



**MINERALS COUNCIL OF AUSTRALIA
SUBMISSION TO THE INDEPENDENT REVIEW OF THE EPBC
WATER TRIGGER FOR COAL SEAM GAS AND LARGE COAL
MINING DEVELOPMENT**

12 FEBRUARY 2016

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EXECUTIVE SUMMARY

The Australian minerals industry is committed to upholding high standards of environmental protection and the use of sound science and robust risk-based approaches to the assessment and management of potential environmental impacts. Mining is a mature industry that has over a long period invested in improved science to better understand and manage water related environmental risks.

The 2013 water trigger *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) amendment was poorly conceived, central to which was the absence of a regulatory impact statement on the Bill. The addition of a new matter of national environmental significance is a major change in the operation of the EPBC Act. Critically, the affected industry was not consulted prior to the Bill being considered by Parliament.

The MCA considers the water trigger legislation is critically flawed, for the following reasons:

- **The water trigger is inappropriate** - The problem remains ill-defined. No case was made for this significant change to the EPBC Act. An EPBC Act water trigger was rejected by both the 2009 Hawke Review and the Senate Regional and Rural Affairs Committee in 2012.
- **Contrary to government policy** – The restriction on using approval bilateral agreements for the water trigger is contrary to the objects of the EPBC Act and COAG commitments to improve regulatory efficiency.
- **Poorly targeted regulation** - Contrary to other matters of national environmental significance, the impacts from only two industries are considered, despite the potential for common impacts from other sectors.
- **Unnecessary duplication of state-based regulation** - The water trigger duplicates comprehensive state-based regulation for the protection of water resources. Removal of the water trigger would have no significant negative environmental impact, because the trigger does nothing to strengthen existing jurisdictional regulation.
- **Overlap with water reforms** – The water trigger overlaps with state based water resource planning (including catchments within the Murray-Darling Basin covered by the *Water Act 2007*). It represents a sector specific barrier to water access.
- **Costs to industry are significant** – These comprise direct administrative costs, cost recovery charges and delays cost, all of which erode project value.
- **Delays to projects** – The ambiguity in the design of the water trigger has led to the capture of almost all coal mining approvals (including minor amendments of existing mine plans). This has led to unnecessary burden on industry resources and creates long approval delays which can impact on site improvement works and the continuity of existing operations.
- **No regulatory benefit** – After two years of operation, it is clear there is no additional benefit arising from Commonwealth oversight. State regulators already use water experts when assessing coal seam gas and coal projects. The advice of the Independent Expert Scientific Committee (IESC) is also considered in state assessment processes. IESC research and associated tools would continue to be used by state regulators.

Key Recommendations

The MCA strongly recommends the water trigger legislation be repealed. The MCA considers there is no value in the water trigger legislation, but it comes at considerable cost to industry in terms of time and it increases cost for industry.

In the event a decision is taken to retain the water trigger, **the EPBC Act should be amended to allow the water trigger to be administered by the states under approval bilateral agreements.**

The MCA also recommends the following changes to improve the operability of the legislation and provide greater certainty for both proponents and regulators:

- Definitions of a water resource and a large coal mining development should be modified to improve certainty on the scope of the water trigger, remove the capture of minor modifications to existing projects and link more directly to environmental values.
- The exemption for existing projects and operations authorised prior to the commencement of the water trigger should be strengthened to ensure the renewal, amendment or extension of an existing authorisation does not affect the exemption status for unchanged components and changes that do not have a significant impact on a water resource.
- IESC interaction with the legislation can be improved through early and ongoing opportunities for proponents to engage directly with the Office of Water Science and the IESC, improved alignment with state information requirements and a greater focus on material risks in the assessment

1. INTRODUCTION

The Minerals Council of Australia (MCA) welcomes the opportunity to provide input into the review of the water trigger for coal seam gas and large coal mining development under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), established in June 2013.

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible attuned to its communities' needs and expectations.

MCA member companies are signatories to *Enduring Value – the Australian Minerals Industry Framework for Sustainable Development* and have a long standing commitment to the effective and responsible management of Australia's water resources.

Nationally, the coal sector is a small water user, representing around 0.8 per cent of national water consumption. By comparison, agriculture consumes 62 per cent of national water resources.¹

The Australian minerals industry is committed to upholding high standards of environmental protection and the use of sound science and robust risk-based approaches in the assessment and management of potential environmental impacts. Mining is a mature industry and has over a long period, invested in improved science to better understand and manage water related environmental risks.

