



**NORTHERN
LAND COUNCIL**



**Central
Land Council**

Northern Land Council and Central Land Council

Joint Submission to the Legislation Scrutiny Committee

**Petroleum Legislation Miscellaneous Amendments
Bill 2019**

4 February 2020

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Abbreviations and Definitions

ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth)
Bill	<i>Petroleum Legislation Miscellaneous Amendment Bill 2019</i> (NT)
CLC	Central Land Council
EMP	Environment Management Plan
Final Report	<i>Final Report</i> of the Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs and Associated Activities in the Northern Territory
Implementation Plan	Scientific Inquiry into Hydraulic Fracturing Implementation Plan
Inquiry	The Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs and Associated Activities in the Northern Territory
NLC	Northern Land Council
NTA	<i>Native Title Act 1993</i> (Cth)
Government	Northern Territory Government
Petroleum Act	<i>Petroleum Act</i> (NT)
Petroleum Regulations	<i>Petroleum (Environment) Regulations</i> (NT)
Recommendations	Recommendations of the Final Report

Introduction

Overview

The NLC and CLC continue to welcome the reform process being undertaken by the Government to implement the suite of Recommendations presented in the Final Report of the Inquiry. The NLC and CLC are pleased to be part of this process and comment on the Bill.

One of the key issues identified in the Final Report was a lack of trust in the both the Government and the petroleum industry and a lack of confidence in the current regulatory framework to adequately manage the multitude of risks associated with the development of an onshore shale gas industry in the Northern Territory. Chapter 14 of the Final Report provides that

The design, development and implementation of a robust regulatory regime is the principal way by which the Government can ensure that any onshore shale gas industry develops in a manner that protects the environment, is safe to humans, and meets community demands. (p. 370)

Regulatory reform is critical to restoring trust and faith in industry and Government and protecting humans and the environment.

The Bill has been drafted to progress or implement 9 recommendations of the Independent Scientific Inquiry into Hydraulic Fracturing. The Bill introduces proposed amendments to the Petroleum Act and Petroleum Regulation, which we have identified will partially implement Recommendations 7.11, 10.2, 14.2, 14.6, 14.7, 14.8, 14.10, 14.11 and 14.13. These Recommendations are set out at **Appendix 1**.

It is also important to get it right. In this respect, while we are largely supportive of the proposed amendments to the Petroleum Act, we are troubled by the fragmentary approach being undertaken in relation to regulatory reform and the implementation of the Recommendations of the Final Report. Many of the Recommendations are only implemented in part, which seriously undermines the risk mitigation which the Recommendations aim to enforce on hydraulic fracturing. This creates an unacceptable risk for Territorians and the environment.

This submission sets out key observations on the strengths and concerns regarding the Bill. **Appendix 2** sets out a summary of the Land Councils' recommendations on the amendments that will be made under the Bill – that is, either supported, partially supported or not supported.

Our comments on the Bill largely relate to the provisions providing for the principles of ecological sustainability, environmental securities, merits review, land access, and prohibited activities.

While the proposed changes will put the Northern Territory ahead of many other jurisdictions, further amendments are required to ensure that Recommendations are fully implemented.

About the Land Councils

This submission is made jointly by the NLC and the CLC (**Land Councils**) both independent statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**).

A key function of the Land Councils is to express the wishes and protect the interests of traditional Aboriginal owners throughout the Northern Territory. The members of the Land Councils are chosen by Aboriginal people living in each Land Council's respective area.

The Land Rights Act sets out the Land Councils' core functions, which include:

- identifying relevant Traditional Owners and affected people
- ascertaining and expressing the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters
- consulting with traditional Aboriginal owners and other Aboriginal people affected by proposals
- negotiating on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim
- assisting Aboriginal people carry out commercial activities; obtaining Traditional Owners' informed consent, as a group
- assisting in the protection of sacred sites
- directing a Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

The Land Councils also fulfil the role of Native Title Representative Bodies under the (CTH) *Native Title Act 1993* (**Native Title Act**), whose role and functions are set out under Part 11, Division 3 of the Native Title Act. In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

For the purposes of this submission, the term **Traditional Owner** is used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters encompassing the NLC and CLC's regions.

