



**Aboriginal Areas
Protection Authority**
protecting sacred sites across the territory

Date: 8 February 2018

Ref: 2017/1149, CAB201800008

Email: fracking.inquiry@nt.gov.au

Dear Hon Justice Pepper

Re: AAPA Submission to the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory Draft Final Report

Thank you for the opportunity to comment on the above. As our earlier submission to the fracking enquiry captures the Authority's wider views on fracking in relation to Aboriginal culture and sacred sites we have largely confined our points in this follow-up to specific recommendations made in relation to the Authority and its role in protecting Sacred Sites.

The Authority supports the recommendations of the Inquiry that pertain to the protection of sacred sites and cultural values. More broadly the Authority is supportive of recommendations in the report that seek to establish a robust regulatory regime that can apply to the practice of hydraulic fracturing.

Consultations with custodians, traditional owners and native title holders

The Authority is supportive of recommendations for the dissemination of sound and impartial advice about proposed hydraulic fracturing projects and their associated risks to custodians, traditional owners and native title holders. Typically the Aboriginal Areas Protection Authority disseminates project information relevant to the protection of sacred sites, and the Authority understands and supports that such information be consistent with information disseminated by other agencies about the same project.

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Clearly the finer details of how agencies intersect with one another to achieve optimal mitigation of risks is beyond the scope of the Inquiry. However, an example of how such collaboration might occur could be instructive. As outlined in the AAPA submission to the Inquiry, the Northern Territory Government derives its power to legislate for the protection of sacred sites from the Aboriginal Land Rights (NT) Act (ALRA). Consequently the Northern Territory Aboriginal Sacred Sites Act is pursuant to S73(1)(a) of the ALRA. There is an inherent relationship between the two pieces of legislation that seeks to make the protection of sacred sites consistent with the broader rights and interests of Aboriginal people as defined in the Land Rights Act. Greater coordination between processes of environmental approvals, processes of consent, and sacred site protection could be achieved through the definition of legislative triggers and regulatory approvals processes.

In a recent example of a major project in the NT that had high risk factors in relation to the protection of sacred sites the AAPA entered into a memorandum of understanding with the Northern Land Council and the proponent to define the manner in which the three entities would work together. Principally the MoU asserted that an agreement between the proponent and the NLC would inform an Authority Certificate for the project. It also established that the Authority would undertake a detailed assessment of sacred sites within the project area prior to the negotiation of an agreement and provide all relevant information to both the proponent and the NLC to inform the negotiation of a resulting Indigenous Land Use Agreement.

The benefit of this approach was that it allowed custodians of sacred sites to define and limit access and use restrictions for the proposed development in their broadest sense, and prior to engaging in a commercial negotiation. In addition the definition of cultural values from the outset allowed custodians of sacred sites to assess potential risks and impacts on sacred sites arising from the proposed development which in turn informed their consent or otherwise for the development. The early identification of sacred site constraints also allowed for the project to be redesigned to minimise risks and impacts well within commercial and negotiation timeframes. The early definition of cultural values

provided transparency in the negotiation process which in this instance ran seamlessly resulting in an agreement being negotiated to the satisfaction of all parties in a relatively short period of time.

Subsurface sites

The Authority is supportive of the Inquiry's Draft Final Report recommendation that the Sacred Sites Act should be amended so that sub-surface formations can be included as a sacred site or a feature of a sacred site.

In a number of NT locations, custodians have knowledge of sub-surface formations including groundwater that are said to be features of sacred sites. Indeed the integrity of groundwater in particular, is recognised as being integral to the maintenance of many water based sacred sites and the maintenance of the cultural landscape more broadly. However there is some uncertainty about whether subsurface formations can be features of, or comprise, a "sacred site" within the meaning of existing site protection legislation in the NT. As noted in the Draft Final Report, it is arguable that only surface sites are protected by the Sacred Sites Act. The Authority agrees with Panel that the Sacred Sites Act be amended to ensure beyond doubt that features of a sacred site, and sacred sites themselves can be underground.

Water

As set out in our earlier response to the enquiry, the practice of hydraulic fracturing could have significant impacts on sacred sites arising from interference with water (surface and groundwater). Water is an essential part of traditional Aboriginal culture, both in terms of access for survival for groups living in remote areas, and also in terms of its spiritual link to Aboriginal sacred sites and religious customs. Clearly issues around the protection of water access for Aboriginal people go beyond sacred site matters, but religious and cultural issues around water access are part of the broader issues and any new fracking regime will need to reflect that.

