THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Sustainability, Environment, Water, Population and Communities, the Honourable Tony Burke, MP)
Environment Protection and Biodiversity Conservation Amendment Bill 2013

OUTLINE
This Bill amends the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) to provide for the establishment of a new matter of national environmental significance (NES) in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on a water resource.

The amendments create a new Subdivision FB of Division 1 of Part 3 of the EPBC Act to:

- put in place robust environmental impact assessment processes for actions involving coal seam gas or large coal mining development that have, will have or are likely to have a significant impact on a water resource;
- create civil penalty and offence provisions for taking an action involving coal seam gas or large coal mining development that has, will have or is likely to have a significant impact on a water resource without an approval or exemption from obtaining an approval. These civil penalty and offence provisions are consistent with similar provisions already in the EPBC Act.

The Bill also provides transitional provisions designed to minimise disruption to the assessment of existing projects as far as possible, while meeting the objectives of the amendments to provide robust assessment of coal seam gas and large coal mining development that has, will have, or is likely to have, a significant impact on a water resource.

FINANCIAL IMPACT STATEMENT

Financial implications of this Bill will be dependent on the number of projects referred under Chapter 4 of the EPBC Act, and consequential impacts on the volume of regulatory work required.

REGULATORY IMPACT STATEMENT

The Prime Minister has granted an exemption from the regulatory impact statement requirements. However, a post-implementation review will commence within two years from the date the Bill is implemented.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Environment Protection and Biodiversity Conservation Amendment Bill 2013

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

This Bill amends the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) to provide for the establishment of a new matter of National Environmental Significance (NES) in relation to the significant impacts or likely significant impacts of coal seam gas development and large coal mining development on water resources.

Human rights implications

The Bill engages the human right of the presumption of innocence.

The Bill will create new criminal offences in respect of people who take an action involving coal seam gas or large coal mining development for the purposes of trade or commerce that has, will have, or is likely to have a significant impact on a water resource without an approval or exemption from obtaining an approval under the EPBC Act. The Bill also applies existing offences in respect of people are executive officers of bodies corporate (relating to providing false or misleading information) and people who are landholders in relation to the new matter of NES.

Strict liability does not apply to any elements of the offences created by the Bill.

Conclusion

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of preventing people from taking actions involving coal seam gas development or large coal mining development that may have a significant impact on a water resource without an approval or exemption from obtaining an approval.

Minister for Sustainability, Environment, Water, Population and Communities
the Hon Tony Burke MP
NOTES ON CLAUSES

Clause 1: Short Title

1. This clause provides that the short title by which the Act may be cited is the “Environment Protection and Biodiversity Conservation Amendment Act 2013”.

Clause 2: Commencement

2. This clause provides that the Act, with the exception of Schedule 1, will commence the day that the Act receives the Royal Assent. Schedule 1 will commence on the day after the Act receives the Royal Assent.

Clause 3: Schedules

3. This clause provides for amendments to the Act specified in the Schedule.

Schedule 1 – Protection of water resources from coal seam gas development and large coal mining development

Part 1 - Amendments to the EPBC Act

Item 1 – Establishing a new matter of National Environmental Significance

4. This item establishes a matter of National Environmental Significance (NES) in relation to protection of water resources from coal seam gas and large coal mining development. This ensures that the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) assessment and approval requirements apply to actions involving coal seam gas development or large coal mining development that has, will have, or is likely to have a significant impact on a water resource.

5. Civil penalty and offence provisions are established to prohibit actions involving coal seam gas development or large coal mining development that has, will have, or is likely to have a significant impact on a water resource, unless done in accordance with an approval issued under Part 9 of the EPBC Act or unless otherwise exempted. These penalties and offences are consistent with penalties and offences for other matters of NES in Division 1 of Part 3.