Within their respective jurisdictions, the Land Councils assist Traditional Owners by providing services in the key areas of land, sea and water management, land acquisition, mineral and petroleum exploration and production, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission, is a responsibility to protect

the traditional rights and interests of Traditional Owners and other Aboriginal people with traditional interests over the combined area of the Land Councils, which is constituted by more than 1,000,000 square kilometres of the land mass of the Northern Territory, and over 80% of the coastline.

Key observations

Strengths

1. Principles of Ecologically Sustainable Development

We are pleased to see that the Minister is required to consider and apply the principles of ecologically sustainable development (**ESD**) in partial fulfilment of Recommendation 14.11. However, we note that the circumstances in which the principles of ESD must be considered and applied are limited. Our concerns about the circumstances in which the principles of ESD are not required to be considered are outlined below under **Concerns**.

2. Improved Transparency

The Land Councils welcome the amendment of section 18 which removes the limitation regarding who is entitled to lodge an objection to the grant of an exploration permit. Under the proposed new section, any person can lodge an objection to the grant of an exploration permit. Previously, only persons with an estate or interest in relation to the land subject of, or land contiguous with land comprised in an exploration permit application area, were entitled to lodge an objection to the grant of an exploration permit. The Land Councils also commend the Government on the proposed introduction of section 16A. This new provision requires the Minister to consider any submissions regarding the release of specified blocks for exploration, publish their determination online, and ensure the determination is able to be subject to judicial review. These amendments are in accordance with Recommendation 14.10 and in keeping with the Government's ongoing commitment to openness and transparency.

3. Environmental securities

A key strength of the Bill is that it will allow the Administrator to create regulations relating to environmental securities in the Petroleum (Environment) Regulations 2016 and to prescribe environmental security bonds for regulated activities in accordance with Recommendation 14.13. The current process for environmental security bonds is not legislated and in need of urgent reform. However the Land Councils strongly consider that the environmental securities process should be a mandatory requirement enshrined in legislation, rather than a discretionary power within the regulations. Our concerns are laid out in detail below.

4. Judicial review

The Land Councils welcome the amendment to Schedule 2 of the Bill to ensure that determinations under the new section 16A will be subject to judicial review. As noted above, the new section 16A provides for the Minister to determine the release of blocks of land for exploration. The inclusion of section 16A in Schedule 2 of the Bill will

enhance lawful decision making concerning petroleum activities and is consistent with Recommendation 14.23. It will also build upon the improvements introduced by the Petroleum Legislation Amendment Bill 2018 in relation to the introduction of open standing for judicial review.

5. Prohibited operations

The NLC commends the Government on the introduction of prohibited operations by the inclusion of the new section 111 in the Bill. However, we consider that this section needs amendment for reasons detailed under **Concerns**.

Concerns

1. Principles of Ecologically Sustainable Development

Recommendation 14.11 outlines that the principles of ESD should be a mandatory consideration “for *any* decision made under the Act in relation to any onshore shale gas industry.”¹ Decisions which are subject to the principles of ESD are included at Schedule 1 of the Bill. Proposed sections 128 – 133 of Division 4 set out decisions for which the Minister is specifically **not** required to consider the principles of ESD. During the Inquiry’s Public Briefing, Rod Applegate, Deputy Chief Executive Officer of the Department of Primary Industry and Resources, commented that “there are a number of decisions under the Act which are not included because ESD is not relevant, such as appointing an inspector or maintaining the Petroleum Register.” Proposed sections 128 – 133, however, concern decisions where the principles of ESD are highly relevant, such as the renewal of exploration permits, variation of exploration permits, renewal of retention licences, renewal of production licences and variation of production licences. We see no basis for the Minister being required not to consider ESD in relation to the above decisions and exempting these decisions from the principles of ESD undermines the implementation of Recommendation 14.11 and should be removed.

