



**NORTHERN  
LAND COUNCIL**

## **Northern Land Council**

**Submission to the Northern Territory Economic  
Policy Scrutiny Committee:**

***Water Amendment Bill 2019***

**15 March 2019**



## **1. About the Northern Land Council**

The Northern Land Council (NLC) was established in 1973. Following the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (**Land Rights Act**), the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the Northern Territory (NT) (**Top End**) to acquire and manage their traditional lands and seas.

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the land councils. Section 23 of the Land Rights Act sets out the NLC's core functions, which gives it the responsibility to:

- identify relevant Traditional Aboriginal Owners and affected people;
- ascertain and express the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters;
- consult with Traditional Owners and other Aboriginal people affected by proposals;
- negotiate on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim;
- assist Aboriginal people to carry out commercial activities;
- obtain Traditional Owners' informed consent, as a group;
- assist in the protection of sacred sites; and
- direct an Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

In 1994, the NLC became a Native Title Representative Body under the *Native Title Act 1993* (Cth) (**Native Title Act**), whose role and functions are set out in Part 11, Division 3 of the Act. In this capacity, the NLC also represents Aboriginal people of the Tiwi Islands and Groote Eylandt.

Throughout its jurisdiction, NLC assists Traditional Owners by providing services in relation to land, sea and water management, land acquisition, mineral & petroleum, community development, land trust administration, native title services, advocacy and policy advice. Relevant to this submission, is a responsibility to protect traditional rights and interests of Traditional Owners and other Aboriginal people with interests in the NLC area, which consists of over 210,000sq km of the land mass of the NT, and over 85% of the coastline and intertidal area.



NLC's strategic vision is:

To have the land and sea rights of Traditional Owners and affected Aboriginal people in the Top End of the Northern Territory recognised and to ensure that Aboriginal people benefit socially, culturally and economically from the secure possession of their land, waters and seas.<sup>1</sup>

## 2. Overview

This is a submission by the NLC, which represents more than 36,000 Aboriginal people in the NT. It is critical that Aboriginal people are actively engaged and participate in developing legislation which governs activity on their land and waters as significant landowners and managers in the NT and we welcome the opportunity to provide comment on the Water Amendment Bill 2019 (**the Bill**) as part of the ongoing reform to the *Water Act* (NT) and part of the implementation of the recommendations of the Final Report of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (**Final Report**).<sup>2</sup>

On behalf of its constituents, the NLC asserts that Aboriginal people are the First Nations People and that the principles of free, prior and informed consent, self-determination and an equitable share in the future growth in the NT economy will underpin future relationships with governments.

The NLC also emphasises the need for the protection and recognition of substantive property, access and use rights for Aboriginal people in accordance with the Land Rights Act and the Native Title Act. These rights include the recognition of traditional ecological knowledge, recognition of rights to the use of natural resources and spiritual and customary rights which are further protected by heritage and environmental laws and regulations and international conventions.<sup>3</sup> The NLC urges the Northern Territory Government (**NTG**) to ensure that NT policies and legislative structures and frameworks do not conflict with the rights of traditional Aboriginal owners and native title holders pursuant to the Land Rights Act, Native Title Act and/or other legislative or common law instruments.

Involvement in the holistic management and control of water, the environment and ecology, in all its forms, is fundamental to the NLC's constituents. In particular, Traditional Owners have a holistic approach to environmental, cultural and economic management which extends to the inclusion of sea country and waters. Relevant aspirations of Traditional Owners in relation to

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<sup>1</sup> Northern Land Council Annual Report 2016/17, p i.

<sup>2</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, *Final Report of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (April 2018).

<sup>3</sup> United Nations Declaration on the Rights of Indigenous People (UNDRIP); *Environment Protection and Biodiversity Conservation Act 1999* (Cth).



these areas include, but are not limited to; the opportunity to derive benefit from the sustainable use of resources, provision of opportunities for economic development, strengthening of monitoring and compliance in relation to activities undertaken on or adjacent to Aboriginal land and better inclusion and participation in planning and decision making.

