Clause 4 – Section 5 amended (Interpretation)

1. There appear to be variations in the way in which hydraulic fracturing is defined, with the definition in the Petroleum Legislation Amendment Bill 2018 differing from that used in the Water Legislation Amendment Bill 2018. In addition, during a public briefing on the Water Legislation Amendment Bill 2018, the Department stated that the definition of hydraulic fracturing would be re-written in a Bill that was currently being drafted – the Water Amendment (Hydraulic Fracturing) Bill 2018.

a. Please clarify how the definition in cl 4 fits in with definitions provided in other NT legislation.

A definition of hydraulic fracturing, consistent with the definition in the Petroleum Legislation Amendment Bill, is to be inserted in the Water Act by the upcoming Water Amendment Bill that is currently before the Economic Policy Scrutiny Committee.

2. In their joint submission, the Central and Northern Land Councils recommend that in the definition of hydraulic fracturing, the term 'hydrocarbons' be replaced with 'petroleum'. The rationale for this is that the *Petroleum Act* defines the term petroleum but not hydrocarbons and using the term petroleum will ensure that the new definition will link the definition of hydraulic fracturing to the definition of petroleum.

a. What would be the effect on the operation of the Bill of implementing their recommendation - would replacing the term hydrocarbons with petroleum provide a clearer definition?

DPIR agree that the word "hydrocarbon" can be replaced with the word "petroleum" in the definition for hydraulic fracturing in the Petroleum Act.

Amended definition should now be 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.

Clause 5 – 15A Appropriate person to hold permit or licence

3. Lock the Gate Alliance have recommended that proposed s 15A(1) be strengthened by clarifying that the appropriate person test be applied to any proponent who wishes 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'.

a. Are appraisal or delineation applications included under permits or licences? If not, is this an issue?

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".

Clause 5 – 15A (2) and (5); Clause 6 – s 16 and s45

4. The Environmental Defenders Office and the CLC/NLC joint submission have drawn attention to problems with the drafting of the proposed sections 15A (2) and (5) and s 16 and s45, as set out below:

Proposed s 15A(2) only includes the conduct of a parent company of an applicant, its directors and the partners of an applicant, it does not include associated entities. This conflicts with the wording of proposed sections 16(3)(ea) and 45(1)(ea) both of which require evidence that the applicant, and any parent company *or associated entity* is an appropriate person.

Proposed s 15A(5) requires the Minister to publish reasons about a determination that an applicant, and any parent company or *associated entity* of the applicant is not an 'appropriate person'. However, on their reading of the Bill, s 15A does not require the Minister to have regard to *associated entities*, for example, the term *associated entities* is not included in proposed s 15A(2) which details the additional matters that the Minister must consider when determining whether a body corporate is an appropriate person.

a. What effect would it have on the operation of the Bill if proposed s 15A(2)(b) was amended to include language that is consistent with proposed s15A(5), s 16(3)(ea) and s 45(1)(ea)?

DPIR agrees that s15A(2)(b) should provide for consideration of an associated entity as per s16(3)(ea) and s45(1)(ea).

Clause 5 – s 15A(6) Definitions of prescribed legislation and prescribed environmental legislation

5. Several submissions have raised concerns that the lists of prescribed legislation and prescribed environmental legislation set out in proposed s 15A(6) are too limited and do not conform with the intent of Rec. 14.12 of the Scientific Inquiry into Hydraulic Fracturing. Key issues raised include:

- Compliance records provide a fuller picture of an applicant's environmental record than contraventions and yet the Minister is required to consider them against a much narrower range of legislation, potentially compromising the effectiveness of the appropriate person test (refer proposed s 15A(1)(a) and s 15A(1)(c)).
- Overseas legislation is not included
- Relevant repealed legislation should be included.

a. What factors were taken into account when determining what legislation to put on each list?

Recommendations 14.20 and 14.12 of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory state "that the Minister must be satisfied that an applicant 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".

The preceding text of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory relating to Recommendations 14.20 and 14.12 detail that this recommendation "should not be limited to compliance with legislation related to petroleum, but also include, for instance, compliance with occupational health and safety and taxation regimes".

b. What would be the effect on the operation of the Bill of only having one broad list of prescribed legislation rather than having two separate lists?