A failure to apply principles of ESD to all relevant decisions would also be contrary to National standards. The principles of ESD are well accepted at both the State and Commonwealth levels. In response to action plans at the international level, State and Commonwealth Governments adopted the *National Conservation Strategy for Australia* in 1983 and agreed upon the *Intergovernmental Agreement on the Environment* (IGAE). The IGAE set out the four well-known principles of ecologically sustainable development – the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms.²

2. The Minister is not required to specify how they considered or applied the principles of ESD

The inclusion of proposed section 6A(2) further undermines the requirement that the Minister consider the principles of ESD. This section specifies that the Minister is not required to specify how they have considered or applied the principles of ESD when making a decision. This severely undermines the operation of 16A(1) and accountability and transparency with respect to the genuine application of the principles.

3. Proposed section 16 should include an obligation to notify relevant landowners

¹ Emphasis added.

² Intergovernmental Agreement on the Environment: Clause 3.5. The IGAE can be accessed via <http://www.deh.gov.au/esd/national/jgae/index.html>

Proposed subsections 16(1) and 16(2) relevantly amend section 16 so that the Minister is required to give notice publicly via newspaper and must invite submissions regarding the release of specified blocks for exploration. However, the Act would be greatly strengthened if an additional amendment was made to section 16 to ensure all relevant landowners and native title parties are notified.

4. Merits Review

As noted in our previous submission of 7 February 2019 in relation to the Petroleum Legislation Amendment Bill 2018, the current Bill does not introduce any amendments in relation to merits review, despite providing for provisions in relation to judicial review. Substantial amendments are required to the Petroleum Act and Petroleum Regulations to fully implement the changes to merits review provided for in Recommendation 14.24. In light of Recommendation 14.24, and the Government's commitment to fully implement the recommendations of the Inquiry, we hope to see further amendments to these provisions in the near future as part of a comprehensive and concerted effort to address the implementation of all remaining Recommendations in full.

5. Security bonds

It is vitally important that the process for calculating security bonds is made public, in keeping with Recommendation 14.13. As noted in the explanatory statement to the Bill, the Bill only implements Recommendation 14.13 'in part.' The Bill relevantly amends section 118(2)(p) of the Petroleum Act. This section grants the Administrator a discretionary power to make regulations in relation to environmental securities. Whilst the Administrator has a discretionary option to make regulations in relation to environmental securities, there is no mandatory requirement on the Government to ensure that a robust, consistent and transparent security bond procedure is in place. This is integral not only to ensuring Recommendation 14.13 is fully implemented, but also to ensure that the Government and taxpayers do not bear the costs of mine site rehabilitation. A long history of mining projects failing to clean up their sites adequately before leaving the Northern Territory has left the Territory with a mining legacy problem estimated at \$1 billion.³ The historical failure by government to ensure adequate security is held provides a direct financial incentive for miners to act irresponsibly.⁴

Considering the importance of environmental securities, and the recent history of legacy mines in both the Northern Territory and more broadly across Australia, the environmental security process should be included in the Petroleum Act rather than regulations. 78% of Aboriginal people in the Northern Territory live in remote areas. Aboriginal communities in remote areas are disproportionately impacted by significant environmental problems such as legacy mines. Further, Aboriginal people living in

³ Northern Territory Department of Primary Industry and Resources, About Legacy Mines: Online: <https://dpir.nt.gov.au/mining-and-energy/mine-rehabilitation-projects/about-legacy-mines>

⁴ As noted by economist Robyn Allen in the 2016 report 'Toward Financial Responsibility in British Columbia's Mining Industry' (Union of British Columbia Indian Chiefs, 2016) p. 54.

remote communities often face structural and systemic barriers that make scrutiny of mining operations and government decisions difficult. The Northern Territory's unique context in this regard makes transparency and a robust regulatory framework in relation to environmental operations all the more important.

6. Land access agreements

The Land Councils note the introduction of 118(2)(pa) and 118(6A) that enable the establishment of regulations concerning land access agreements. We understand based on the reference to Recommendation 14.6 in the Explanatory Statement accompanying the Bill that these amendments are provided to facilitate land access agreements between gas companies and pastoralists in relation to access to pastoral leases. Most pastoral leases in the Northern Territory are also subject to registered native title claims or determinations. It is not clear whether this amendment contemplates any requirements for agreements with native title holders.

