



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Economic Policy Scrutiny Committee

**Inquiry into the Petroleum
Legislation Amendment Bill 2018**

March 2019

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Chair's Preface

This report details the Committee's findings regarding its examination of the Petroleum Legislation Amendment Bill 2018.

In July 2018, the Northern Territory Government released a detailed plan to implement the recommendations from the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*. The primary objective of the Bill is to give effect to a number of these recommendations. Key provisions being introduced by the Bill include: open standing for the review of decisions and determinations through judicial review; the consideration of whether a person or entity is deemed appropriate to hold a permit or licence under this Act; to empower the Petroleum (Environment) Regulations; and the enforceability of codes of practice.

The Committee welcomes the Bill as an important step towards ensuring that petroleum exploration and production activities are regulated in a way that produces environmentally sustainable outcomes. The Committee has recommended that the Assembly pass the Bill with the proposed amendments set out in Recommendations 2 to 11.

As highlighted in Chapter 3, a number of submissions raised pertinent issues, particularly in relation to the provisions for open standing for judicial review and the consideration of whether a person or entity is deemed appropriate to hold a permit or licence under the Act. Concerns raised in submissions have been considered by the Committee and have contributed to the recommended amendments. The relevance of many of the comments put forward in submissions demonstrates the value of the Bill scrutiny process.

On behalf of the Committee, I thank all those who made submissions for their comments on the Bill. 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 Primary Industry and Resources in responding to the Committee's questions through both written responses and at a public briefing.

A handwritten signature in black ink that reads "Tony Sievers". The signature is written in a cursive style and is underlined with a single horizontal line.

Mr Tony Sievers MLA

Chair

Committee Members

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	Party:	Territory Labor
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	Sessional:	Economic Policy Scrutiny
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On 1 February 2019, Member for Fong Lim, Mr Jeff Collins MLA, was discharged from the Committee and replaced by the Member for Sanderson, Mrs Kate Worden MLA.		

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Acknowledgments

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

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 Petroleum Legislation Amendment Bill 2018 with the proposed amendments set out in Recommendations 2 - 11.

Recommendation 2

The Committee recommends that the definition of hydraulic fracturing (cl 4) be amended to replace the term 'gas and oil extraction' and the word 'hydrocarbons' with the word petroleum.

Recommendation 3

That proposed s15A(2)(b) be amended to provide for consideration of an associated entity as per s16(3)(ea) and s45(1)(ea).

Recommendation 4

That proposed s15A(4) be removed and proposed s 15A(1)(a) be amended with words to the following effect: 'whether the person has contravened the prescribed legislation, taking into account the seriousness of past contraventions, the length of time since the contraventions occurred, and any other matters that appear relevant to the Minister'.

Recommendation 5

The Committee recommends that proposed s15A(1)(c) be amended by substituting the words 'prescribed legislation' for 'prescribed environmental legislation'.

Recommendation 6

The Committee recommends that the following legislation be added to the prescribed legislation listed in proposed s15A(6): the Water Act 1992 (NT), the Northern Territory Aboriginal Sacred Sites Act 1989 (NT), and the Taxation Administration Act 2007 (NT)

Recommendation 7

The Committee recommends that the Bill be amended to include the following decisions in the proposed Schedule – Judicial Review of decision or determination (cls 12 and 18):

- Proposed section 15A – appropriate person to hold permit or licence
- Section 19(10) of the *Petroleum Act 1984* (NT) – *determination to either refuse or approve a transfer of an interest.*

Recommendation 8

The Committee recommends that the Bill be amended to enable the Petroleum (Environment) Regulations to update the proposed Schedule – Judicial Review of decision or determination (cls 12 and 18).

Recommendation 9

The Committee recommends that the term “code of practice” should be adopted throughout the entirety of the Bill.

Recommendation 10

The Committee recommends that the phrase “the Minister must be satisfied” be inserted after the word “licence” in cl 10(2).

Recommendation 11

The Committee recommends that the Bill be amended to place on an applicant a clear obligation to disclose matters relevant to section 15A, and to enable the Minister to request further information relevant to a determination under section 15A, in line with Recommendation 14.12 of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.

1 Introduction

Introduction of the Bill

- 1.1 The Petroleum Legislation Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly by the then Minister for Primary Industry and Resources, the Hon Ken Vowles, MLA, on 29 November 2018. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 12 March 2019.¹

Conduct of the Inquiry

- 1.2 On 30 November 2018 the Committee called for submissions by 30 January 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 13 submissions to its inquiry. The Committee held a public briefing with the Department of Primary Industry and Resources on 4 March 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 the proposed amendments set out in Recommendations 2 - 11.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Petroleum Legislation Amendment Bill 2018 with the proposed amendments set out in Recommendations 2 - 11.

