



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

**Inquiry into the Water Further
Amendment Bill 2019**

October 2019

Contents

Chair’s Preface	4
Committee Members	5
Committee Secretariat	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
Policy Context.....	13
Water rights under Water Act 1992.....	14
Effect of the Water Further Amendment Bill 2019	14
3 Examination of the Bill.....	15
Introduction.....	15
Clause 4, Section 4 amended (Interpretation) – Aboriginal economic development.....	15
Clause 4, Section 4 amended (Interpretation) – proposed s 4(1) - definition of eligible Aboriginal people.....	17
Section 4(3) – Beneficial Uses of Water	18
Clause 5, Section 4B inserted – Meaning of eligible land.....	18
Clause 6, Section 22A amended – Beneficial uses within water control district.....	20
Proposed s 22A(2)	20
Proposed s 22A(3)	20
Clause 7, Section 22B amended (Water allocation plans).....	21
Clause 8, Section 22C inserted – Designation of eligible land for Aboriginal water reserve in water allocation plan.....	22
Matters outside the scope of the Bill	22
Appendix 1: Submissions Received.....	23
Appendix 2: Public Briefing and Public Hearings.....	24
Bibliography.....	25

Chair's Preface

This report details the Committee's findings regarding its examination of the Water Further Amendment Bill 2019. The primary purpose of the Bill is to embed key aspects of the Strategic Aboriginal Water Reserves Policy Framework within the *Water Act 1992* (NT) and the Water Regulations 1992. The Policy Framework aims to provide eligible Aboriginal people with increased opportunities to access water for economic development and to ensure that Aboriginal water reserves continue to be an enduring requirement of water allocation plans made under the *Water Act 1992* (NT).

The Committee received eight submissions to its inquiry. Five of these submissions supported the Bill but suggested amendments or raised concerns for future review. The three remaining submissions were not within the scope of the Bill. The primary issues raised in submissions concerned the scope of the definitions for "eligible Aboriginal people", "eligible land" and "Aboriginal economic development" and the degree to which these definitions adequately represent the interests of Aboriginal people, taking into account that not all Aboriginal people have land rights or exclusive native title.

The determination of "eligible land" is central to the operation of Aboriginal water reserves. Eligible land is clearly defined in the Bill and includes Aboriginal land as defined in the *Aboriginal Land Rights (Northern Territory) Act 1993* (Cth); land under an exclusive possession native title determination; and Aboriginal land (Northern Territory enhanced freehold). "Eligible Aboriginal people" are those who have rights to, or a connection to, one of these three land tenures. Land under a non-exclusive possession native title determination is not considered to be eligible land. This exclusion was challenged by two submitters who noted that the majority of native title determinations in the Northern Territory are non-exclusive determinations over pastoral leases.

The Committee acknowledges these concerns but notes that the purpose of the Policy Framework is to promote the capacity of Aboriginal people to conduct water dependent commercial developments. Commercial developments on non-exclusive native title land would require the agreement of other rights holders, most commonly the pastoral lease holder and this is likely to impede the setting up of commercial developments. This could have an adverse impact on the ability to achieve the main aim of the Policy Framework which is to facilitate water-related Aboriginal economic development. Consequently, while the Committee considers that further exploration of opportunities to advance economic development for non-exclusive native title rights holders is warranted, it does not fall within the scope of the Bill.

On behalf of the Committee I would like to thank all those who made submissions or appeared before the Committee for their insightful advice and clarification of complex issues. The Committee also thanks the Department of Environment and Natural Resources for their assistance and advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Mr Tony Sievers MLA
Chair

Committee Members

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The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at the public hearing and the Department of Environment and Natural Resources for its advice.

Acronyms and Abbreviations

ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
CLC	Central Land Council
NLC	Northern Land Council

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 Further Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

Recommendation 2

The Committee recommends that clause 6 be amended by removing proposed subsection 22A(3).

