



**NORTHERN
LAND COUNCIL**



**Central
Land Council**

Northern Land Council and Central Land Council

Joint Submission to the Economic Policy Scrutiny Committee

Petroleum Legislation Amendment Bill 2018

7 February 2019

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Abbreviations and Definitions

ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
Bill	<i>Petroleum Legislation Amendment Bill 2018 (NT)</i>
CLC	Central Land Council
EMP	Environment Management Plan
Final Report	<i>Final Report of the Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs and Associated Activities in the Northern Territory</i>
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
Government	Northern Territory Government
Petroleum Act	<i>Petroleum Act (NT)</i>
Petroleum Regulations	<i>Petroleum (Environment) Regulations (NT)</i>
Recommendations	Recommendations stated in 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 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 introduces proposed amendments to the Petroleum Act and Petroleum Regulation, which we have identified will partially implement Recommendations 14.12 and 14.23 of the Final Report. The amendments also pave the way for the implementation of Recommendation 14.18 of the Final Report. Recommendations 14.12, 14.18 and 14.23 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 and Petroleum Regulations, we are troubled by the piecemeal approach being undertaken in relation to regulatory reform.

The Bill only partially implements three of the Recommendations and the Explanatory Statement does not provide any reason as to why a staged approach to the reforms is preferred. It does also not explain why amendments to the Petroleum Regulations that came into force at 19 December 2018 were not the subject of this Bill. There is a risk that substantive reform won't be achieved and the Government's ability to deliver the Implementation Plan in full may be compromised if legislative amendments and other critical reforms continue to be made on an ad hoc basis.

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 or partially supported.

Our comments on the Bill largely relate to the provisions providing for an appropriate person test. While the proposed changes will put the Northern Territory ahead of many other jurisdictions, further amendments are required to ensure that Recommendation 14.12 is 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. Appropriate Person Test

The Final Report recommended the introduction of an appropriate person test to oblige the Minister to consider whether a person who wishes to enter or expand their petroleum activities in the Northern Territory has a good reputation and demonstrated compliance with laws in Australia and overseas.

The Bill proposes to implement an appropriate person test by introducing section 15A to the Petroleum Act. Proposed section 15A is based on provisions in the *Petroleum (Onshore) Act 1991* (NSW) and requires the Minister to be satisfied that an applicant is an appropriate person before granting them a permit or licence. This amendment puts the Northern Territory ahead of many other Australian jurisdictions. Accordingly, we welcome the introduction of an appropriate person test in the Bill.

However, our support for the reform specified in the Bill is conditional. Changes to the Bill are required to implement Recommendation 14.12 in full and are outlined below under **Concerns**.

2. Improved Transparency

We are pleased to see that the Bill proposes to require the Minister to publish reasons for why they have determined that someone is an appropriate person. This is an indication of the Government's willingness to work towards improving transparency and restoring the community's confidence in the regulatory regime.

3. Open Standing for Judicial Review

The Bill introduces open standing for most administrative decisions made under the Petroleum Act and Petroleum Regulations. This will enhance lawful decision making concerning petroleum activities and is consistent with Recommendation 14.23.

This is an important step in increasing access to justice and providing for a more accountable, transparent and an improved decision-making process.

We are, however, very concerned that two key decisions have been excluded from the list of decisions that are judicially reviewable. We detail these decisions under **Concerns**.

4. Enable the Implementation of an Enforceable Code of Practice

The Land Councils welcome the proposed amendments that will enable the establishment an enforceable code of conduct that gas companies must comply with. This sets the ground work for the implementation of Recommendation 14.23 of the

Final Report. We assume that further details on the substance of the code and associated offences will be forthcoming.

We submit 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.

5. Confirm Existing Arrangements

The Bill introduces provisions to confirm the Minister's power to approve EMPs for onshore petroleum activities. This is welcomed by the Land Councils. This promotes certainty that existing and future regulations for the protection of the environment can include a scheme for approving and enforcing EMPs.