¹ Hon Ken Vowles MLA, the then Minister for Primary Industry and Resources, Parliamentary Record, Debates Day 3 – 29 November 2018, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>

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 Provisions of the Bill

Background to the Bill

2.1 The Northern Territory Government is currently undertaking a review of environment protection legislation in response to the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (the Scientific Inquiry). The amendments made in this Bill are part of this larger review as set out in the Government's Implementation Plan which, as noted in the then Minister's Explanatory Speech, focuses on the following key actions and reforms:

- Strengthening regulation;
- Ensuring accountable industry practice;
- Safeguarding water and the environment;
- Respecting community and culture;
- Maximising regional benefits/local opportunities; and
- Planning for industry.²

Purpose and Overview of the Bill

2.2 As noted in the Explanatory Statement, the purpose of the Bill:

is to make amendments to the *Petroleum Act* to give effect to a number of recommendations made by the Inquiry into Hydraulic Fracturing in the Northern Territory by providing for open standing for the review of decisions and determinations through judicial review; the consideration of whether a person or entity is deemed appropriate to hold a permit or licence under this Act; to empower the *Petroleum (Environment) Regulations*; and to ensure enforceability of codes of practice.³

² Hon. Ken Vowles MLA, the then Minister for Primary Industry and Resources, Explanatory Speech, *Debates Day 3, 29 November 2018*, p. 6, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>

³ Explanatory Statement, *Petroleum Legislation Amendment Bill 2018 (Serial 76)*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

3 Examination of the Bill

Introduction

3.1 Of the 13 submissions received, two unequivocally support the Bill with one requesting that the Bill be processed as soon as possible.⁴ Four submissions generally support the Bill but propose amendments to specific sections⁵ while two simply recommend amendments to the Bill.⁶ The Association of Mining and Exploration Companies expressed concerns that the Bill may have unintended consequences for the mining and exploration industry.⁷ Five submissions do not support the Bill due to a fundamental opposition to hydraulic fracturing, however, these submissions did not make specific reference to any of the clauses contained in the Bill.⁸

3.2 Key issues raised in submissions relate to the following:

- Definition of hydraulic fracturing;
- Appropriate Person to hold a permit or licence;
- Open standing for Judicial Review;
- Approval of Transfers;
- Code of Practice; and
- Matters recommended by the Scientific Inquiry that the Bill does not address.

These issues are examined below.

Clause 4 – Section 5 amended (Interpretation)

3.3 In their joint submission, the Central Land Council (CLC) and Northern Land Council (NLC) commented that the definition of hydraulic fracturing refers to the inducement of fractures that conduct 'hydrocarbons' and that this is undefined in the *Petroleum Act 1984* (NT). They suggest that it would be better to replace the term 'hydrocarbons' with 'petroleum' as this is defined in the Act and would better link the definition of hydraulic fracturing to the definition of petroleum.⁹

3.4 The Committee sought clarification from the Department of Primary Industry and Resources (the Department) regarding the effect of amending the definition as

⁴ Aboriginal Areas Protection Authority, Submission No. 3, p. 1; Katherine Mining Services Association, Submission No. 4, p. 1.

⁵ Australian Petroleum, Production and Exploration Association, Submission No. 9, p.1; Environmental Defender's Office NT, Submission No. 10, p.1; Arid Lands Environment Centre, Submission No. 12, p. 1; Central Land Council/Northern Land Council joint submission, Submission No. 13, p. 4.

⁶ Lock the Gate Alliance, Submission No. 6; Association of Mining and Exploration Companies, Submission No. 1.

⁷ Association of Mining and Exploration Companies, Submission No. 1, p. 1.

⁸ Heidi Jennings, Submission No. 2; Judyanne Kent, Submission No. 5; Protect NT Inc., Submission No. 7; Jeremy Singer, Submission No. 8; Pauline Cass, Submission No. 11.

⁹ CLC/NLC joint submission, Submission No. 12, p. 13.

requested and was advised that it would not adversely affect the operation of the Bill. The Department proposed an amended definition as follows:

“Hydraulic fracturing” means the underground petroleum extraction process that involves the injection of fluids at high pressure into a geological formation to induce fractures that conduct petroleum for extraction.¹⁰

- 3.5 This amendment also replaces the term ‘gas and oil extraction’ with the word petroleum in order to modernise the language and ensure consistency.

Committee’s Comments

- 3.6 The Committee is satisfied with the Department’s advice.

Recommendation 2

The Committee recommends that the definition of hydraulic fracturing (cl 4) be amended to replace the term ‘gas and oil extraction’ and the word ‘hydrocarbons’ with the word petroleum.

Clause 5 – Proposed Section 15A(1) – Appropriate person to hold a permit or licence

- 3.7 Recommendation 14.12 of the Scientific Inquiry recommended:

That the Minister must not grant any further exploration permits unless satisfied that the applicant (including any related entity) is a fit and proper person, taking into account, among other things, the applicant’s environmental history and history of compliance with the Petroleum Act and any other relevant legislation both domestically and overseas.

That failure to disclose a matter upon request relevant to the determination of whether an applicant is a fit and proper person will result in civil and/or criminal sanctions under the Petroleum Act.

That the Minister’s reasons for determining whether or not the applicant is a fit and proper person be published online.¹¹

- 3.8 Clause 5, proposed s15A, aims to implement this recommendation by introducing provisions that the Minister must have regard to when determining whether a person or body is an ‘appropriate person’ to hold a permit or licence.