Recommendation 3

The Committee recommends that proposed section 22B(7) be amended to remove the words 'all or'.

1 Introduction

Introduction of the Bill

- 1.1 The Water Further 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 Wednesday 14 August 2019. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by Tuesday 15 October 2019.¹

Conduct of the Inquiry

- 1.2 On 16 August 2019 the Committee called for submissions by 4 September 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 2, the Committee received eight submissions to its inquiry. The Committee held a public briefing with the Department of Environment and Natural Resources on 21 August 2019 and public hearings with six witnesses in Darwin on 24 September 2019.

Outcome of Committee's Consideration

- 1.4 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.
- 1.5 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 proposed amendments as set out in recommendations 2 and 3.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Water Further Amendment Bill 2019 with the proposed amendments set out in recommendations 2 and 3.

¹ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft - Daily Hansard – Day 5 – 14 August 2019*, p. 4, <http://hdl.handle.net/10070/753835>.

Report Structure

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 In 2016 the Government made a commitment to reinstate Strategic Indigenous Water Reserves as part of its 2016 Sustainable Water Use Policy. Subsequently, a *Strategic Aboriginal Water Reserves Policy Framework* (the Policy Framework) was developed and completed in October 2017. In presenting the Bill, the Minister for Environment and Natural Resources noted that:

This policy aims to provide eligible Aboriginal people with increased opportunity to access water resources for economic development. As stated in the policy:

Now that the Strategic Aboriginal Water Reserves policy framework has been approved by Government, the Water Act will be amended to ensure that Strategic Aboriginal Water Reserves are enduring requirements of water allocation plans and provide certainty in the management of water resources.²

2.2 The aim of Strategic Aboriginal Water Reserves Policy Framework (Aboriginal water reserves) is to ensure that a proportion of water resources in a water allocation plan are reserved for future economic development for Aboriginal people. There are a number of ways in which Aboriginal water reserves can be used for economic development, with potential outcomes including:

- Running their own enterprise on their land;
- Partnering with other businesses to run enterprises on Aboriginal or non-Aboriginal land;
- Trading access to their entitlements to another entity in exchange for agreed benefits which could include monetary or employment opportunities.³

Purpose of the Bill

2.3 As noted in the Explanatory Statement, the purpose of the Bill is to:

capture aspects of the Northern Territory Government's Strategic Aboriginal Water Reserves Policy Framework (October 2017) into legislation to ensure that strategic Aboriginal water reserves remain an enduring requirement of water allocation plans made under the *Water Act 1992*.⁴

Policy Context

2.4 A number of issues raised in submissions relate to the interaction between land rights and water rights. In order to ensure clarity regarding how water rights are structured

² Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft - Daily Hansard – Day 5 – 14 August 2019*, p. 4, <http://hdl.handle.net/10070/753835>.

³ Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft - Daily Hansard – Day 5 - 14 August 2019*, pp. 4-5, <http://hdl.handle.net/10070/753834>.

⁴ Explanatory Statement, *Water Further Amendment Bill 2019 (Serial 100)*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/100-2019>.

and managed in the Northern Territory, this section provides a brief overview of water rights under the *Water Act 1992* (NT) and of the effect of the Bill on these rights.

Water rights under Water Act 1992

2.5 Section 9(2) of the *Water Act 1992* (NT) provides:

Subject to the Act, the property in and the rights to use, flow and control of all water in the Territory is vested in the Territory and those rights are exercisable by the Minister in the name of and on behalf of the Territory.

2.6 Thus, according to the Act, no one has the right to take or use water except as provided by the Act.

2.7 The Act gives a general public right to take surface water for domestic or stock purposes (s 10). It also gives owners and occupiers of land rights to take surface or ground water for a range of limited purposes (ss 11 – 15).

2.8 The other source of a right to take water under the Act is a water extraction licence (ss 45 and 60).

2.9 The Act also provides for the creation of water allocation plans for water control districts. These plans propose how water should be allocated within the district. These plans, where they apply, must be considered by the Controller when making decisions regarding a permit, licence, or consent (s 90). The plans do not give or take any rights to access or use water.

