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19 September 2018

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 Legislation Amendment Bill 2018

The Environmental Defenders Office (NT) Inc (**EDONT**) welcomes the opportunity to make a submission to the Committee on the *Water Legislation Amendment Bill 2018* (**the Bill**).

EDONT is a community legal centre specialising in public interest environmental law. We regularly advise and represent clients on issues relating to environmental regulation and water law. For example, in 2015 our office successfully challenged the legality of the then Minister's decision to issue 18 groundwater licences under the *Water Act* in the Supreme Court. We also frequently advise communities on the regulation of mining and petroleum activities. We are widely respected for our expertise, and are regularly invited to participate in policy and law reform processes as a key stakeholder.

1. Reform context

Our understanding is that the intent of this Bill is to amend the *Water Act* (**the Act**) to:

1. Remove the current exemptions for petroleum/mining under the Act so that these industries are regulated in the same way as other water users (consistent with recommendation 7.1 of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry**)), and
2. Improve offences, penalties and compliance to reflect national water industry best practice.

While we have reviewed this Bill within the framework of this intent, we think it is important at the outset to acknowledge the broader context of this Bill, and specifically, that there will be further reforms to water legislation in the near future to implement additional Fracking Inquiry recommendations.

We are concerned that progressing related reforms incrementally risks creating confusion, and may undermine public trust and participation in the law reform process. In our opinion, it is preferable for all fracking-related water amendments to be presented in a single, comprehensive package. This would enable stakeholders and the community to understand and comment on the full picture of reform, building community confidence in the fracking reform process.

However, acknowledging the Committee's terms of reference, and that much of this Bill is not directly drawn from the Fracking Inquiry, we now focus our comments on the Bill provisions.

2. Specific Bill provisions

On the whole, EDONT supports this Bill, subject to our comments and suggested amendments below.

Removal of exemptions for mining/petroleum

We are pleased to see that the Bill removes the current exemptions for mining and petroleum activities from requirements to obtain a licence to interfere with a waterway and from surface and groundwater offence and licensing provisions (Parts 5 and 6 of the *Water Act*). These amendments are long overdue, and are strongly supported.

However, we do not support the continued exemption from the water pollution offence (section 7(2) of the Act). This is inconsistent with the stated purpose of the Bill, which is to apply the same regulatory framework to all water users. Further, it is simply not appropriate to provide mining and petroleum operators with a broad based exemption from prosecution under this Act for polluting water anywhere on their site. On our reading of this exemption, for example, it would protect a fracking company that carelessly spills chemicals and pollutes a waterhole within the boundary of their petroleum permit from prosecution under this Act. There is no rationale for providing an exemption for such an offence, particularly as there could be others who have an interest in protecting and using this water (e.g. pastoralists, traditional owners), and history has shown that reliance cannot be placed on the resource regulator (the Department of Primary Industries and Resources) to hold companies to account for environmental damage.

The repeal of this exemption would not, of course, constrain mining/petroleum operators from carrying out their activities in accordance with their relevant licences and approvals (which would enable the regulated discharge of waste, etc). However it would deliver a more equitable legislative framework, going some way towards rectifying the historically poor environmental regulation of these industries in the Northern Territory.

Offences and penalties

EDONT supports the proposed re-drafting and strengthening of the various offence and penalty provisions in the Bill, including the introduction of strict liability and reversal of the burden of proof. We also support the range of provisions to strengthen compliance and enforcement. These include introducing remediation notices (new sections 33A – 33D), strengthening the powers of the Controller (section 88), extending liability to occupiers/owners, corporate liability, and joint approval holders (new sections 102-102D), establishing continuing offences (section 104A), and specifying additional orders and sentencing matters for Court proceedings (new sections 105B and 105C). These changes represent significant progress for compliance and enforcement of water management in the Northern Territory, and are therefore welcome.

However, while these reforms are critically important, we consider that these amendments will be of limited value without adequate regulatory tools and transparency measures to support implementation. We strongly recommend the government ensure that the Bill incorporates[1]:

- Transparency of water licences (through mandatory publication) so that the public can see exactly what conditions licences are subject to;
- Mandatory measurement of water extractions (e.g. through metering) and obligations to make that data available publicly; and
- Regular compliance audits (e.g. of development/infrastructure on licence-holding properties).

We acknowledge that proposed section 88 enables the Controller to require a person to 'install, operate and maintain equipment,' which would enable the installation of meters. However, transparency over this information (and regular audits) will be critical for developing a robust compliance regime that the community trusts. We have not identified adequate transparency provisions in the Bill (or the Act). The Register established by section 95 of the Act (and clause 17

[1] These kinds of matters have been identified as essential to responding to water compliance issues in the Murray-Darling Basin. See for example, the submission by EDONSW on the recent NSW Water Reform Action Plan: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/5638/attachments/original/1529302770/WRAP_Consultation_2_EDO_NSW_Submission_150418.pdf?1529302770

of the Regulation) does not require publication of licence documents, and there is no requirement to publish data that monitors extractions.

