LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

Inquiry into the Water Amendment Bill 2019

May 2019

Contents

Chair's Preface **4**
Committee Members **5**
Committee Secretariat **6**
Acknowledgments **6**
Acronyms and Abbreviations **7**
Terms of Reference **8**
Recommendations **10**

1 Introduction **11**
Introduction of the Bill 11
Conduct of the Inquiry 11
Outcome of Committee's Consideration 11
Report Structure 12

2 Overview of the Bill **13**
Background to the Bill 13
Purpose of the Bill 13

3 Examination of the Bill **14**
Introduction 14
Clause 4 – proposed section 4(1) definition of hydraulic fracturing 14
Clause 7 – proposed section 17A – offence provisions 15
Context 15
Issues raised 15
Clause 7 – proposed section 17B – flowback fluid/produced water exemption 19
Clause 8 – no licence to take water for petroleum activity - proposed section 45A 22
Clause 9 – Proposed section 60A – Licence to take ground water for hydraulic fracturing 22
Clause 10 – proposed s67(4) – Grant of recharge licence 27
Section 47 of the *Water Act 1992* 27
Clause 11 – Part 16 inserted – Transitional matters for Water Amendment Act 2019 28
Matters not within scope but related to the Scientific Inquiry recommendations 29

Appendix A: Submissions Received and Public Briefing **31**
Bibliography **32**
Dissenting Report by Mr Guyula **33**

Chair's Preface

This report details the Committee's findings regarding its examination of the Water Amendment Bill 2019.

The Water Amendment Bill 2019 (the Bill) is part of a broader environmental regulatory reform process being implemented through a series of legislative reforms to a number of Acts. The aim of these reforms is to minimise and mitigate risks associated with hydraulic fracturing by implementing the 135 recommendations of the *Final Report of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*. The purpose of the Bill is to give effect to Recommendations 7.6, 7.8(a), 7.9 and 7.17 by introducing provisions to prohibit the following: surface water take for petroleum activities; water extraction for hydraulic fracturing within 1 km of landowner's bore without agreement or hydrogeological information; reinjection of hydraulic fracturing wastewater into aquifers; and release of hydraulic fracturing wastewater to surface waters.

The Committee welcomes the Bill as an important step in minimising the risks associated with hydraulic fracturing activities. In particular, it notes that the proposed amendments will effectively remove any discretion in the decision making powers of the Controller of Water Resources in relation to both water extraction and wastewater management associated with hydraulic fracturing activities, thus assuring a degree of certainty regarding the continued implementation of the recommendations from the Scientific Inquiry.

As highlighted in Chapter 3, a number of submissions raised concerns regarding the penalties proposed for environmental offences relating to hydraulic fracturing waste and water. The Committee acknowledges these concerns but notes that, in line with the recommendations of the Scientific Inquiry, the Northern Territory Government will be undertaking a full-scale review to revise and increase environmental offences and penalties before any production approvals are granted. A number of other pertinent issues were raised by submitters, particularly those regarding provisions on the use of produced water or flowback fluid in the hydraulic fracturing process and criteria for assessing the granting of licences to take ground water for hydraulic fracturing. These issues have been considered by the Committee and have contributed to the Committee's recommendations.

On behalf of the Committee, I thank all the submitters for their comments. I would also like to thank the Department of the Legislative Assembly for the support provided to the Committee, and my fellow Committee members for their bipartisan commitment to the legislative review process. I also acknowledge the work of the Department of Environment and Natural Resources in responding to this inquiry through both attendance at a public briefing and written responses to the Committee's questions.

Mr Tony Sievers MLA
Chair

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Acknowledgments

The Committee acknowledges the individuals and organisations that have made written submissions to this inquiry and the Department of Environment and Natural Resources for providing comments on concerns raised in submissions and for appearing before the Committee at the public briefing.

Acronyms and Abbreviations

ALEC	Arid Lands Environment Centre
CLC	Central Land Council
DENR	Department of Environment and Natural Resources
EDONT	Environmental Defenders Office NT
EMP	Environmental Management Plan
NLC	Northern Land Council
SREBA	Strategic Regional Environmental and Baseline Assessment

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

(1) Standing Order 178 is suspended.

(2) The Assembly appoints the following scrutiny committees:

  (a) The Social Policy Scrutiny Committee

  (b) The Economic Policy Scrutiny Committee

(3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

(4) The functions of the scrutiny committees shall be to inquire and report on:

  (a) any matter within its subject area referred to it:

    (i) by the Assembly;

    (ii) by a Minister; or

    (iii) on its own motion.

  (b) any bill referred to it by the Assembly;

  (c) in relation to any bill referred by the Assembly:

    (i) whether the Assembly should pass the bill;

    (ii) whether the Assembly should amend the bill;

    (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

      (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

      (B) is consistent with principles of natural justice; and

      (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

      (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

      (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

      (F) provides appropriate protection against self-incrimination; and

      (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Water Amendment Bill 2019 with the proposed amendments set out in Recommendations 2 - 4.

Recommendation 2

That the word 'groundwater' be removed from proposed s17B(2)(b) and replaced with words that make it clear that the exemption only applies where produced water or flowback fluid is contained within the hydrocarbon bearing formation.

Recommendation 3

That proposed s60A(2)(b) be amended to read to the effect that:

(b) the Controller is satisfied that hydrogeological investigations and ground water 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)

Recommendation 4

That section 47 of the *Water Act 1992* be amended to state that any notice given under that section does not apply to activities related to hydraulic fracturing.

1 Introduction

Introduction of the Bill

1.1 The Water Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, on 13 February 2019. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 7 May 2019.[1]

Conduct of the Inquiry

1.2 On 15 February 2019 the Committee called for submissions by 11 March 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 As noted in Appendix 1, the Committee received 33 submissions to its inquiry from individuals and organisations. In addition, the Committee also received 257 proforma submissions.

1.4 The Committee held a public briefing with the Department of Environment and Natural Resources on 3 April 2019.

Outcome of Committee's Consideration

1.5 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

(iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with the proposed amendments set out in Recommendations 2 - 4.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Water Amendment Bill 2019 with the proposed amendments set out in Recommendations 2 - 4.