It is also important to acknowledge that historically, throughout Australia and particularly in the NT, laws have failed to recognise and acknowledge the “dynamism of Indigenous relationships to water.”<sup>4</sup> Specifically, Aboriginal people’s holistic and value-laden conceptualisations of water go beyond definitions found within the Australian legal framework to encompass economic, cultural, environmental, social and ecological aspirations and obligations. As such, it is the NLC’s view that legal water management and governance frameworks in the NT need to account for the integration and interrelation between water and other resources such as land, the socially conductive and obligatory nature of water relations as well as the individual and group economic aspirations of Aboriginal people.<sup>5</sup>

This submission highlights the NLC’s particular concerns in respect of the NTG’s fragmented approach to the ongoing reform of the *Water Act* (NT) and the implementation of the recommendations of the Final Report.

For the purposes of this submission, the term *Traditional Owner* will be used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters encompassing the NLC’s region.

### **3. The Water Amendment Bill 2019**

Pursuant to section 23 of the Land Rights Act, the NLC has legislative responsibilities to express the views of and advocate for Aboriginal peoples’ rights to control and manage access to land and waters, protect sacred sites, and to exercise traditional and cultural practices. As such, it is the NLC’s strong view that the Bill must give legal certainty to the rights of the NLC’s constituents to exercise these rights and management of their lands and waters as well as manage the impacts of activities taking place on their lands and waters, or adjacent lands and waters.

The NLC emphasises that any amendments to current legislative and regulatory water and environmental management policies or practices could have significant impacts on both the

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<sup>4</sup> Peter Burdon, Georgina Drew, Matthew Stubbs, Adam Webster and Marcus Barber, ‘Decolonising Indigenous water ‘rights’ in Australia: flow, difference, and the limits of law’ (2015) 5(4) *Settler Colonial Studies* 334, 335.

<sup>5</sup> *Ibid*, 335-7.



cultural and economic control and management of Aboriginal land, waterways and resources - a large volume of which are privately owned and/or controlled by Aboriginal people pursuant to the Land Rights Act and the Native Title Act.

Pursuant to the Explanatory Statement published by the NTG Minister for Environment and Natural Resources, the Bill has been introduced to the Legislative Assembly of the NT to give effect to four of the recommendations of the Final Report (see Part 5 herein). None of the ancillary material available at the time of finalising this submission provided holistic or contextual insight into the NTG's reform agenda or how the Bill might interact with future reform in respect of both the *Water Act* (NT) and the various legislative actions required to implement all of the recommendations of the Final Report.

Relevant clauses of the Bill are examined below.

### **3.1 Clauses 4 and 5**

It is the NLC's view that the proposed definition of *hydraulic fracturing* detailed in clause 4 of the Bill should be further amended to capture all possible forms and variances of anticipated practices. In particular, the inclusion of 'injection of fluids' in the definition requires clarification and, preferably, expansion to account for actual industry practice. It is recommended that this definition be amended to account for the use of proppants, which are solids - not fluids - (synthetic or natural) that are mixed with fracking fluids as a matter of standard practice in hydraulic fracturing processes.

The NLC also wishes to make comment on some matters of particular concern including the need for explicit restriction on the use of BTEX compounds, and continued monitoring of contaminant levels both on activity sites and off-tenure locations possibly impacted by hydraulic fracturing activities, cumulative impact and/or environmental events related to hydraulic fracturing or where the impacts of an environmental event are heightened by hydraulic fracturing activities (such as seismic activity). Contaminants of particular concern, in respect of both environmental risks (including water contamination) and harm minimisation, include Naturally Occurring Radioactive Material (NORM) with respect to levels exceeding those detailed in the *Radioactive Ores and Concentrates (Packaging and Transport) Act 1980* (NT) or the *Atomic Energy Act* (Cth), BTEX compounds and oil based fluids.

It is noted that other Australian jurisdictions have already introduced specific and extensive statutory and regulatory measures to ban the use of BTEX compounds in coal seam gas drilling



and hydraulic fracturing activities.<sup>6</sup> The NLC highly recommends a similar approach be taken by the NTG with extensive input sought from stakeholders prior to finalisation.

