NSWIC
NEW SOUTH WALES IRRIGATORS' COUNCIL

PO Box RI437
Royal Exchange NSW I225
Tel: 02 925I 8466
Fax: 02 925I 8477
info@nswic.org.au
www.nswic.org.au
ABN: 49 087 28I 746

Briefing Paper

Commonwealth Mining/CSG Bill

130313

Andrew Gregson
Chief Executive Officer

Introduction

On Tuesday 12 March. Commonwealth Environment Minister Tony Burke announced that the Government would introduce a Bill (the Bill) to Amend the *Environment Protection and Biodiversity Conservation Amendment Act 1999* (the Act). The Bill is designed to give the Commonwealth capacity to disapprove large mining and coal seam gas operations where they impact on water resources.

Details

The Bill can be accessed here.

The Explanatory Memorandum can be accessed here.

The Regulations can be accessed here.

The Guidelines on Significant Impact can be accessed here.

Preliminary Concerns

NSWIC has a fully documented policy position in respect of mining and coal seam gas development (here). It seeks to find a means by which those industries can co-exist with irrigated agriculture, advocates a "no regrets" approach to water resources and contemplates a management approach by the State of NSW.

When first advised of the approach to the matter by the Commonwealth, we were concerned that it may affect users of water resources other than mining and CSG extraction. Further, we were concerned that the potential lack of a head of power pursuant to the Constitution may lead to further uncertainty.

How the Bill Deals with Those Concerns

The Bill is quite specific in addressing only *coal seam gas development* or *large coal mining development*. At first consideration, this specificity allays our first concern.

The Bill draws two heads of Constitutional power - the power to regulate corporations and the power to regulate trade. The Commonwealth has the power to regulate corporate entities no matter which state they are attached to. This head of power alone is not sufficient, as mining and CSG operations could have restructured as non-corporate entities (unit trusts, for example). Utilising the trade power largely closes this loophole as the Commonwealth can regulate both international and interstate trade

A small hole possibly remains open for a non-corporate entity to operate solely within one state. This would seem unlikely given the largely export oriented nature of the industries

involved, but further consideration should be given for the capacity for a single-state non-corporate entity to engage in extraction of a resource that it then sells *within that state* to another entity that engages in trade. The second entity is not involved in the extractive activity and therefore *may not* be regulated by the Act.

Issues Arising from the Bill

The Bill is constructed such that an offence occurs when an action takes place that *will have a* ***significant impact*** *a water resource* (emphasis added).

The key question arising is the definition of a *significant impact*.

The Bill itself is silent on the issue, as are the Act and the Regulations pursuant to it.

The Department has published "guidelines" on the matter (available here) which run to 36 pages providing no great certainty or clarity on the matter. Those guidelines also have no legal standing.

The matter has previously been considered by the Federal Court. In 2001, Justice Branson held that the term meant an

> *impact that is important, notable or of consequence having regard to its context or intensity*[1]

We are advised that the issue of *significant impact* has been one causing angst in many contexts of the Act. It seems that it will be no different in relation to water resources. In this instance, however, the angst lies with mining and CSG operators rather than irrigators.

Conclusion

The Bill represents a significant hurdle for new development of mining and CSG operations, evidenced by industry reaction at the time of writing.

There appears to be no adverse impact to the irrigation sector.

ENDS

[1] *Booth* v *Bosworth* [2001] FCA 1453