[1] Hon Eva Lawler, Minister for Environment and Natural Resources, Parliamentary Record, *Draft – Daily Hansard Day 2 – 3 February 2019,* http://hdl.handle.net/10070/306106, p. 4.

Report Structure

1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

1.8 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 The Water Amendment Bill 2019 is part of a broader environmental regulatory reform process which is being implemented through a series of legislative reforms to the Water and other relevant Acts. The purpose of these legislative reforms is to minimise and mitigate any risks associated with hydraulic fracturing by implementing the 135 recommendations of the *Final Report of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*.[2]

2.2 In presenting the Bill, the Minister stated that section 90 of the *Water Act 1992* (NT) includes 'a power for the Controller to take into account "any other factors" they consider should be taken into account'.[3] The Minister noted that:

> These factors are very clearly the Government's position and commitment to the [Scientific] Inquiry Report recommendations and which have been spelt out in my Department of Environment and Natural Resources' Onshore Gas Water Licensing Policy.[4]

Purpose of the Bill

2.3 As noted in the Explanatory Statement, the Bill is to give effect to the following recommendations contained in the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (the Scientific Inquiry):

- 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[5]

[2] Hon Eva Lawler, Minister for Environment and Natural Resources, Parliamentary Record, *Draft – Daily Hansard Day 2 – 3 February 2019,* http://hdl.handle.net/10070/306106, p. 2.
[3] Hon Eva Lawler, Minister for Environment and Natural Resources, Parliamentary Record, *Draft – Daily Hansard Day 2 – 3 February 2019,* http://hdl.handle.net/10070/306106, p. 2.
[4] Hon Eva Lawler, Minister for Environment and Natural Resources, Parliamentary Record, *Draft – Daily Hansard Day 2 – 3 February 2019,* http://hdl.handle.net/10070/306106, p. 2.
[5] Explanatory Statement, Water Amendment Bill 2019 (Serial 80), p. 1, https://parliament.nt.gov.au/committees/EPSC/80-2019.

3 Examination of the Bill

Introduction

3.1 Of the 34 submissions received, one submission supports the Bill as it stands[6] while 20 submissions do not support the Bill.[7] Five submissions support the Bill subject to amendments[8] while eight submissions suggested amendments to the Bill but did not clearly express support for or against the Bill.[9] Specific concerns and issues raised in submissions are set out below.

Clause 4 – proposed section 4(1) definition of hydraulic fracturing

3.2 The Northern Land Council (NLC) recommended that the proposed definition of hydraulic fracturing be amended to 'capture all possible forms and variances of anticipated practices' including the use of proppants, which are solids mixed with fracking fluids, 'as a matter of standard practice'.[10]

3.3 The Committee sought clarification from the Department regarding how the amendment recommended by NLC would affect the operation of the Bill and was advised that:

> In relation to the definition of hydraulic fracturing we are looking for consistency across the pieces of legislation that regulate hydraulic fracturing—we are aligning with the Petroleum Amendment Bill. In relation to those specific additional elements to that definition key is that we consider the process of injecting fluids into a petroleum formation to cause fractures in that formation. That is the risk that both we and the inquiry considered. Adding more elements to that definition, such as the use of proppants or other specific elements would mean that in some circumstances you may not qualify under the definition of hydraulic fracturing. Our position is to keep it broad and in line with the existing definitions.[11]

Committee's Comments

3.4 The Committee is satisfied with the Department's response.

[6] Submission 23 – Minerals Council of Australia, p. 1.
[7] Submissions 3-19; Submission 22; Submission 29; Submission 34 (form submission).
[8] Submission 2 – Environmental Defenders Office NT (EDONT), p. 1; Submission 25 – Protect Country Alliance, p. 1; Submission 26 - Arid Lands Environment Centre, p.1; Submission 31 – Protect NT Inc., p. 1; Submission 33 – Central Land Council (CLC), p. 1.
[9] Submission 1 – Dominic Nicholls; Submission 20 – Reverend Dr Levett-Olson; Submission 21 – Groundwater Solutions International; Submission 24 – Lock the Gate Alliance; Submission 27 – Pauline Cass; Submission 28 – Environment Centre NT; Submission 30 – Heidi Jennings; Submission 32 – Northern Land Council (NLC).
[10] Submission 32 – NLC, p. 5.
[11] C Shaw, Department of Environment and Natural Resources (DENR), Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 6.

Clause 7 – proposed section 17A – offence provisions

Context

3.5 As outlined in the Explanatory Statement, proposed s17A introduces new offence provisions to put into effect:

> the prohibitions required by both Recommendation 7.9 relating to hydraulic fracturing wastewater reinjection into aquifers and Recommendation 7.17 relating to discharging hydraulic fracturing wastewater to surface waters such as waterholes, rivers and streams.[12]

3.6 The Committee notes that unauthorised pollution or environmental harm that may result from petroleum activities is already regulated through the *Petroleum Act 1984* and the *Water Act 1992.* However, at present, the pollution offence provisions in these Acts provide for the granting of approvals that would allow hydraulic fracturing waste to come into contact with water. As advised by the Department:

> The approval of an Environment Management Plan under the Petroleum (Environment) Regulations could authorise this disposal within a petroleum site provided that approval criteria could be demonstrated to be met. Further, for wastewater releases outside of the petroleum sites, a waste disposal licence or waste discharge licence could also be granted under the *Water Act* to make that lawful.[13]

3.7 Proposed section 17A 'prevents an application for a waste discharge licence under the *Water Act*, and removes any potential for legal challenge should one not be issued'.[14] In addition, any loss of containment in the well that occurs during a hydraulic fracturing process 'would be subject to the existing environmental harm and pollution offences of the *Petroleum Act* and the *Water Act*'.[15]

Issues raised

3.8 Some submitters considered that the current drafting of s17A is not reflective of modern standards for environmental offences,[16] with the Environmental Defenders Office NT (EDONT) citing section 345 (1) and (2) of the *Water Management Act 2000* (NSW) as an example of best practice.[17] Many submitters considered that the inclusion of fault elements and proof of harm would make enforcement difficult,[18] with one submitter commenting that the offences contained in s17A(1) to (4) would:

> Likely be difficult to enforce in practice, placing an unreasonably high burden on the prosecution because they contain:

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[12] Explanatory Statement, Water Amendment Bill 2019 (Serial 80), p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[13] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 5.
[14] J Townsend, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 4.
[15] J Townsend, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 4.
[16] Submission 2 – EDONT, p. 2; Submission 24 – Lock the Gate Alliance, p. 1.
[17] Submission 2 – EDONT, p. 2.
[18] Submission 2 –EDONT, pp. 1-2; Submission No. 32 –NLC, p. 6; Submission 24 – Lock the Gate Alliance, p. 1; Submission 20 – Reverend Dr Levitt-Olsen, p. 1; Submission 25 – Protect Country Alliance NT, p. 2; Form Submission; Submission 26 - Arid Lands Environment Centre, p. 3; Submission 28 – Environment Centre NT, p. 2; Submission 31 – Protect NT Inc., p. 2.