Given the current status of the NTG's ongoing environmental regulatory reform process, the NLC reserves its views on the adequacy of the Bill's approach to the management of *hydraulic fracturing waste*. The proposed reforms which will be of relevance here include, but are not limited to: the *Waste Management and Pollution Control Act* (NT), Petroleum (Environment) Regulations and Environment Management Plans (EMPs) in respect of waste discharge and additional, currently fragmented, requirements under the *Environmental Assessment Act* (NT) and Environmental Assessment Administrative Procedures, the *Waste Management and Pollution Control Act* (NT) and *Litter Act* (NT).

It is recommended that such legislative reforms, and the ongoing application of existing regulations, apply to the collection, storage, use and/or disposal of *hydraulic fracturing waste* and other bi-product and/or *flowback fluid* associated with the hydraulic fracturing process. However, the NTG's fragmented approach to the introduction of these reforms and the implementation of the recommendations of the Final Report makes the assessment of the regime's adequacy highly problematic. The NLC recommends that the proposed reforms to the NT's environmental regulatory framework explicitly regulate all forms, stages and possible applications of *hydraulic fracturing waste* and that NT petroleum licencing, EMPs and environmental approvals, where necessary, be capable of applying additional, context specific, environmentally and culturally appropriate, waste management practices.

### 3.2 Clause 7

The NLC welcomes the Bill's introduction of new offences under new s 17A prohibiting *hydraulic fracturing waste*, treated or untreated, from coming into contact with waters, limited by proposed s 17B which excludes the application of the offences from (a) produced water or flowback fluid, and (b) *hydraulic fracturing waste* that comes into contact with ground water during the process of hydraulic fracturing. However, it is the NLC's view that the current drafting of the offences does not adequately deter possible harmful impacts or capture all circumstances of prohibited activity.

The NLC is particularly concerned at the inclusion of an element of intention in offences (1)-(4) which creates an unnecessary evidentiary burden to prosecution that was not envisaged by the requisite recommendation of the Final Report.<sup>7</sup> Further, inclusion of an element of intent

<sup>6</sup> See eg, *Petroleum (Onshore) Act 1991* (NSW) and Department of Trade and Investment, New South Wales Government, Code of Practice for Coal Seam Gas (September 2012).

<sup>7</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, above n 2, recommendation 7.9.



undermines the “serious concerns”<sup>8</sup> and unknown risks of seismic activities outlined by the Final Report as requiring absolute prohibition of the discharge of *any* onshore shale gas hydraulic fracturing wastewater (treated or untreated), with no exceptions. The level of risk associated with the possible occurrence of both serious and material environmental harm calls for a strict test capable of clear application.

The NLC also questions the adequacy of the proposed penalties for the offences as outlined in clause 7 of the Bill. Given the extent of potential harm to the environment and local ecology, as well as access to and use of land for economic, cultural and subsistence purposes, the NLC believes the penalty levels are inadequate and, as such, are unlikely to provide the desired deterrence. Specifically, some body corporates may not be adequately deterred by the proposed financial penalties which may, in some instances, be considerably lower than the cost of undertaking compliant disposal.

The NLC supports the insertion of a strict liability offence pursuant to new s17A(5). This offence should address those events that occur without the offender’s explicit intent or knowledge of the outcome. This is necessary to ensure industry-wide due diligence and compliance in respect of the storage, use and disposal of *hydraulic fracturing waste* – being an activity that is established in the Final Report as being fraught with uncertainties and risks.

However, the NLC is concerned by the extensive limitations imposed on the operation of the offences under proposed new s 17B(1) of the Act. This is particularly concerning due to the lack of clarification as to (a) the types of dangerous or hazardous materials/fluids that could classify as *produced water* and (b) the NTG’s intentions as to how they will limit and monitor adverse impacts of *hydraulic fracturing waste* that comes into contact with ground water during the fracturing process. As such, the NLC strongly recommends that the definition of *produced water* be amended to include scientific guidelines as to the allowable levels of contaminants that will be accepted in order for a substance to be classified as *produced water*. The NLC further recommends the removal of s 17B(1)(b) as a limitation from the operation of the offences outlined in s 17A due to the real and uncontrolled risk of contaminants and/or unsuitable water types being introduced to ground water and related ecological systems without any deterrent or legislative recourse.