Effect of the Water Further Amendment Bill 2019

2.10 The Water Further Amendment Bill 2019 creates a new beneficial use of water under a water allocation plan of “Aboriginal economic development” and provides for how such a use is to be determined and allocated under a water allocation plan. This creates a notional reserve of water in the water control district for Aboriginal economic development but does not in itself create any right to access or use any water.

2.11 The one part of the Bill that directly controls water rights is proposed s 71BA which prohibits the Controller granting ‘a water extraction licence in relation to an Aboriginal water reserve unless the Aboriginal persons of a class prescribed by regulation have given consent’.

2.12 No part of the Bill takes away or erodes any Aboriginal rights to water. As such it was strongly supported by the Northern Land Council (NLC) and Central Land Council (CLC). However, both the NLC and CLC considered that eligibility for a reserve for Aboriginal economic development should be increased.

3 Examination of the Bill

Introduction

- 3.1 Three submissions addressed matters related to hydraulic fracturing and are not considered to be within the scope of the Bill.⁵ The remaining submissions were supportive of the Bill with some amendments suggested. The Northern Territory Farmers Association Inc. commented on the importance of ensuring that frameworks to access Aboriginal water reserves are well developed and that water for agricultural purposes is not lost.⁶ The primary issues raised in the remaining submissions concerned the scope of the definitions for “eligible Aboriginal people”, “eligible land” and “Aboriginal economic development” and the degree to which these definitions adequately represented the interests of Aboriginal people, taking into account that not all Aboriginal people have land rights or exclusive native title.⁷

Clause 4, Section 4 amended (Interpretation) – Aboriginal economic development

- 3.2 Aboriginal economic development is defined as meaning ‘economic development by or for the benefit of eligible Aboriginal people’ (proposed s 4(1)). Both Protect NT Inc and Heidi Jennings raised concerns that this definition could benefit some Aboriginal families at the expense of others, with Protect NT Inc. commenting that:

We have concerns regarding the words, “or for the benefit of”, being included in this interpretation for the following reasons:

1. It allows a third party to be allocated Aboriginal reserved water.
2. Who decides what is beneficial for the “eligible Aboriginal people”?
3. If an action is economically beneficial but socially detrimental, will it still be eligible under this Bill?⁸

- 3.3 Protect NT Inc commented that while proposed s 71B(1) provides some protection by requiring that the Controller must not grant a water extraction licence in relation to an Aboriginal water reserve unless relevant Aboriginal persons have given consent, this does not ensure that consideration will be given to the needs of the broader Aboriginal community.⁹
- 3.4 The right to withhold or give consent to access an Aboriginal Water Reserve rests with “eligible Aboriginal people” or their authorised representatives. Proposed s 4(1) defines “eligible Aboriginal people” as those ‘who have a legal entitlement to access water resources because of their ownership of, or interest in, eligible land’. Eligible land is defined in proposed s 4B and includes:

- Aboriginal land (scheduled under the *Aboriginal Land Rights Act*);

⁵ Submission 3 – Protect Country Alliance; Submission 5 – Shannon Townsend-Tapp; Submission 7 – Rallen Australia.

⁶ Submission 6 – Northern Territory Farmers Association Inc., p. 1.

⁷ Submission 1 – Protect NT; Submission 2 – Central Land Council (CLC); Submission 4 – Heidi Jennings; Submission 8 – Northern Land Council (NLC);

⁸ Submission 1 – Protect NT Inc, p. 1; Submission 4 – Heidi Jennings, p. 1.

⁹ Submission 1 – Protect NT Inc, p. 1.