- 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)[19]

3.9 The Committee requested clarification from the Department regarding the rationale for using fault elements and was advised that:

> The fault elements were modelled on the existing section 16 of the Water Act 1992. However, they were also updated to be compliant with Part IIAA of the Criminal Code of the Northern Territory. Advice was sought from the Department of the Attorney General and Justice regarding the appropriate balance between enforceability and maintaining human rights, particularly given the intent of the new section is to prohibit the deliberate action of disposing waste.[20]

3.10 The Committee notes that when interpreting offence provisions within the Bill it is important to understand that such provisions are now subject to Part IIAA of the *Criminal Code Act 1983* (NT). Offence provisions that are not classified as strict or absolute liability must include fault elements (s43AC and s43ACA of the *Criminal Code Act 1983 (NT)*). Further details can be found in Part IIAA which 'states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences'.[21]

3.11 A large number of submitters considered that the penalties in s17A are too low to provide an adequate deterrent, particularly for body corporates, and will not effectively implement Scientific Inquiry Recommendations 7.9 and 7.17.[22] Arid Lands Environment Centre Inc. (ALEC) drew attention to the similarities between the penalties in s17A and those in the Environmental Offences in the *Petroleum Act 1984*, noting that these had been criticised in Section 14.10.2.5 of the Scientific Inquiry report as being 'too low, having regard to both the potential consequences of non-compliance and the commercial incentives for non-compliance'.[23] ALEC recommended that the penalties be increased in line with standards set by the Scientific Inquiry.

3.12 The Committee raised this issue with the Department and was advised by Mr Shaw that the Scientific Inquiry's recommendation to revise and increase environmental offences and penalties will be undertaken in 'stage 3 of the implementation of the hydraulic fracturing inquiry'.[24] Ms Townsend noted that, in accordance with the specifications of the Scientific Inquiry, stage 3 must be completed before any production approvals are granted:

> The final report also requires that prior to production approvals being granted, environmental offences and penalties associated with petroleum activities be revised

[19] Submission 2 – EDONT, p. 2.
[20] Department of Environment and Natural Resources (DENR), *Responses to Written Questions,* 12 April 2019, p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[21] *Criminal Code Act 1983* (NT), Part IIAA, p. 27.
[22] Submission 2 – Environmental Defenders Office NT (EDONT), pp. 1-2; Submission 32 –NLC, p. 7; Submission 24 – Lock the Gate Alliance, p. 1; Submission 25 – Protect Country Alliance NT, p. 1; Form Submission; Submission 26 - Arid Lands Environment Centre, p. 3
[23] Submission 26 – ALEC, p. 3.
[24] C Shaw, Committee Transcript, public briefing, 3 April 2019, p. 5.

> and increased. This will include increases in criminal penalties, the introduction of civil penalties and reversal of the onus of proof and creation of rebuttal presumptions. These future changes will go through public consultation as they are considered, developed and drafted.[25]

3.13 Several submitters commented that penalties nominated in proposed s17A should be more consistent with other offence provisions in the Act such as those amended by the Water Legislation Amendment Bill 2018, with EDONT noting that sections 44 and 46 of the *Water Act 1992* include strict liability offences and higher penalty rates than are provided for in s17A of this Bill.[26]

3.14 The Committee sought clarification from the Department as to why the strict liability penalty in s17A(5) is lower than those in sections 44 and 46 of the *Water Act 1992* and was advised that:

> Subsection (5) is a smaller offence, which is appropriate for the maintenance of human rights and dealing with circumstances when a genuine accident has occurred. The difference between sections 44 and 46 compared with section 17A is that purposely contravening the requirement for a licence or a licence condition requires a higher level of personal action, relative to a genuine accident or mistake that section 17A(5) may relate to.[27]

3.15 Arid Lands Environment Centre considered that s17A(5) needs to be upgraded if it is to provide a genuine deterrent[28] while some submitters considered that s17A should be re-drafted as a strict liability offence,[29] with the following statement by EDONT generally summing up this view:

> 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).[30]

3.16 The Committee notes that, through proposed s17A(5), the Bill:

> engages the right conferred under Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The right to presumption of innocence is also a fundamental common law principle.[31]

3.17 The Committee, therefore, when considering the appropriateness of requests made in submissions to increase the penalty level of proposed s17A(5), or to redraft s17A 'as a straightforward strict liability offence', is cognisant of the importance of balancing the right to the presumption of innocence against risks to the public interest. The Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) notes that:

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[25] J Townsend, Committee Transcript, public briefing, 3 April 2019, p. 4.
[26] Submission 2 – EDONT, p. 2; Submission 24 – Lock the Gate Alliance, p.2; Submission 30 – Heidi Jennings, p. 2.
[27] DENR, Response to Written Questions, 12 April 2019, p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[28] Submission 26 - Arid Lands Environment Centre, p. 3.
[29] Submission 2 – EDONT, p. 2; Submission 24 – Lock the Gate Alliance, p. 2; Submission 28 – Environment Centre NT, p. 2; Form Submission, p 1.
[30] Submission 2 – EDONT, p. 2.
[31] Statement of Compatibility with Human Rights, Water Amendment Bill 2019 (Serial 80), p. 1, https://parliament.nt.gov.au/committees/EPSC/80-2019.

> The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (i.e. recklessness).
>
> The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so.[32]

3.18 As noted in the Northern Territory Water Legislation Amendment Bill 2018 inquiry report, the Guide outlines further principles on the appropriate application of strict, absolute, or deemed liability, as does the Senate Standing Committee for the Scrutiny of Bills Sixth Report of 2002, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* and the New South Wales Legislation Review Committee's Report No. 6 of 2006, *Strict and Absolute Liability: Responses to the Discussion Paper* (the NSW Legislation Review Committee).