The NLC supports reduced water extraction through the allowing of *flowback fluids* to be used in future hydraulic fracturing events. However, the NLC strongly recommends that further consideration be given to the regulation of *flowback fluids* with the need for clear controls in respect of its capture, storage, processing, use and release/disposal. Specific details should be

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<sup>8</sup> Ibid, 161.



added to the definition of *flowback fluids* or in the relevant regulations to characterise ‘allowed to flow from the well’, the level of treatment required in respect to the *flowback fluids* classification and final disposal/release requirements. Queensland’s CSG Water Management Policy and related legislative and regulatory controls provide a strong starting point for a detailed management plan of these considerations.<sup>9</sup>

The NLC also recommends the introduction of a requirement for land owners to be notified of any offences committed under the proposed additional offences. This is important to ensure transparency, accountability and the mitigation of possible risks to those accessing and using the area – particularly in respect to Traditional Owners’ extensive rights to use and access under both the Land Rights Act and the Native Title Act.

### 3.3 Clause 8

Read together, the drafting of clause 8 of the Bill and the relevant explanatory statement provide an unclear conclusion as to the proposed and actual purpose and operation of the insertion of s 45A. The Explanatory Statement purports that s 45A gives effect to recommendation 7.6 of the Final Report ‘that prior to the grant of any further exploration approvals, the use of all surface water resources for any onshore shale gas activity in the NT be prohibited.’ The drafting of Section 45A appears broader than the proposed intention, being that the Controller must not grant a *licence to take water* if the proposed beneficial use is petroleum activity, *ipso facto*, the prohibition is not limited to surface water.

The NLC supports the currently proposed drafting of s 45A. However, clarification is sought from NTG and the Committee as to whether or not, as per the current drafting, the prohibition is intended to apply to all water sources, not limited to surface water.

Notwithstanding the NLC’s in principle support for the insertion of section 45A, the NLC seeks further clarification as to how this provision will be applied and monitored by the NTG, particularly in respect of existing industry operations.

### 3.4 Clause 9

Generally, the NLC is supportive of the proposed insertion of s 60A into the Act in an effort to implement Recommendation 7.8(a) of the Final Report. However, the NLC notes that the drafting only seeks to implement point (a) and that further legislative action is required in order to fully implement the Final Report’s recommendation in relation to the prevention of unacceptable local drawdown of aquifers. It is integral that the additional recommendations under Recommendation 7.8 be implemented as soon as practicable in order to ensure adverse

<sup>9</sup> See, [https://environment.des.qld.gov.au/management/non-mining/csg-water.html#csq\\_water\\_management\\_policy](https://environment.des.qld.gov.au/management/non-mining/csg-water.html#csq_water_management_policy)





impacts of hydraulic fracturing activities are limited and monitored to avoid short and long term environmental and financial detriment to land owners, specifically Traditional Owners.

The NLC recommends that the drafting of proposed new s 60A(2) be amended to allow the Controller to grant a licence only when both of the requirements under subsection (a) *and* (b) have been fulfilled. Such an amendment would provide more robust protection for inadequately informed or misled land owners, adjacent land owners or bore owners whilst also lowering the risks for harmful environmental outcomes.

### 3.5 Clause 10

In principle, the NLC welcomes the introduction of a restriction on the re-injection of aquifers with water that is or contains *hydraulic fracturing waste*. Given the fragmented nature of the NTG's environmental regulatory reform process, the NLC seeks clarification as to whether or not *hydraulic fracturing waste* is capable of being re-categorised after treatment. This is an important distinction that could have significant impacts on the health of NT water sources, ecological systems and aquifers if not transparently interpreted and adequately monitored – all of which are of significant interest to the NLC's constituents as land owners, cultural custodians and residents of potentially impacted areas.

### 3.6 Clause 11

The NLC welcomes the NTG's attempt to provide transitional arrangements for the application of new s 60A. However, the NLC seeks to clarify the extent of the transitional arrangements. Specifically, the NLC recommends that this section explicitly apply to both proposed and existing bores as well as expired licensees seeking renewal and licensees seeking amendment of existing licences. Such an amendment would ensure all interests in the NT's precious groundwater resources are comprehensively assessed, with no loopholes for existing licence-holders or pre-built infrastructure.