- Aboriginal land (Northern Territory enhanced freehold); and
- Exclusive Possession Native Title Determination.¹⁰

3.5 Effectively, this means that the right to give or withhold consent is vested in Aboriginal people who have existing land rights under the legislation set out above. This will include holders of an exclusive possession native title determination and Aboriginal Land Trusts under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). As noted by the Department of Environment and Natural Resources (the Department), Aboriginal Land Trusts can only act at the direction of Land Councils¹¹ which have a wide range of functions in relation to protecting 'the interests of traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council'.¹² In addition:

Land Councils will also have a role in representing **eligible Aboriginal people** in navigating the consent process. This is similar to other functions by Land Councils defined in the *Aboriginal Land Rights (NT) Act 1978* (ALRA).¹³

3.6 Prior to applying for a licence to access water from an Aboriginal water reserve an applicant must gain the consent of the eligible Aboriginal rights holders or their authorised representatives. Licence applications to extract water from an Aboriginal water reserve are subject to the standard requirements of the *Water Act 1992* (NT), as noted in 3.4.4 and 3.4.5 of the *Strategic Aboriginal Water Reserve Policy Framework*:

3.4.4 All applications to extract water from a Strategic Aboriginal Water Reserve will be subject to the standard requirements of the *Water Act*. This includes the same licence application and approval processes (including public notifications of intent and decision, comment and right of review) required for standard water extraction licences.

3.4.5 All licences granted to extract water from a Strategic Aboriginal Water Reserve will be subject to the same standard conditions and licence security protocols that apply to all other water extraction licences in that water allocation plan area.¹⁴

Committee's comments

3.7 The Committee acknowledges submitters' concerns but considers no amendments to be warranted.

¹⁰ Northern Territory Government, *Strategic Aboriginal Water Reserve Policy Framework*, V13/10/17, p. 4, https://denr.nt.gov.au/_data/assets/pdf_file/0011/457553/SWRC-Policy-Framework_A4_V1.pdf.

¹¹ Department of Environment and Natural Resources, *Water Further Amendment Bill 2019* (Serial 100), Submission to the Economic Policy Scrutiny Committee, Public Briefing, 21 August 2019, p.8, https://parliament.nt.gov.au/_data/assets/pdf_file/0004/729724/DENR-TP-for-EPSC-briefing-21AUG19.pdf

¹² *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 23.

¹³ Department of Environment and Natural Resources, *Water Further Amendment Bill 2019* (Serial 100), Submission to the Economic Policy Scrutiny Committee, Public Briefing, 21 August 2019, p.8, https://parliament.nt.gov.au/_data/assets/pdf_file/0004/729724/DENR-TP-for-EPSC-briefing-21AUG19.pdf

¹⁴ Northern Territory Government, *Strategic Aboriginal Water Reserve Policy Framework*, Version 13/10/17, p. 5, https://denr.nt.gov.au/_data/assets/pdf_file/0011/457553/SWRC-Policy-Framework_A4_V1.pdf.

Clause 4, Section 4 amended (Interpretation) – proposed s 4(1) - definition of eligible Aboriginal people

3.8 The Central Land Council commented that the definition of “eligible Aboriginal people” is too vague and noted that the definition does not 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.¹⁵

3.9 The Committee sought clarification from the Department regarding the scope of people who would be “eligible Aboriginal people” under the Bill’s definition in relation to land owned by ALRA Land Trusts, and the scope of what would be considered an “interest in” eligible land under the definition generally and was advised that:

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 71 BA(2)) and will include reference to the relevant consent provider. In most cases, this is likely to relate to a legal land-holding entity.

¹⁵ Submission 2 – Central Land Council (CLC), p. 3.

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.¹⁶

Committee's comments

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

Section 4(3) – Beneficial Uses of Water

3.11 The Central Land Council commented that Aboriginal people have a dynamic relationship with water, with culture being a key component. Although “culture” is included as a beneficial use of water in s 4(3)(e) they have recommended that the definition be amended as follows to be more inclusive of Aboriginal values:

Cultural – to provide water to meet aesthetic, recreational and cultural needs *including the cultural needs of Aboriginal people of a water control district.*¹⁷

3.12 The Committee sought clarification from the Department regarding the effect on the operation of the Bill of amending s 4(3)(e) to implement CLC's recommendation and was advised that:

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*.¹⁸

Committee's comments

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

Clause 5, Section 4B inserted – Meaning of eligible land

3.14 As noted in paragraph 3.4, proposed s 4B recognises a range of land tenures that are eligible for giving rise to an Aboriginal economic development allocation under a water allocation plan.