3.19 The Committee notes the relevance, for this Bill, of two of the principles that the NSW Legislation Review Committee adopted in relation to Bills:

> (1) Fault liability is one of the most fundamental protections of the criminal law and to exclude this protection is a serious matter. It should only ever be excluded if, and to the extent that, there are sound and compelling public interest justifications for doing so.
>
> (9) Monetary penalties for particular strict and absolute liability offences must be set at an appropriate and justifiable level having regard to the lack of fault of the person punished and the legislative objective. The Committee will continue to monitor closely the size of monetary penalties to ensure they are not excessive.[33]

3.20 The Committee is of the view that the protection of water in the Northern Territory provides strong justification for including s17A(5). At the same time, it considers that at this stage of the implementation of the Scientific Inquiry recommendations, an environmental offence level 4 is sufficient to achieve this objective, bearing in mind the Department's advice that a full review of environmental offences and penalties will be undertaken prior to any production licences being granted (see paragraph 3.12).

3.21 The NLC recommended that the Bill introduce a requirement for landowners to be notified of any offences under s17A that are committed on their land. The Committee sought clarification from the Department regarding current and future mechanisms for informing landowners of environmental offences committed on their land and was advised that:

> Environmental incidents that occur on a petroleum interest are covered by the *Petroleum Act 1984* and regulations. This includes the requirement to notify the Minister for the Environment about reportable and recordable incidents within a legislated timeframe, with the Minister required to publish the notifiable offences within two days of receiving notification. Further to this, Schedule 1 sub-regulation 9 of the Petroleum (Environment) Regulations requires an EMP to outline future

[32] Department of the Attorney-General, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, Australian Government, September 2011, p. 22.

[33] Legislation Review Committee, Strict and Absolute Liability: Responses to the Discussion Paper, Report No 6 of 2006, Parliament of New South Wales, 17 October 2006. pp. 13-14.

> stakeholder engagement activities between a gas company and affected stakeholders. These plans are anticipated to include an outline of the landholder notification process should an environmental incident related to a petroleum activity occur.[34]

Committee's Comments

3.22 The Committee is satisfied with the Department's responses to the issues raised regarding proposed s17A. It acknowledges the concerns raised in submissions regarding the level of penalties and the limited application of strict liability, however, given the planned review of environmental offences and penalties to be undertaken prior to the granting of production approvals, it considers the proposed penalties to be sufficient for the exploration phase.

Clause 7 – proposed section 17B – flowback fluid/produced water exemption

3.23 Proposed s17B states that the offences in s17A do not apply if hydraulic fracturing waste, in the form of produced water and flowback fluid, comes into contact with ground water during the process of hydraulic fracturing. As noted in the Explanatory Statement, 'any environmental impacts associated with reuse of hydraulic fracturing fluids would be managed through an Environment Management Plan under the Petroleum (Environment) Regulations'.[35]

3.24 Many submitters expressed concern that s17B(1)(b) will exempt operators from being subject to penalties if they contaminate ground water with hydraulic fracturing waste,[36] with EDONT commenting that:

> On our interpretation, if fracking waste water were reinjected into a well and that waste water leaked from the well into an aquifer during that 'frack,' it could be argued that the offences in s17A do not apply. This is because 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. This would appear to be an unintended consequence of the drafting and is clearly contrary to the intent of the Inquiry's recommendations.[37]

3.25 Several of these submitters considered that the drafting of s17B(1)(b) is too broad and that an amendment to the wording is required in order to avoid the potential outcome identified by EDONT.[38] In regard to proposed s17B, the Central Land Council (CLC) commented that:

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[34] Department of Environment and Natural Resources (DENR), Response to Written Questions, 12 April 2019, p. 1, https://parliament.nt.gov.au/committees/EPSC/80-2019.

[35] Explanatory Statement, Water Amendment Bill 2019 (Serial 80), p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019

[36] Submission 30 – Heidi Jennings, p. 1; Submission 28 – Environment Centre NT, p. 2; Form Submission, p. 1; Submission 2 – EDONT, p. 2; Submission 33 – CLC, p. 1; Submission 3 – Pauline Cass, p. 1; Submission 26 – ALEC, p. 1; Submission 32 – NLC, p. 7; Submission 20 – Reverend Dr Levitt-Olsen, p. 2; Submission 31 – Protect NT Inc., p. 2; Submission 19 – Justin Tutty, p. 2.

[37] Submission 2 – EDONT, p. 2.

[38] Submission 2 – EDONT, p. 2; Submission 3 – Pauline Cass, p. 1; Submission 26 – ALEC, p. 1; Submission 31 – Protect NT Inc., p. 2; Submission 33 – CLC, p. 1;

> Hydraulic waste should not come into contact with water contained in aquifers. If this clause is intended to apply only to water contained within shale gas formations, then this should be specified.[39]

3.26 EDONT suggested that s17B(1)(b) be amended as follows:

> (b) the hydraulic fracturing waste comes into contact with water that is contained in the target geological formation during the process of hydraulic fracturing.[40]

3.27 The Committee sought clarification from the Department regarding the reason for including proposed s17B(1)(b) in the Bill. The Department advised that:

> Section 17B has been deliberately … included to facilitate recycling of hydraulic fracturing flowback fluids to future hydraulic fracturing activities within the petroleum well in order to reduce demand for our water resources. The reason it is required is that the gas producing shale formations naturally contain small amounts of water, generally of poor quality. As such, without the disapplication provided for by 17B, having flowback fluid come into contact with this water within the shale formation would be unlawful under section 17A.
>
> We have noted significant concern from submitters regarding the potential for section 17B to be considered as a loophole for pollution. This is not the case. Reinjection of waste into aquifers and discharge into waterways will be an offence.[41]

3.28 The Department further noted that, at present:

> It needs to be understood that these changes are a form of back up to the primary regulatory tool to regulate the environmental impacts of hydraulic fracturing—which is the Environmental Management Plan. Potential pollution risks associated with the reuse of flowback into hydraulic fracturing operations are required to undergo rigorous assessment to demonstrate to the Minister for Environment and Natural Resources' satisfaction that all the environmental risks and impacts have been reduced to As Low As Reasonably Practical and to acceptable levels. This decision will be supported by advice from the independent EPA.[42]

