in the hands of the states. The committee finds this approach to be consistent with the EPBC Act, as listed in Part 1 Section 3 (2)(g)(i), stating that in order to achieve its objects, the EPBC Act:

Promotes a partnership approach to environmental protection and biodiversity conservation through:

(i) bilateral agreements with States and Territories

Conclusion

2.24 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. 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.

16 Holcim, *Submission 4*, p. 2.

17 Department of Resources, Energy and Tourism, *Submission 5*, pp 5–8.

18 Department of Resources, Energy and Tourism, *Submission 5*, p. 7.

Recommendation 1

2.25 The committee recommends that the bill not be passed.

**Senator Glenn Sterle
Committee Chair**