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 prescribed legislation, noting that as per s15A(6)(a) prescribed legislation includes prescribed environmental legislation as listed.

c. Please clarify whether proposed s 15A(6)(k) of prescribed environmental legislation and s 15A(6)(v) of prescribed legislation include overseas legislation.

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".

d. What would be the effect on the operation of the Bill of including other relevant legislation such as that covering: natural resource management (e.g. water), planning, taxation law, land use law and sacred site legislation?

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), 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.

Clause 5 – s 15A(4) Minister may disregard contraventions mentioned in s 15A(1)(a)

6. Several submissions recommended that this proposed section be removed. The main argument put forward was that it is inappropriate to enable the Minister to 'disregard' contraventions. The Minister should have regard for, or consider, all contraventions even if the final decision resulted in the applicant being granted a permit or licence despite past contraventions.

a. Please explain the intent behind proposed s 15A(4).

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.

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

7. The Environmental Defenders Office expressed concerns that prescribing decisions and determinations for which any person has standing in a schedule could increase the risk that some decisions could be inadvertently omitted through drafting errors. They also considered there was potential to exclude circumstances where a decision maker failed to make a decision that she or he was required to make.

a. What process was followed to determine which decisions or determinations were included in the Schedule?

Recommendation 14.23 of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory required "that prior to the grant of any further exploration approvals, the Petroleum Act and Petroleum (Environment) Regulations be amended to allow open standing to challenge administrative decisions made under these enactments." A legal and policy review of administrative decisions in the Petroleum Act was conducted, which identified the decisions that would satisfy the intent of this recommendation.

b. Are there any processes available to address a situation where a decision maker failed to make a decision that she or he was required to make?

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.

8. CLC and NLC have identified that two critical decisions have not been included in the proposed judicial review schedule and recommend that the Bill be amended to include all decisions made under the *Petroleum Act* and Petroleum Regulations.

a. Is there any reason why the following are not included in the Schedule?

- The determination regarding whether an applicant is an appropriate person to be granted a permit or licence (s 15A).
- Section 19(10) of the *Petroleum Act* – determination to either refuse or approve a transfer of an interest.

DPIR agrees that s15A and s93(10) of the Petroleum Act should be included in the Schedule Judicial Review of Decisions or Determination, and available for judicial review.

b. What effect would it have on the operation of the Bill if all decisions made under the Petroleum Act and Petroleum Regulations were open to judicial review with open standing?

Some decisions should remain omitted from the Schedule as they do not serve the purpose or intention of the Inquiry into Hydraulic Fracturing's recommendations.

An example of this is S7(1) of the Petroleum Act – the decision of the Minister to delegate powers and functions under the Act is not deemed appropriate for review. Another example is found in s64(2) of the Petroleum Act – the decision by the Minister to require a proponent give notice and information to the Minister where petroleum is discovered in an exploration permit or licence area.

9. The Australian Petroleum Production & Exploration Association (APPEA) expressed concern that open standing for judicial review would increase the level of risk to development in the NT and recommends that broad standing categories be implemented consistent with the proposed changes to the *Northern Territory Environment Act*.

a. *What consideration has been given to how open standing for judicial review will impact on development in the NT?*

The Northern Territory Government has accepted all of the recommendations of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory. Recommendation 14.23 states that prior to the grant of any further exploration approvals, the Petroleum Act and Petroleum (Environment) Regulations be amended to allow open standing to challenge administrative decisions made under these enactments. Prior to this amendment to the Petroleum Act, judicial review has been available for all decisions under the Petroleum Act through common law provisions.

b. *What would be the effect of adopting APPEA's recommendation that broad standing categories be implemented consistent with the proposed changes to the Northern Territory Environment Act?*

The recommendation of the Inquiry into Hydraulic Fracturing in the Northern Territory was explicit in that "the Petroleum Act and Petroleum (Environment) Regulations be amended to allow open standing to challenge administrative decisions made under these enactments." Government accepted this and all of the Inquiry recommendations.