This MCA submission is supported by state representative bodies, including New South Wales Minerals Council, Queensland Resources Council and the Chamber for Minerals and Energy of Western Australia.

2. LACK OF DUE PROCESS

The introduction and passing of the 2013 water trigger EPBC Act amendment is an exemplar of poor process, driven by inadequate policy development and a lack of consultation with affected parties. The addition of a new matter of national environmental significance represented a major change in the operation of the EPBC Act. Despite this, industry was not consulted until after the Bill was already under consideration by Parliament.²

The water trigger was introduced in response to alleged community concerns around the expansion of the coal seam gas industry in northern New South Wales centered on a perceived lack of oversight of the industry. Instead of analysing the substance of these concerns, whether they were driven by local or systemic issues and whether there were similar concerns for the coal industry (which had long operated under a comprehensive environmental assessment regime), the government moved a blunt and immediate regulatory response. By not completing a regulatory impact statement (RIS), the agreed COAG principles of best practice regulation were not given proper consideration, particularly:³

Principle 1: establishing a case for action before addressing a problem.

Principle 2: a range of feasible policy option must be considered, including self-regulatory, co-regulatory and non-regulatory approaches

Principle 7: consulting effectively with affected key stakeholders at all stages of the regulatory cycle

Principle 8: government action should be effective and proportional to the issue being the addressed.

¹ Australian Bureau of Statistics, [Water Account, Australia, 2013-14](#), ABS catalogue no. 4610.0, released on 26 November 2015.

² Department of Sustainability, Environment, Water, Population and Communities - Answers to written questions taken on notice, Senate Committee inquiry into the Environment Protection and Biodiversity Conservation Amendment Bill 2013.

³ Council of Australian Governments, [Best Practice Regulation – A guide for ministerial councils and national standard setting bodies](#), COAG, October 2007

Furthermore, no clear argument was made why the water trigger should be exempt from a RIS. The 2013 Productivity Commission report on major project approval processes points to this failure of process:

The Commission does not support the Australian Government's decision to exempt the water trigger amendment from a RIS process. Such exemptions should be limited to genuinely exceptional circumstances, such as emergency situations, where a clear public benefit can be demonstrated.⁴

Given the above, it can only be concluded the water trigger arose from political expediency and not as the result of a considered policy review and development process.

3. FAULTS WITH THE WATER TRIGGER

The MCA considers the water trigger to be inappropriate and poorly targeted. It duplicates existing state-level protections and encroaches on the effectiveness of water planning and market development. It adds no regulatory value, replicating state oversight and relies upon the same IESC advice. Like all additional regulatory layers, it comes at a significant cost to industry and delays can put at risk additional investment.

3.1 An inappropriate legislative response

The Senate Environment and Communications Committee undertook the only review of the water trigger amendment prior to becoming law. Despite the large number of submissions received, the committee report recommended the bill be passed based only on 'a strong feeling that the assessment and approval processes for these developments are inadequate'.⁵ The MCA considers 'a strong feeling' is not a sufficient basis for what was a significant legislative change.

The MCA provides the following responses to specific questions within the issues paper for the independent review:

- **Australian Government action was unnecessary** – The problem was not defined nor a case for action made. The inclusion of a water trigger was considered in detail in the 2009 Hawke Review of the EPBC Act and the Senate Rural and Regional Affairs and Transport Committee.⁶ It was rejected in both instances.
- **Contrary to government policy** – Including the objects of the EPBC Act and COAG commitments to improve regulatory efficiency. The prohibition on including the water trigger in an approval bilateral agreement is unprecedented for an environmental trigger. It unnecessarily increases regulatory burden on business.
- **No additional protection for water resources** – Contrary to other matters of national environmental significance, the impacts from only two industries are considered, despite the potential for common impacts from a range of different sectors.
- **There was no evidence of regulatory or market failure** – The water trigger duplicates existing state and territory regulation of coal developments. Prior to and since its inception, state governments have introduced a plethora of new policies and regulation pertaining to the management of mining activities and water resource protection.
- **The water trigger provides no scientific benefit** – State regulators use water experts when assessing CSG and coal projects. Under arrangements stemming from the former national partnership agreement (NPA) on coal seam gas and large coal developments, signatory

⁴ Productivity Commission, [Major Project Development Assessment Processes: final research report](#), Canberra, November 2013, p. 149.

⁵ Senate Environment and Communications Committee, [Environment Protection and Biodiversity Conservation Amendment Bill 2013 \[Provisions\] Committee report](#), p. 31.