3.15 Both the CLC and the NLC expressed concern that, for land held under native title, the Bill only includes exclusive native title determinations, with this resulting in the interests of native title holders under non-exclusive native title determinations not being recognised.¹⁹

¹⁶ Department of Environment and Natural Resources, *Responses to Written Questions*, 19 September 2019, pp.1-2, <https://parliament.nt.gov.au/committees/EPSC/100-2019>.

¹⁷ Submission 2 – CLC, p. 4.

¹⁸ Department of Environment and Natural Resources, *Responses to Written Questions*, 19 September 2019, p.2, <https://parliament.nt.gov.au/committees/EPSC/100-2019>.

¹⁹ Submission 2 – CLC, p. 3; Submission 8 – NLC, p. 1.

- 3.16 Proposed s 4B is consistent with the Policy Framework, which provides eligible Aboriginal rights holders to be 'Aboriginal rights holders vested in the following land:
- i. Aboriginal land (scheduled under the Aboriginal Land Rights Act);
 - ii. Aboriginal land (Northern Territory enhanced freehold); and
 - iii. Exclusive Possession Native Title Determination Areas.²⁰
- 3.17 The Department advised that the purpose of the Policy Framework is 'to promote the capacity of Aboriginal people to conduct water dependent commercial developments on their country into the future'.²¹ Commercial developments on non-exclusive native title land, however, would require the agreement of the other rights holders of the land, most commonly the pastoral lease holder. As noted by the Department:
- This means that non-exclusive native title rights holders would usually need to secure a sublease or licence from the relevant pastoralist before proceeding with a commercial development, as well as a water licence and other statutory clearances.
- The additional hurdle of obtaining a sublease or licence may mean that in many cases non-exclusive rights holders will not be positioned to carry out developments on their traditional country because they have been unable to reach arrangements with pastoralists. Potentially, their access to an Aboriginal water reserve could be traded with third parties providing a small income stream; however this is not the main objective of the policy.²²
- 3.18 These impediments to the setting up of commercial developments could result in significant amounts of water remaining unused in Aboriginal water reserves thereby defeating the main aim of the Policy Framework which is to facilitate water-related Aboriginal economic development.
- 3.19 The Northern Land Council argued for a different policy approach:
- Although we support passage of the Bill, the NLC is disappointed that one of our key recommendations has not been adopted – that is, that eligibility should be broadened to encompass Aboriginal land without direct water access, as well as Aboriginal people and communities who have neither land rights nor exclusive native title. There is negligible land held under exclusive native title in the Northern Territory, with the majority of land determined as native title being pastoral leases. While we do not want to delay passage of the Bill, we recommend a review of the policy, which in its current form risks further marginalising and increasing inequality for some Aboriginal groups.²³
- 3.20 The Northern Land Council has emphasised the importance of this concern by noting that the vast majority of native title determinations in the Northern Territory are over land under pastoral leases, and are therefore not exclusive possession native title determination areas.

²⁰ Northern Territory Government, Strategic Aboriginal Water Reserve Policy Framework, Version 13/10/17, p. 4, https://denr.nt.gov.au/_data/assets/pdf_file/0011/457553/SWRC-Policy-Framework_A4_V1.pdf. The Policy Framework states that these 'are defined as those whom, by virtue of their existing land rights, have rights to take water resources for consumptive beneficial uses'. It is not apparent what this means, given that the right to take water for a consumptive use comes from a licence issued under the Act.

²¹ Department of Environment and Natural Resources, e-mail communication, 27 September 2019 (unpublished).