Items 2-3 – Consequential changes to section 25AA

6. These items are a consequence of establishing the new matter of NES (see Item 1). Section 25AA provides a defence/exception to the offence and civil penalty provisions of Division 1, Part 3 of the EPBC Act. The defence/exception ensures that a person cannot be tried for impacts caused by the actions of third parties which are consequential to the actions of the first person, but which are not directed or requested by the first person. This does not prevent enforcement measures being taken against the third party for taking an action without an approval which has significant impacts on a matter protected by Part 3 of the EPBC Act.
7. The current item ensures that the section 25AA defence/exception applies in relation to the new offences and civil penalty provisions that establish the new matter of NES.

**Item 4 – Consequential changes to section 34**

8. This item is a consequence of establishing the new matter of NES (see Item 1). Part 4, Division 2 of the EPBC Act provides for the accreditation of authorisation processes or management arrangements, and the making of declarations that an action in a class of actions does not require approval under Part 9 for the purposes of a specified provision of Part 3 if the action is taken in accordance with an accredited management arrangement. In accrediting a management arrangement, the Minister must be satisfied that there has been or will be an adequate assessment of the impacts of relevant actions on the “matter protected” by the provision of Part 3 in relation to which it is proposed to make a declaration.

9. The current item amends the table in section 34 to provide that, for the purposes of declarations relating to the new matter of NES, the “matter protected” is “a water resource”.

**Items 5-6 – Consequential changes to sections 75 and 82**

10. These items are a consequence of establishing the new matter of NES (see Item 1). Under subsection 75(2), in deciding whether an action referred under the Act is a “controlled action”, the Minister must consider the adverse impacts the action has, will have, or is likely to have on each matter protected by Part 3 of the EPBC Act. Similarly, section 82 provides that the “relevant impacts” of an action for the purposes of assessment and approval under Parts 8 and 9 of the Act are the impacts the action has, will have, or is likely to have on each matter protected by each provision of Part 3 of the EPBC Act that the Minister has decided under section 75 is a “controlling provision”.

11. The items provide that, in relation to subsections 24D(3) and 24E(3), the impacts of the action on the matter protected by those provisions are only those impacts that are part of the action that is taken in or on a Commonwealth area, a Territory, a Commonwealth marine area or Commonwealth land. This is consistent with qualifications applying to actions within National Heritage places, the Commonwealth marine environment and Commonwealth land. These provisions, and the current item, reflect the powers and role of the Commonwealth in relation to environmental matters.

**Items 7-15 – Consequential changes to subparagraph 304-306**

12. These items are a consequence of establishing the new matter of NES (see Item 1). Section 304 establishes the object of Part 14 of the EPBC Act, in relation to providing for conservation agreements between the Commonwealth and persons related to the protection and conservation of matter of NES.
13. The items provide for the addition of the new matter of NES to the matters about which conservation agreements may be entered into.

**Items 16-17 – Consequential changes to sections 495 and 496C**

14. These items are a consequence of establishing the new matter of NES (see Item 1). Section 495 provides for criminal liability of executive officers of bodies corporate in relation to offences relating to providing false or misleading information. Section 496C relates provides for criminal liability of landholders where an action is taken by a third party, but the landholder was reckless as to whether a contravention would occur, the landholder was in a position to influence the conduct of the third party, and the landholder failed to take all reasonable steps to prevent the contravention.

15. The items provide for the addition of the offences relating to the new matter of NES to the lists in paragraphs 495(2)(a) and 496C(1)(a).

**Item 18 – Definition of evidential burden**

16. This item provides a definition of “evidential burden”. The definition is the same as the definition in the *Criminal Code Act 1995* (Cth).

**Part 2 - Application and transitional provisions**

**Items 19-23 – Application and transitional provisions**

17. These items establish whether the provisions of Schedule 1 apply to particular projects, and transitional provisions for where provisions of Schedule 1 apply to projects that have been referred under Part 7 of the EPBC Act.

18. Item 19 provides definitions for the purposes of the application and transitional provisions in Part 2 of the Act.

**Application of Schedule 1**

19. Item 20 specifies that the amendments made by Schedule 1 apply in relation to an action involving coal seam gas development or large coal mining development that is taken on or after the day the item commences. This applies even if the action began before the day the item commences.