⁶ A Hawke, [Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999](#), Minister for the Environment, Heritage and the Arts, 21 December 2009, p. 110 and Senate Rural and Regional Affairs and Transport Committee, [Environment Protection and Biodiversity Conservation Amendment \(Protection Australia's Water Resources\) Bill 2011 Committee Report](#), 27 February 2012.

states, which includes all major coal jurisdictions, are required to seek the advice of the Independent Expert Scientific Committee (IESC) for those projects which may have a significant impact on a water resource.

- **Removal of the water trigger would have no significant negative environmental impact** – State based regulation is comprehensive and would continue to include consideration of IESC advice regardless of the existence of the EPBC water trigger. Furthermore, the Commonwealth retains oversight of water matters where there is a connection to other matters of National Environmental Significance (mNES).
- **Alternatives were not considered** – A regulatory impact statement (RIS) was not completed. At the time the water trigger was introduced, the NPA and IESC were operating as intended, water reforms were progressing and state-based regimes were renewed. However, these initiatives were disregarded in pursuit of federal regulation.

Further information on key matters is provided in the following sections.

3.2 Poorly Targeted Regulation

A failure of existing protections for water resources was not identified. Should this have been the case, then the mNES should seek to regulate the environmental impact, regardless of the activity contributing to that significant impact. Targeting two types of resource extraction for water impacts that may be common to many industries (for example, reducing water availability to support a groundwater dependent ecosystem) sets a poor precedent for Commonwealth legislation.

In 2011, the Senate Rural and Regional Affairs and Transport Committee reviewed a similar sector specific water trigger, the EPBC Amendment (Protecting Australia's Water Resources) Bill 2011. The Committee report concluded:

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.**⁷

Impacts on water resources are not restricted to a single sector. If the objective of the trigger is the protection of a water resource, it is a clear failure of the legislation that activities which may have a much larger and more significant impact (for example, agriculture consumes 62 per cent of national water resources versus 0.8 per cent for coal mining) should be excluded.⁸

Box 1 - Namoi Catchment Water Study⁹

Initiated by the New South Wales Government in response to community concerns regarding possible effects on the area's ground and surface water flows from future coal mining and CSG, Namoi Catchment Water Study concluded 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 (and unlikely) 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.

While the water trigger may be perceived as providing an additional level of 'confidence' in water resource management, the narrow focus creates community misconceptions about the relative impacts of mining and CSG extraction with other water users. This may in turn create a perception

⁷ Senate Rural and Regional Affairs and Transport Committee, [Environment Protection and Biodiversity Conservation Amendment \(Protection Australia's Water Resources\) Bill 2011 Committee Report](#), 27 February 2016.

⁸ Australian Bureau of Statistics, [Water Account, Australia, 2013-14](#), ABS catalogue no. 4610.0, released on 26 November 2015.

⁹ Schlumberger Water Services (Australia) Pty Ltd, [Namoi Catchment Water Study - Independent Expert Final Study Report](#), Prepared for NSW Department of Trade and Investment, Regional Infrastructure and Services, Orange, July 2012

the water trigger will achieve an improvement in the protection of water resources in Australia, despite the exclusion of major water users.

3.3 Duplication of state-based regulation

Given the comprehensive regulation at the state level, **which incorporates the advice of the IESC**, the MCA considers the case for retaining the sector specific EPBC water trigger is weak. The water trigger serves only to provide an additional regulatory approvals 'layer'. Should the trigger be repealed, the existing levels of protection would be maintained.

State regulation is comprehensive

The mining industry is comprehensively regulated for environmental and water impacts at the state level. Major coal mining states, including New South Wales and Queensland have industry or water specific policies in place for the assessment and management of potential impacts from development. Examples of these are provided below.

New South Wales

Key legislation and specific policies aimed at protecting water resources include:

- *Environmental Planning and Assessment Act 1979 (NSW)* – An object of this act is the proper management, development and conservation of natural resources, including water resources.
- *Water Management Act 2000 (NSW)* – The main object of this act is the sustainable and integrated management of the state's water, a key component of which is water sharing plans. Water sharing plans set out the rules for licensing and sharing water between water users and the environment, within sustainable limits, which mining operations must comply with.
- *Protection of the Environment (Operations) Act 1997* – The main object of this act is to protect, restore and enhance the quality of the environment, including water resources.
- Mining State Environment Planning Policy – In October 2013, the Mining State Environmental Planning Policy was amended to require up-front consideration to be given to agricultural land and water resources in mining and CSG project assessments located on strategic agricultural land through a new 'gateway' assessment process.
- Aquifer Interference Policy - Released September 2012, the Aquifer Interference Policy requires all water impacts associated with aquifer interference activities such as mining to be accounted for and licensed, ensuring water impacts are within sustainable limits set out in water sharing plans and that water remains available for other licence holders and the environment.¹⁰
- Risk assessment guidelines for groundwater dependent ecosystems.