## 4. Ongoing *Water Act* (NT) reform

In October 2018, the NTG released the Northern Territory Water Regulatory Reform Directions Paper (**Directions Paper**) providing a general overview of the NTG's proposed reforms to the NT water regulatory framework.<sup>10</sup> Feedback has been sought by the NTG to the Directions Paper by 31 March 2019. Whilst the NLC welcomes the opportunity to respond to the Directions Paper it must be noted that it does not holistically consider the current status of the water and environmental reform process that includes the current Bill or possible future amendments required for the implementation of the recommendations of the Final Report.

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<sup>10</sup> Northern Territory Government, *Northern Territory Water Regulatory Reform Directions Paper* (October 2018).



The NLC acknowledges and welcomes the amendments to the *Water Act* (NT) passed by the Legislative Assembly in late 2018 requiring mining and petroleum companies to obtain licences and permits in relation to water extraction, giving effect to recommendation 7.1 of the Final Report. This was a long overdue amendment which should assist in the management and monitoring of the mining and petroleum industry's use of water resources, allow for the management of environmental impacts of water use and extraction as well as provide a possibility of increased accountability in water usage in these industries.

Notwithstanding this, it should be noted that the contents of the recent amendment and the current Bill are not addressed in the Directions Paper, making it particularly difficult for the NLC to provide comment as to the holistic impact of the proposed amendments on our constituents.

Further to that outlined above, the NLC wishes to highlight some specific concerns in relation to the NTG's reform agenda as detailed in the Directions Paper and the seeming lack of interaction and comprehensive analysis as to its interaction with the current Bill and ongoing implementation of the recommendations of the Final Report.

#### **4.1 Strategic Aboriginal Water Reserves (SAWR)**

The Strategic Aboriginal Water Reserve Policy Framework published on 13 October 2017 articulates the NTG's commitment to the introduction of an amendment to the *Water Act* (NT) which establishes a statutory basis for the inclusion of SAWRs in Water Allocation Plans throughout the NT (**SAWR Policy**). The SAWR Policy comes as a response to decades of campaigning from Aboriginal interest groups and Aboriginal peoples in an attempt to respond to institutionalised inequity and inequality in water distribution in the NT and Australia more generally. Such inequality has been widely recognised with the, now dissolved, National Water Commission describing Aboriginal peoples and groups multifaceted water use needs as an unmet demand on the water system.<sup>11</sup> This inequality is evidenced by a comparison of Aboriginal land ownership and water entitlement which suggests significant exclusion and/or the inaccessibility of water entitlements/markets to Aboriginal peoples and groups.<sup>12</sup>

Whilst the introduction of SAWRs into the *Water Act* (NT) is strongly supported by the NLC there are significant elements of, and omission from, the SAWR Policy that require further consultation and negotiation with Traditional Owners and the NLC, as the representative body

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<sup>11</sup> Sue Jackson and Marcia Langton, 'Trends in the Recognition of Indigenous water needs in Australian water reform: The limitations of 'Cultural' entitlement in achieving water equity' (2012) 22 *The Journal of Water Law* 109, 114.

<sup>12</sup> *Ibid*, 110.



for over 36,000 Aboriginal people in the NT. Most significantly in respect of this submission is the need for the elimination of policy and legal vagaries which are only heightened by the NTG's fragmented and incoherent approach to the reform of the *Water Act* (NT).

To date, Aboriginal people and groups throughout Australia, in particular the NT, have been treated by successive governments as 'undifferentiated' stakeholders, often bundled into cultural or community categories with various other interest groups.<sup>13</sup> This is a pattern that must not be repeated in respect of the current opportunities for holistic reform to the *Water Act* (NT).

Whilst the SAWR Policy and related amendments are outside the scope of the current Bill, it is important to acknowledge that the longer the NTG waits to introduce draft legislation implementing the SAWR Policy, the greater the potential detriment inflicted on the NT's Aboriginal population through further exclusion from already increasingly allocated water systems. This fear is only compounded by recent amendments and the current Bill which bring into question the NTG's allocation priorities and intentions in respect of SAWRs and existing and impending Water Allocation Plans.