Requirements for land access agreements with Traditional Owners are commonly provided for under the ALRA and the NTA, although not always. Accordingly, the Land Councils would welcome further discussions with the Government about the regulations addressing situations where access agreements between native title holders and gas companies should be required in the absence of or in addition to agreements required under the ALRA or NTA. Providing for such agreements may be relevant to the Government's potential compensation liability under the NTA.

7. Prohibited activities

We submit that further change is required to the new section 111. Proposed subsections 111(2)(b) and (3)(b) provide that certain activities can be done with the consent of certain persons, including any registered native title body corporate. However, there is no equivalent requirement to obtain the consent of registered native title claimants. The NTA affords registered native title claimants and registered native title bodies corporate identical procedural rights, including the right to negotiate an agreement with gas companies for the grant of petroleum tenements. Accordingly, it is not clear why the consent of registered native title claimants is not required to depart from prohibited activities. Similar to our comments under the preceding heading, a failure to provide an equivalent right to registered native title claimants or other common law holders of native title may be relevant to the Government's potential compensation liability under the NTA.

Finally, we note that the new section 111 falls short of a full implementation of Recommendations 7.11 and 10.2. Recommendation 10.2 provides that any mandated setback distances for gas well heads, pipelines and gas processing facilities be done in consultation with a number of stakeholders, including Land Councils and local communities. We are not aware of any community consultations on this matter.

Recommendation 7.11 lists six required actions to minimise risks of groundwater contamination. The new section 111 implements one of the actions and it is not clear from the Explanatory Memorandum for this Bill how the remaining activities will be addressed. We also submit that section 7.11 cannot be fully implemented unless the Code of Practice: Onshore activities in the Northern Territory (**Code**) is amended to mandate that all wells are constructed to at least Category 9 (or equivalent). The NLC's submissions to the Government on the Code of Practice are repeated here for convenience:

B4.3.2(c) provides that less than two verified barriers may be provided for in some circumstances and B4.3.2(d) provides for one verified well barrier in other circumstances. Repeated submissions from industry to the Inquiry refer to multiple well barriers and the requirements stipulated under B4.3.2(c) and B4.3.2(d) are a significant and concerning departure from those representations. No well should be permitted to contain only one barrier. This is also inconsistent with Recommendation 7.11 which requires that wells be constructed to Category 9 (or equivalent).

This part of the Code is a significant departure from Recommendation 7.11 and we reiterate our previous submission that the Code requires amendment to rectify this.

Appendix 1: Recommendations

Recommendation 7.11

That prior to the grant of any further exploration approvals, in order to minimise the risk of groundwater contamination from leaky gas wells:

- *all wells subject to hydraulic fracturing must be constructed to at least Category 9 (or equivalent) and tested to ensure well integrity before and after hydraulic fracturing, with the integrity test results certified by the regulator and publicly disclosed online;*
- *a minimum offset distance of at least 1 km between water supply bores and well pads must be adopted unless site-specific information of the kind described in Recommendation 7.8 is available to the contrary;*
- *where a well is hydraulically fractured, monitoring of groundwater be undertaken around each well pad to detect any groundwater contamination using multilevel observation bores to ensure full coverage of the horizon, of any aquifer(s) containing water of sufficient quality to be of value for environmental or consumptive use;*
- *all existing well pads are to be equipped with multilevel observation bores (as above);*

Recommendation 10.2

That in consultation with the gas industry, landholders, Land Councils, local government and local communities, the Government mandates an appropriate setback distance from all gas well heads, pipelines and gas processing facilities to a habitable dwelling (including all buildings or premises where people reside or work, schools and associated playgrounds, permanent sporting facilities and hospitals or other community medical facilities) in order to minimise risks identified in HHRA reports, including potential pathways for waterborne and airborne contaminants. Such setback distances should not be less than 2 km and should apply to all exploration and production activities.

