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Mr Tony Sievers
Chair
Economic Policy Scrutiny Committee
GPO Box 3721
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Dear Mr Sievers Tony

Thank you for your letter of 11 September 2019 regarding the Committee's Inquiry into the Water Further Amendment Bill 2019 (Serial 100).

The Water Further Amendment Bill 2019 is intended to capture the key elements of the Northern Territory Government's Strategic Aboriginal Water Reserves Policy Framework (October 2017) (the Policy) into legislation. This Government is not proposing to review the key elements of the established Policy which was developed following extensive consultation with a wide range of stakeholders in 2016 and 2017. Some of the questions the Committee has asked relate to key elements of the Policy and I will indicate that where relevant.

I agree to this letter being published on the Committee's website.

In response to the Committee's written questions, the following information is provided:

1. The Committee has asked about the term eligible Aboriginal people which is defined in the Bill through ownership or interest in eligible land. Classes of eligible Aboriginal people will differ for each category of eligible land. The categories of eligible land are established in the Bill in proposed new section 4B.

   To answer the specific question, the term 'interest in' refers to an exclusive possession native title determination (s4B(1)(b)), the term 'ownership' refers to a land title of various types being in existence (the balance of s4B), such as land titles held by Land Trusts (s4B(1)(a) specifically).

   The concern raised by the Central Land Council regarding a lack of clarity was recognised in the drafting of the Bill. The following provides additional information regarding this point.

The determination of eligible land is central to the operation of Aboriginal water reserves and therefore, the categories of eligible land are definitive. The definition of Aboriginal Land (Trust land), for example, is as defined in the relevant legislation. Which class of eligible Aboriginal people gives consent to access an Aboriginal water reserve will be driven by the tenure of the land or the interest held in that land.

The definition of 'eligible Aboriginal people' is only referred to in the Bill in the definition of the new beneficial use category of 'Aboriginal economic development'.

The classes of eligible Aboriginal people, for each category of eligible land, are not defined in the Bill.

The Committee's question relates to whether this results in a lack of clarity around who the eligible Aboriginal people are for Aboriginal Land Trusts.

Whether or not there is a lack of clarity is not, in itself, the issue, as the Bill sets out a process for any lack of clarity to be resolved.

The Committee will note that the Bill refers to a role being conferred on Land Councils under the Water Regulations 1992 (proposed new section 108(2)(w) refers). This role has not been determined at this stage; however, it is likely to include a role in obtaining the consent of eligible Aboriginal people. The manner and form of consent by eligible Aboriginal people will also be prescribed in the Regulations (refer proposed new section 71BA(2)) and will include reference to the relevant consent provider. In most cases, this is likely to relate to a legal land-holding entity.

The clarity around who will provide consent will be in the Water Regulations 1992, and these details will be developed by the Department of Environment and Natural Resources in consultation with the relevant Land Councils and on the basis of other advice.

2. Revisiting the definitions of beneficial use categories is not under consideration at this time as it sits outside of the scope of approved drafting. Therefore, the impact of changing the definition of the cultural beneficial use on the *Water Act 1992* and declared water allocation plans, has not been assessed. However, the comments made by the Central Land Council regarding the definition of cultural beneficial use falls within the scope of broader water regulatory reform and will be considered for future amendments to the *Water Act 1992*.

3a. In terms of benefit and with reference to 1. above, it needs to be clear who can benefit from an Aboriginal water reserve. Exclusive possession native title determinations offer this possibility, non-exclusive native title determinations do not. The amending provisions in the proposed Bill reflect the Policy.

To answer the Committee's question insofar as it relates to the Policy, the difficulty with including non-exclusive possession native title rights holders in the Policy was that their identity is uncertain until a determination is made, indeed there could also be overlapping and competing claims over a land area. Once a determination is made, the eligible land will be captured in the next review of a water allocation plan.

3b. The Committee's question reflects a legal point of difference, on which the NT Government and Central Land Council hold different views. I am unable to comment further on that point.

3c. The effect on the operation of the Bill by removing the words: "to the exclusion of all others" would be that the Bill captures non-exclusive possession native title determinations. Refer to 1. and 3a., above.

4a. The beneficial use category of 'environment' is established as compulsory in the *Water Act 1992* through the operation of s22B. The addition of 'Aboriginal economic development' as a new beneficial use category in the *Water Act 1992* is reflective of the Policy which states: "*the Water Act will be amended to ensure that Strategic Aboriginal Water Reserves are enduring requirements of water allocation plans ...*". The Central Land Council's submission refers to the proposed new section 22A(2) which will have the effect of establishing 'environment' and 'Aboriginal economic development' as beneficial use categories for declared water control districts, ahead of any other beneficial uses being declared for that district through a declaration made by the Administrator in the *Gazette* under s22A(1). The Central Land Council's submission requests that 'cultural' be added to these other two beneficial use categories, to apply in the same way. This proposed new section 22A(2) has been drafted to clarify the status of these two beneficial uses, one existing, one new. The proposal to add 'cultural' is outside of the approved drafting scope and the implications have not been assessed.

4b. The inclusion of 'cultural' as a default beneficial use category is outside of the approved drafting scope, but can be considered in future reforms to the *Water Act 1992*, as for the suggestion at 2. Therefore, the implications on the *Water Act 1992* of establishing 'cultural' as a default beneficial use category have not been assessed. Similarly, the implications on existing water allocation plans have not been assessed.

5a. Water allocation plans are prepared for the management of water resources, and Aboriginal water reserves will be established in water allocation plans, that is for an Aboriginal water reserve to be established, a water resource must exist. The situation posed in the Committee's question, would not arise.

6a. Again, this question relates to the Policy. I will interpret the Committee's question as meaning why 30 per cent was chosen, rather than the actual percentage of eligible land in a water allocation plan area.

Water allocation plans are developed for water resources for which there is high competition. In cases where water allocation plans are fully or over allocated, such as where there has been extensive water-based development and/or water allocation plans have been in place for some time, the licensing process has distributed all available water. In these situations, the Aboriginal water reserve will be 'notional', that is, not have water allocated to it.

Due to variations between water allocation plan areas, the establishment of a threshold is preferable to a one size fits all approach. A tangible, objective measure also supports certainty and transparency around the calculation of an Aboriginal water reserve volume, in preference to more subjective measures.

The Strategic Aboriginal Water Reserves discussion paper identified alternative policy positions for determining access to reserves, including percentages. As the Committee will appreciate, this consultation resulted in a range of views being presented from a wide range of stakeholders, starting from a percentage as low as three per cent. Thirty per cent is the resulting threshold adopted by the Northern Territory Government in the established Policy and is considered to be a reasonable and achievable target, considering the limitations around access to water in some water allocation plans.

It is not intended to revisit the Policy and it is not intended to capture the thresholds in the Bill.

Yours sincerely

EVA LAWLER

19 SEP 2019