20. Item 21 specifies that the amendments made by Schedule 1 do not apply in relation to an action involving coal seam gas development or large coal mining development if, on or after the day the item commences, the Minister approves the taking of the action under Part 9 of the EPBC Act, for the purposes of a provision of Part 3 of the EPBC Act (as in place before the commencement of the item).

21. Item 22 establishes that the provisions of Schedule 1 do not apply to certain actions involving coal seam gas development or large coal mining development that have, will have, or are likely to have a significant impact on a water
resource. The provisions of Schedule 1 do not apply if, immediately before commencement of the Act:

- an approval for the taking of the action by the person is in operation under Part 9 of the EPBC Act for the purposes of any other provision of Part 3 of the EPBC Act; or

- there is in force a decision under Division 2 of Part 7 of the EPBC Act that the taking of the action is not a controlled action for the purposes of each other provision of Part 3 of the EPBC Act; or

- there is in force a decision under Division 2 of Part 7 of the EPBC Act that the taking of the action is not a controlled action for the purposes of each other provision of Part 3 of the EPBC Act, because the Minister believes the action will be undertaken in a particular manner; or

- the Minister has received the advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining under section 131AB of the EPBC Act in relation to the action; or

- the final advice of the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining has been provided to a relevant State or Territory Minister in relation to the action, for the purpose of a specific environmental authorisation; or

- the action was authorised by a prior environmental authorisation. Subitem 22(3) specifies that an action has a prior environmental authorisation where the action was authorised by a specific environmental authorisation and, immediately before the commencement of this item, no further specific environmental authorisation was necessary to allow the action to be taken lawfully. At the time the action is taken, the specific environmental authorisation must continue to be in force. Item 19 provides definitions of “specific environmental authorisation” and “environmental authorisation”. The intent of this subitem is to ensure that actions that have obtained, prior to the commencement of Schedule 1, all required authorisations under Commonwealth, State and Territory laws with the objective of protecting the environment and/or promoting the conservation and ecologically sustainable use of natural resources are not subject to the provisions of Schedule 1. Any project that has a State or Territory environmental authorisation, but which is the subject of a referral under EPBC Act would not satisfy the requirements of Subitem 22(3)(c), and would therefore not be exempt from the requirement for an approval under Part 9 of the EPBC Act.

22. Subitem 22(4) provides that a renewal or extension of a specified environmental authorisation is presumed to be a new specific environmental authorisation unless the circumstances in Subitems 22(4)(a) and (b) are met. The consequence of this is that the conditions to establish an exemption under Subitem 22(3) would not be satisfied.
Decision as to whether the new matter of NES is a controlling provision

23. Item 23 establishes transitional provisions relating to actions that, immediately prior to the commencement of Schedule 1, have been determined to be a controlled action under Part 7 of the EPBC Act but in relation to which an approval decision has not been made under Part 9 of the EPBC Act.

24. Subitem 23(2) provides that, in relation to the actions to which Subitem 23(1) applies, the Minister must decide whether the new matter of NES is a controlling provision for the action within 60 business days after the commencement of Schedule 1.

25. Subitems 23(3)-(9) provide requirements for making a decision under Subitem 23(2) that the new matter of NES is a controlling provision for an action. These include that the Minister:

- must notify the proponent of the proposed decision and invite the proponent to provide written comments on the proposed decision within 10 business days.

- may notify any other relevant Ministers of the proposed decision and invite the Minister to provide written comment on the proposed decision within 10 business days.

- may, if he or she believes on reasonable grounds that he or she does not have enough information to decide whether the new matter of NES is a controlling provision for the action, request the proponent to provide specified information relevant to making the decision. Time, for the purposes of the transitional period during which the Minister must make his or her decision, does not run while the further information is being sought. This is consistent with other provisions of the EPBC Act regarding requests for further information, such as section 77(6) of the EPBC Act.