Proposed section 15A(1)

- 3.9 Lock the Gate Alliance suggested that s15A(1) should provide greater clarity regarding the applicants to which the appropriate person test applies:

It also needs to be clear that this test applies to any proponent wanting to undertake a petroleum activity including granting a permit or licence, for any exploration activity, appraisal or delineation applications, all EMPs, plus the production application phase. The decision on whether a proponent is an

¹⁰ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

¹¹ Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, Northern Territory Government, p. 403, <https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>.

‘appropriate person’ should also be guided by the opportunity for public submissions of relevant information.¹²

- 3.10 The Committee sought clarification from the Department regarding the type of applications that would require an applicant to be assessed as an appropriate person and was advised that:

The test as to whether a person is an appropriate person will apply to the granting of an exploration permit, a retention licence, and a production/operating licence. A person cannot apply to undertake an exploration activity unless they have an approved Environment Management Plan, which they cannot acquire without an exploration permit or licence. This covers the “appraisal or delineation activities”.¹³

Committee’s Comments

- 3.11 The Department’s response has satisfied the Committee that there is no ambiguity regarding the type of applications for which the Minister must conduct an appropriate person test and that the provisions adequately cover all petroleum activities. The Committee does not consider it practical or necessary for the Minister’s decision to be guided by public submissions on the suitability of an applicant.

Proposed s 15A(2) and (5) - Associated Entities

- 3.12 Some submissions commented that the current drafting of proposed s15A does not make it sufficiently clear that the ‘appropriate person test’ also applies to associated entities, with CLC and NLC noting that:

Under the proposed section 15A, the Minister could consider the conduct of a parent company of an applicant, and its directors, and the partners of an applicant. However, the current drafting of the Bill would not allow consideration of other associated entities, such as agents, joint ventures or other related bodies corporate.¹⁴

- 3.13 The Environmental Defenders Office noted that proposed s15A(2) ‘does not require the Minister to have regard to “associated entities”’¹⁵ while the CLC/NLC joint submission commented that proposed s15A(2) is at odds with proposed s16(3)(ea) and s45(1)(ea), both of which ‘require an applicant to provide information that any parent company or *associated entity* is an appropriate person’.¹⁶
- 3.14 The Department advised that the above observations are correct and that ‘s15A(2)(b) should provide for consideration of an associated entity as per s16(3)(ea) and s45(1)(ea)’.¹⁷

¹² Lock the Gate Alliance, Submission No. 6, p. 2.

¹³ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

¹⁴ CLC/NLC Joint Submission, Submission No. 13, p11.

¹⁵ Environmental Defenders Office NT, Submission No. 10, p. 2.

¹⁶ CLC/NLC Joint Submission, Submission No. 13, p. 11.

¹⁷ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 2, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Committee's comments

- 3.15 The Committee considers the issues raised by CLC, NLC and the Environmental Defenders Office to be valid and is satisfied with the Department's advice.

Recommendation 3

That proposed s15A(2)(b) be amended to provide for consideration of an associated entity as per s16(3)(ea) and s45(1)(ea).

Proposed s 15A(4) – Minister may disregard contraventions

- 3.16 Several submissions expressed concerns regarding the effect of s15A(4) which provides the Minister with discretion to disregard contraventions referred to in s15A(1)(a).¹⁸

- 3.17 CLC and NLC note that there is nothing in proposed s15A(4) that precludes the Minister from determining that a person is an appropriate person. Their submission draws attention to the fact that requiring the Minister to consider contraventions is not the same as requiring the Minister to determine that a person is not an appropriate person on the basis that at some time in the past they have contravened the prescribed legislation. Therefore they recommend that proposed subsection 15A(4) be removed and note that:

To be able to disregard that offence is peculiar and derogates from a holistic assessment of the matters listed under subsections 15A(1) and (2).¹⁹

- 3.18 The Committee sought clarification from the Department regarding the purpose of this section and was advised that:

The intent behind proposed s15A(4) is to allow an applicant access to "natural justice" in the process of determining whether they are an appropriate person. S15A(4)(a) – (c) provide for the regard to the "degree of seriousness of the contraventions", "the length of time since", and any other matter that appears relevant to the Minister".

The Minister is required to publish a statement of reasons as per s15A(5) that would detail this consideration in their determination.²⁰

Committee's comments

- 3.19 The Committee is of the view that proposed s15A(4) is redundant as the provisions in s15A(1) already provide sufficient scope for the Minister to have regard to the matters set out in proposed s15A(4). The Committee proposes that the Department's concerns about "natural justice" would be more appropriately met by removing s15A(4) and amending s15A(1)(a) to require the Minister to take into account the matters set out in proposed s15A(4)(a) to (c).

¹⁸ Arid Lands Environment Centre, Submission No. 12, p. 2; Lock the Gate Alliance, Submission No. 6, p. 2; CLC/NLC Joint Submission, Submission No. 13, p. 10-11.

¹⁹ CLC/NLC Joint Submission, Submission No. 13, p. 10-11.

