

# **Submission to the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory**

**Aboriginal Areas Protection Authority**

**April 2017**

# 1. Executive Summary

- All Sacred Sites in the Northern Territory are protected by the *Northern Territory Aboriginal Sacred Sites Act* whether they are known about by the Aboriginal Areas Protection Authority (as the body that administers the *Northern Territory Aboriginal Sacred Sites Act*) or not;
- Damage to sacred sites can have far reaching consequences for Aboriginal people;
- The practice of hydraulic fracturing could have significant impacts on sacred sites arising from interference with subsurface water;
- The mechanisms of the *Northern Territory Aboriginal Sacred Sites Act* are considered to be adequate to mitigate surface impacts associated with inland gas development;
- However, the framework of the Northern Territory Aboriginal Sacred Sites is limited in its capacity to manage and mitigate subsurface impacts that may be associated with the practice of hydraulic fracturing; and so any framework put in place to allow for hydraulic fracturing will need to address this;
- The Aboriginal Areas Protection Authority currently has limited capacity to assess, analyse, and interpret subsurface impacts and how these might affect sacred sites, particularly those that might have water as a feature of the sacred site, and this too will need to be addressed in any proposed framework.

## **Recommendations:**

1. That Authority Certificates issued by the Aboriginal Areas Protection Authority be mandated through statute for any project that utilises hydraulic fracturing.
2. That the regulatory framework for the approval of hydraulic fracturing and the processes of the *Northern Territory Aboriginal Sacred Sites Act* be aligned to ensure the adequate protection of sacred sites.
3. That the *Environmental Assessment Act* and the *Petroleum Act* contain provision to ensure that an Authority Certificate has been issued to a proponent proposing to utilise hydraulic fracturing as a technique prior to any approvals being granted under those statutes.
4. That the Aboriginal Areas Protection Authority be adequately resourced to develop the capacity to interpret technical information pertaining to the possible impacts of hydraulic fracturing in order to mitigate such impacts on sacred sites in the vicinity of proposed works in the form of an Authority Certificate.
5. That applications to the Aboriginal Areas Protection Authority for activities likely to involve the method of hydraulic fracturing be explicit about this proposed activity in the definition of proposed works.

6. That applications to the Aboriginal Areas Protection Authority for works involving hydraulic fracturing include the proposed scope of all ground disturbance and all underground disturbance (in square metres/kilometres), including the likely impact on any underground water bodies and metric volumes of water proposed for surface or subsurface extraction – demonstrating any scale up in these areas of impact or volume of water extraction over the life of the project.
7. That appropriate and project specific information on the possible impacts of hydraulic fracturing be provided in plain English and or local Aboriginal languages for the benefit of custodians of sacred sites.
8. That the Aboriginal Areas Protection Authority be granted time and resources to conduct thorough consultations with Aboriginal custodians of sacred sites in remote locations in relation to any application for work associated with hydraulic fracturing.
9. That the Authority be provided the resources to commission independent scientific and environmental advice where it is deemed necessary in relation to the risks of specific projects to specific sacred sites.
10. Where proponents seek an *Authority Certificate* based on an application in accordance with Section 22(1)(b) of the *Northern Territory Aboriginal Sacred Sites Act*, that such an agreement be deemed binding only where the proponent has engaged an authorised Land Council of the Northern Territory to conduct the necessary anthropological research and provide legal advice to any Aboriginal person or custodian group entering into such an agreement. The Authority shall issue an Authority certificate based on agreement upon the satisfaction that the Anthropology report provided by the relevant Land Council contains the necessary instructions for the identification of Aboriginal custodians of the sacred sites and their instructions for the identification and protection of sacred sites in accordance with the Act.