The Draft Environment Protection Bill is different legislation. On 30 October 2018 the Minister for Environment announced the Draft that was released for public consultation would be amended so that standing for judicial review of decisions made in the environmental assessment process would be limited to those directly affected by the decision, and those who had made a genuine submission during the decision-making process.

c. *Would implementation of APPEA's recommendation detract from the intent of the Scientific Inquiry's Rec. 14.23?*

The recommendation of the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory was explicit in that "the Petroleum Act and Petroleum (Environment) Regulations be amended to allow open standing to challenge administrative decisions made under these enactments." The Inquiry has made a recommendation to provide for open standing, meaning that standing will not be limited to a person or entity that has interests that have been affected by a decision.

Clauses 9, 11 and 17 – Code of Practice

10. The Environmental Defenders Office has 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 rather than simply stating that it address potential environment risks.

a. *What would be the effect of such an amendment on the operation of the Bill?*

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

11. Clause 9 of the Bill refers to a 'code of conduct' while clauses 11 and 17 refer to a code of practice.

a. Why are different terms used?

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

12. Proposed s 118(2)(ra), when read in conjunction with Section 118(2) of the *Petroleum Act,* provides the Administrator with the discretion to prescribe for the making of a code of conduct and corresponding offences but does not mandate such regulation. NLC and CLC commented that this creates uncertainty that the code of practice will actually be implemented and maintained.

a. How could proposed s118(2)(ra) be amended to provide greater certainty that the code of practice will be implemented and maintained?

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).

13. 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.

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.

a. Will a draft code of practice be put up for public consultation?

The draft codes of practice will be open for public consultation before it is adopted by the Petroleum (Environment) Regulations.

b. What, if any, mechanisms have been considered to ensure scrutiny of the initial development of the code of practice and any amendments to it once it has been developed?

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.

d. Will the making or amendment of a code of practice be reviewable by the Assembly?

Amendments to a code of practice will be able to be made through an amendment to the Petroleum (Environment) Regulations, where an amendment will be adopted under these Regulations. As per s118 of the Petroleum Act changes to Regulations can be made by the Administrator.

Clause 10 – Section 93 amended (Approval of transfers)

14. Several submissions commented that the wording of this section should 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 s 15A. Currently, proposed s 93(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.

a. Is there any reason why the phrase 'the Minister must be satisfied that' could not be inserted after the word 'licence' in cl 10 (2)?

DPIR agrees that the phrase "the Minister must be satisfied" should be inserted after the word "licence" in cl10(2) to ensure consistency of language throughout the Bill.

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

15. According to the Minister's Explanatory Speech (p. 6), the purpose of the Bill is to give effect to a number of recommendations made by the Scientific Inquiry into Hydraulic Fracturing. Recommendations 14.12 and 14.20 recommend that civil and/or criminal sanctions apply against applicants who fail to disclose a matter upon request that is relevant to the determination of whether they are a fit and proper person.

a. Why is no provision made in the Bill for civil and/or criminal sanctions against applicants who fail to disclose matters that are relevant to the determination of whether they are a fit and proper person?

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(9)(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.

Applicants will be required to adhere to the requirements of the Petroleum Act in order for the Minister to make a determination as to whether the applicant is an appropriate person.

Section 106 of the Petroleum Act provides for the offences and penalties for failing to comply with the Petroleum Act. Therefore, if the Bill is passed, a company is required to provide evidence of compliance/contravention of related legislation. Failure to provide this information is a breach of the Petroleum Act at S106, which is subject to offence penalties under the current Act.

Further, the Final Report of the Inquiry into Hydraulic Fracturing in the Northern Territory also made a recommendation (14.29) that "prior to the grant of any further production approvals, the Government enacts a broader range of powers to sanction". It is anticipated that the implementation of this recommendation will be completed by the end of 2021 or before production licences are granted, as per the Government's publicly available Implementation Plan.

16. Several submissions commented that a more comprehensive approach would have provided a more coherent perspective on the final legislative framework for fracking. Attention was drawn to the absence of provisions mandating environmentally sustainable development principles (Scientific Inquiry Rec. 14.11) and merits review decisions (Scientific Inquiry Rec. 14.24).

a. Is there an intention to include provisions for mandating environmentally sustainable development principles and merits review decisions?

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

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.