²⁰ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 4, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Recommendation 4

That proposed s15A(4) be removed and proposed s 15A(1)(a) be amended with words to the following effect: 'whether the person has contravened the prescribed legislation, taking into account the seriousness of past contraventions, the length of time since the contraventions occurred, and any other matters that appear relevant to the Minister'.

Proposed ss 15A(1)(a) and (c) and 15A(6) – application of prescribed environmental legislation and prescribed legislation

3.20 Proposed s15A(6) lists the Acts that are covered by the terms *prescribed environmental legislation* and *prescribed legislation*.

3.21 Several submissions noted that proposed s15A(1)(c) of the Bill requires compliance records to only be considered against prescribed environmental legislation while Recommendation 14.12 of the Scientific Inquiry requires compliance records to be considered against all relevant legislation.²¹ In this respect the CLC/NLC joint submission noted that:

Proposed section 15A makes a distinction between 'contraventions' of prescribed legislation and 'compliance' with prescribed environmental legislation (prescribed legislation and prescribed environmental legislation are defined in section 15A). The Minister must consider compliance with prescribed environmental legislation, but must only consider contraventions of prescribed legislation, which is a narrower consideration. This distinction is not made in the NSW provisions and is not consistent with Recommendation 14.12, which recommends that compliance with all relevant legislation, not just environmental legislation, is assessed.

Consistent with Recommendation 14.12, compliance with prescribed legislation and prescribed environmental legislation should be the relevant consideration for assessing whether or not a person is an appropriate person.²²

3.22 The Environmental Defenders Office NT noted that requiring compliance records to only be considered against prescribed environmental legislation rather than all relevant legislation creates the following risk:

This approach will result in compliance records (e.g. repeated warnings or penalty infringements being issued, demonstrating disregard for environmental management practices) under highly relevant legislation not being a relevant matter for the Minister to consider.²³

3.23 The Committee sought clarification from the Department as to why proposed s15A(c) only required the applicant's compliance record to be considered against prescribed environmental legislation rather than against prescribed legislation and was advised this was in error and that the Department 'agree that compliance to all listed legislation should be required'.²⁴

²¹ Environmental Defenders Office NT, Submission No. 10, p. 2; Lock the Gate Alliance, Submission No. 6, p.1; CLC/NLC Joint submission, Submission No. 13, pp. 9-10.

²² CLC/NLC Joint Submission, Submission No. 13, p. 9.

²³ Environmental Defenders Office NT, Submission No. 10, p. 2.

²⁴ James Pratt, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019.

3.24 Submissions put forward a number of alternatives or modifications to the lists of legislation proposed in s15A(6) including:

- Prescribed environmental legislation should be expanded to include a broader range of legislation such as the *Water Act 1992* (NT), taxation law, land use laws and sacred site legislation.²⁵
- There should only be a single list of prescribed legislation that better captures ‘all relevant legislation that deals with environmental protection, natural resource management (e.g. water) and planning (rather than only identifying a narrow range of ‘pollution’ legislation).²⁶
- A broader list of prescribed legislation should also include relevant repealed legislation.²⁷
- Compliance should also be considered against overseas legislation.²⁸

3.25 The Department advised:

There are practicality issues in attempting to list every piece of legislation (including as and when amended) across all jurisdictions. Provision was made in s15A(6)(v) that prescribed legislation was to mean “an Act of another jurisdiction that is similar in nature and purpose to an Act listed”.

However, DPIR agrees to the insertion of the *Water Act 1992* (NT), and the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), and the *Taxation Administration Act 2007* (NT) into the list of prescribed legislation for determining an appropriate person.²⁹

3.26 The Committee sought clarification from the Department as to why there are two separate lists of legislation rather than one broader list prescribing all relevant legislation and was advised that:

The two separate lists delineate between environmental legislation and the various other types of relevant legislation that an appropriate person will not have breached.

The administration of these separate lists is addressed in that s15A, s16 and s45 of the *Petroleum Legislation Amendment Bill* require consideration of any breaches against the prescribed legislation, noting that as per s15A(6)(a) prescribed legislation includes prescribed environmental legislation as listed.³⁰

3.27 Regarding the inclusion of overseas legislation the Department advised that:

Overseas legislation is covered in s15A(6)(v) and s15A(6)(k) where it references “an Act of another jurisdiction that is similar in nature and purpose to an Act listed”.³¹

²⁵ Arid Lands Environment Centre, Submission No. 12, p. 1; Lock the Gate Alliance, Submission No. 6, p. 1; CLC/NLC Joint Submission, Submission No. 13, p. 9.

²⁶ Environmental Defenders Office NT, Submission No. 10, p. 2.

²⁷ Environmental Defenders Office NT, Submission No. 10, p. 2; Arid Lands Environment Centre, Submission No. 12, p.1.

²⁸ CLC/NLC Joint Submission, Submission No. 13, p. 10.

²⁹ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 3, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

³⁰ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 3, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

³¹ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 3, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Committee Comments

3.28 The Committee is satisfied with the Department's response regarding overseas legislation. The Committee concurs with submitters and the Department that proposed s15A(1)(c) should be amended to require an applicant's record of compliance to be considered against prescribed legislation rather than prescribed environmental legislation. This will enable the Bill to meet the requirements of Recommendation 14.12 of the Scientific Inquiry.