## 2. Introduction

Sacred sites are an integral part of Indigenous people's social and cultural lives. They are integrally associated with traditional creation stories or narratives that codify a corpus of Indigenous law that applies and permeates to the deepest levels of Indigenous society. The protection and maintenance of sacred sites is of the utmost importance to the maintenance of the social fabric of Indigenous people in the Northern Territory of Australia. The Aboriginal Areas Protection Authority was established in 1989 as a statutory body under the *Northern Territory Aboriginal Sacred Sites Act* to assist in the protection of sacred sites in the NT.

This submission responds to an invitation from the Scientific Enquiry into Hydraulic Fracturing in the Northern Territory to provide comment on:

1. the cultural values relating to traditionally significant sites including their amenity value;
2. the nature and extent of the impacts and risks that hydraulic fracturing and the associated activities could have on cultural values in the Northern Territory, including culturally significant sites;
3. measures that can be taken to mitigate such impacts and risks; and
4. the Authority's views on the adequacy and effectiveness of these measures and any gaps in the current approach to protecting culturally significant sites that warrants attention by the Enquiry.

The submission addresses these criteria and makes several recommendations to the Enquiry in relation to the regulatory framework specific to sacred sites in the Northern Territory.

### 3. The Northern Territory Sacred Sites Act and the protection of sacred sites

The Aboriginal Areas Protection Authority (the Authority) is a statutory body established under the *Northern Territory Aboriginal Sacred Sites Act* 1989 (the Sacred Sites Act) to administer sacred site protection in the Northern Territory. The Act is subsidiary legislation arising from Section 73(1)(a) of the *Northern Territory Land Rights Act* (1973) which establishes both the legislative basis for the protection of sacred sites and the powers of the Northern Territory Government to establish a body to administer that protection.

The Aboriginal Areas Protection Authority is governed by a 12 member Board. Ten members of the Board are custodians of sacred sites who are appointed by the Administrator of the Northern Territory upon the recommendation of the four Northern Territory Aboriginal Land Councils to the relevant Minister. These Board members are typically highly respected senior Aboriginal people who have regional knowledge of sacred sites and associated authority for decision making and ceremonial matters. They are drawn from a breadth of geographic regions across the Territory. Two members of the Board are nominated by the Northern Territory Government and appointed by the Administrator, and are typically senior Northern Territory public servants.

The majority of the powers of the Sacred Sites Act are vested in the Board and are not subject to Ministerial control, thus ensuring independence of decision making of the Authority in relation to sacred site matters. The Minister has limited powers in relation to the operation of Sacred Sites Act.

The functions of the Authority are set out in Section 10 of the Sacred Sites Act but are broadly concerned with protecting sacred sites in the context of development through the provision of advice to proponents based upon consultation with custodians of sacred sites.

The protection of Aboriginal sacred sites is recognised by the Northern Territory Government and the broader Territory community as an important element in the preservation of the Territory's cultural heritage for the benefit of all Territorians. The Authority seeks to strike a balance between the protection of sacred sites and development in the Northern Territory.

The objective of the Sacred Sites Act as set out in the preamble, or long title of the Sacred Sites Act:

*An Act to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes<sup>1</sup>*

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<sup>1</sup> The *Northern Territory Aboriginal Sacred Sites Act*

The Sacred Sites Act is essentially a risk management framework for the protection of sacred sites in the Northern Territory. The Authority Certificate process as described in Section One below, balances the protection of sacred sites with development by defining conditions, if any, for the protection of sacred sites in relation to proposed developments. Application for an Authority certificate is not mandatory; however the offence provisions in the Act apply in instances where sacred sites are damaged. It is an offence under the Sacred Sites Act to:

- Enter or Remain on a sacred site (s33).
- Work on a sacred site (s34).
- Desecrate a sacred site (s35).

In *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* Justice Susan Oliver in finding that OM (Manganese) Ltd had desecrated a sacred site summarised the ethos of the Act as:

*In my view, the scheme of the Act relies on mutual trust and respect of the land over which the authority for use or work on the land is given. Sacred sites that exist on a parcel of land are identified and the recipient of the authority then undertakes to observe broad conditions related to the preservation and respect of the sacred sites. The recipient is left to determine the manner of use that will ensure that protection. This view is consistent with what is expressed in the Preamble to the Act<sup>2</sup>.*

Typically the processes of the Act and the methodology that has been developed to administer it concern the surface impact of proposed works on an area that may or may not contain sacred sites. If sacred sites are present then an authority will be issued that contains legally binding instructions to mitigate any impact of the proposed works on a sacred site.