Oversight is provided by:

- NSW Office of Water – Provides specialist review of all water assessments submitted by proponents.
- NSW Mining and Petroleum Gateway Panel – Established in 2013, the gateway process is a preliminary scientific assessment of the agricultural and water impacts of proposals located on strategic agricultural land, before the existing development assessment process. The panel is made up of independent experts in agricultural science, water and mining and it seeks the advice of the IESC when preparing gateway certificates.¹¹
- NSW Department of Planning and Environment (DPE) - responsible for coordinating the overall assessment of mining development applications. DPE often commissions its own

¹⁰ Department of Primary Industries, [Aquifer Interference Policy](#), NSW Government, viewed 29 January 2016.

¹¹ NSW Government [Strategic Regional Land Use Policy – the Gateway process](#), September 2012

expert reviews of water assessments, particularly on projects where water is a significant issue.

- NSW Department of Planning and Environment (DPE) - responsible for coordinating the overall assessment of mining and CSG development applications. DPE often commissions its own expert reviews of water assessments, particularly on projects where water is a significant issue.

Several of the above policies were implemented within 12 months of the water trigger amendment.

Queensland

With respect to the Queensland regulation and oversight, the International Energy Agency makes the following observation:

Overall, the Queensland approach seems to embody many features of regulatory best practice, with cumulative, regional assessments revised regularly, purpose-built institutions and a strong focus on water issues.¹²

Key legislation and specific policies aimed at protecting water resources include:

- *Water Act 2000 (Qld)* and *Water Regulations 2002 (Qld)*
- Water Resource Plans – Specify water sharing arrangements and ensure environmental needs are met
- *Regional Planning Interests Act 2014 (Qld)* (RPI Act) which aims to protect strategic agricultural and environmental areas, central to which is an assessment of potential impacts on water resources, including surface and groundwater resources and associated ecosystems. RPI Act requirements are in addition to and in many cases duplicative environmental regulation.
- *Environment Protection Act 1994 (Qld)* (EP Act)
- Environmental Protection Policy (Water) 2009 to protect natural waters and environmental values dependent on those waters
- Regional water supply strategies.

Oversight is provided by:

- Chief executive administering the RPI Act, supported by the following assessing agencies:
 - Department of Agriculture and Fisheries
 - Department of Natural Resources and Mines
 - Department of Environment and Heritage Protection
 - Local Government
- Department of Environment and Heritage Protection (DEHP) for the EP Act.
- Office of groundwater assessment, which provides advice to DEHP on coal seam gas matters.
- Queensland Great Artesian Basin Advisory Committee, which advises the minister on issues affecting the Great Artesian Basin.
- Gasfields Commission, which reviews regulation, advises ministers and government agencies on industry coexistence, which may include convening advisory bodies to provide technical input.¹³

¹² International Energy Agency, *World energy outlook 2015*, IEA, Paris, 2015, p. 265.

¹³ Gasfields Commission Queensland, [Powers and Functions](#), updated 30 January 2015.

As provided previously, in addition to the above, state governments also seek IESC advice when assessing proposed developments.

A redundant measure

A 2011 Senate Committee inquiry into a similar proposal for a sector specific EPBC water trigger found:

... 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

These findings have become a reality for proponents of developments captured by the water trigger. It is unclear whether there has been significant differentiation between state and Commonwealth approval conditions for individual projects. This duplication is highlighted by cases where the Commonwealth simply refers to the state conditions as satisfying EPBC requirements (see Box 2 below).

Box 2 - Redundant Approvals

Example 1

A Queensland coal project had the following water management conditions attached to their Commonwealth approval:

The approval holder must manage impacts to water resources in accordance with the requirements of any conditions imposed by the authority responsible for administering the *Water Act 2000 (Qld)* and in accordance with conditions 9, 10 and 11 imposed by the Queensland Coordinator-General under Section 54B of the *State Development and Public Works Act 1971* as outlined in Appendix 1 of the Coordinator-General's evaluation report on the environmental impact assessment...