Further substantive comments on the SAWR Policy and its relationship with the Directions Paper and other proposed *Water Act* (NT) and environmental legislative amendments will be provided in the NLC's submission in response to the Directions Paper.

#### **4.2 Aboriginal representation in planning and policy**

Despite previous commitments from NTG for the establishment of an Aboriginal Water Unit to provide advice on the integration of Aboriginal interests in NT water planning,<sup>14</sup> to date, Aboriginal involvement in water planning and policy development has been extremely limited. Aboriginal communities and representative entities such as the NLC are asking for a seat at the table in water planning and management negotiations,<sup>15</sup> and it is of paramount importance that people are afforded that opportunity in a real and substantive manner.

It is strongly recommended that the NTG refrain from the introduction of further legislation and/or regulatory amendments until such time as Aboriginal people are afforded a real voice in

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<sup>13</sup> Sue Jackson, 'Water and Indigenous rights: Mechanisms and pathways of recognition, representation and redistribution' (2018) September *Wiley Interdisciplinary Reviews: Water* 1, 3.

<sup>14</sup> Department of Trade, Business and Innovation, Northern Territory Government, *Our Economic Future: Northern Territory Economic Development Framework* (2017).

<sup>15</sup> Marcus Barber and Sue Jackson, 'Indigenous engagement in Australian mine water management: The alignment of corporate strategies with national water reform objectives' (2012) 37 *Resources Policy* 48, 57.



the water planning and reform process, and that the land councils be involved in the design of this process and/or structural representation.

## **5. Implementation of recommendations of the Hydraulic Fracturing Final Report**

On 17 April 2018, the NTG made a commitment to implement all of the recommendations in the Final Report. The purpose of the Bill, as identified in the Explanatory Statement, is to give effect to a number of recommendations of the Final Report. The relevant recommendations are listed as follows:

- Recommendation 7.6 – prohibition on surface water take for petroleum activities
- Recommendation 7.8(a) – prohibition on water extraction for hydraulic fracturing within 1km of landowners bore without agreement or hydrogeological information
- Recommendation 7.9 – prohibition on reinjection of hydraulic fracturing wastewater into aquifers
- Recommendation 7.17 – prohibition on release of hydraulic fracturing wastewater to surface waters

The NLC acknowledges that the Bill has gone a long way to addressing, in full, recommendations 7.6, 7.9 and 7.17. However, overall, the NTG’s fragmented approach to the implementation of the recommendations of the Final Report raises significant concerns, including: the possibility of unintended drafting inconsistencies and/or loopholes, a lack of clarity as to the operation and interaction of recommendations within the same and/or other statutes and regulations. Further, this complex and disjointed reform process creates confusion for stakeholders and the general public alike, limiting overall capacity to provide comprehensive feedback and recommendations in respect of the proposed reforms.

The NLC also highlights issues of the accessibility of the current Bill and the continuing reform process in respect of both the *Water Act* (NT) and the ongoing implementation of the recommendations of the Final Report. The vast majority of the NLC’s constituents live in remote and/or very remote locations, compounded by high levels of illiteracy and low levels of formal education, making it extremely difficult to access and interpret information in relation to the proposed reforms and the reform process more generally. Further, the NLC’s constituents are the largest land owner/proprietary interest holder in the Top End, making it fundamental that they be adequately consulted and informed in respect of any proposed reforms that could impact on their interests – economic, proprietary, cultural or otherwise.

The NLC again recommends a comprehensive approach to the implementation of the recommendations of the Final Report with consideration of the planned *Water Act* (NT) reforms. In particular, the NLC recommends the release of a policy framework detailing a holistic and



comprehensive guide to the NTG’s planned water reforms and the implementation of the recommendations of the Final Report more generally. This should include ongoing engagement and consultation with the NLC as well as the provision of on country information workshops for Traditional Owners and interested Aboriginal peoples to provide direct input into the reform process.

## **6. Relevant legislation, case law and declarations**

An examination of relevant legislation, case law, and the United Nations Declaration on the Rights of Indigenous Peoples (**UN Declaration**) provides an overview of the obligations the NTG should consider with respect to the interests of Traditional Owners in the context of the Bill.