- must consider:
  
  - any comments received from a proponent or Minister within the relevant 10 business day period;
  
  - any further information provided in response to a request.

- must, within 10 business days after making a decision, give written notice of the decision to the person proposing to take the action and publish notice of the decision in accordance with regulations.

- must give reasons give reasons for the decision to a person who has been given notice of the decision and makes a written request that the Minister do so. The written request must be made within 28 days of being given the notice of the decision. The Minister must provide the reasons for decision as soon a practicable, within 28 days of receiving the request.
26. Subitem 23(10) provides that anything done by the Minister under Item 23 is not invalid merely because it was not done within the required time period.

Where the new matter of NES is a controlling provision

27. Item 24 provides transitional arrangements where the Minister makes a decision under Item 22 that the new matter of NES is a controlling provision for an action.

28. Subitem 24(2) provides that the decision, made before the commencement of Schedule 1, under section 75 of the EPBC Act on whether any other provision of Division 1 of Part 3 of the EPBC Act is a controlling provision (the **primary decision**) is taken to be varied by the Minister’s decision that the new matter of NES is a controlling provision for the action (the **new decision**).

29. Subitem 24(3) provides that the validity of the primary decision is not affected by the making of the new decision, nor can the original decision be revoked, varied, suspended, challenged, reviewed, set aside or called in question because of, or for reasons relating to, the new decision or the variation of the primary decision.

30. Subitem 24(4) provides that any approval process decision, as defined in Item 19, that was made before the new decision is made continues to have the effect it would have if the primary decision had not been varied by the new decision.

31. Subitems 24(5)-(7) provide for transitional provisions in relation to actions covered by a bilateral agreement. Subitem 24(5) provides that, if section 83 of the EPBC Act applied immediately before the new decision is made, then that section continues to apply. The consequence of this is that Part 8 of the EPBC Act (in relation to assessment of the impacts of controlled actions) does not apply to those actions. Subitem 24(6) provides that the validity of anything done before the new decision for the purposes of a relevant bilateral agreement is not affected by the making of the new decision, nor can it be revoked, varied, suspended, challenged, reviewed, set aside or called in question because of, or for reasons relating to, the new decision or the variation of the primary decision. Subitem 24(7) provides that anything done for the purposes of a bilateral agreement before the new decision is made continues to have the effect that it would have if the primary decision had not been varied by the new decision.

32. Subitem 24(8) provides transitional provisions in relation to actions being assessed under Part 8. The subitem provides, that for the purposes of Part 8 of the EPBC Act, “relevant impacts” as defined in section 82 of the EPBC Act do not include the impacts of coal seam gas developments and large coal mining developments on water resources under Item 1. Subitem 24(9) provides that, for the purposes of a bilateral assessment, “relevant impacts” as do not include the impacts of coal seam gas developments and large coal mining developments on water resources under Item 1. The purpose of these subitems is to ensure that an assessment is not made invalid by the inclusion of the new matter of NES.
33. The intent of Subitems 24(5)-(9) is to ensure that the assessment of the impacts of a controlled action, under either a bilateral agreement or Part 8 of the EPBC Act, is not substantially disrupted by the designation of the new matter of NES as a controlling provision for the action. Impacts relating to the new matter of NES may be considered in deciding whether to approve the action and whether to impose conditions under Part 9 of the EPBC Act. The Minister remains able to request further information on the impacts of the action in relation to the new matter of NES under section 132 of the EPBC Act if the Minister believes on reasonable grounds that he or she does not have enough information to make an informed decision about whether or not to approve the taking of the action.

Review of operation of Act

34. Item 25 provides that the Minister must cause an independent review to be undertaken of the operation of the Act and the extent to which its objectives have been achieved. The person undertaking the review must provide the Minister with a report. Within 15 sitting days of the relevant House of Parliament, the Minister must table the report in each House of the Parliament.

Modifications that may be made by regulations

35. Item 26 provides for additional provisions of a transitional nature relating to the amendments in Part 1 of Schedule 1, including saving or application provisions, to be prescribed in regulations.