The approval holder must make monitoring data available to the Department and Queensland Government authorities (if requested) for inclusion in any cumulative impact assessment, regional water balance model, bioregional assessment or relevant research.

Example 2

A coal project in New South Wales had the following approval conditions imposed by the Commonwealth:

To minimise impacts on **water resources**, the **approval holder** must comply with the following conditions in the **New South Wales development consent**:

- Schedule 3, conditions 1 – general performance measures and 10(h)(iii) water management plan.
- Schedule 4, conditions 9 – water supply, 10 – water pollution, 12 – water management performance measures and 14 – water management plan.
- Schedule 5, all conditions related to notification of landholders and independent review.

As demonstrated in the above examples, through the water trigger, a coal development can be subject to regulation at both the state and Commonwealth levels requiring two assessments (using the same advice), two approvals and two channels for compliance and reporting. However, the substance of the approval in terms of obligations on the proponent and the level of protection afforded to the environment are the same. This makes the additional Commonwealth approval redundant.

¹⁴ Senate Rural and Regional Affairs and Transport Committee, [Environment Protection and Biodiversity Conservation Amendment \(Protection Australia's Water Resources\) Bill 2011 Committee Report](#), 27 February 2012

3.4 No scientific value in the regulation

The water trigger approval provides no additional scientific value above existing arrangements for the provision of independent scientific advice. There is no additional scientific oversight where both the Commonwealth and state regulators rely upon the same advice. This is further highlighted where the assessment is carried out under a bilateral agreement using an accredited process.

The narrow purview of the Commonwealth regulator (focussed on specific impacts from specific sectors), without an understanding of the broader environmental factors available to state regulators may result in the unnecessary rejection of a development proposal or inappropriate project conditioning.

National Partnership Agreement (NPA)

The water trigger duplicates arrangements under the former NPA, for which arrangements continue to operate.

Central to the operation of the water trigger is the requirement for the Commonwealth minister to consider the advice of the IESC. The IESC was established in 2012 as a statutory advisory body under the EPBC Act. The IESC provides advice to Commonwealth and state governments on potential water impacts of CSG and large coal developments. Supporting the IESC was an NPA, which Queensland, New South Wales, South Australia, Victoria and the Northern Territory were signatories with the Commonwealth.¹⁵ All partner jurisdictions have in place agreed protocols for identifying projects which will be referred to the Committee for advice.¹⁶

An independent review of the operation of the NPA was undertaken over 2014 and 2015. The report concluded:

The operation and achievements of the Agreement have strengthened the regulation of coal seam gas and large coal mining by enhancing the extent to which decisions have been informed by improved science and independent expert advice.¹⁷

With respect to the use of the advice, the report comments:

IESC advice has been available to relevant regulators as intended under the Agreement and has been considered...¹⁸

The NPA concluded on 30 June 2014. However, the arrangements continue to operate beyond the formal life of the agreement. This is evidenced by the ongoing regulator requests and advices issued by the IESC. For example, between July 2014 and December 2015 the IESC provided 23 separate advices on a range of projects in response to requests from several jurisdictions. These included:¹⁹

- Seven provisions of advice to the Australian Government
- Eight provisions of joint advice to the Australian and New South Wales governments
- Four provisions of joint advices to the Australian and Queensland governments
- Three provisions of advice to the New South Wales government
- One provision of advice to the South Australian government.

¹⁵ Council on Federal Financial Relations, [National partnership agreement on coal seam gas and large coal mining development](#), COAG, 2012.

¹⁶ Independent Expert Scientific Committee on coal seam gas and coal mining, [IESC advice on coal seam gas and coal mining](#), Department of the Environment, updated 24 November 2015.

¹⁷ S Hunter, *Independent review of the national partnership agreement on coal seam gas and large coal mining development – Report*, Department of the Environment, June 2015, p. 4.

¹⁸ S Hunter, *Independent review of the national partnership agreement on coal seam gas and large coal mining development – Report*, Department of the Environment, June 2015, p. 5.

¹⁹ Independent Expert Scientific Committee on coal seam gas and coal mining, [IESC advice provided to regulators - 2015 and 2014 tables](#), Department of the Environment, updated 24 December 2015.

Advisory Role of the IESC

While outside the scope of this review, the MCA maintains the advisory role of the IESC is of marginal scientific value. However, the MCA strongly supports the IESC research program and associated tools to improve water resource science and understanding of the potential impacts of development. Furthermore, despite industry concerns regarding the narrow, single sector focus of the bioregional assessment program, the development of these regional approaches is generally supported (noting industry concerns regarding the limitations on their findings).²⁰

3.5 Overlap with water resource planning

The water trigger overlaps with state based water resource planning (including catchments within the Murray-Darling Basin covered by the *Water Act 2007*). It represents a sector specific barrier to water access.