Recommendation 5

The Committee recommends that proposed s15A(1)(c) be amended by substituting the words 'prescribed legislation' for 'prescribed environmental legislation'.

3.29 The Committee acknowledges submitters' concerns regarding the current limitations to the prescribed list of legislation and notes the Department's agreement to expand the list.

Recommendation 6

The Committee recommends that the following legislation be added to the prescribed legislation listed in proposed s15A(6): the Water Act 1992 (NT), the Northern Territory Aboriginal Sacred Sites Act 1989 (NT), and the Taxation Administration Act 2007 (NT)

Clauses 8, 12, 15 and 18 – Open Standing for Judicial Review

3.30 Open standing for judicial review will enable any person to apply to have a decision or determination listed in the proposed Schedule (cl 12) set aside if they consider the original decision maker did not follow the correct process.

3.31 Two submitters expressed the view that all decisions and determinations made under the *Petroleum Act 1984* (NT) and the Petroleum (Environment) Regulations should be eligible for judicial review rather than limiting review to those decisions prescribed in a schedule.³²

3.32 The Committee sought advice from the Department regarding the effect on the operation of the Bill of allowing all decisions made under the *Petroleum Act 1984* (NT) and Regulations to be eligible for judicial review. The Department advised that it is not appropriate for some decisions to be eligible for review as 'they do not serve the purpose or intention of the Inquiry into Hydraulic Fracturing's recommendations'.³³ The Department provided the following example and explanation:

Another example is section 64(2) of the act. The decision by the minister to require a proponent to give notice of information to the minister where petroleum is discovered in an exploration permit or licence area. In essence, the company

³² Environmental Defenders Office NT, Submission No. 10, p. 2-3; CLC/NLC Joint Submission, Submission No. 13, p. 17.

³³ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 5, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

advises government that it has found some resource and the minister make the decision to accept that information.

There is no real logic there to seek why that would be for review, the minister is noting that a company has discovered petroleum resources. Normally that is publicly listed—if it is an ASX listed company it would be detailed publicly anyway. Future development applications through an environmental management plan would also be forthcoming.³⁴

3.33 The Environmental Defenders Office NT commented that:

The ‘schedule’ approach (whereby reviewable ‘decisions’ and ‘determinations’ are set out in a Schedule) carries with it the risk that certain decisions could be inadvertently omitted via drafting errors.³⁵

3.34 Two submissions drew attention to the following two decisions that were not included on the proposed Schedule but which they consider should be judicially reviewable:

- Proposed section 15A – appropriate person to hold permit or licence;³⁶ and
- Section 19(10) of the Petroleum Act – determination to either refuse or approve a transfer of an interest³⁷

3.35 The Committee asked the Department to clarify what processes had been followed to ensure that the proposed Schedule in clause 12 was comprehensive and was advised that:

I am confident that the list there is detailed and accurate. We conducted a legal and policy review of the act to identify all those relevant decisions. The scrutiny process has also identified one that was overlooked and we acknowledge that. There was no intent there, it was an oversight. Again, the scrutiny process has identified that.

In the proposed amendment bill, 15A is not in that list as yet because this Bill has not passed. That is probably an item for the Scrutiny Committee to include in their report that should be included in the decision making process. I am very confident the list is appropriate.³⁸

3.36 The Environmental Defenders Office NT further noted that:

we consider the language of the proposed clauses places potential limitations on the kind of judicial review proceedings that can be brought under open standing. For example, on our interpretation, the drafting could preclude open standing in circumstances where a decision-maker has *failed* to make a decision that s/he is required to make (because it expressly specifies only that ‘decisions’ and ‘determinations’ can be the subject of judicial review).³⁹

3.37 The Committee sought clarification from the Department as to whether the current drafting of the Bill would preclude open standing in cases where ‘a decision-maker has *failed* to make a decision that s/he is required to make’ and was advised that:

³⁴ James Pratt, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019, p. 8.

³⁵ Environmental Defenders Office NT, Submission No. 10, p. 3.

³⁶ Arid Lands Environment Centre, Submission No. 12, p. 2; CLC/NLC Joint Submission, Submission No. 13, pp. 12-13.

³⁷ CLC/NLC Joint Submission, Submission No. 13, pp. 12-13.

³⁸ James Pratt, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019, p. 7.

³⁹ Environmental Defenders Office NT, Submission No. 10, p. 3.