Recommendation 14.2

That the Minister must immediately notify the public of any proposed land release for any onshore shale gas exploration. That the Minister must consult with the public and stakeholders and consider any comments received in relation to any proposed land release. That the Minister be required to take into account the following matters when deciding whether or not to release land for exploration:

- *the prospectivity of the land for petroleum;*
- *the possibility of co-existence between the onshore gas industry and any existing or proposed industries in the area; and*

- *whether the land is an area of intensive agriculture, high ecological value, high scenic value, culturally significant or strategic significance. That the Minister publish a statement of a statement of reasons why the land has been released and why coexistence is deemed to be possible.*

Recommendation 14.6

That a statutory land access agreement be required by legislation. That prior to undertaking any onshore shale gas activity on a Pastoral Lease (including but not limited to any exploration or production activity), a land access agreement must be negotiated and signed by the Pastoral Lessee and the gas company. That breach of the land access agreement be a breach of the relevant exploration or production approval giving rise to the onshore shale gas activity being carried out on the land.

Recommendation 14.7

That in addition to any terms negotiated between the pastoralist and the gas company, the statutory land access agreement must contain the above standard minimum protections for pastoralists.

Recommendation 14.8

That prior to the grant of any further exploration permits or production approvals, the Government enacts a minimum mandatory compensation scheme payable to Pastoral Lessees for all onshore shale gas production on their Pastoral Lease. Compensation should be calculated by reference to the impact that the development will have on the Pastoral Lease and the Pastoral Lessee, for example, the number of wells drilled, the value of the land (both before and after), and the area of land cleared and rendered unavailable for pastoral activities.

Recommendation 14.11

That the Petroleum Act be amended to make the principles of ESD a mandatory relevant consideration for any decision made under that Act in relation to any onshore shale gas industry. That the principles of ESD must be taken into account and applied by a decision-maker in respect of all decisions concerning any onshore shale gas industry.

Recommendation 14.10

That any person may lodge an objection to the proposed grant of an exploration permit within a prescribed time limit. That all objections received by the Minister must be published online. That the Minister must, in determining whether to grant or refuse the application, take into account any objection received.

Recommendation 14.13

That prior to the grant of any further production approvals, the Government develops and implements a financial assurance framework for the onshore shale gas industry that:

- *is transparent and is developed in consultation with the community and key stakeholders;*
- *clarifies the activities that require a bond or security to be in place and describe how the amount of the bond or security is calculated; and*
- *requires the public disclosure of all financial assurances and the calculation methodology*

Recommendation 14.23

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.

Appendix 2: Analysis of Bill and Regulations

Petroleum Legislation Miscellaneous Amendment Act 2019 (NT): comments and analysis			
Issue	Reference	Preliminary view	Comments and notes
Principles of ecologically sustainable development	Clause 4 – Section 5 Amended	Supported	This cause amends section 5 to insert two new definitions into the Act being a definition of environment and a definition of principles of ecologically sustainable development by reference to the definitions within the Environment Protection Act 2019.
Minister not required to specify how the principles of ecologically sustainable development have been applied when making a decision	Clause 5 – Section 6A inserted	Partially Supported	The Minister should be required to consider and apply the principles of ecologically sustainable development in making any decisions as contemplated by Recommendation 14.11. The section should also be amended to require the Minister to specify how the Minister considered or applied the principles of ESD.
Release of blocks and application	Clause 6 – Section 16	Partially Supported	Section 16 should be amended to provide that notice should be given to owners, registered native title bodies corporate, registered native title claimants and native title representative bodies.
Determination of release blocks	Clause 7 – Section 16A inserted	Partially Supported	The insertion of section 16A sets out the process for the determination of release blocks. However, this section should include a requirement to notify land owners.
Removal of limitation on entitlement to lodging an objection	Clause 8 – Section 18 amended	Supported	

to the grant of an exploration permit			
Certain operations prohibited	Clause 19 – Section 111	Partially Supported	Subsections 111(2)(b) and (3)(b) should be amended to require the consent of registered native title claimants to prohibited activities. We also note that the Code of Practice should also be amended to allow full implementation of Recommendation 7.11.
Environmental securities	Clause 21 – Section 118 amended	Partially Supported	This clause amends section 118(2)(p) and relevantly grants the Administrator a discretionary power to make regulations in relation to environmental securities. However, there should be a mandatory requirement within the Act which creates an environmental securities process, with details of this process contained in the regulations.