From: [redacted]
To: EPSC EPSC
Cc: [redacted]
Subject: Submission concerning Water Act Amendment Bill 2019
Date: Tuesday, 5 March 2019 5:23:53 PM

Dear Secretary Jennifer Buckley, Economic Policy Scrutiny Committee,

It was with dismay that I learned only today – and not from public notice by the government – of the narrow time-frame for submissions in regard to this proposed legislation. As a result, I do not have adequate time to provide the scholarly evidence that I have researched in the past about the impact (actual, not potential, impact) of hydraulic fracturing particularly but not exclusively on groundwater sources, including artesian basins and other aquifers. My close reading of the evidence (and the scholarly article I published as a result) is the primary reason I am opposed to the entire process of 'fracking' and its attendant infrastructure, regulatory, evidentiary, environmental, and political implications.

I do understand, however, that this government is committed to the expansion of hydraulic fracturing even though many worldwide jurisdictions are phasing it out as quickly as practicable due both to its poor record of environmental safety, and to the decreasing demand and thus limited profitability for this and other forms of fossil-fuel mining. It may not fall within the proposed Act, but it is certainly pertinent to the NT, that the overseas record of fracking companies defaulting, folding, or declaring bankruptcy, leaves little confidence in any promises of remediation – including to water sources – that the industry might undertake. In almost every case, either no remediation is done, or it is done at public, taxpayer, expense. This is a poor legacy for Territorians who will inherit the liabilities without receiving any corresponding benefits.

In respect to the specific wording of the proposed Water Act Amendment Bill 2019, my main concern is that the language seems designed to protect hydraulic fracturing companies from ever being found guilty of criminal liability for pollution of watersources with fracking waste. It will be almost impossible to prove in a courtroom situation – and prohibitively expensive even to attempt – that individuals or organisations have 'intentionally' engaged in 'conduct' that 'resulted in' damage. The court system is already struggling with cases that involve proof of intent; and the likely consequence in this case is that no 'person' will ever go to court.

Similarly, the (c) clauses in 17 A 1 and 3, by using the words 'has knowledge of the result' become a license for malfeasance, since proving 'knowledge of the result' has failed in almost every court proceeding; it is virtually impossible to prove beyond doubt that 'knowledge' existed prior to damage occurring. Without a more practicable legal phrase such as 'might reasonably have known or been expected to know' these two clauses in point of fact invalidate the NT's power to litigate in the case of damage.

The definition of 'person' is also not specified in the proposed Act. What is the status of a company – whether multinational corporation, local wholly-owned subsidiary, private-public partnership, or engaged subcontractors – whose actions cause damage? In some jurisdictions corporations are legally defined as 'persons' in regard to (or to escape from) legal liability. Is that the case here? If so, the definition needs to be included in the Act. If not, then again the laws are pointless; because no one 'person' in a corporate structure can ever be proven in a court of law to bear *sole* intent and responsibility for the failings of a company, especially on a systemic basis.

Similarly, there is no definition of 'petroleum activity', which in one clause [60 (1) (A) (a)] seems to include hydraulic fracturing processes but in all other clauses seems not to include fracking. Will companies be able to argue that extraction of 'natural' gas, since it is not a specifically 'petroleum activity' is therefore not covered by the provisions of this Act?

Clause 17 B seems designed to ensure the following: *If any person is found to negligently cause damage to groundwater, the penalties shall not apply if the damage is caused during normal and expected processes.* This is colloquially known as a 'Get Out of Jail Free' clause. If that is the intention, then the public should be better informed that fracking in the NT will perpetually be liability-free. If it is not the intention (and clearly the clause itself has been designed by legal representation of hydraulic fracturing companies) it should simply be stricken out altogether. Whether the damage is caused by the process itself or actions subsequent to that is utterly immaterial: damage to groundwater supplies remains irrevocable, and any penalties applied should first be *made to apply* and second reflect the gravity of *generational harm* to the shared environment. That is clearly not the design of this Bill.

The Act allocates significant responsibilities to the 'Controller' (also not defined in the Act) but does not set out any penalties should this official fail, through accident or intent, to police water resources in ways that are transparent, scrupulous, and independently verified by NT Parliament.

It is not easy to know whether the proposed Water Act Amendment Bill 2019 is simply written in undue haste and therefore without proper regard to the clear legal consequences of its vague and dismissive penalties; or if it is a matter of intention by the current NT government to ensure that hydraulic fracturing proceeds expeditiously by companies who need have no fear of consequences should they corrupt groundwater sources for generations to come. Whichever reason applies, the result is the same: this Amendment as currently worded will mean that no person, company, or corporation will ever in the NT's future be held to account for damage to the water that belongs to all NT residents and future generations.

The existing international record of hydraulic fracturing is so negative that many jurisdictions are attempting retrospective legislation to curtail, control, or even embargo the entire process. Those jurisdictions are usually being challenged in the courts in such punitive juridical torts by the corporate interests involved that the majority simply give up on ever remediating the damage already done.

I doubt, however, that there is any other jurisdiction besides the NT that is determined, *prospectively*, to suffer such consequences by intent and will. Yet that is the inevitable outcome of this proposed Act in its current wording. It is, in essence, a grant of perpetual impunity for every entity that desires to introduce hydraulic fracturing to this Territory.

I would like to hope that if the voice of Territorians changes the government at the next election on the basis of maintaining the NT's previous (and prudent) ban on hydraulic fracturing, then the current members who remain may be willing to revisit this proposed Water Act and get it right at that point. Far better, however, to correct its deficiencies now: the signal must be clear to all interested fracking companies that they imperil water supplies at significant peril to their own fiduciary and risk-assessment processes.

Specific wording changes which could assist in this include:

- Replacement of the current clauses in 17 A (1) (a), (2) (a), (3) (a), and (4) (a) with words such as these:
    - 'the person or associated persons undertake, assign, or contract by hire conduct in any hydraulic fracturing processes that …'
    - The words 'intentionally' and 'has knowledge of' should be stricken out completely.

- Removal of 17 A (1) (c) and 3 (c) altogether, or the replacement of *all* these clauses in 17 A 1 to 5 by words such as these:
    - 'a reasonable person or association would know or be expected to know, or to avoid reckless actions likely to cause, the result …'

- The removal of 17 B altogether – no replacement wording can repair its effect of granting operational impunity to all involved in the hydraulic fracturing industry.

- Adding narrowly statutory definitions of 'person', 'Controller', and 'petroleum activity' that capture for the purpose of criminal liability the nature of corporations, group decision-making, opacity in grants-decisions, and evidence of corruption, in regards to our water.

I beseech your Committee, by the redrafting of this legislation, to at least attempt some semblance of protection of the watersources on which all citizens (and natural inhabitants fauna and flora) of the Northern Territory rely, and which we are duty-

bound to hand on in perpetuity, undamaged and intact, to the generations still to come.

The final Act will consequently reflect either your intention to protect our water, or your determination to compromise it forever for the sake of temporary greed in the face of international evidence and the precautionary principles of proper governance.

Written in haste and sincerity this 5th day of March 2019, respectfully,
L Lee Levett-Olson

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