ENVIRONMENTAL DEFENDERS OFFICE NT

2/7 Pavonia Place, Nightcliff NT
GPO Box 4289 Darwin NT 0801
Tel. 08 8981 5883
edont@edont.org.au
www.edont.org.au

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Economic Policy Scrutiny Committee
Legislative Assembly of the Northern Territory
Parliament House
Darwin, NT 0800
By email: EPSC@nt.gov.au

Dear Chair and Committee members

Submission on Water Amendment Bill 2019

The Environmental Defenders Office (NT) Inc (**EDONT**) welcomes the opportunity to make a submission to the Committee on the *Water Amendment Bill 2019* (**the Bill**).

EDONT is a community legal centre specialising in public interest environmental law. We regularly advise and represent clients on matters relating to petroleum, mining and water issues. We have engaged closely in the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry**) and the subsequent implementation of its recommendations by the Northern Territory government.

We understand the intent of this Bill is to amend the *Water Act* (**the Act**) to implement the following four recommendations of the Fracking Inquiry:

- Recommendation 7.6 – prohibition on the use of surface water for hydraulic fracturing (**fracking**)
- Recommendation 7.8(a) – prohibition of ground water extraction within 1km of existing stock/domestic use bores (unless the landholder agrees, or hydrogeological information indicates an alternative distance is appropriate)
- Recommendation 7.9 – prohibition on the reinjection of waste water into deep aquifers and conventional reservoirs
- Recommendation 7.17 – prohibition on discharge of fracking waste water into surface waters.

Our submission focuses on whether the Bill's drafting is appropriate to fully implement the intent of these recommendations.

EDONT supports this Bill, subject to amendments being made to resolve three issues, discussed below. In our view, these three matters undermine the implementation of recommendations 7.9, 7.17 and 7.8(a).

Comments on Bill provisions

a. Offence provisions (proposed s17A)

EDONT supports the establishment of offences to implement recommendations 7.9 and 7.17 (combined with proposed s67, which prohibits the Controller from granting a licence to reinject fracking wastewater into an aquifer)[1]. We support that the s17A offences cannot be 'avoided' via an approval or authorisation (i.e. an environmental management plan), as this is consistent with the Fracking Inquiry's intent that there be an absolute prohibition on fracking waste coming into contact with surface and ground water.

[1] This is subject to our concerns regarding proposed s 17B, discussed below.

However, we consider the drafting of s17A needs to be revised to adequately deliver a 'prohibition' consistent with recommendations 7.9 and 7.17.

In particular, the offences contained in subsections (1)-(4) do not reflect modern standards for environmental offences. They would likely be difficult to enforce in practice, placing an unreasonably high burden on the prosecution because they contain:

- 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).

We consider it is likely that in practice, only the strict liability offence (s17A(5)) may be prosecuted. As the lowest penalty levels apply for this offence (maximum penalty of $59,675 for corporations; $11,935 for individuals), this seriously undermines the utility of s17A as a prohibition[2].

The provisions, therefore, do not reflect best practice environmental offences[3]. We are particularly surprised at the drafting because it is inconsistent with other offences in the Act which were amended in late 2018[4]. The introduction of strict liability, reversal of the burden of proof, and increased penalty amounts into the Act brought its offence provisions into line with modern standards. It is perverse for s17A to be drafted inconsistently with these recently updated provisions.

Given the above, we consider s17A does not satisfactorily implement recommendations 7.9 and 7.17. 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).

b. <u>Flowback fluid/ produced water exemption (proposed s 17B)</u>

EDONT understands the intent of s17B is to enable flowback fluid and/or produced water to be reused in fracking wells, without creating the unintended consequence that an operator could be guilty of an offence if that fluid comes into contact with water occurring in the shale gas formation. This position has been taken on the assumption that the re-use of fracking waste water (if treated) is appropriate as it would reduce the volume of ground water extracted for fracking.

We are concerned that the exemption in s17B(1)(b) has been drafted too broadly. 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 coms 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.