Concerns

1. Further amendments

It is important that the Recommendations in Chapter 14 of the Final Report are implemented in full to restore confidence in the Government's capacity to effectively regulate the onshore petroleum industry.

We have identified below that the Bill only partially implements Recommendations 14.12 and 14.23, and amendments are required to effect full implementation. Further and substantial amendments are still required to the Petroleum Act and Petroleum Regulations to implement all of the Recommendations presented in Chapter 14 of the Final Report.

It may be the Government's intention to implement further Recommendations in Chapter 14 at a later stage through further amendments, but this is uncertain, especially if the reform schedule extends to the next election cycle, and highlights our concerns with a piecemeal or staged approach to regulatory reform.

2. Appropriate Person Test

As noted above, the appropriate person test in proposed section 15A of the Petroleum Act is based on NSW provisions, which are referred to in the Final Report. However, there are some key differences between the Bill and the relevant NSW legislation that are not explained in the Explanatory Statement and appear to depart from Recommendation 14.12 of the Final Report. Accordingly, the appropriate person provisions require amendment.

2.1 Compliance with prescribed legislation

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.

2.2 Prescribed legislation and prescribed environmental legislation

The proposed definition of prescribed legislation in the Bill is currently too narrow and should be expanded to include taxation law, land use laws and sacred site legislation.

The Inquiry recommended that compliance with taxation laws be included, yet the *Taxation Administration Act* (NT) and the *Taxation Administration Act 1953* (Cth) do not appear in the current definition of prescribed legislation.

Compliance with land use laws such as the *Mining Management Act* (NT), *Planning Act* (NT), *Water Act* (NT), *Native Title Act 1993* (Cth) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) should also be included in the definition of prescribed legislation. This is so that the Minister may have regard to an applicant's previous compliance with laws regulating other uses of land in the Northern Territory.

Further, the importance of protecting sacred sites and objects and sites and objects of heritage value to Aboriginal people in the Northern Territory is well documented, including in Chapter 11 of the Final Report. The definition of prescribed legislation should include compliance with the *Northern Territory Aboriginal Sacred Sites Act* (NT) and the *Heritage Act* (NT). This will provide an important incentive to applicants who are already operating in the Northern Territory to comply with sacred site and heritage legislation.

2.3 Compliance with overseas legislation

Recommendation 14.12 provides that the Minister should consider an applicant's compliance with relevant legislation domestically and overseas. Changes to the Bill are required to ensure that an applicant's compliance with overseas legislation can be considered by the Minister.

The new definitions of 'prescribed environmental legislation' and 'prescribed legislation' in the Bill, include legislation of the Commonwealth, State, Territory and 'an Act of another jurisdiction that is similar in nature and purpose to an Act listed above'. All the listed Acts are from Australian jurisdictions. This indicates that only compliance with Acts of Australian jurisdictions can be considered.

Many of the companies who have exploration licences for petroleum in the Northern Territory operate, or have related bodies corporate that operate, in non-Australian jurisdictions. For example, Falcon Oil & Gas Pty Ltd, Santos QNT Pty Ltd and Inpex Oil & Gas Australia Pty Ltd or their related entities have exploration permits in the Northern Territory and operate projects overseas. It is crucial that the Minister consider compliance with non-Australian laws when assessing future applications for production licences for any applicants who may have operated overseas. The proposed definitions should be amended to make clear that compliance with legislation in non-Australian jurisdictions can be considered by the Minister.

2.4 Minister's discretion to disregard contraventions

We do not support the inclusion of proposed subsection 15A(4) in the Petroleum Act, which allows the Minister to disregard contraventions with regard to any matters the Minister considers relevant. We submit that it should be removed.

