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Economic Policy Scrutiny Committee
Legislative Assembly of the Northern Territory
Parliament House
Darwin, NT 0800
By email: EPSC@nt.gov.au

Dear Chair and Committee members

Submission on Petroleum Legislation Amendment Bill 2018

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

EDONT is a community legal centre specialising in public interest environmental law. We are widely respected for our expertise and are regularly invited to participate in policy and law reform processes as a key stakeholder. We frequently advise communities on the regulation of mining and petroleum activities in the Northern Territory, and are therefore acutely aware of the high levels of community interest in and anxiety about fracking and how it will be regulated.

The Bill seeks to implement some recommendations of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry).** EDONT was closely engaged in the Fracking Inquiry, preparing three written submissions and appearing at two public hearings. Many of our original recommendations were adopted in the Final Report's recommendations (and therefore adopted by the Northern Territory government).

Subject to our comments below, EDONT supports the Bill, on the basis that it implements important recommendations of the Fracking Inquiry. The proposed amendments to the *Petroleum Act*, when implemented, should lead to more accountable and rigorous regulation of petroleum activities in the Northern Territory.

We make the following specific comments on the Bill, including proposing some amendments that we consider will improve the interpretation of (and therefore implementation of) these important new elements of the petroleum regulatory regime.

Fit and proper person test ('appropriate person' test) (Bill clauses 5 – 7)

We support the introduction of an 'appropriate person' test. In particular, we support the test that the Minister is required to apply and the various matters to be considered (proposed s15A(1)-(3)); and the requirement to publish reasons (proposed s15A(5)).

Failure to disclose information

However, on our interpretation of the Bill's current drafting, there is no provision that implements the Fracking Inquiry's recommendation that the failure to disclose a relevant matter (e.g. environmental compliance record) will lead to civil/criminal sanctions under the *Petroleum Act*[1]. 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

[1] See page 416, recommendation 14.20: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494300

these matters. This must be rectified in order to faithfully implement the Fracking Inquiry's recommendation 14.20 and ensure that the 'appropriate person' test can be enforced.

Prescribed legislation

We are also concerned that:

- the list of 'prescribed environmental legislation', for which the Minister is to consider compliance records (proposed s15A(6)), is missing important environmental legislation and is therefore too limited, and
- for a broader suite of legislation (including the Petroleum Act itself), only the consideration of 'contraventions' is required, rather than consideration of compliance history.

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.

In our view, there should only be a single list of 'prescribed legislation' for which the Minister is required to have regard to all compliance records, including contraventions. The list must better capture 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). It should also include relevant repealed legislation. This approach should be backed up by a positive obligation on proponents to disclose all relevant information, backed by strong sanctions for non-disclosure.

Making these amendments would ensure the 'appropriate person' test is consistent with recommendation 14.12 of the Fracking Inquiry's Final Report, which specified the Minister was to consider "the applicant's environmental history and history of compliance with the Petroleum Act and any other relevant legislation both domestically and overseas".[2]

Associated entities

We observe that:

- proposed s16 requires evidence be provided that an applicant, parent company and '*associate entity'* is an 'appropriate person'; and
- proposed s15A(5) requires the Minister to publish reasons about a determination that an *'associated entity'* (in addition to an applicant or parent company) in not an appropriate person.

However, on our interpretation, proposed section 15A does not require the Minister to have regard to 'associated entities' when making a decision about an 'appropriate person'. It is important to make it clear that both a parent company and an 'associated entity' are relevant in deciding whether an applicant is an 'appropriate person' (which appears to be the overall intent). This could be achieved by amending s15A(2)(b), with language that is consistent with s15A(5) and s16.

Transfers

While we strongly support the application of the 'appropriate person' test to the approval of transfers (Bill cl 10), we submit that the test the Minister must apply for normal applications (in proposed s15A) should equally apply to transfer applications. The transferee will become the new operator and must therefore be subject to the same level of oversight by the Minister. Section 93 of the Act should therefore be amended to include equivalent language, i.e. "the Minister must be satisfied that the transferee is an appropriate person…".

