Environmental Defenders Office

29 January 2020

Legislation Scrutiny Committee
Parliament House
GPO Box 3721
Darwin NT 0801

By email: LSC@nt.gov.au

Dear Chair and Committee members

Submission on Petroleum Legislation Miscellaneous Amendments Bill 2019

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make this submission on the Petroleum Legislation Miscellaneous Amendments Bill 2019 (**Bill**).

The EDO is a community legal centre dedicated to protecting the environment. We regularly advise and act for clients about matters relating to petroleum and mining activities in the Northern Territory and have engaged closely on the implementation of various legislative and policy reforms arising from the Final Report of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry**).

EDO supports the passage of this Bill insofar as it implements important recommendations of the Fracking Inquiry. However, our support is subject to recommendations to amend various clauses, as set out below. Our proposed amendments are intended to ensure the Fracking Inquiry's recommendations are faithfully implemented, delivering a robust, transparent and accountable regulatory framework that responds appropriately to the environmental impacts and risks of petroleum and hydraulic fracturing activities in the Northern Territory.

Clause 4: Section 5 amended (Interpretation)

We support the proposed new definitions to be inserted by clause 5, as they are consistent with definitions in the *Environment Protection Act 2019*.

These changes will bring greater cohesion to the Northern Territory's environmental laws.

Clause 5: Part IA inserted (Principles of ecologically sustainable development) and clause 22: transitional arrangements

We strongly support the requirement for the Minister to 'consider and apply' the principles of ecologically sustainable development (**ESD**) to the decisions identified in Schedule 1, as this was a clear recommendation of the Fracking Inquiry (recommendation 14.11).

These amendments will bring greater rigour to the consideration of environmental impacts of petroleum activities and deliver greater consistency across Territory environmental laws.

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However, as we noted during consultation on the Environment Protection Bill 2019, the explicit requirement that the Minister is not required to specify *how* they have considered or applied these principles seriously undermines this requirement. Proposed s 6A(2) should be deleted, in order to genuinely deliver accountable and transparent decision-making, and faithfully implement the intent of the Fracking Inquiry.

Further, we object to the exclusion of the requirement for the Minister to consider and apply the principles of ESD for various decisions via transitional arrangements (Bill clause 22). Recommendation 14.11 is explicit that *all* decisions concerning any onshore shale gas industry require ESD to be considered and applied. We do not see any appropriate rationale for excluding this obligation in the context of transitional arrangements (e.g. where an exploration permit has been made but not determined), particularly given there has been considerable notice to proponents, via the Fracking Inquiry and government's response, that such a policy change is intended.

Clauses 6 – 7: release of blocks for exploration

Recommendation 14.2 of the Fracking Inquiry requires the development of a statutory 'land release' process for onshore gas exploration. This process, currently absent from the *Petroleum Act 1984* (**Act**), was recommended to ensure that land that is inappropriate for petroleum activities (for various strategic reasons, including conflicting land use) is not to be released for exploration, and to ensure that, as a matter of law, the community and stakeholders have a role in participating in the decision-making process about land release.

Despite the clear terms of recommendation 14.2, the Bill does *not* include appropriate amendments to implement a clear, efficient process that will ensure that land is only released for exploration if it first passes an initial 'hurdle' of being identified as suitable for release, following public consultation.

In order to properly implement recommendation 14.2 (together with recommendations 14.3 and 14.4), the Act should establish a clear process as follows:

1. The Minister identifies blocks proposed to be released, and initiates a public notification and submission process, which includes a minimum mandatory consultation period;
2. Following conclusion of this consultation period, the Minister determines whether or not to release the blocks, guided by:
    - Considering all submissions, and
    - Determining whether the blocks trigger statutory criteria – namely, prospectivity; the possibility of co-existence; and competing values and uses (agricultural, ecological, cultural significance, etc);
3. If the Minister finds that the proposed block(s) are prospective and co-existence with existing industry and land values/uses is possible[1], s/he may determine to release those blocks and

[1] Noting that recommendation 14.3 provides that the government not approve any application for an exploration permit in relation to areas that are not prospective for onshore shale gas or where co-existence is not possible.

publishes a statement of reasons for the decision. A subsequent process seeking applications for exploration permits for those blocks can be initiated.

4. If the Minister finds that the proposed block(s) are not prospective; that co-existence is not possible; or that the block(s) meet the criteria for a 'no go zone' (by way of reserved blocks, under s9 of the Act) (recommendation 14.4), the Minister must declare that block to be a reserved block and not release the land for exploration.

Rather than stepping out this straightforward process, the Bill appears to integrate the land release process with the exploration permit application process so that they are carried our concurrently. In addition to being inconsistent with the Fracking Inquiry's approach, it is flawed for a number of reasons.