Below please find the Aboriginal Areas Protection Area's (AAPA's) comments in relation to the draft recommendations.

11.1

That gas companies be required to obtain an Authority Certificate before undertaking any onshore shale gas activity.

The AAPA is supportive of this recommendation.

To achieve the above recommendation, Authority Certificates should be made mandatory through changes to legislation for example:

-amending the Petroleum Act to mandate the possession of an Authority Certificate as a criteria for approval;

-appending a valid Authority Certificate to an approved mine / environmental management plan.

The same effect may also be achieved through other regulations.

11.2

That AAPA:

- ***be provided with a copy of any application to conduct hydraulic fracturing for onshore shale gas under petroleum environment legislation at an early stage of the assessment and approval process;***
- ***be given an adequate opportunity to explain the application to custodians;***
- ***and be given an adequate opportunity to comment on the application and have those comments considered by the decision-maker.***

The AAPA is supportive of these recommendations.

The AAPA would also like to explore in more detail precisely what its role would be in terms of 'explaining' the applications to Custodians. Part of the AAPA 's role currently is in explaining the impact of proposed projects in relation to Sacred Sites, and this would continue, but it is unclear if this recommendation envisages the AAPA going beyond its current role in terms of disseminating information.

11.3

That legislation for the protection of sacred sites be amended so that sub-surface formations can be included as a sacred site or a feature of a sacred site.

The AAPA supports this recommendation.

The Authority will require technical/scientific information and legal advice to identify ways in which it can amend the Act so that underground features of a sacred site and sacred sites themselves can be protected.

The Authority notes that the Crown owns the mineral and petroleum resources beneath the ground (Northern Territory of Australia Minerals (Acquisition) Act). To amend the Act the Authority will likely need to involve the Commonwealth in future discussions.

11.4

That gas companies be required to provide a statement to native title holders with information of the kind required under s 41(6) of the Land Rights Act for the purposes of negotiating a petroleum exploration agreement under the future act provisions of the Native Title Act.

The Authority is supportive of this recommendation and agrees that introducing a requirement for gas companies to provide a statement to native title holders with information of the kind required under s 41(6) of the Land Rights Act will:

- ensure that native title holders are informed about the nature of the development proposed, and
- assist land councils in its consultations for native title land.

The Authority would also benefit from receiving a copy of such a statement from gas companies to assist it in processing Authority Certificates for hydraulic fracturing activities.

As part of the Authority Certificate process, the Authority requires proponents to provide details about proposed works and activities, and will issue a Certificate on the basis that it is satisfied that the use of or work on an area can proceed without substantive risk of

damage or interference to a sacred site. A Certificate may also be issued if an agreement has been reached between the Aboriginal custodians of any affected site and the applicant for the Certificate.

11.5

That interpreters be used at all consultations with Aboriginal people for whom English is a second language. Interpreters must be appropriately supported to ensure that they understand the subject matter of the consultation.

The Authority is supportive of this recommendation.

11.6

That Land Councils, AAPA, and the Government cooperate to ensure that reliable, accessible (including with the use of interpreters), trusted, and accurate information about any onshore shale gas industry is effectively communicated to all Aboriginal people that will be affected by any onshore shale gas industry.

That the gas industry fund the design and delivery of any information programs.

The Authority is supportive of this recommendation.

11.8

That a comprehensive assessment of the cultural impacts of any onshore shale gas development be completed prior to the grant of any production licence. The cultural assessment must:

- ***be designed in consultation with Land Councils and AAPA;***
- ***engage traditional Aboriginal owners, native title holders and the affected Aboriginal communities, and be conducted in accordance with world leading practice; and be resourced by the gas industry.***

The AAPA is supportive of this recommendation.

The AAPA has the anthropological expertise and long-term relationships with custodians to assist with designing and carrying out comprehensive assessments of the cultural impacts of onshore shale gas development.

Should you require further clarification of these comments please contact the Authority

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ben Scambary', with a large, stylized flourish at the end.

Dr Ben Scambary

Chief Executive Officer