There are existing provisions in the Petroleum Act providing for a number of administrative decisions to be made within determined timeframes. Review provisions for decisions also exist within the Petroleum Act.⁴⁰

3.38 The Department further advised that there are:

Certain areas where making a decision is not time bound and the minister not making a decision might actually be in the best interest of the Northern Territory. For example, that could be to do with acreage and release of acreage. There are other decisions that are time bound and should the decision maker not make a decision within that period then the review provisions become available.⁴¹

3.39 The Australian Petroleum, Production and Exploration Association Limited (APPEA) expressed concerns that the introduction of open standing for judicial review would increase the 'level of risk to development in the NT by allowing any party, regardless of interest, to bring forward legal proceedings on an approval'.⁴²

3.40 In response to this concern the Department advised that the Government has committed to implementing the recommendations from the Scientific Inquiry and that the Inquiry explicitly stated that 'the Petroleum Act and Petroleum (Environment) Regulations be amended to allow open standing for judicial review'.⁴³

3.41 The Committee asked the Department to clarify how the relevance of the Schedule would be maintained, given that legislation is continually updated. The Department advised that:

this is the first tranche of changes to the Petroleum Act 1984 and we have tried to capture those decisions within the Petroleum Act 1984 which involve a decision by the minister and is therefore subject to judicial review. Any further changes to the Petroleum Act 1984, which have been flagged, if those changes involve decisions with the minister, then those decisions will also—and can be in judicial review—be added to the schedule.

Each time the Petroleum Act 1984—I know it will be amended at least another two times—is amended, we will update the schedule in accordance with any decisions and powers that were issued that the minister making of in decision-making.

Whilst there are various concerns that legislation can be dated over time, the decisions in the legislation will remain and the schedule will remain current with those decisions.⁴⁴

Committee's comments

3.42 The Committee acknowledges the concerns expressed in submissions but is satisfied with the Department's responses regarding the utility of prescribing the decisions available for judicial review in a Schedule.

⁴⁰ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 4, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁴¹ Allister Trier, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019, p. 9.

⁴² APPEA, Submission No. 9, p. 1.

⁴³ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 5, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁴⁴ Rod Applegate, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019, p. 7.

- 3.43 The Committee notes that while Section 19(10) of the *Petroleum Act 1984* (NT) was inadvertently omitted from the proposed Schedule, the Department is in agreement that the Bill should be amended to include this decision. Similarly it notes the Department's recommendation that the other decision identified as being omitted, proposed s15A, should be addressed by the Committee in its report.

Recommendation 7

The Committee recommends that the Bill be amended to include the following decisions in the proposed Schedule – Judicial Review of decision or determination (cls 12 and 18):

- **Proposed section 15A – appropriate person to hold permit or licence**
- **Section 19(10) of the *Petroleum Act 1984* (NT) – *determination to either refuse or approve a transfer of an interest.***

- 3.44 Although the Department has partially addressed the Committee's concern regarding mechanisms for maintaining the currency of the proposed Schedule for Judicial Review, it considers that amending the Bill to enable the Schedule to be updated through the Petroleum Environment Regulations provides a better solution than relying on amendments to the Act.

Recommendation 8

The Committee recommends that the Bill be amended to enable the Petroleum (Environment) Regulations to update the proposed Schedule – Judicial Review of decision or determination (cls 12 and 18).

Clauses 9, 11 and 17 – Code of Practice

- 3.45 Two submissions expressed support for the implementation of enforceable codes of practice (cl 11, s 118(2)(ra)) but suggested improvements as discussed below.⁴⁵
- 3.46 The Environmental Defenders Office suggested that 'the definition of 'environment management plan' should be amended to emphasise that a plan must be designed to *avoid* and *minimise* the impacts and risks of the activity on the environment'.⁴⁶ As currently drafted, the definition simply states that such a plan 'addresses potential environmental risks and impacts ...'.⁴⁷
- 3.47 The Committee sought advice from the Department as to the adequacy of the definition of environment management plan and was advised that:

As per Regulation 2(b) of the Petroleum (Environment) Regulations, Environment Management Plans provided for by the Regulations ensure regulated activities are carried out in a manner by which the environmental impacts and

⁴⁵ Environmental Defenders Office NT, Submission No. 10, p. 3; CLC/NLC Joint Submission, Submission No. 13, p. 7.

⁴⁶ Environmental Defenders Office NT, Submission No. 10, p. 3.

⁴⁷ Petroleum Legislation Amendment Bill 2018, cl 11 – s 118(7), p. 8.

environmental risks will be reduced to a level that is as low as reasonably practicable, and acceptable.⁴⁸

3.48 The Environmental Defenders Office NT further noted an inconsistency in the terminology used, with the Bill referring to a ‘code of conduct’ in cl 9 and ‘code of practice’ in cls 11 and 17.⁴⁹

3.49 The Committee requested that the Department clarify why different terms were used and was advised that:

This is unintended. The term “code of practice” should be adopted throughout the entirety of the Bill.⁵⁰

3.50 CLC and NLC commented that the proposed amendments to s118 of the Act do not guarantee that the code of practice will actually be implemented and maintained. They suggest that:

the proposed amendments to section 118 of the Petroleum Act should be changed to *mandate* the Administrator to prescribe a code of conduct and corresponding offences. The proposed drafting affords the Administrator *discretion* to regulate for a code of conduct, which means that there is no way to ensure that Recommendation 14.23 will be implemented and maintained.⁵¹

3.51 The Committee sought advice from the Department regarding whether the provisions in cl 11 provide sufficient certainty that a code of practice will be implemented and maintained. The Department advised that:

As per the Inquiry’s recommendation the codes of practice will be legally enforceable, hence the amendments to the Petroleum Act. The codes of practice will be reviewed periodically with input from DPIR, the Department of Environment and Natural Resources (DENR) and the NT Environment Protection Authority (NTEPA).⁵²

3.52 Regarding the mechanism for amending the code of practice the Department advised that:

Amendments to a code of practice can be made through an amendment to the Petroleum (Environment) Regulations where an amendment will be adopted under these regulations.⁵³

3.53 Lock the Gate Alliance expressed concerns that providing for the Regulations to make and enforce a code of practice could preclude any legal or public scrutiny of the details, result in less strict enforcement of the code and enable its arbitrary amendment by the Department or the Minister. They comment that:

It would be appropriate to include in the Act the requirement that codes of practice, and new codes of practice, to be put out for public consultation and feedback, to ensure the highest level of scrutiny and transparency.⁵⁴

⁴⁸ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 6, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁴⁹ Environmental Defenders Office NT, Submission No. 10, p. 3.

⁵⁰ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 6, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁵¹ CLC/NLC joint submission, Submission No. 13, p. 8.

⁵² Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 6, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁵³ James Pratt, Transcript from Public Briefing with the Economic Policy Scrutiny Committee, 4 March 2019, p. 9.

⁵⁴ Lock the Gate Alliance, Submission No. 6, p. 3.

- 3.54 The Committee sought clarity from the Department regarding the enforceability of the code of practice and the extent to which it would be subject to public scrutiny and was advised that:

The draft codes of practice have been drafted as per the recommendations of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory. The recommendation states that the codes should be enforceable by law. To enable this enforcement an amendment to the Petroleum Act was required to provide for the Regulations to make and enforce codes of practice.

The codes of practice have been drafted as per the recommendations of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory. The codes were developed by a working group consisting of scientific and technical representatives from CSIRO, DENR and DIPR. The draft codes of practice have been subjected to a legal and peer review, and will be subjected to a period of public consultation.⁵⁵

Committee's comments

- 3.55 The Committee is satisfied with the Department's comments. It also notes that with regard to the definition of 'environment management plan', Regulation 2(a) specifies that regulated activities are to be carried out in a manner that is 'consistent with principles of ecologically sustainable development'.⁵⁶

Recommendation 9

The Committee recommends that the term "code of practice" should be adopted throughout the entirety of the Bill.

Clause 10 – Section 93 amended (Approval of transfers)

- 3.56 Two submissions requested that the wording of proposed s93 be strengthened to ensure that the appropriate person test is applied to transferees in the same way as it is applied to normal applications as set out in proposed s15A. Currently, proposed s93(9)(c)(ii) simply states that the Minister *must take into account evidence* rather than *the Minister must be satisfied* that the transferee, parent company and any associated entity is an appropriate person.
- 3.57 The Committee sought clarity from the Department as to why the wording in proposed s93(9)(c)(ii) differs from that used in proposed s15A and was advised that:

DPIR agrees that the phrase "the Minister must be satisfied" should be inserted after the word "licence" in cl 10(2) to ensure consistency of language throughout the Bill.⁵⁷

Committee's comments

- 3.58 The Committee is satisfied with the Department's response.

⁵⁵ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 7, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

⁵⁶ Petroleum (Environment) Regulations (NT), Regulation 2(a).

⁵⁷ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 7, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Recommendation 10

The Committee recommends that the phrase “the Minister must be satisfied” be inserted after the word “licence” in cl 10(2).

Matters recommended by the Scientific Inquiry that the Bill does not address

Failure to disclose information

3.59 CLC, NLC and the Environmental Defenders Office commented that the proposed amendments do not enable full implementation of Recommendations 14.12 and 14.20 of the Inquiry into Hydraulic Fracturing. These recommendations require that an applicant who fails to disclose a matter relevant to the determination of whether the applicant is a fit and proper person should be subject to civil and/or criminal sanctions. The Environmental Defenders Office stated that:

Although the applicant is required to provide ‘evidence that the applicant... is an appropriate person,’ it does not *require* the disclosure of the applicant’s compliance record (and other matters), nor provide clear and appropriate offence provisions if the applicant is misleading or fails to disclose these matters.⁵⁸

3.60 Recommendation 14.12 recommends that failure to disclose a matter upon request relevant to the determination of whether an applicant is a fit and proper person will result in civil and/or criminal sanctions under the *Petroleum Act 1984* (NT).

3.61 The Department states:

S16(3)(ea) of the Bill requires an applicant to provide evidence of being an appropriate person to be granted an exploration permit; S45(1)(ea) of the Bill requires an applicant to provide evidence of being an appropriate person to be granted a production licence; and s93(c)(ii) requires an applicant to provide evidence of being an appropriate person to hold a permit under this Act.