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, encourage productive and efficient use of water resources and equitable access arrangements for water users. The mining industry has worked closely with government on water reform and is increasingly being incorporated into water planning and entitlement regimes managed by the states.

In 2014 the former National Water Commission released a discussion paper on mining and unconventional gas under the NWI. The paper concluded there was a need for 'linking water planning more effectively with project approvals at the state and Commonwealth levels'.²¹ The water trigger represents a barrier to this reconciliation of water planning and regulation.

In some circumstances, a coal development's only 'impact' is water extraction. If that water has been purchased through a water market or an entitlement granted under an existing water planning process, it is inconsistent that mining, by nature of the activity, also requires EPBC Act approval to secure access to that water.

3.6 Costs to industry

The assessment of water impacts, including referral to the IESC is required at both the state and Commonwealth levels. However, this does not mean there are no costs associated with the water trigger. There are many direct and indirect costs associated with an additional regulatory layer. These include:

- Direct administration costs
- Regulatory cost recovery
- Project delay costs

The costs incurred by proponents will depend on the size and complexity of the proposed development. Estimations of these costs for assessment under the water trigger are provided below.²² These costs are in addition to what would be required under state processes and in meeting IESC requirements. They do not include the cost of detailed assessment which would be required in any case and which can be substantial.

²⁰ Minerals Council of Australia, [Submission to the Independent review of the national partnership agreement on coal seam gas and large coal mining development](#), 19 December 2014.

²¹ National Water Commission, [Water for mining and unconventional gas under the National Water Initiative](#), NWC, 2014, p. 6.

²² Cost estimations are based on those provided by MCA member companies

Direct costs

Project proponents can incur significant additional costs across the assessment and approval process. These include:

Referral

Referral costs of around \$50,000, (in some cases up to \$100,000). This includes:

- **Pre-referral contact costs** of around \$10,000 for travel, consultants and internal resources.
- **Referral to the Commonwealth.** Referral documents are extensive and often contain dozens of pages of detailed technical information. Internal company resources required may be in the order of 40 – 100 personnel hours at an estimated cost of between \$2,500 and \$10,000. The cost for a consultant to address EPBC Act requirements may be around \$15,000.
- **Informal requests for further information** are a common feature of the referral process. Where this occurs, further work by consultants is often required up to 50 hours or \$15,000.
- **Follow up and coordination with the Department of the Environment** is also required. Up to 20 hours from internal resources may be required.

Assessment

Additional Assessment costs of up to \$20,000. This includes:

- **Time and costs associated with liaising with the Commonwealth** during the assessment process is approximately 50 hrs or \$10,000.
- **A supplementary EIS** tailored to Commonwealth needs is often required, the development of which required company and consultant resources of around 50 hours or \$10,000.

Approval

Additional approval costs of up to \$30,000. This includes:

- **Internal resources** - time responding preparing additional information, estimated at 50 to 100 hours (up to \$10,000).
- **Preparation for additional meetings**, 12 – 25 hours for internal resources and around 12 hours for a consultant at around \$3,000).
- **Additional costs for meetings** including internal resources, consultants, preparation and travel up to \$20,000.

Post Approval

Additional post-approval costs of up to \$30,000, plus ongoing monitoring and compliance costs to meet dual reporting/compliance requirements:

- Technical differences between Commonwealth and state conditions may mean **separate water management plans** need to be developed and approved. The cost of developing a Commonwealth specific plan is in the order of \$10,000 - \$20,000.
- **Post approval meetings** can cost proponents around \$5,000 - \$10,000.
- Additional costs are incurred in meeting separate compliance and reporting requirements. While reporting needs can vary, the administrative costs can be substantial. Estimations are not able to be made.

When considered in isolation, the total direct **costs to proponents of the water trigger may be up to \$130,000** for an individual project.