### **6.1 *Native Title Act 1993 (Cth)***

The High Court’s decision in *Mabo v Queensland (No 2) (1992) 175 CLR 1*, and subsequently *Akiba v Commonwealth (2013) 250 CLR 209*, recognised Indigenous rights to land and water at common law. Since these seminal decisions the Courts have continued to recognise and expand the application of Native Title principles to various contexts. Additionally, the NLC reminds the Committee that s 211 of the Native Title Act allows native title holders to conduct certain activities on lands and waters without the need to obtain a permit, as is required of others. These rights cannot be subverted in any way through the introduction of statutory licencing and/or permit regulations.

The NLC also notes that the process of securing access to water sources and/or dispose of *hydraulic fracturing waste* may be subject to negotiation requirements under the Native Title Act.

### **6.2 *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)***

The NLC would like to bring to the Committee’s attention s 73(1)(c) of the Land Rights Act. This section allows the NTG to make laws providing for the “protection or conservation of, or making other provision with respect to, wildlife in the Northern Territory, including wildlife on Aboriginal land, and, in particular, laws providing for schemes of management of wildlife on Aboriginal land.” However, such schemes must be “formulated in consultation with the Aboriginals using the land to which the scheme applies.” It is the NLC’s strong view that amendments of the kind proposed in the Bill should consider the extent to which Aboriginal people’s interests and/or the proposed amendments impact the right of Aboriginal people to utilise resources to in respect of the above.

Further consideration needs also to be given to s 19 of the Land Rights Act which details the statutory requirement for third parties to be granted interests in Aboriginal land, including an



interest securing access to water. The NLC emphasises that formalisation of an interest pursuant to the requirements under the Land Rights Act,<sup>16</sup> is necessary for any third party to access water overlying or underlying Aboriginal land if accessed via that land.

### 6.3 United Nations Declaration on the Rights of Indigenous People

The UN Declaration emphasises Indigenous peoples' right to be involved in the determination and development of priorities and strategies for the development of their lands, territories and other resources.<sup>17</sup> Specifically, article 32 of the UN Declaration sets out that:

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Further, article 29 of the UN Declaration provides Indigenous peoples with the right to the conservation and protection of the environment and capacity of their lands and resources and that States will take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.<sup>18</sup> This is of particular concern in the context of the proposed new ss 17A and 17B of the Bill which do not provide sufficient detail to ensure, even when read in conjunction with additional legislative requirements under the *Waste Management and Pollution Control Act* (NT) and *Litter Act* (NT), the adequate storage and disposal of hazardous waste and the implementation of programs for monitoring, maintaining and restoring the health of Aboriginal peoples affected by possible waste events.<sup>19</sup>

The NLC strongly recommends that the NTG consider the rights of Indigenous peoples as outlined in the UN Declaration and act in accordance with these principles when undertaking to amend existing and/or introduce new legislative or regulatory requirements that are likely to impact on the ability of Aboriginal peoples to fully utilise their rights to access and use their lands and resources (including water). It is integral to the rights of Aboriginal peoples, in particular Traditional Owners, that they are able to exercise their rights to conserve and protect their lands and resources and that any approved methods of waste disposal be first consented to

<sup>16</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s19(5).

<sup>17</sup> UN Declaration, above n 3, art 32(1).

<sup>18</sup> *Ibid*, art 29(2).

<sup>19</sup> *Ibid*, art 29(2) -(3).



by the relevant Traditional Owners in accordance with the principles of free, prior and informed consent.

#### **6.4 National Water Initiative**

In 2004 the Council of Australian Governments (COAG), of which the Northern Territory is a party, endorsed the ‘Intergovernmental Agreement on a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory’<sup>20</sup> (NWI). A key feature of the NWI was the establishment of water access entitlements and planning frameworks – a specific outcome of which being the recognition of indigenous needs in relation to water access and management and the inclusion of Indigenous peoples in planning and water plans.

