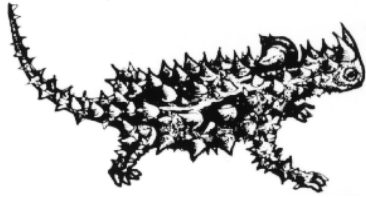


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Arid Lands Environment Centre Submission to the Economic Policy Scrutiny Committee on the Water Amendment Bill 2019

The Arid Lands Environment Centre (ALEC) is central Australia's peak environmental organisation that has been advocating for the protection of nature and ecologically sustainable development for the arid lands since 1980.

ALEC is regularly engaged in the regulatory and policy reform required in implementing the 135 recommendations from the *Final Report* from the *Scientific Inquiry into Hydraulic Fracturing Northern Territory* (Final Report). It is fundamental that these reforms are implemented in a way that is true to the intent of the Final Report and that government delivers on their stated commitment to introduce reform that protects the water resources of the NT.

While we support amending the *Water Act* to deliver on the four key recommendations, this Bill does not provide the legal certainty required by those recommendations from the Final Report to protect water sources.

Government has stated that the intention of the amendments to the *Water Act* is to permit an operator to use produced or flow back water during the fracturing process. This intention is not clear in the Act, which is instead drafted in a way that exposes water sources to contamination from the use of this produced or flowback water. The current drafting of 17B provides an exception to the offence provisions that would effectively permit an operator to inadvertently or intentionally release waste water into other waters during the process of fracturing with produced or flowback water. This is a perverted and unintended consequence.

There are key definitional and regulatory issues that need to be clarified in order to ensure that this Bill operates as intended. The Bill has been introduced at a pivotal stage in the implementation of the Final Report and there are several critical issues concerning the protection of water that remain unresolved.

This submission will outline the key sections that need to be redrafted in order to both comply with the recommendations, and to provide appropriate protections for water from the recognised risks of unconventional petroleum development.

Key issues

- The exemption to 17A is not necessary to permit the reinjection of produced water during fracturing.
 - S. 17B needs to be amended to provide certainty that other water sources will be protected when using produced/flowback fluid during fracturing.
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- There is no legal justification to exempt an operator from liability in a situation of contaminated surface waters in order to permit the use of produced or flowback water.
- The Bill needs to include a clear definition to distinguish between the activities of disposing waste water as compared to the use of waste water (flowback/produced water) during hydraulic fracturing.
- The offence and penalty provisions need to be strengthened in line with the Final Report to operate as an effective deterrent and otherwise enable successful prosecutions.

Protecting water resources from contamination

7.17 and 7.9 are unequivocal in recommending that those activities should be prohibited. A plain reading of section 17B, does not provide that explicit prohibition. Government has not sufficiently justified the case for exempting surface water protections in section 17A in order to permit the use of flowback and produced water during fracturing.

Recommendation 7.17

Section 17A does not provide a ‘prohibition’ but rather an offence that requires evidence of fault, knowledge and harm. Providing an exception to this offence undermines the intent of the recommendation to provide an all-encompassing prohibition. No exception to this was anticipated in section 7.6.7 of the Final report. Furthermore, as no company has indicated that they would seek to discharge wastewater into water ways, there is no justification for providing legal immunity from a contravention of section 17A.

Environmental contamination from produced water spills was noted in the Final Report to be the largest, by volume, source of water contamination.¹ Further, the inquiry found there was “unequivocal’ evidence that chemical and wastewater spills were very likely. Consider therefore, the hypothetical situation where an operator may inadvertently, through using produced/flowback water, cause the release of waste water into surface waters or groundwater in the process of hydraulic fracturing, which causes contamination.

According to the current drafting of 17B, this would not be an offence under the Act. This unintended consequence contradicts recommendation 7.17 and undermines the protection afforded to water sources. The legal exemption undermines the entire risk mitigation framework of the Inquiry and needs to be rectified.

Government has stated that the *Petroleum Act* provides legal redress, but we are submitting that those provisions are not legally adequate. Furthermore, the offence provisions only apply if the contamination occurs within 1km of the site. The *Petroleum Act* therefore does not provide adequate safeguards if contamination is permitted under the operation of 17B. This will be expanded further in the offences section of the submission.

