



Economic Policy Scrutiny Committee
Legislative Assembly of the Northern Territory
By email: EPSC@nt.gov.au

4th September 2019

To whom it may concern

RE: Water Further Amendment Bill 2019

The Central Land Council (CLC) welcomes the opportunity to comment on the Northern Territory Government's Water Further Amendment Bill 2019 (Bill). The CLC strongly supports legislation that addresses the rights and interests of Aboriginal people in the NT. The CLC supports the intent of this Bill, with some amendments, to provide access to water for economic development by Aboriginal people.

The CLC has statutory responsibilities to ascertain, represent and protect the rights and interests of Aboriginal people living in the CLC region. One of the CLC's central roles is to protect the interests of Aboriginal people with an interest in Aboriginal land, by assisting constituents to make land claims, negotiate agreements with third parties, protect sacred sites, and utilise land and other financial resources for the benefit of their communities.

The attached document provides comment and recommendations on the Bill. Further to those comments the CLC supports the Bill in recognising the role of the land councils and conferring a function on Aboriginal land councils in relation to Aboriginal water reserves under section 108(2)(w). The CLC is prepared to carry out this function subject to any constraints on its resources.

We also welcome that the Water Controller will not be granting a water extraction licence in relation to an Aboriginal water reserve unless Aboriginal people give consent. We request that CLC be involved in the drafting of the regulation referred to in section 71BA(1) at an early stage.

Yours sincerely,

Joe Martin-Jard
Chief Executive Officer

Central Land Council submission to the Water Further Amendment Bill 2019

Recommendation 1 – Change the definition of “Eligible Aboriginal people” in section 4(1) to reflect the nature of interest of Aboriginal people under ALRA

- **Eligible Aboriginal people** is defined under section 4(1) of the Water Further Amendment Bill (**Water Bill**) as “*Aboriginal people who have a legal entitlement to access water resources because of their ownership of or interest in eligible land*”.
- This definition is vague and does not seem to address the fact that under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (ALRA)*, Aboriginal land is owned by Aboriginal land trusts and not Aboriginal people. Under section 4(1) of ALRA, Aboriginal land trusts hold title to land “*for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned.*” To avoid doubt, the definition of “eligible Aboriginal people” should be amended to provide for such persons as well as traditional Aboriginal owners.
- We recommend that the definition of **eligible Aboriginal people** be amended as follows:

“**eligible Aboriginal people** are Aboriginal people who have an legal entitlement to access water resources because of their ownership of, or interest, including native title interest, in eligible land which includes being traditional Aboriginal owners, or Aboriginals entitled by Aboriginal tradition to the use or occupation, of eligible land.”

“**traditional Aboriginal owners** has the same meaning as in section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. ”

Recommendation 2 – Change in definition of “eligible land” in new Section 4B to allow for non-exclusive native title determination.

- The definition of eligible land in Section 4B(1) of the Water Bill only includes land over which an exclusive native title determination has been made.
- This means that the interests of native title holders under non-exclusive native title determinations (**Non-Exclusive Native Title Holders**) will not be recognised. A non-exclusive native title determination in CLC’s region normally covers the *lands and waters* over a determination area and those rights and interests include, for example:
 - a. the right to access and travel over any part of the land and waters;
 - b. the right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land;
 - c. the right to make decisions about the use and enjoyment of the land and waters by Aboriginal people who recognise themselves as governed by Aboriginal traditional laws and customs and who acknowledge the traditional laws and customs of the native title holders; and
 - d. the right to share and exchange natural resources obtained on or from the land and waters, including traditional items made from the natural resources.
- The limitation of eligible land to “exclusive native title determination” fails to recognise all the non-exclusive determinations over pastoral leases.
- The grant of a water licence (ie a licence relating to the management or regulation of surface and subterranean water) is an act to which native title holders are entitled to

compensation (see section 24HA(5) of the *Native Title Act 1993 (Cth)*). If the Northern Territory Government fails to recognise the interests of Non-Exclusive Native Title Holders and the grant of a water licence results in the impairment of the native title rights and interests of those Non-Exclusive Native Title Holders, this may result in a compensation liability for the Northern Territory Government.

- We recommend that paragraph (b) of the definition of eligible land in Section 4B(1) be amended so that the words “*to the exclusion of all others*” are deleted.

Recommendation 3 – Amend section 22A(2) to allow “cultural” to be a beneficial use in a water control district and amend the definition of “cultural” in section 4(3) to specifically take into account Aboriginal cultural needs

- Aboriginal people have a dynamic relationship with water which includes social, cultural, environmental components.
- The cultural landscape of an area typically includes physical (e.g. sacred sites, ancestor trees and other features such as stone arrangements) and non-physical (e.g. knowledge, practices, songs, ceremony) cultural values. All water sources such as soakages, rock holes, springs and rivers generally play a major role in the social, cultural, spiritual and customary values of traditional owners and native title holders of an area.
- Accordingly, we recommend that:
 - a) section 22A be amended to add “cultural” as a beneficial use category which applies to water resources in a water control district; and
 - b) the definition of cultural in section 3(e) be amended as follows:

“cultural – to provide water to meet aesthetic, recreational and cultural needs including the cultural needs of Aboriginal people of a water control district”

Recommendation 4 - Deletion of “water resources on, under or adjacent to the land”

- While there may be sufficient ecological data for some water systems, on the whole, groundwater and broader ecology research and data remain limited in the Northern Territory. Furthermore, the Water Policy does not include any methodology or justification for excluding eligible land without water resources.
- Given the limited information on groundwater reserves, by limiting eligible land to land where there is water resources on, under or adjacent to the land, there is a risk that an Aboriginal water reserve may be excluded from eligible land.
- We recommend that section 22C(1) be amended to delete paragraph (b), “*there are water resources on, under or adjacent to the land.*”

Recommendation 5 – Include a clause in the Bill that specifies a percentage of the consumptive pool available for the Aboriginal Water reserve

- The CLC supports a cap enshrined in legislation to provide security for rights holders.
- The CLC notes the difference between the CLC/NLC’s 50% recommendation of the consumptive pool being allocated to the Strategic Aboriginal Water Reserve to the NT government’s policy of a 30%. The CLC requests that a process to resolve this difference be undertaken.