3.29 The Committee sought further clarification from the Department regarding how the requirements of Recommendation 7.9 of the Scientific Inquiry would be met, given that proposed s17B appears to contravene the prohibition set out in this recommendation. The Department advised that:

> we propose, in line with some of the submissions, to change 17B so that the disapplication of the offences of 17A only apply in a circumstance where that waste water, be it flowback fluid or produced water, is contained with the hydrocarbon bearing formation.
>
> The disapplication would not apply if the hydraulic fracturing waste water, through a spill in a hydraulic fracturing process, made a surface water. That will close that potential gap and make it clear that that is not the intent of this provision to allow for that to happen. [43]

Committee's Comments

[39] Submission 33 – CLC, p. 1
[40] Submission 2 – EDONT, p. 2
[41] J Townsend, Department of Environment and Natural Resources (DENR), Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 4.
[42] J Townsend, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 4.
[43] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 5.

3.30 The Committee considers the issues raised in submissions to be valid and is satisfied with the Department's explanation regarding the purpose and intended operation of proposed s17B. The Committee notes that the intention of s17B is to only allow the reuse of produced water and flowback fluid where these are properly contained within the well and the shale formation, and that any spills resulting from its reuse would be prosecuted under s17A. It considers that, if the wording of s17B(2)(b) is amended to more clearly reflect this intention, the requirements of Recommendations 7.9 and 7.17 would be adequately met.

Recommendation 2

That the word 'groundwater' be removed from proposed s17B(2)(b) and replaced with words that make it clear that the exemption only applies where produced water or flowback fluid is contained within the hydrocarbon bearing formation.

3.31 Arid Lands Environment Centre expressed concerns that s17B, by permitting the re-use of produced water and flowback fluids, creates a legal ambiguity as to whether an operator is intentionally disposing of wastewater or simply reusing wastewater during the fracturing process. ALEC commented that there is nothing to 'prevent an operator from disposing wastewater, that is produced or flowback, but declaring that they were simply undertaking fracturing while using produced or flowback water' and recommended that the Bill:

> include an enforceable definition that distinguishes between disposal of waste water and the reinjection of produced/flowback water.[44]

3.32 The Committee sought clarification from the Department as to whether it would be possible for an operator to dispose of wastewater under the guise of using produced water or flowback fluid during a hydraulic fracturing process and was advised that:

> Hydraulic fracturing has a very specific definition in the Bill and there would be no issue discerning between this action to facilitate petroleum production versus waste water injection. There is no technical ability to inject additional waste water under the guise of hydraulic fracturing as it is a highly controlled process.[45]

3.33 The NLC recommended 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*', and 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'.[46]

3.34 The Committee sought clarification from the Department regarding NLC's recommendation and was advised that:

> The purpose of this Bill is not to regulate the composition of flow back water or produced water but to prevent its disposal to surface and ground water in accordance with the recommendations of the Scientific Inquiry.

[44] Submission 26 – ALEC, p. 3
[45] DENR, Response to Written Questions, 12 April 2019, p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019
.[46] Submission 32 – NLC, p. 7.

> The requirements to deal with capture, storage, processing, use, release and disposal are beyond the operation of the *Water Act 1992* and are more relevantly captured by the *Petroleum Act 1984* and legislative mechanisms such as the Codes of Practice, Environment Management Plans and through the *Waste Management and Pollution Control Act 1998*.[47]

Committee's Comments

3.35 The Committee is satisfied with the Department's advice regarding the concerns raised by ALEC and NLC.

Clause 8 – no licence to take water for petroleum activity - proposed section 45A

3.36 Proposed s45A prohibits the granting of a licence to take water under section 45 of the *Water Act* if the proposed use of the water is petroleum activity.

3.37 The NLC commented that the proposed drafting of s45A 'appears broader than the proposed intention' and queried whether 'the prohibition is intended to apply to all water sources, not limited to surface water'.[48]

3.38 The Committee notes that the prohibition only relates to surface water, as s45A will, if passed, sit within Part 5, Division 2, of the *Water Act 1992*, with water in this Division defined as follows: **water** means water flowing or contained in a waterway (Part 5, Division 2, section 43).

3.39 The NLC queried how s45A will be applied and monitored, particularly in relation to existing industry operations. The Committee sought clarification from the Department and was advised that:

> There are currently no approved surface water extraction licences for hydraulic fracturing purposes. Should an application be received the Controller of Water Resources would refuse the application. The Department has a proactive compliance approach and any breach of environmental standards will be investigated, as it would be in all other circumstances.[49]

Committee's Comments

3.40 The Committee is satisfied with the Department's advice.

Clause 9 – Proposed section 60A – Licence to take ground water for hydraulic fracturing

3.41 Proposed s60A gives effect to the first element of Scientific Inquiry Recommendation 7.8 which requires:

> That prior to the grant of any further exploration approvals, the extraction of water from water bores to supply water for hydraulic fracturing be prohibited within at

[47] DENR, Response to Written Questions, 12 April 2019, p. 2, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[48] Submission 32 – NLC, p. 8.
[49] DENR, Response to Written Questions, 12 April 2019, pp. 2-3, https://parliament.nt.gov.au/committees/EPSC/80-2019.

> least 1 km of existing or proposed groundwater bores (that are used for domestic or stock use) unless hydrogeological investigations and groundwater modelling, including the SREBA [Strategic Regional Environmental and Baseline Assessment], indicate that a different distance is appropriate, or if the landholder agrees to a variation of this distance;[50]

3.42 The key concerns raised in submissions in relation to s60A include:

i. the potential impacts of s60A on conflicts between existing bore users and the petroleum industry, particularly if there are drought conditions;

ii. the requirement to seek agreement from the bore owner rather than the landholder in s60A(2)(a);

iii. a recommendation that s60A(2) require that the Controller must not grant the licence unless the conditions of both subsection (a) and (b) are met; and

iv. the degree to which s60A(2)(b) provides adequate assurance that the investigations referred to in this section will be of sufficient quality to ensure there will be no adverse effects on the supply of water to designated bores.