First, the current approach appears highly likely to undermine the independence and objectivity of the Ministerial decision around suitability for release. Second, it is a confusing and inefficient process for both government and proponents. In circumstances where land is ultimately determined to be unsuitable for release, it appears that the government would still be required to see through the statutory decision-making process in relation to permit applications, including any review rights (Act ss 16-20). Applicants would have been put to the unnecessary time and expense of preparing an application for a permit over land subsequently determined to be unsuitable for exploration.

As such, in our view the Bill does not appropriately nor faithfully implement recommendation 14.2, nor recommendations 14.3 and 14.4. These provisions should be redrafted to establish a clear and upfront land release process, as we have set out above.

We also make the following additional comments about the drafting of proposed amendments to s16 and new s16A in the Bill.

Criteria guiding land release

The Bill appears to attempt to implement the criteria set out in recommendation 14.2 by directing that public submissions in response to a land release proposal are to be directed only to those criteria (drafting note to s2A(b)). However, this does not carry the same legal weight as mandating that the Minister determine whether the applicable criteria are met or not, rather than simply considering submissions on those matters (as draft s16A proposes). Consistent with our comments above, the legislated criteria must guide the Minister's decision, not what may be included in submissions.

Further, the proposed note to subsection (2A)(b) has qualified the criterion of 'strategic importance' to link this to 'nearby residential areas'. This limitation is not contemplated by the language of recommendation 14.2, which has otherwise been faithfully transplanted into this proposed subsection. In our view it is not appropriate to limit strategic importance to 'nearby residential areas'. A matter may be of strategic significance to the community broadly, whether at a local or Territory level. We submit that these words be deleted.

Approach to public consultation

Proposed amendments in clause 7 introduce public notification of the release of blocks for exploration (amended s16(1)). We consider that any notification requirement should specify that publication on a government website is required, in addition to newspaper circulation. This would ensure that there is a modern, freely available and widely accessible mechanism for accessing information. This would be consistent with the intent behind recommendation 14.2, which includes increasing transparency and accountability around petroleum decision-making.

Section 16 should also be amended to include a minimum timeframe for public notification and submissions on land release, consistent with our comments above. The proposed language for subclause (dc) in the proposed s16(2A) appears to indicate that the submission period is the same as the application period. However, there is no statutorily mandated application period.

We consider a minimum period of 28 days should be inserted into the Act to ensure the public is provided with sufficient timeframes to ensure genuine input into the decision-making process. This is consistent with the approach taken for submissions on environment management plans under the Petroleum (Environment) Regulations 2016 (cl 8B).

Clauses 8 - 9: objections to exploration permits

EDO supports the amendments proposed in clauses 8 and 9 of the Bill.

The amendments will enable any person to lodge an objection to an application for the grant of an exploration permit (rather than only those with an estate or interest in the land or contiguous land), delivering critical public participation rights in decision-making about petroleum and hydraulic fracturing activities, and consistent with recommendation 14.10.

Clauses 16 - 17: compensation to owners, compensation for right of access

EDO submits that the matters that are identified in recommendation 14.8 as being subject to compensation should be explicitly inserted into the Act.

Section 81 of the Act should clearly list all the matters that compensation is available for, which includes diminution of land value (currently omitted from the Act), loss or damage (currently only 'damage' is included in the Act), and deprivation of use or enjoyment of the land, while also enabling the Regulations to prescribe additional matters.

It is important to ensure these matters are clearly given the force of law and are entrenched in the Act rather than inserted into Regulations, which are more easily (and less transparently) amended.

We also submit that proposed section 7A should specify that any compensation scheme in the Regulations should be specified as a 'minimum mandatory' compensation scheme, consistent with recommendation 14.8. This would make it explicit that such a scheme would deliver *mandatory* compensation, and that it only sets a *minimum* baseline (rather than absolutely dictating an outcome, without scope for negotiation).

Clause 19: section 111 replaced

EDO largely supports the amendments to section 111.

The amendments will give statutory force to an important setback requirement for water bores specified in the Fracking Inquiry (recommendation 7.11).

However, we are concerned that section 111 does not properly implement recommendation 10.2 at proposed clause (1)(c), which only includes a setback of 2km of wells from land being used as a 'residence' rather than a more expansive application to a range of 'habitable dwellings,' being all buildings or premises where people reside or work (including playgrounds, sporting fields, medical facilities, etc)[2].

Although there may be limited circumstances where in practice this issue arises, it is certainly feasible that there may be relevant facilities in remote communities where this setback is clearly appropriate. We submit that this clause be amended to ensure these other uses are captured, as per recommendation 10.2.