²² Department of Environment and Natural Resources, e-mail communication, 27 September 2019 (unpublished).

²³ Submission 8 – NLC, p. 1.

Committee's comments

3.21 The Committee notes that not including non-exclusive native title land as eligible land is consistent with the Policy Framework and its objective of promoting the commercial use of water on Aboriginal land. While the Committee considers that opportunities to advance economic development for non-exclusive native title rights holders warrants further exploration, it falls outside the purpose of the Bill.

Clause 6, Section 22A amended – Beneficial uses within water control district.

Proposed s 22A(2)

3.22 Section 4(3) of the *Water Act 1992* (NT) contains a list of the beneficial uses of water that can be declared as a beneficial use in a declared water control district. Proposed s 22A establishes the “environment” and “Aboriginal economic development” as default beneficial use categories in declared water control districts. This means that they will automatically exist 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 s 22A(1).²⁴

3.23 Noting the social, cultural, and spiritual significance of water to Aboriginal people, the Central Land Council recommended that proposed s 22A be amended to include “cultural” as a default beneficial use category along with environment and Aboriginal economic development.²⁵

3.24 The Committee sought clarification from the Department regarding the effect on the operation of the Bill of designating “cultural” as a default beneficial use category and was advised that:

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*, 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.

Committee's comments

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

Proposed s 22A(3)

3.26 Proposed s 22A(3) states that subsection (2), which specifies Aboriginal economic development as a default beneficial use of water, does not apply if all or none of the land in the water control district to which the water allocation plan relates is eligible land. The Northern Land Council recommends that subsection (3) be removed as the

²⁴ Department of Environment and Natural Resources, Water Further Amendment Bill 2019 (Serial 100), Submission to the Economic Policy Scrutiny Committee, Public Briefing, 21 August 2019, p. 6, https://parliament.nt.gov.au/_data/assets/pdf_file/0004/729724/DENR-TP-for-EPSC-briefing-21AUG19.pdf.

²⁵ Submission 2 – CLC, p. 3.

Administrator would not declare Aboriginal economic development as a use unless it were relevant.

Committee's comments

3.27 The Committee agrees with the Northern Land Council's recommendation.

Recommendation 2

The Committee recommends that clause 6 be amended by removing proposed subsection 22A(3).

Clause 7, Section 22B amended (Water allocation plans)

3.28 Proposed s 22B(7) states that water allocated under subsection (5)(a) (allocation of water to beneficial uses) is to include an Aboriginal water reserve, 'unless all or none of the land in the water control district to which the water allocation plan relates is eligible land'. The Northern Land Council has recommended that the words 'all or' be removed from subsection (7).

3.29 The Committee notes that in circumstances where a whole area is eligible land, such as a large land trust, a strategic Aboriginal water reserve would not be necessary because there is no competition for water. Consequently, a water allocation plan would not be prepared for such an area and including the words 'all or' in proposed sub-section (7) is redundant. As advised by the Department:

In terms of water allocation and competition for water, because both Anindilyakwa and Tiwi are large Aboriginal Land Trusts and they own their country in entirety, there is actually no competition for water there. We would never find ourselves in the situation where we would need to apply strategic Aboriginal water reserves. Also, it is unlikely that we would prepare a water allocation plan for that country. If we were to do any sort of water planning, it would be a water management strategy and we would develop that in consultation with the right people. It is really the Northern Land Council and the Central Land Council that are the stakeholders in this particular bill.²⁶

Committee's comments

3.30 The Committee considers the Northern Land Council's recommendation to have merit and is satisfied that the words 'all or' in proposed subsection (7) are redundant.

Recommendation 3

The Committee recommends that proposed section 22B(7) be amended to remove the words 'all or'.

²⁶ Committee Transcript, Public Briefing, 21 August 2019, p. 6.