Open standing for judicial review (Bill clauses 8,12,15, 18)

We strongly support the inclusion of "open standing" for judicial review of administrative action under the *Petroleum Act*, a highly significant recommendation of the Fracking Inquiry (recommendation 14.23) that the Bill seeks to implement. This amendment will represent an important step forward

[2] See page 403: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494300

for access to justice in the Northern Territory and will support accountable decision-making in the context of petroleum activities.

However, the drafting of these provisions appears unnecessarily complicated, and restrictive. 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. More significantly, 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).

Given the Fracking Inquiry clearly intended open standing provisions to be expansive[3], these drafting matters could unnecessarily undermine the implementation of open standing in the *Petroleum Act*. We submit that this could be easily rectified via a revised approach to drafting[4]. For example, the relevant provisions (cl 8, 15) could be drafted simply as follows:

> *Any person may bring proceedings in the Supreme Court for an order to remedy or restrain a breach of this Act or the regulations. Any such proceedings may be brought whether or not any right of the person has been or may be infringed by or as a consequence of the breach.*

Alternatively, at a minimum, the Bill could be amended to specify that open standing for judicial review is also available for a failure to make a decision, and in respect of conduct engaged in for the purpose of making a decision[5]. This would make it clear that open standing is available for the review of all administrative law errors.

Enabling codes of practice and environment management plans (Bill clauses 9, 11, 17)

We support the requirement for codes of practice to be enforceable, consistent with the Fracking Inquiry's recommendations. However, we consider there are some drafting matters that should be rectified.

We submit that the definition of 'environment management plan' (Bill cl 11) 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. This is more consistent with best practice approach to environmental impact assessment and environmental management, and would be more appropriate given the role of these plans as a type of 'environmental approval' for petroleum activities.

We also note that there appears to be a typographical error in cl 9 of the Bill. We assume that the reference to 'code of conduct' is intended to be a reference to a 'code of practice'. Given the significance of enforceable codes of practice for regulating the fracking industry in line with the recommendations of the Fracking Inquiry, this drafting should be rectified.

Concluding remarks

Finally, we take this opportunity to briefly reiterate (per our previous submissions on recent legislative reforms related to fracking) that implementing various recommendations in a 'piecemeal' manner, and in a manner that appears to be rushed, continues to risk undermining community engagement and trust in the reform process.

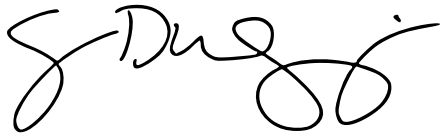
In our view, it would have been preferable for this Bill to have been a more comprehensive, considered package of reforms to the *Petroleum Act.* For example, there are a range of additional recommendations of the Fracking Inquiry that anticipate amendments to the *Petroleum Act* that

[3] See the Final Report's discussion at pp419-421: https://frackinginquiry.nt.gov.au/inquiry-reports?a=494300
[4] See for example s252 of the *Protection of the Environment Operations Act 1997* (NSW): https://www.legislation.nsw.gov.au/#/view/act/1997/156/chap8/part8.4/sec252 and s9.45 of the *Environmental Planning and Assessment Act* 1979 (NSW): https://www.legislation.nsw.gov.au/#/view/act/1979/203/part9/div9.5/sec9.45.
[5] See for example, s173O of the *Nature Conservation Act* (Qld)

would have been relatively straightforward to include in this Bill (e.g. requiring consideration and application of the principles of ecologically sustainable development – recommendation 14.11; the inclusion of merits review rights – recommendation 14.24). This approach would have had the advantage of presenting the community with a more coherent and holistic picture of the final legislative framework for fracking.

Yours sincerely

Environmental Defenders Office (NT) Inc



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