The Minister should be required to make an assessment that considers all contraventions (and compliance) of relevant law by a person. The Minister may form the view that a particular contravention does not preclude their satisfaction that a person is an appropriate person. For example, a person may have committed a dishonesty offence 8 years earlier, but since that time demonstrated exemplary compliance with relevant regulatory regimes and developed good repute. In these circumstances, the person's subsequent compliance and repute may be enough to satisfy the Minister that the person is an appropriate person despite the offence. Nothing in proposed section 15A would preclude this. However, to be able to disregard that offence is peculiar and derogates from a holistic assessment of the matters listed under subsections 15A(1)-(2).

2.5 Associated entities

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 (i.e. a subsidiary body corporate of an applicant or, where the applicant is a subsidiary of a holding company of another body corporate, that other body corporate).

The proposed drafting of subsection 15A(2) is at odds with proposed drafting of subsections 16(3)(ea) and 45(1)(ea) of the Petroleum Act, which require an applicant to provide information that any parent company or associated entity is an appropriate person. The current drafting may lead to a situation where an applicant is required to provide information concerning its associated entities, but it is not clear that the Minister can consider that information in deciding if someone is an appropriate person.

The Bill should require the Minister to consider all related bodies corporate (as defined in the *Corporation Act 2001* (Cth)) of an applicant. Similar drafting to section 24A of the *Petroleum (Onshore) Act 1991* (NSW) should also be adopted to ensure the Minister may consider joint ventures and other informal or formal arrangements that an applicant may have in relation to a proposed petroleum project.

2.6 Transfers

Approximately 25% of the land mass of the Northern Territory is subject to granted exploration permits, including prospective areas such as the Beetaloo Sub-Basin. Many people who wish to gain entry into, or expand their interest in, petroleum activities in the Northern Territory will do so through transfers of a granted interest. Accordingly, it is appropriate and important that transparency applies to all persons approved expansion or entry into the industry in the Northern Territory, whether by a new grant or a transfer of an existing interest.

The Bill proposes to introduce changes to the Petroleum Act to ensure that a Minister *must be satisfied* that a person is an appropriate person before granting them a permit or licence. However, under the changes the Minister does not need to be satisfied that someone is an appropriate person before approving the transfer of a permit or licence in their favour. Instead, the Minister must consider whether or not a transferee is an appropriate person, but they *do not need to be satisfied* that they are an appropriate person to approve the transfer. This is a significant departure from the equivalent NSW provisions, which treats grants and transfers alike.

Further, as there is no decision by the Minister as to a transferee's appropriateness there is also no requirement for the Minister to publish reasons for why a transferee may or may not be an appropriate person. This detracts from the transparency that is meant to be gained by the introduction of the appropriate person test.

2.7 Civil and/or criminal sanctions

Recommendation 14.12 of the Final Report provides that a failure to disclose information relevant to a determination of whether someone is an appropriate person should attract civil and/or criminal sanctions. The current Bill does not provide for any sanctions for a failure to provide such information to the Minister. This is a concerning departure from the intent of Recommendation 14.12.

2.8 Conclusion

As demonstrated from the comments above, various amendments are required to the Bill to fully implement Recommendation 14.12.

It may be the Government's intention to fully implement Recommendation 14.12 at a later stage through further amendments, but this is uncertain and again highlights the concerns noted in our submission with a piecemeal approach to regulatory reform.

It is important that Recommendation 14.12 is fully implemented in the Bill. A failure to do so will erode people's trust in the Government's commitment to fully implement the Recommendations.

3. *Judicial Review*

Judicial review enhances transparency by ensuring that people can apply to have a decision by the Minister set aside if the wrong process is followed. Unlike merits review, judicial review cannot change the decision of the Minister. The consequence of a decision being set aside under judicial review is that the Minister must remake the decision in accordance with correct process.

Two decisions have not been included in the proposed list of decisions that are judicially reviewable. These are decisions under:

- proposed section 15A – appropriate person to hold permit or licence

- section 19(10) – determination to either refuse or approve a transfer of an interest

The Explanatory Statement provides no information to indicate whether these omissions are an oversight or deliberate.

Crucially, decisions by the Minister that someone is an appropriate person have been excluded from decisions that are judicially reviewable. This omission undermines the importance of the reform that is at the heart of the Bill.