Clause 21: powers to make regulations relating to land access and environmental securities

Land access arrangements

EDO is concerned that the implementation of recommendation 14.6 relating to land access agreements is proposed for inclusion in Regulations, in direct contradiction to the explicit language of the Fracking Inquiry:

> *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 (emphasis added).*

The Act must:

- Include a clear, statutory obligation for an access agreement to be in place prior to any fracking activities taking place;
- mandate that all petroleum activities must be carried out in accordance with access arrangements; and
- establish that the failure to do so is a breach of the permit or approval.

Failing to include these matters in the Act undermines the strength and enforceability of these provisions, which may have direct and serious impacts on landowners and occupiers affected by petroleum activities.

The absence of a legislative requirement for a land access agreement to be in place also contrasts with the existing compensation provisions (Act ss 81-82), which include a clear requirement for compensation to be paid by petroleum interest holders to owners and occupiers of land. It is also

[2] See Fracking Inquiry report at p259

inconsistent with other jurisdictions, which recognise the importance of land access negotiations to landholders by incorporating equivalent requirements in legislation (see for example, NSW's *Petroleum (Onshore) Act 1991*, s 69).

While some details around land access arrangements may be suitable for inclusion in Regulations, the Act should provide for the following:

- A mandatory requirement for a land access to be in place, consistent with any specifications in the Regulations;
- That the failure to have an agreement in place amounts to a breach of an exploration permit or production approval; and
- A list of minimum requirements for land access agreements that are to be set out in Regulation (which encapsulate all the themes listed in the Fracking Inquiry at pp 394-395), such as:
    - Rights and obligations of parties;
    - Consultation and notice requirements;
    - Compensation, make good and indemnification provisions;
    - Liabilities for costs and fees;
    - Dispute resolution;
    - Environmental protection, rehabilitation and remediation;
    - Any other relevant matters.

Environmental securities

Similarly, in regard to the power to make Regulations for environmental securities, the Act should include a clear 'head of power' that specifically imposes on interest holders a clear, unequivocal legal obligation to provide an environmental security. This could very simply be inserted via an amendment to section 79(2) of the Act.

The Act should also include other key matters relevant to ensuring a robust environmental security framework, including requirements for transparency over the calculation method and quantum of security, powers to review and change the security over time, and obligations relating to relinquishment. The omission of these provisions could have serious and far-reaching consequences, including the risk that the Territory be left with significant future liabilities.

The approach proposed is also inconsistent with comparable NT legislation, including the provisions for environment protection bonds in the *Environment Protection Act 2019,* and for securities required under the *Mining Management Act 2001*.

Clause 23: schedule amended relating to judicial review

EDO supports the inclusion of this decision into the Schedule of decisions subject to open standing for judicial review (under s57ABA of the Act), consistent with the inclusion of other key decisions[3].

Part 3: amendment of Petroleum (Environment) Regulations 2016

We do not object to the proposed amendments to the Petroleum (Environment) Regulations 2016 (**PER**) on the basis that they are effectively structural and do not contain substantive changes to the operation of the approval process (i.e. they only transfer matters from the Regulations to the Act).

We support the decisions that have been identified for inclusion in proposed clause 5A of the PER, although consider that to ensure there is no confusion in interpretation, it unnecessary for the various sub-clauses to be specified (that is, decisions under clauses 11, 14, 19, 20 and 27 should simply be identified as the prescribed decisions).

Concluding comments

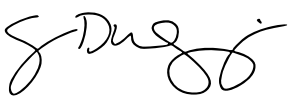
As noted in this submission, the Bill proposes that some key aspects of various Fracking Inquiry recommendations will be implemented via Regulations, including matters related to compensation, the jurisdiction of NTCAT, land access arrangements, and environmental securities.

The issues proposed for inclusion in Regulations are of significant public interest, and any final Regulations will have direct impacts on communities and those individuals with rights and interests in land that will be impacted by petroleum and fracking activities (such as native title holders, pastoral leaseholders).

In the context of the Northern Territory Government's ongoing commitment to building trust in the regulatory framework for onshore petroleum and fracking activities, communities and individuals must be able to have their say on these reforms, regardless of any targeted consultation processes being carried out. It is therefore critical that the Government undertakes transparent public consultation when developing these Regulations.

We would welcome the opportunity to further discuss our comments at any time.

Yours sincerely,



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[3] However, as raised in a previous submission in relation to this provision, we reiterate that we consider the format of drafting (whereby reviewable decisions are set out in a Schedule) is not appropriate. It is unnecessarily complicated and restrictive, also carrying with it the risk that certain decisions could be inadvertently omitted.