We suggest this issue could be easily resolved by amending the drafting as follows (or with words to similar effect):

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[2] As we have previously observed, for penalties to be effective, they must:
a) reflect the seriousness of the offence, and
b) present a genuine deterrent, in particular to ensure that noncompliance is not simply factored into the 'cost of doing business'.

[3] In addition to the offence provisions in the *Water Act* (e.g. ss44, 46) that could be a model for drafting, there are many examples in environmental legislation around Australia that could be drawn on. For example, the *Water Management Act 2000 (NSW)* provides:
Section 345 - Harm to aquifers and waterfront land
(1) A person who harms an aquifer or waterfront land, and does so intentionally or negligently, is guilty of an offence.
Tier 1 penalty.
(2) A person who harms an aquifer or waterfront land is guilty of an offence.
Tier 2 penalty.

[4] *Water Legislation Amendment Act 2018*

Section 17B(1) Application of section 17A

……

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

This amendment would make it explicit, and beyond doubt, that it is an offence under the Act for fracking fluid/produced water that is reinjected into a well to come into contact with any water, with the limited exception of water is part of the target shale gas formation itself[5].

In the absence of this kind of amendment, we consider s17B seriously undermines implementation of recommendation 7.9.

c. Licence to take ground water for hydraulic fracturing (proposed s 60A)

Proposed s 60A seeks to implement recommendation 7.8(a), which provides that licences for groundwater extraction fracking cannot be granted within 1km of another bore, subject to two exceptions:

i. If owners of the bore(s) consent, or

ii. 'unless hydrogeological investigations and groundwater modelling, including the SREBA, indicate that a different distance is appropriate'.

In relation to (ii), proposed s60A(2)(b) implements this as follows: *'..unless… hydrogeological investigations and ground water monitoring indicate that the activities under the licence will not have any adverse effect on the supply of water to any designated bore'.*

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).

We therefore submit that, to provide greater accountability over this decision and to ensure independent information is used (as intended by the recommendation), the drafting of s60A 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….

Concluding comments

Finally, we take this opportunity to reiterate our ongoing concerns about the approach to public consultation on the various reforms that are progressing to implement the Fracking Inquiry's recommendations.

Although we acknowledge this is not a matter directly for the Committee, we strongly urge the NT Government to establish a more coherent and coordinated approach that provides genuine

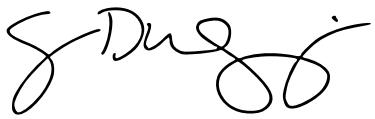
[5] While we acknowledge there may be offence provisions in other legislation that may apply in this scenario, this does not take into account the relative difficulties associated with prosecuting offences under each piece of legislation. For example, the environmental offences under the *Petroleum Act* are generally limited to a 1km radius, require proof of harm, and have defences available (including that the action was authorised), while the *Water Act* pollution offence does not apply on fracking sites. Prosecuting under the *Petroleum Act* would therefore likely be more difficult compared with a strict liability offence prohibiting any fracking waste water coming into contact with ground or surface water, as per our recommended drafting.

opportunities to the community and stakeholders to contribute to shaping the products of these reform processes. As we have previously noted, the current 'piecemeal' approach, whereby various reforms in related matters are released in an uncoordinated manner, and often in the absence of any explanatory material (or not released for comment at all) risks creating confusion and is inconsistent with a commitment to build trust in the reform process and the regulatory framework for fracking.

In the context of this Bill, for example, we understand that additional regulatory matters related to the protection and management of water from fracking (including waste water) will be contained in forthcoming Codes of Practice under the *Petroleum Act* and *Petroleum (Environment) Regulations*. Given the relationship between this Bill and the Codes of Practice, it is disappointing that these were not released as a package for public consultation, prior to the introduction of this Bill into Parliament. This would have enabled these inter-related reforms to be considered together, providing an opportunity for input that is based on a common understanding from all interested stakeholders and the community of the entire proposed regulatory framework.

Yours sincerely

Environmental Defenders Office (NT) Inc



Gillian Duggin

Principal Lawyer