3.43 One submitter raised concerns that proposed s60A could 'put the petroleum industry in conflict with existing groundwater users, especially if the aquifers don't recharge sufficiently due to dry/drought conditions'.[51]

3.44 The Committee notes that licences to take ground water are already granted under s60 of the *Water Act 1992*. Proposed s60A does not grant any additional rights to individuals or companies undertaking petroleum activities, instead, the effect of proposed s60A is to limit the circumstances under which a licence to take ground water for hydraulic fracturing can be granted, thereby providing added protection to aquifers and ensuring compliance with Scientific Inquiry Recommendation 7.8a. The Committee further notes the Department's advice regarding the current criteria in the *Water Act 1992* that influences whether or not an application is granted:

> This requirement [s60A(2)] is in addition to the existing criteria of the *Water Act* that must be taken into the consideration to grant or refuse an application. Some of these considerations include: the availability of water in the area; existing and likely future demand for water for domestic purposes; and potential adverse impacts on other lawful water uses. This means that even if a land owner provides agreement, but there are going to be broader impacts on the water resource or other users, an extraction licence would not be granted.[52]

3.45 Regarding the potential impact of 'dry/drought conditions', the Committee sought clarification from the Department on the extent to which the hydrogeological investigations and groundwater modelling referred to in s60A can adequately take into account adverse effects on water supply if such conditions arise, and was advised that:

> All groundwater models include a recharge model which takes into account the historical climate record in the region (typically over a 50-100 year period). This ensures the model accounts for both wet and dry periods.

[50] Scientific Inquiry into Hydraulic Fracturing in the NT, Final Report, p. 139.
[51] Submission 27 – Pauline Cass, p. 3.
[52] J Townsend, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 3.

> Assessment of water extraction licences take this model into account as to potential impacts caused. The licences are also issued with conditions which provide for water take to be limited in dry conditions as explained … below.
>
> Water extraction licences include a condition that the Controller of Water Resources may amend, revoke, suspend or modify the licence at any time, as provided for in section 93 of the Water Act 1992. In making such a decision the Controller needs to take into account the range of factors outlined in section 90(1) of the Water Act 1992. Considerations in relation to seasonal drought conditions have already been taken into account when the licence was granted.
>
> Section 96(2) of the Water Act 1992 outlines the emergency powers available to the Minister in times of likely or actual water shortages. The Water Controller is also able to reduce the annual allocation of a water licence in areas managed under Water Allocation Plans.[53]

3.46 The second key issue relates to the requirement to obtain the agreement of the bore owner rather than the landholder, and was raised by the Central Land Council which commented that:

> The definition of 'owner' in section 60A (3) does not refer to Aboriginal Land Trusts or other landholders, instead referring to the owner of the bore, which is defined as the holder or applicant of a permit or licence under the *Water Act*, or the person who uses or maintains the bore. Recommendation 7.8a refers to a requirement to obtain the consent of the 'landholder' to extract water within 1 km of an existing bore. However, the definition used in the Water Amendment Bill does not always equate to the landholder, as often the person holding or applying for permits or licences, or using or maintaining bores will not be the owner of the land. For example there may be grazing licences or other licences granted by Aboriginal Land Trusts that allow licensees to use and maintain bores. Furthermore, this definition does not include bores located on Aboriginal Land Trusts that are not in current use, but for which Traditional Owners may have aspirations to use in the future. To properly implement recommendation 7.8a the definition of 'owner' should include landholders with specific reference to Aboriginal Land Trusts.[54]

3.47 The Committee sought clarification from the Department regarding the rationale for referring to 'bore owner' rather than 'landholder' as specified in Recommendation 7.8a and was advised that:

> At a higher level the recommendation is about protecting water supplies from existing bores to make sure that these bores continue to supply the water whether it is for stock and domestic or a licensed take for horticulture. It is that risk that this Bill is trying to manage, not the overarching land access and impacts associated with petroleum activities being undertaken on particular land. There are a range of existing protections for this.
>
> The primary reason we have chosen to have the agreement provided by the bore owner, or the user of the bore, is the fact that they are the ones who use that water and will be impacted should the bore no longer provide appropriate water production.[55]

3.48 The NLC recommended 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

[53] DENR, Response to Written Questions, 12 April 2019, p. 3, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[54] Submission 33 – CLC, pp. 2-3.
[55] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 10.

> inadequately informed or misled land owners, adjacent land owners or bore owners whilst also lowering the risks for harmful environmental outcomes.

3.49 The Committee invited the Department to comment on the NLC's concerns and was advised that:

> As we were working through it, our primary policy background is the fact that the Government has adopted the recommendations of the inquiry and it provided for either/or. We considered that having both be mandatorily required would effectively negate the ability for a bore owner to enter into an arrangement with a petroleum operator if they chose to in an appropriately informed way. That could rule out options for a petroleum proponent to enter into agreement with a bore owner to provide things such as improving their bore to otherwise offset potential and possible impacts or other mechanisms they consider necessary.[56]

3.50 A large number of submissions raised issues in relation to proposed s60A(2)(b), with key concerns relating to the use of the term groundwater 'monitoring' rather than 'modelling',[57] and the extent to which the current wording of this section ensures that hydrogeological investigations will be of sufficient quality to safeguard the supply of water to bores.[58] In relation to groundwater 'monitoring' versus 'modelling', Groundwater Solutions International noted that:

> hydrogeological investigations should cover/include groundwater monitoring. However, 'groundwater modelling' is the accepted method for determining likely future impacts of a groundwater extraction activity on bore users within a radius of 1km. … If the NT Government relies solely on groundwater monitoring to determine whether there are groundwater impacts due to hydraulic fracturing, then by the time the impact is monitored, the problem has already occurred.[59]

3.51 In addition, the CLC commented that:

> Monitoring and modelling have distinct meanings, and in this case modelling would require analysis and evidence as to why there would be no adverse effect to water supply, whereas monitoring would only be applied once extraction has begun.[60]

3.52 The Committee notes that Scientific Inquiry Recommendation 7.8a also refers to groundwater modelling rather than monitoring and sought clarification from the Department as to why s60A(2)(b) used the term monitoring. The Department advised that:

> We will be proposing that this section is subject to an amendment to correct an error in the reference to 'monitoring'. It should read 'modelling' to make it consistent with the Inquiry report.[61]

3.53 Both the EDONT and Lock the Gate Alliance considered that investigations referred to in s60A(2)(b) should require third party verification, with the EDONT commenting that:

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[56] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 10.
[57] Submission 33 – CLC, p. 2; Submission 21 – Groundwater Solutions International, p. 1; Submission 24 – Lock the Gate Alliance, p. 2; Submission 26 - Arid Lands Environment Centre, pp. 3-4; Submission 28 – Environment Centre NT, p. 2.
[58] Submission 2 - EDONT, p. 3; Submission 24 – Lock the Gate Alliance, p. 2.
[59] Submission 21 – Groundwater Solutions International, p. 2.
[60] Submission 33 – CLC, p. 2.
[61] J Townsend, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 3.