- *Section 17B needs to be removed from the Bill and replaced by an unequivocal prohibition, consistent with recommendation 7.17 and 7.9.*
- *Section 17B needs to be redrafted to provide absolute clarity on its intended operation.*
- *Section 17B should be revised so that it only permits the use of produced or flowback water in the target shale formation.*

Recommendation 7.9 and distinguishing waste water disposal vs produced/flowback water fracturing

¹ Scientific Inquiry Into Hydraulic Fracturing in the Northern Territory – Final Report, chapter 7 at page 153.

A significant proportion of water used in the fracturing process is not recovered following the fracturing event. Water is therefore effectively, 'disposed' during the fracturing process. The intent of 7.9 is to prohibit the disposal of waste water but the Bill will effectively permit this by allowing the reinjection of produced or flowback water during fracturing.

This legal ambiguity needs to be corrected by including a specific legal test to distinguish between the activities of intentional disposal of wastewater compared to the reinjection of waste water (produced/flowback water) during fracturing. The lack of a clear distinction is a fundamental deficiency in the Bill that contradicts recommendation 7.9.

Without this clear delineation there are no explicit controls that would prevent an operator from disposing waste water, that is produced or flowback, but declaring that they were simply undertaking fracturing while using produced or flowback water.

The Bill fails to address the second component of recommendation 7.9 without outlining a process for conducting the full scientific investigations required to "determine that all risks associated with these practices can be mitigated".

- *The Bill needs to include an enforceable definition that distinguishes between disposal of waste water and the reinjection of produced/flowback water.*

Offences

The current drafting of the offence provisions will be exceptionally difficult to prosecute. There are significant complications in attributing fault to a corporate entity and it will be very difficult to establish the 'responsible person' in the event of fault.

This section is therefore unlikely to operate as an effective deterrent as proving intention to cause harm in relation to environmental incidents is near impossible. The history of environmental regulatory compliance and enforcement in the Northern Territory also leaves much to be desired.

As the government has highlighted the offence provisions of the *Petroleum Act* in their defence of the drafting of these amendments, it is necessary to note the findings of the Final Report on those exact provisions. The Final Report concluded in section 14.10.2.5 that:

"the penalties provided for in the Petroleum Act and Petroleum Environment Regulations are, in the Panel's opinion; too low, having regard to both the potential consequences of non-compliance and the commercial incentives for non-compliance".

As the offence provisions in this Bill are identical, they are therefore also too low to act as an effective deterrent according to the logic of the Final Report.

- *In order to ensure the offence provisions act as an effective deterrent and penalty for non-compliance, the penalty amounts need to be increased.*
- *The environmental offence level of the strict liability offence of section 17A(5) needs to be upgraded.*

Recommendation 7.8

Recommendation 7.8 includes an explicit reference to *modelling* which has not been included in section 60A. The amendment in its current form is therefore inconsistent with the recommendation which explicitly requires the inclusion of *modelling*.

The distinction between these terms has significant ramifications in terms of mitigating risks. Monitoring is not able to prevent a risk. Modelling however, enables the projection of dewatering scenarios that incorporates the results of monitoring which will inform a risk assessment. Monitoring on its own will not be able to prevent adverse impacts, but rather highlight when adverse impacts have already occurred. This section therefore needs to be redrafted to include specific reference to *modelling* as consistent with recommendation 7.8

- *Section 60A needs to be redrafted to include explicit reference to modelling.*

The reform process

It is necessary to reiterate an ongoing concern with this process of legislative reform through the implementation program. Considering that there has not been any public engagement on the waste water management framework or codes of practice, it is impossible to understand how this amendment will operate in practice. The transport, storage and processing of produced or flowback water is entirely theoretical at this point. Which simultaneously undermines the recommendations but also makes it difficult to comprehend and evaluate this Bill.

There needs to be a concerted improvement in proactive and accessible engagement on these regulatory changes. Without that engagement there will continue to be widespread public confusion and a lack of confidence in the ability of government to properly implement laws that will protect the water resources of the NT. There is growing community concern that government is waning on their complete commitment to the recommendations; with this Bill only exacerbating those concerns.

There is broad community and expert opinion that substantiates our position that the current drafting of the Bill does not properly implement the recommendations from the Final report. It is fundamental that these Bills are being transparently scrutinised, however there is little point in ‘consulting’ the public if the form and content of the amendments are definitive. Unless there are opportunities to redraft sections of this Bill to address widespread community concerns, this scrutiny process is powerless to deliver on its legal and political mandate.

The key sections highlighted in this submission need to be redrafted in order to fulfill the governments’ commitment to implementing all 135 recommendations in full. Without correcting these weaknesses, it will be near impossible to mitigate all the risks posed by this industry to water.