

11 March 2019

Economic Policy Scrutiny Committee
Legislative Assembly of the Northern Territory
Parliament House
Darwin, NT 0800

By email: EPSC@nt.gov.au

Dear Chair and Committee members,

RE: Submission on Northern Territory Water Amendment Bill 2019

By way of introduction, Lock the Gate Alliance is a national grassroots organisation made up of 100,000 individuals and over 250 local groups who are concerned about unsafe or inappropriate mining. The mission of the Lock the Gate Alliance is to protect Australia's agricultural, environmental, and cultural resources from inappropriate mining and to educate and empower all Australians to demand sustainable solutions to food and energy production. Lock the Gate works across the NT and is committed to advocating for environmental and community health, and the productivity of local economies.

Lock the Gate welcomes the opportunity to make a submission to the Committee on the *Northern Territory Water Amendment Bill 2019*. We are focusing this submission on the areas that are in need of improvement before the Bill can be finalized.

Re-write S17A to avoid loopholes – make consistent with previous amended offences

We consider the drafting of Section 17A needs to be redrafted to be consistent with Fracking Inquiry Final Report recommendations 7.9 and 7.17. In particular, the offences contained in subsections do not reflect modern standards for environmental offences and would likely be difficult to enforce in practice.

As drafted, they place an unreasonably high burden on the prosecution because they contain:

- fault elements (knowledge, intention and/or recklessness) for both the action and the outcome, and
- the requirement for proof of harm (material or serious environmental harm).

Due to the current drafting, in our view there are not likely to be any successful prosecutions under the fault provisions of the proposed section 17A. There are just too many loopholes and ways for Defendants to get off. Identifying the appropriate Defendant would be a very difficult task and trying to prove intent to pollute against a corporation would be quite impossible.

17A must be redrafted to be consistent with other offences in the Act which were amended in late 20184. The introduction of strict liability, reversal of the burden of proof, and increased penalty amounts into the Act brought its offence provisions into line with modern standards. It is perverse for s17A to be drafted inconsistently with these recently updated provisions.

Section 17A should be redrafted as a straightforward strict liability offence with the burden of proof reversed and with a more appropriate penalty (environmental offence level 2), and fault elements should be integrated into an 'aggravated' offence at the highest penalty level (environmental offence level 1).

Require third party verification of hydrogeological investigations and groundwater modelling, as per the Fracking Inquiry recommendation 7.8

Recommendation 7.8 of the Final Report of the NT Fracking Inquiry points to the need for: *hydrogeological investigations and groundwater modelling.*

Yet the draft of the Act at Section 60A(2)(b) only refers to ground water monitoring. Monitoring is part of hydrogeological investigations, but does not include the critical step of producing a model to prevent unsustainable drawdown occurring into the future.

Therefore, to be consistent with Recommendation 7.8, please update Section 60A(2)(b) of the Bill to read:

60A Licence to take ground water for hydraulic fracturing

(2) The Controller must not grant the licence unless:

(b) independent third party verified hydrogeological investigations and groundwater modelling indicate that the activities under the licence will not have any adverse effect on the supply of water to any designated bore mentioned in subsection (1)(b).

We also recommend that the spelling of 'ground water' be corrected to 'groundwater' throughout the Bill and Act.

Reword the exemption under Section 17B(1)(b) to specify what is meant, avoid legal loopholes

The exemption in s17B(1)(b) has been drafted in a way that could be interpreted to legally allow fracking wastewater to be reinjected into a well and leak from the well into an aquifer during the process of hydraulic fracturing. In this case with the current wording, the fracking company could argue that that the offences in s17A do not apply.

The s17B exemption applies when fracking waste comes into contact with 'ground water' (which is defined broadly to include aquifers, Act s4) 'during the process' of fracking. No one in the Territory would want fracking companies to be exempt from a pollution offence if they pollute an aquifer in the process of fracking. The Department may argue that this exemption and pollution offence could be dealt with in another way. However, it is unnecessary to word the exception in this way and could have a perverse legal outcome contrary to the intent of the Fracking Inquiry's recommendations.

We acknowledge the work of the EDO NT to carefully look through the Water Amendment Bill and offer that the issue could be easily resolved by amending the drafting of 17B(b) as follows (or with words to similar effect):

17B Application of section 17A

(1) Section 17A does not apply if: (a) hydraulic fracturing waste is produced water or flowback fluid; and

(b) the hydraulic fracturing waste comes into contact with water that is contained in the target geological formation during the process of hydraulic fracturing

This amendment would make it explicit, and beyond doubt, that it is an offence under the Act for fracking fluid/produced water that is reinjected into a well to come into contact with any water, with the limited exception of water is part of the target shale gas formation itself.

Without this amendment, Section 17B seriously undermines the implementation of Recommendation 7.9 from the NT Fracking Inquiry Final Report.

The current drafting also increases our ongoing concern that the exemption from compliance with Section 16 remains in place. Thus, a miner is allowed to pollute, provided the waste or polluted water stays within the mining or petroleum site. So, if the mining or petroleum site also includes pastoral water bores or aquifers at the site which get polluted that is not in breach of Section 16. We understand the Department has the view that the Petroleum Act adequately deals with pollution offences in this case. Yet to avoid any confusion, we recommend specific wording in the at Section 16 that states '*only in strict accordance with a*

specific licence’ could pollution occur “in the course of carrying out a mining activity or a petroleum activity”.

Updated drafting could deal with the situation by making a provision that a miner is given a specific licence to breach S16 but only in strict accordance with the terms of their licence. This would remove any potential arguable loopholes or confusion around what is deemed a ‘mining or petroleum site’.

Give communities a genuine say with all draft legal changes and codes made available

Finally, we submit that the role of the subcommittee in ensuring proper oversight of changes to law in relation to fracking in the Northern Territory would be significantly strengthened if the full suite of changes that interact were available for consideration. There is concern in the community and interest in meaningful consultation on these changes.

So far it appears that the NT Government only paid for external consultation support for the Environment Protection Act. And now that Act looks like it’s being derailed due to industry pressure, including from the fracking industry. This gives the community almost zero confidence in the Government’s ability to undertake these changes in an appropriate way that puts clear information, the protection of Territory communities and water supplies at the heart of decision making.

We recommend the committee require all the Codes of Practice and drafted legal changes in relation to fracking to be out for thorough public and regional and remote consultation and then considered as a suite of laws in-concert, to allow for thorough oversight of any gaps or inconsistencies.

Yours truly,



Naomi Hogan
Lock the Gate Alliance