> In our view, s60A does not satisfactorily implement recommendation 7.8(a) because there is no accountability mechanism applying to the Controller's decision-making process. The current drafting would allow the Controller to grant a licence on the basis of any 'investigations' submitted by an operator that asserts a finding of 'no adverse effect,' without requiring the Controller to make any form of judgement about the veracity of that information, nor consider independently produced information (e.g. the SREBA).[62]

3.54 The Committee sought clarification from the Department regarding whether the investigations required by s60A(2)(b) were to be supplied by an independent third party, the Department, or the applicant and was advised that:

> It would be up to the applicant to provide a hydrogeological investigation that would be reviewed and verified by the experts within the Water Resources Division. The licence application also goes out for public comment and any issues raised by a third party would be considered by the Water Controller when making her decision.[63]

3.55 The EDONT further suggested that in order to ensure the independent nature of any investigations, and to provide greater accountability over this decision, that the wording of s60A(2) be amended as follows:

> 60A Licence to take ground water for hydraulic fracturing
>
> ……
>
> (2) The Controller must not grant the licence unless… (b) the Controller is satisfied that, based on hydrogeological investigations, ground water monitoring and modelling that have been prepared and/or verified by an independent third party, the activities under the licence will not have any adverse effect on the supply of water to any designated bore….[64]

3.56 The Committee sought clarification from the Department regarding the effect of amending the Bill to require that the Controller be 'satisfied' that hydrogeological investigations indicate there will be no adverse impacts to local groundwater levels and was advised that the Department supports an amendment to this effect.[65] The Department further advised that:

> the Water Controller would still need to be convinced that the factors required under section 90 of the Act were able to be met, and any information obtained from a hydrogeological investigation would be in addition to those factors.[66]

Committee's Comments

3.57 The Committee is satisfied with the Department's advice on issues raised in relation to proposed s60A(2). It agrees with the concerns raised in submissions regarding the use of the term 'ground water monitoring' and considers that this should be replaced with the term 'groundwater modelling'. The Committee is also of the view that s60A(2)(b) should be amended to require that the Controller be satisfied that the

[62] Submission 2 – EDONT, p. 3.
[63] DENR, Response to Written Questions, 12 April 2019, pp. 3-4, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[64] Submission 2 – EDONT, p. 3.
[65] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 6
[66] DENR, Response to Written Questions, 12 April 2019, p. 4, https://parliament.nt.gov.au/committees/EPSC/80-2019.

investigations delineated in this subsection indicate that the licence will not adversely impact on water supply to any designated bore mentioned in subsection (1)(b).

Recommendation 3

That proposed s60A(2)(b) be amended to read to the effect that:

(b) the Controller is satisfied that hydrogeological investigations and ground water 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)

Clause 10 – proposed s67(4) – Grant of recharge licence

3.58 Proposed s67(4) prohibits the Controller from granting a recharge licence 'that permits the increase of water contained in an aquifer with water that is or contains hydraulic fracturing waste'.

3.59 The NLC requested clarification as to whether '*hydraulic fracturing waste* is capable of being re-categorised after treatment', noting that:

> 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 …[67]

3.60 The Committee sought clarification from the Department regarding whether the definition of hydraulic fracturing waste contained in clause 4A prevents hydraulic fracturing waste from being re-categorised and was advised that:

> The definition of Hydraulic Fracturing Waste includes waste that has been treated. Therefore waste cannot be re-categorized and would always be captured by the proposed section 67(4).[68]

Committee's Comments

3.61 The Committee is satisfied with the Department's advice that hydraulic fracturing waste cannot be re-categorised.

Section 47 of the *Water Act 1992*

3.62 One submitter commented that section 47 of the *Water Act 1992* should be removed as it contravened Recommendation 7.9 of the Scientific Inquiry and contradicted the insertion of proposed s67(4).[69]

3.63 Section 47 of the *Water Act 1992* provides that:

> The Administrator may, on the recommendation of the Minister, by notice in the *Gazette,* declare that a provision of this Part [Part 6 – Ground water] does not apply to or in relation to a bore, or to drainage water or waste, of a class or description specified in the notice and, accordingly, that provision does not apply.

[67] Submission 32 – NLC, p. 9.
[68] DENR, Response to Written Questions, 12 April 2019, p. 5, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[69] Submission 27 – Pauline Cass, p. 2.

3.64 Section 47 has the potential to enable the Administrator to exempt the application of proposed sections 60A and 67(4) and could, therefore, result in non-compliance with the following Scientific Inquiry recommendations:

- 7.8a – prohibition on water extraction for hydraulic fracturing within 1km of landowner's bore without agreement or hydrogeological information
- 7.9 - prohibition on reinjection of hydraulic fracturing wastewater into aquifers

3.65 Section 47 could also enable the Administrator to exempt the application of s62 of the *Water Act 1992* which prohibits the disposal of waste underground by means of a bore.

3.66 The Committee sought clarification from the Department regarding the purpose of s47 and its potential impact on the provisions of the Bill and was advised that:

> There are a range of exemptions in different areas in effect across the Northern Territory dating from commencement of the Act in 1992. Exemptions generally exist in very remote areas where the impact and burden of a licence or permit is not warranted, because the risks to water management from extraction are low.