The NLC reminds the NTG of their commitments under the NWI and recommends that the proposed SAWR reforms be drafted and released for comment prior to the progression of other proposed amendments to the *Water Act* (NT), particularly any reforms that may directly or indirectly impact on water allocations under existing or impending Water Allocation Plans.

#### **7. Conclusion**

The NLC holds serious concerns over the current drafting of the *Water Amendment Bill 2019*, particularly in respect to potential impacts, and/or a lack of transparency concerning potential impacts, on the NLC’s constituents, namely Traditional Owners and their various interests in land and water throughout the Top End.

Specific concerns relate largely to the adequacy of the elements and deterrence prospects of proposed offences pursuant to proposed s 17A in the Bill, transparency of the Controller’s licensing decision making and the scope for inconsistencies and/or deficiencies in the holistic application of ongoing water and environment reform and the implementation of the recommendations of the Final Report.

Further, the NLC is concerned that the monitoring and enforcement of proposed reforms, as well as issues of cumulative and off-tenure impacts, have not been sufficiently considered and accounted for within the Bill.

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<sup>20</sup> Council of Australian Governments (COAG), ‘Intergovernmental Agreement on a National Water Initiative Between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory’ (Intergovernmental Agreement, COAG, 25 June 2004).



The most significant concerns for the NLC are those pertaining to the fragmented nature of the ongoing *Water Act* (NT) reform process and the planned adoption and implementation of the recommendations of the Final Report. The holistic operation of these reforms remains unclear, raising serious questions as to the practical utility of individually introduced amendments and the NTG's ability to provide ongoing accountability in respect of the successful application of proposed amendments.

Further, the NTG's fragmented approach to the reform process severely limits the NLC's ability to seek meaningful input from, or provide accurate, practical information to, NLC constituents who are, collectively, largest the land owners in the Top End. Hence, are the most likely to be affected by hydraulic fracturing activities and related waste and/or environmental impacts.

## **8. Recommendations**

The NLC makes the below specific recommendations to ensure the protection of the rights of Traditional Owners within its region:

1. Amendment of definition of *hydraulic fracturing* – clause 3.1
2. Adoption of extensive statutory prohibition of and monitoring in relation to the use of contaminants – clause 3.1
3. Statutory clarification of the definition of *flowback fluids* including the regulation of same – clause 3.1 and 3.2
4. Removal of intention element in offences under s 17A – clause 3.2
5. Undertake review of penalty levels in relation to all offences under s 17A – clause 3.2
6. Removal of limitation to offence operation under s 17B(1)(b) – clause 3.2
7. Insertion of requirement for land owner notification in relation to offences under s 17A – clause 3.2
8. Amendment of s 60A to allow grant of licences only when both (a) and (b) are fulfilled – clause 3.4
9. Statutory clarification as to the classification of *hydraulic fracturing waste* – clause 3.5
10. Amendment of s 117 to clarify application – clause 3.6

In addition to the 10 recommendations outlined above, the NLC seeks clarification from the NTG, prior to the assent of the Bill, as to statutory and/or regulatory measures that will provide ongoing monitoring and management of industry impacts on the environment and water sources both inside and outside defined lease areas – particularly accounting for possible cumulative impacts and off-tenure impacts. Further, the NLC also seeks clarification as to the transparency and accountability of decisions made pursuant to the proposed amendments and the limited knowledge basis (baseline data) on which decisions appear to be able to be made by the Controller.





Most significantly, the NLC makes the serious recommendation that, prior to the further progression of this Bill and any other proposed amendments to the *Water Act* (NT), the NTG release a holistic and detailed reform package (inc. timeframes) which provides an opportunity for coordinated and informed stakeholder feedback. Such a package should include a coordinated public communications strategy including the provision of publically available information holistically addressing the proposed *Water Act* (NT) reform process and the proposed implementation of the recommendations of the Final Report in an accessible format.

Finally, the NLC calls on the NTG to immediately fulfil its previous commitment to establish an internal Aboriginal Water Unit to provide advice on the integration of Aboriginal interests in NT water planning.

Should you have any further questions regarding our submission, please feel free to contact Caitlin Richards on 08 8920 5201 or email [caitlin.richards@nlc.org.au](mailto:caitlin.richards@nlc.org.au)