Regulatory cost recovery

Cost recovery under the EPBC Act was introduced on 1 October 2014. Proponents of coal developments captured by the water trigger incur the following charges:²³

- **A referral fee of \$7,352.** It is important to note the ambiguity of the water trigger results in many proponents making precautionary referrals regardless of the level of potential impact.
- **An assessment fee** which varies dependent on the assessment pathway selected and a complexity multiplier. Base costs for assessment range between \$8,661 and \$30,202.
- **The base cost of \$26,043** is applied to assessments completed under a bilateral agreement
- The base cost for **the assessment of a post-approval management plan is \$3,233.**
- **Other activities**, including variations and requests for further information have base costs up to \$13,087.
- **Complexity costs** for any of the above can be considerable. The complexity cost for the water trigger can be up to \$45,711. Other costs may also be incurred, including assessing alternatives and assessing additional information on management measures.

The total cost base level costs for Commonwealth referral and assessment of a single mNES using an environmental impact statement is \$54,874. This could increase to \$99,585 should a high complexity cost be applied.

Project delay costs

The cost of project delays can be significant. Should the water trigger be the only or major focus of an EPBC Assessment process, delays arising from the approval process can have a significant impact on the net present value (NPV) of a project. This is particularly important where Commonwealth approval process is misaligned with the state approval (which is often the case).

Commonwealth approval of coal projects can take significantly longer than the state approval, even where assessment was undertaken under a bilateral agreement. It is not uncommon for the Commonwealth approval to take many months longer than the state approval. Some projects have experienced delays greater than 12 months to receive Commonwealth approval.

Delay costs on projects can be substantial, irrespective of the root cause or the specific EPBC Act trigger. For example, industry estimates suggest a one year delay can reduce the net present value (NPV) of a major mining project by up to 13 per cent. For large mining projects of \$3 to 4 billion in value, this can result in an NPV loss of up to \$30 million each month.

It is important to not automatically assume that coal developments would trigger the EPBC Act via other mNES. Instead, the cost benefit analysis should include the administration, compliance and delay costs attributed to the water trigger in isolation.

Appeals

In addition to uncertain approval timeframes, the need for Commonwealth approval provides another avenue for anti-industry groups to unduly delay projects using the appeals system. These further delays can also present a significant risk to the future of existing operations seeking modification or extension.

3.7 Impacts to existing operations

Since its introduction, the water trigger has captured the modifications to existing operations, regardless of size or materiality. The capture of rolling minor modifications represents a significant regulatory burden for business and an inefficient use of company and government resources.

²³ Department of the Environment, [Cost recovery implementation statement](#), viewed 5 February 2016.

Central to the effective management of coal operations is the ability to adapt to changing circumstances, (e.g. market conditions) and to make operational improvements throughout the mine life. Critical to enabling this is a timely and certain regulatory process.

Project approvals are a significant consideration for companies making investment decisions on project improvements and/or operational changes. As provided above, Commonwealth approval is complex, costly and can take a long time. This inhibits an operations ability to adapt to changing conditions and has resulted in the abandonment of improvement projects.

Timely approvals are also critical to the continuation of existing operations. Significant delays, caused by the water trigger approval can present a significant risk to the viability of those operations.

4. REFORM RECOMMENDATIONS

4.1 Repeal of the water trigger

The water trigger represents redundant, duplicative legislation. Accordingly, **the MCA strongly recommends all legislation pertaining to the water trigger be repealed.**

4.2 Remove the restriction on approval bilaterals

If the water trigger is not repealed, the EPBC Act should be amended to allow the water trigger to be administered by the states under approval bilateral agreements. This would bring the water trigger into line with all other comparable mNES.

4.3 Definitions and Clarifications

In the event the water trigger is retained in some form, the MCA recommends the following definitional changes to further clarify the operation of the legislation.

Water resource

s528 of the EPBC Act defines a water resource 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 may be well suited for the operation of the Water Act it is unsuitable for environmental regulation. The materiality of a ‘water resource’ is as an important factor when considering potential impacts and as such the necessity to refer actions. Key considerations include the quality of the water resource, its connection with environmental values, its size and variability.

Determining what constitutes a significant impact on a water resource, unlike more discrete environmental matters (e.g. species or habitat loss) is far more difficult to define. For a more measurable outcome, and in keeping with the objects of the EPBC Act, the MCA recommends the definition of a water resource be modified to specifically link the water resource to identified environmental values.

Large coal mining development

The definition of a ‘large coal mining development’ in the EPBC Act is unnecessarily broad and provides little assistance to proponents and regulators when determining whether or not a specific development may be captured by the water trigger.

The significant impact guideline for the water trigger provides 'the application of the water trigger relates to a development's likely impact on a water resource, and not the size of the proposed CSG or coal mining activity per se'.²⁴ However, this clarification is unlikely to effectively narrow the types of coal projects captured by the water trigger.