We also consider that the updated penalties, while a significant improvement from the existing penalties in the Act, remain well below 'best practice'. We have reviewed water legislation in Queensland and NSW, and observe that for equivalent offences in those jurisdictions, the penalties are, at a minimum, almost double those proposed in the Bill (and in the case of NSW, the penalties are significantly higher).

For example, proposed section 44 sets the offence of 'taking surface water' without an authorisation as having a maximum penalty of 500 penalty units ($77,500) for unintentional offences, and 1000 penalty units ($155,000) or two years gaol for intentional offences. This can be compared to:

- Queensland, where the equivalent offence has a maximum penalty of $217, 365 (*Water Act 2000*, s808); and
- NSW, where the equivalent offence has a penalty of up to $5 million (corporation) or $1million/2 years gaol (individual) where intentional, or $2 million (corporation) or $500,000 (individual) where unintentional (*Water Management Act 2000,* s60A and s363B).

Other offences also have very minor penalties. For example, proposed new section 88 (powers of the Controller) enables requirements to be imposed on a licence holder to install "equipment" (amongst other things). This is an important power that would enable metering of water extractions, which as we note above, would be a key compliance tool. However, contravening such a notice only attracts a maximum penalty of 50 penalty units ($7,750).

It is well accepted that in order 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'.

We submit that the penalty amounts proposed for the Northern Territory's legislation, while improved, are still far removed from meeting either of these policy objectives, and must therefore be significantly increased.

Transitional arrangements

EDONT supports the effect of proposed new section 113 to the extent that it will remove the exemption for hydraulic fracturing activities with immediate effect (i.e. the requirement for a water extraction licence would apply immediately once the Bill becomes law).

For the avoidance of any doubt, we recommend that the definition of 'hydraulic fracturing' in these provisions should be re-drafted so that it is not be limited to the extraction of 'shale gas'. Instead, it should capture any hydrocarbon (gas, oil) that is subject to the process of hydraulic fracturing.

However, EDONT has concerns about how proposed section 113 is drafted to apply to existing mining and petroleum operations. It is our understanding, from the explanatory statement accompanying the Bill, that for petroleum and mining activities (other than fracking), the amended Act is intended to be applied to these activities as new, renewed or amended environmental management plans (EMPs) and mining management plans (MMPs) are approved. This is not explicit in the Bill, which in our view could be interpreted as simply carrying over the former Act to all existing mining and petroleum activities so long as they have valid EMPs and MMPs. For the avoidance of doubt, we submit that the drafting of section 113 should be clarified to make it explicit that all existing activities will transition to the new Act as their EMPs and MMPs are renewed.

In our view, section 113 should also be amended to have a maximum timeframe for existing mining/petroleum activities to transition to the new framework, i.e. to obtain a licence. For example, while we understand in practice that MMPs are renewed on multiple occasions over the

life of a mine, under the *Mining Management Act* there is no timeframe mandated for their review and amendment (instead, this rests with the discretion of the Minister under s41). Moreover, the public does not have access to these documents, meaning that it is not possible to have any assurance or oversight about timeframes for MMPs being reissued. We therefore strongly consider there should be a clear limit in the Bill on the period of time that an existing mining or petroleum activity can continue under the former Act (i.e. without a licence). This will provide a clear assurance that all mines and petroleum activities will eventually be transitioned to the new framework. We consider a maximum transitional period of 2 years from commencement would be sufficient, and that amendments to this effect should be inserted into clause 113.

3. Future reforms

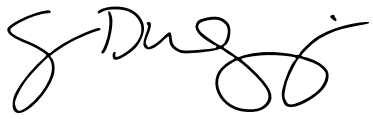
Finally, we would like to take this opportunity to identify more fundamental issues associated with the Act that this Bill could have rectified. These issues include that the Act:

- has no objectives clause (which, ordinarily, would be a key way to guide decision-making);
- provides excessive discretionary powers, with limited criteria to guide decision-making and limited (if any) constraints on powers;
- contains very limited transparency / access to information; and
- includes no access to justice mechanisms for third parties acting in the public interest (that is, third party merits appeal rights to an independent body such as NTCAT, and open standing for judicial review and civil enforcement).

We strongly encourage the government to consider addressing these issues as future reforms to the Act are progressed, to deliver greater accountability and transparency. Their inclusion would ensure there is a genuinely robust and best practice legislative framework for water management in place for the Northern Territory, appropriately reflecting the critical importance of water resources for livelihoods and industry.

Yours sincerely

Environmental Defenders Office (NT) Inc



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