The Department is confident the provisions stated above require a company to demonstrate their record of compliance and/or contravention to prescribe legislation and prescribed environmental legislation as detailed in the Bill.⁵⁹

Committee’ comments

3.62 It is not apparent that an obligation “to provide evidence of being an appropriate person” carries a sufficiently clear obligation to disclose evidence that one is not an appropriate person, that to not do so would comprise a contravention of the Act that would amount to a crime pursuant to section 106 of the Act. To rely on such wording stands in stark contrast to other disclosure requirements, where legislation clearly sets out the elements of the offence and imposes strict liability so inadvertent omission is not an excuse. Examples of such requirements include sections 53 and 55 of the *Water Act 1992* (NT) and section 74 of the *Teacher Registration* (Northern

⁵⁸ Environmental Defenders Office NT, Submission No. 10, p. 1

⁵⁹ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 8, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Territory) *Act 2004* (and proposed section 73A in the Teacher Registration (Northern Territory) Legislation Amendment Bill 2019).

- 3.63 The provisions cited by the Department also do not directly address the Scientific Inquiry's recommendation as they do not create an offence of failing to disclose something on request.
- 3.64 The determination of whether someone is a fit and proper person is a matter that may require some investigation. There are some matters where it would be simple to place an obligation on an applicant to disclose relevant information under proposed section 15A, such as whether the person has contravened the prescribed legislation or had a licence or other authority suspended. The relevance of some matters require the judgement of the Minister. For example, whether a person is in partnership with another person whom the Minister does not consider to be an appropriate person (j), or other matters the Minister considers relevant (k). For such matters the Minister may need to seek disclosure of specific information.

Recommendation 11

The Committee recommends that the Bill be amended to place on an applicant a clear obligation to disclose matters relevant to section 15A, and to enable the Minister to request further information relevant to a determination under section 15A, in line with Recommendation 14.12 of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.

The Bill would benefit from a more comprehensive approach

- 3.65 Several submissions expressed disappointment that the Bill does not fully implement relevant recommendations from the Inquiry into Hydraulic Fracturing and commented that a more comprehensive approach would have provided a more coherent perspective on the final legislative framework for fracking.⁶⁰ Concern was expressed regarding the failure to include provisions to meet two of the recommendations made in the Inquiry into Hydraulic Fracturing, these being: the mandating of consideration of environmentally sustainable development (ESD) principles in any decisions made under the Act (Rec 14.11);⁶¹ and the need to include merits review for decisions made under the *Petroleum Act* and the Petroleum Environment Regulations in relation to any onshore shale gas industry (Rec 14.24).⁶²
- 3.66 Regarding the two issues identified above, the Department has advised the Committee that:

The Government is implementing recommendations in accordance with its publicly available Implementation Plan.

⁶⁰ Environmental Defenders Office NT, Submission No. 10, pp. 3-4; Arid Lands Environment Centre, Submission No. 12, pp. 2-3; Lock the Gate Alliance, Submission No. 6, pp. 2-3; CLC/NLC Joint Submission, Submission No. 13, p. 10-11.

⁶¹ Environmental Defenders Office NT, Submission No. 10, p. 3; Arid Lands Environment Centre, Submission No. 12, p. 2-3.

⁶² Lock the Gate Alliance, Submission No. 6, p. 2; Environmental Defenders Office NT, Submission No. 10, p. 4; CLC/NLC Joint Submission, Submission No. 13, p. 13.

The Inquiry's Recommendation 14.11 (ecologically sustainable development principles) and 14.24 (merits review) have been forecast as stage three recommendations in the Government's implementation plan.

Notwithstanding, regulation 2 of the Petroleum (Environment) Regulations currently provides for regulated activities to be carried out in a manner that is consistent with the principles of ecologically sustainable development.⁶³

Committee's comments

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

⁶³ Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, pp. 8-9, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Appendix A: Submissions Received and Public Hearings

Submissions Received

1. Association of Mining and Exploration Companies
2. Heidi Jennings
3. Aboriginal Areas Protection Authority
4. Katherine mining Services Association
5. Judyanne Kent
6. Lock the Gate Alliance
7. Protect NT Incorporated
8. Jeremy Singer
9. Australian Petroleum Production & Exploration Association
10. Environmental Defenders Office NT
11. Pauline Cass
12. Arid Lands Environment Centre
13. Northern Land Council and Central Land Council joint submission

Public Briefing – Darwin, 4 March 2019

The following witnesses from the Department of Primary Industry and Resources appeared before the Committee:

- Alister Trier, Chief Executive Officer
- Rod Applegate, Deputy Chief Executive Officer
- James Pratt, Executive Director, Onshore Gas Development

Note: Copies of submissions are available at:

<https://parliament.nt.gov.au/committees/EPSC/76-2018>

Bibliography

Department of Primary Industry and Resources, *Responses to Written Questions from the Committee*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Explanatory Statement, *Petroleum Legislation Amendment Bill 2018 (Serial 76)*, p. 1, <https://parliament.nt.gov.au/committees/EPSC/76-2018>

Hon Ken Vowles MLA, the then Minister for Primary Industry and Resources, Parliamentary Record, *Debates Day 3 – 29 November 2018*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/305255>

Petroleum Act 1984 (NT)

Petroleum (Environment) Regulations (NT)

Petroleum (Onshore) Act 1991 No 84 (NSW)

Public Briefing Transcript, Economic Policy Scrutiny Committee, 4 March 2019

Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, Northern Territory Government, <https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>