Committee's Comments

3.67 The Committee notes that the intent of the Bill is clearly to prohibit petroleum activities from reinjecting wastes into groundwater and from extracting groundwater in ways that are unsustainable or that do not meet the requirements set out in the Scientific Inquiry recommendations. Although the Department has stated that it is highly improbable that a future Minister would seek agreement from the Administrator to exempt petroleum activities from the provisions in Part 6 of the Act, the Committee is of the view that the exemption provided by s47 of the Act should not apply to proposed sections 60A and 67(4) or to any existing sections within Part 6 of the Act when applied to hydraulic fracturing.

Recommendation 4

That section 47 of the *Water Act 1992* be amended to state that any notice given under that section does not apply to activities related to hydraulic fracturing.

Clause 11 – Part 16 inserted – Transitional matters for Water Amendment Act 2019

3.68 The NLC requested clarification regarding the extent of the transitional arrangements set out in proposed s117 and recommended 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'.[70]

3.69 The Committee invited comment from the Department and was advised that:

> The section itself covers both proposed and existing bores. The transitional arrangements cover licences which are seeking renewal or amendment. An

[70] Submission 32 – NLC, p. 9.

> expired licence which has not sought renewal would not be lawful and would not be covered.[71]

3.70 The Committee notes that there are specified time-frames within which a renewal application must be lodged, if the application is not lodged within the relevant time-frame the licence cannot be renewed and the licence holder must apply for a new licence.

Committee's Comments

3.71 The Committee is satisfied with the Department's advice.

Matters not within scope but related to the Scientific Inquiry recommendations

3.72 Some submitters have commented that the Bill cannot meet the requirements of Scientific Inquiry Recommendation 7.9 unless s7 of the *Water Act 1992* is removed, as it prevents petroleum and mining activities from being subject to the pollution provisions contained in s16 of that Act.[72]

3.73 The Committee notes that the reason that s7 exempts petroleum activities from s16 is because these activities are regulated under the Petroleum (Environment) Regulations or through waste disposal authorisations under the *Water Act 1992*.

3.74 The Bill seeks to adjust this regulatory framework for petroleum activities in accordance with the recommendations of the inquiry. In this context, proposed new section 17A prohibits allowing hydraulic fracturing waste, whether treated or untreated, to come into contact with waters, to make it clear that these activities cannot be authorised under that framework. As noted by Ms Townsend in her opening statement to the Committee at the public briefing:

> As with the application of this Bill to water extraction, 17A makes it an offence for any hydraulic fracturing waste to have contact with surface, ground or tidal waters. This means that reinjection of hydraulic fracturing wastewater into an aquifer, or discharge to surface water, is prohibited. This provision prevents an application for a waste discharge licence under the *Water Act*, and removes any potential for legal challenge should one not be issued.[73]

3.75 The Committee further notes the Department's advice that:

> In the unlikely event of a loss of containment in the well during a hydraulic fracturing process involving the use of flowback fluids, this would be subject to the existing environmental harm and pollution offences of the *Petroleum Act* and the *Water Act*.[74]

3.76 One submitter commented that the insertion of proposed s67(4) would require s63 of the Act to also be amended.[75] Section 63 of the Act sits under Part 6, Division 5 –

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[71] C Shaw, DENR, Committee Transcript, public briefing on Water Amendment Bill 2019, 3 April 2019, p. 11.
[72] Submission 19 – Justin Tutty, p. 2; Submission 27 – Pauline Cass, p. 1-2; Submission 30 – Heidi Jennings, p. 1
[73] J Townsend, Committee Transcript, Public Briefing, 3 April 2019, p. 4, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[74] J Townsend, Committee Transcript, Public Briefing, 3 April 2019, p. 4, https://parliament.nt.gov.au/committees/EPSC/80-2019.
[75] Submission 31 – Protect NT Inc., pp. 1-2.

Waste disposal, and sets out the conditions under which the Controller may grant a waste disposal licence. It is important to note that the Controller can only grant such a licence subject to the *Water Act 1992*. If the Amendment Bill is passed, proposed s17A of the Bill will prohibit the disposal of hydraulic fracturing waste into groundwater. As a result, the Controller will no longer be able to grant a waste disposal licence for hydraulic fracturing waste under s63.

Appendix A: Submissions Received and Public Briefing

Submissions Received

1. Dominic Nicholls
2. Environmental Defenders Office NT
3. Katherine Marchment
4. Leonardo Ortega
5. Ben Robertson
6. Leonie Nelson
7. Karen Schoen

8a. Grusha Leeman
8b. Grusha Leeman

9. David Wright
10. Sarah Robertson
11. Jo Murray
12. Katie Grimshaw
13. Ben McIntyre
14. Barkly Environment Group
15. Sue Fraser-Adams
16. Vicki Stephens
17. Graeme Parsons
18. Johanna Kieboom
19. Justin Tutty
20. Reverend Dr Lee Levett-Olson
21. Groundwater Solutions International
22. Fredericka Saltmarsh
23. Minerals Council of Australia NT Division
24. Lock the Gate Alliance
25. Protect Country Alliance NT
26. Arid Lands Environment Centre Inc.
27. Pauline Cass
28. Environment Centre NT
29. Juliet Saltmarsh
30. Heidi Jennings
31. Protect NT Inc.
32. Northern Land Council
33. Central Land Council
34. Proforma Submission (257)

Public Briefing – Darwin, 3 April 2019

Department of Environment and Natural Resources

- Ms Joanne Townsend, Chief Executive Officer,
- Mr Christopher Shaw, Executive Director, Onshore Gas Reform

Note: Copies of submissions, briefing transcripts and tabled papers are available at: https://parliament.nt.gov.au/committees/EPSC/80-2019.

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Dissenting Report by Mr Guyula

Yingiya Mark Guyula MLA
Member for Nhulunbuy, NT Legislative Assembly

29/04/2019

Economic Policy Scrutiny Committee – Dissenting Report

I do support the recommendations made to the Legislative Assembly by the Economic Policy Scrutiny Committee. However the following is a Dissenting Report that outlines where my view differs from the Committee Report.

1) I do not believe there has been adequate consultation with community
2) I have concerns about the piecemeal nature of changes to legislation that relate to Hydraulic Fracturing
3) I have concerns that penalties in Section 17A of this legislation are not strong enough, and that these will be amended at a later date when they could be amended now.
4) I share the Land Council concerns around Section 60A that excludes Landowners from exercising their authority.

Yours Sincerely

Yiŋiya Mark Guyula MLA

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