Clause 8, Section 22C inserted – Designation of eligible land for Aboriginal water reserve in water allocation plan

- 3.31 Proposed s 22C(1) enables a water allocation plan to designate eligible land as land in respect of which an Aboriginal water reserve applies if ‘(a) the land is more than 1 hectare; and (b) there are water resources on, under or adjacent to the land’.
- 3.32 The Northern Land Council recommended that proposed s 22C(1)(a) be removed while both CLC and NLC considered that proposed s 22C(1)(b) should be removed.²⁷ The Central Land Council commented that as ‘the Water Policy does not include any methodology or justification for excluding eligible land without water resources’ and, given the ‘limited information on groundwater reserves’ limiting eligible land in this way poses ‘a risk that an Aboriginal water reserve may be excluded from eligible land’.²⁸

Committee’s comments

- 3.33 The Committee considers the circumstances under which a water allocation plan may not designate eligible land as land in respect of which an Aboriginal water reserve applies to be appropriate and is of the view that both subsections (1)(a) and (1)(b) should be retained.
- 3.34 The Committee notes that a key purpose of the Policy Framework is to reserve water for Aboriginal economic development. In view of this major objective it is reasonable to exclude land parcels of under one hectare in size as not being of sufficient scale for economic development.
- 3.35 Regarding the risk that an Aboriginal water reserve may be excluded from eligible land due to limited information on groundwater reserves, the Committee notes that the Bill reflects the methodology established in the Policy Framework for determining eligible land, which is principally land that has direct access to water.

Matters outside the scope of the Bill

- 3.36 A number of other issues were raised in submissions or at the public hearing but were not considered to be within the scope of the Bill. These included:
- The cap on the amount of water from the available consumptive pool that can be included in a Strategic Aboriginal Water Reserve;²⁹
 - Issues relating to the impact of Aboriginal water reserves on other industries;³⁰ and
 - Issues relating to hydraulic fracturing.³¹

²⁷ Submission 8 – NLC, p. 2; Submission 2 – CLC, p. 4.

²⁸ Submission 2 – CLC, p. 4.

²⁹ Submission 3 – CLC, p.3; Committee Transcript, pp. 4 and 7.

³⁰ Submission 6 – NT Farmers Association Inc, p. 1.

³¹ Submission 2 – Protect Country Alliance; Submission 5 – Shannon Townsend-Tapp; Submission 7 – Rallen Australia.

Appendix 1: Submissions Received

Submissions Received

1. Protect NT Inc.
2. Central Land Council
3. Protect Country Alliance
4. Heidi Jennings
5. Shannon Townsend-Tapp
6. Northern Territory Farmers Association Inc
7. Rallen Australia Pty Ltd
8. Northern Land Council

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/EPSC/100-2019>.

Appendix 2: Public Briefing and Public Hearings

Public Briefing – 21 August 2019

Department of Environment and Natural Resources

- Joanne Townsend, Chief Executive Officer
- Christine Long, Executive Director Water Resources

Public Hearing – 24 September 2019

Central Land Council

- Peter Donohoe, Manager Land Management Section
- Su Sze Ting, Senior Lawyer

Northern Land Council

- Greg McDonald, Manager Minerals and Energy
- Tess Cole-Adams, Lawyer

Northern Territory Farmers Association Inc.

- Paul Burke, Chief Executive Officer

Note

Copies of hearing transcripts and tabled papers are available at:
<https://parliament.nt.gov.au/committees/EPSC/100-2019#PB>.

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Hon Eva Lawler MLA, Minister for Environment and Natural Resources, *Draft - Daily Hansard – Day 5 – 14 August 2019*, <http://hdl.handle.net/10070/753835>

Native Title Act 1993 (Cth)

Northern Territory Government, *Strategic Aboriginal Water Reserve Policy Framework*, V13/10/17, https://denr.nt.gov.au/_data/assets/pdf_file/0011/457553/SWRC-Policy-Framework_A4_V1.pdf.

Water Act 1992 (NT)

Water Regulations 1992 (NT)