Recommendation 14.23 of the Final Report provides that administrative decisions under the Petroleum Act and Petroleum Regulations should be judicially reviewable. There is no apparent justification for the exclusion of a few administrative decisions, from what is otherwise a comprehensive list of reviewable decisions. We submit that the Bill should be amended to include all decisions made under the Petroleum Act and Petroleum Regulations.

4. Merits Review

The 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 of the Final Report. 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 all remaining Recommendations in full.

5. Definition of Hydraulic Fracturing

The Bill provides for a definition of hydraulic fracturing, which is a welcome reform. Yet, the current drafting of this definition introduces further uncertainty. The new definition refers to fractures that conduct 'hydrocarbons', which is undefined in the Petroleum Act. By replacing the term 'hydrocarbons' with 'petroleum', which is defined in the Petroleum Act, the new definition will appropriately link the definition of hydraulic fracturing to the definition of petroleum.

Appendix 1: Recommendations

Recommendation 14.12

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.

Recommendation 14.18

That prior to the grant of any further exploration approvals, the Government develops and implements enforceable codes of practice with minimum prescriptive standards and requirements in relation to all exploration and production activities, including but not limited to, land clearing, seismic surveys, well construction, drilling, hydraulic fracturing and decommissioning and abandonment.

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 Amendment Act 2018 (NT) Serial No 76: comments and analysis			
Issue	Reference	Preliminary view	Comments and notes
Definitions			
appropriate person	S 4 - Section 5 Amended	Supported	
hydraulic fracturing	S 5 - Section 5 amended (interpretation)	Partially supported	Amendment is required to link to definition of hydraulic fracturing to 'petroleum'.
environmental management plan	S 14 - Regulation 3 amended (Definitions)	Supported	
Tribunal	S 16 - Regulation 29 amended (Review by Tribunal)	Supported	This removes the definition of Tribunal at r 29 as it is already defined in the Petroleum Act.
Petroleum Act and Petroleum (Environmental) Regulations:			
Appropriate Person	S 5 - Section 15A Inserted S 6 - Section 16 amended (Application)	Partially supported	The following changes are required to implement Recommendation 14.12 in full: <ul style="list-style-type: none"> ensure that Minister will assess compliance with all prescribed legislation, not only environmental legislation; include laws concerning taxation, land use and sacred sites in the definition of

	<p>for exploration permit)</p> <p>S 7 – Section 45 amended (Application for production licence)</p> <p>S 10 – Section 93 amended (Approval of transfers)</p>		<p>prescribed legislation;</p> <ul style="list-style-type: none"> • remove the Minister ability to disregard contraventions; • ensure that the Minister must consider compliance with laws from overseas jurisdictions; • ensure that the Minister can consider a person’s associated entities; • apply the appropriate person test to transfers in the same way it applies to grants; and • must include criminal and/or civil sanctions for failing to disclose information to the Minister.
Judicial Review	<p>S 8 – Part II, Division 6, Subdivision 1 inserted</p> <p>S 12 – Schedule inserted</p> <p>S 15 – Part 2, Division 7, Subdivision 1 inserted</p> <p>S 18 – Schedule 1A inserted</p>	Partially Supported	<p>All decisions under the Petroleum Act and Petroleum Regulations should be judicially reviewable, including:</p> <ul style="list-style-type: none"> • decisions that someone is an appropriate person under proposed section 15A; and • decisions to approve or refuse a transfer under section 19(10).
Code of Conduct	<p>S 9 – Section 58 amended (General conditions)</p>	Partially Supported	<p>This paves the way for a code of conduct to be established. It should be mandatory for the Administrator to regulate for a code of conduct and related offences.</p>
Environmental Management Plans	<p>S 9 – Section 58 amended</p>	Supported	<p>We are pleased to see amendments to confirm the Administrator and Ministers existing powers in relation to EMPs.</p>

	(General conditions) S 17 - Schedule 1 amended (Information to be included in environment management plan)		
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