The MCA considers the definition of a large coal mining development should be refined to ensure it is only those impacts that are unique to the industry are considered. For example, water extraction activities should be excluded as they are common across different sectors and managed under state-based water resource planning and licencing. In addition, minor modifications to existing projects should be excluded wherever sufficient water allocations exist. The definition of large coal mining development should be amended to reflect this.

With respect to third party impacts, the MCA considers it is unreasonable for proponents to have to account for non-regulated activities for which information is unlikely to be available. Consistent with the approach adopted in the development of bioregional assessments, only other large coal developments should be considered. Suggested changes are in parentheses are provide below:

s528(b) when considered with other [**large coal mining**] developments, whether past, present or reasonably foreseeable developments

Furthermore, reasonably foreseeable developments should be further defined in supporting guidance material. Accordingly the MCA recommends the following clarification:

- Present developments – these include those in operation, have commenced construction or have made a financial announcement
- Reasonably foreseeable developments – these include those projects where financial forecast are positive and which have been approved and commencement announced or are under assessment and full documentation is available.

Exemptions for 'grandfathered' projects

The legislation provides an exemption for existing projects and operations authorised prior to the commencement of the water trigger. The exemption 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 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 these 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 significant risks to the environment.

There remains substantial 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. The need to halt an existing operation while an assessment is undertaken would have significant negative ramifications.

The MCA recommends the exemptions within the legislation should be strengthened to ensure the renewal, amendment or extension of an existing authorisation does not affect the exemption status for unchanged components and changes that do not have a significant impact on a water resource.

²⁴ Department of the Environment, [Significant Impact Guidelines 1.3: Coal seam gas and large coal mining developments – impacts on water resources](#), DotE, Canberra, December 2013, p. 7.

4.4 IESC intersection

The 2014 MCA submission on the National Partnership Agreement included a range of recommendations for operational reform of the IESC process, many of which are relevant to this review.²⁵ Some of the more pertinent comments and recommendations are provided below:

Engagement with IESC process

Despite IESC advice being a required input into regulator decision making, there is a lack of opportunity to engage or respond to the Office of Water Science (OWS) or IESC queries or concerns, including addressing incorrect assumptions and advice. This can result in advice being published which may cause unnecessary community concern and inform public feedback. The MCA recommends:

- In instances where IESC advice is required, there should be tripartite engagement between the regulator (DotE or State based), OWS and the proponent at the commencement of the process to clarify expectations, communication and facilitate seamless assessment
- There is a need for a structured process whereby proponents can directly engage directly with the IESC to address concerns raised or provide further information or clarification
- Should it not be appropriate or practical for proponents to engage directly with the IESC, proponents should be able to engage with the OWS to address concerns and avoid misinterpretation.

Information requirements

There is misalignment between State and Commonwealth information requirements for water impacts. This can give rise to material provided by proponents not being in a suitable format for OWS and IESC consideration and result in key information being provided, but overlooked. Revision of material provided in Environmental Impact Statements can be both costly and unnecessarily delay the assessment/approval process. The MCA recommends:

- There is a need for greater alignment of State and Commonwealth information requirements
- Expectations on the format/structure for providing information to the OWS/IESC should be clarified upon the commencement of an assessment process.

Focus on material risks

Information requirements for IESC advice are broad in nature and not focussed on material risks. This is further reflected in the broad 'standardised' advice issued by the IESC. The need to collect information on all matters, regardless of materiality while in part a result of the difficult to define objective of the water trigger can result in significant efforts/funds directed at understanding lower order issues and divert efforts away from critical matters. The MCA recommends:

- The scope of the IESC have greater linkage to specified values/outcomes (for example, the protection of specific Groundwater Dependent Ecosystems)
- An agreed process/framework for identifying and responding to material vs non-material risks be developed to guide IESC advice.

²⁵ Minerals Council of Australia, [Submission to the Independent review of the national partnership agreement on coal seam gas and large coal mining development](#), 19 December 2014.

Acceptance of peer reviewed modelling

The advice from the IESC often raise issues with the modelling undertaken to support the assessment of impacts and the effectiveness of the proposed mitigation measures. There are often substantial delays while justification is provided for the parameters adopted or additional sensitivity analysis.

- Where science/modelling undertaken by a proponent is peer reviewed, it should be considered adequate assurance for the purposes of the OWS and IESC
- There should be greater recognition of science/models which are developed in line with recognised standards, prior to submission to the IESC.

5. MORE INFORMATION

For more information regarding this submission please contact:

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