Whilst cultural values extend to the subsurface, and may attach to minerals or commodities, the Act practically applies to values at the land surface. An example is that in a number of locations in the Northern Territory custodians have knowledge of subsurface rocks and boulders that are said to be the essence or eggs of various ancestral beings. In anticipation that such features may be unearthed in the course of works the Authority has issued instructions that any such boulders or rocks would be dealt with in a particular way.<sup>3</sup> Where a known subsurface feature of a sacred site exists then it is likely that the Authority could contain instruction to protect that feature from any earth disturbing works on the basis that the subsurface rock or object is a feature of a sacred site. However there are capacity constraints in identifying any subsurface features that may be associated with sacred narratives. Typically however, current practices of the Authority in issuing certificates are adequate to protect subsurface features where they are known by

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<sup>2</sup> *Aboriginal Areas Protection Authority v OM (Manganese) Ltd*: 16

<sup>3</sup> This occurred for proposed earth disturbing works at Ramingining and at Yuendumu.

defining restrictions that apply to surface disturbance. Similarly the extraction of water from known sacred sites is commonly subject of condition in Authority Certificates.

Ownership of all minerals is vested in the Crown. However, it is not unheard of for minerals or commodities to have cultural significance in accordance with Aboriginal tradition<sup>4</sup>. At Bootu Creek, for example where surface outcropping of manganese was symbolic of the local narrative and a feature of a sacred site, the processes of the Sacred Sites Act should have been adequate to protect the sacred site from subsequent damage from mining. In documenting the sacred site in order to protect it, the Authority noted the manganese feature, but such significance was not ascribed by custodians to the extent of the ore body that lay beneath the surface.

### **3.1 The Work of the Authority:**

The Authority provides the means by which Aboriginal sacred sites are protected in the Northern Territory through four key processes:

- Sacred site surveys and the issuing of legally indemnifying Authority Certificates for any proposals of development (Part III, Sites Protection Procedure, Division 1A- Application for Authority Certificate);
- The provision of information to the public about existing sacred sites data through abstracts of Authority records and access to the Registers maintained by the Authority (S48);
- The registration of Aboriginal sacred sites (Part III, Sites Protection Procedure, Division 2- Documenting, Evaluating and Registering Sacred Sites; and
- The enforcement of the offence provisions of the Act (PART IV- Offences, Penalties and Procedures.

The Sacred Sites Act has arguably the strongest cultural heritage protection powers in Australian legislation. McGrath and Lee note that the success of the Act is derived from the statutory separation of the Aboriginal Areas Protection Authority from government, the independence and Aboriginality of the Authority Board and the transparency of any ministerial review process.<sup>5</sup> The Act protects sacred sites in the Northern Territory whether they are known to the Authority or not. The Act does not protect Aboriginal archaeological heritage and is the only Australian statute to do so.<sup>6</sup>

These key processes of the Sacred Sites Act and the Authority are detailed below.

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<sup>4</sup> See Lewis and Scambary (2016: 235)

<sup>5</sup> McGrath and Lee (2016: 10)

<sup>6</sup> In the Northern Territory all Aboriginal archaeological sites and objects are protected by the *Heritage Act*. This Act also protects traditional Aboriginal and Macassan burial sites.

### **3.1.1 Authority Certificates**

Anyone proposing to use or work on land in the Northern Territory may apply to the Authority for an Authority Certificate to cover their proposed activities. Such Certificates are based on consultations with custodians and provide clear instructions on what can and can't be done in and around sacred sites. An Authority Certificate provides a statutory indemnity against prosecution in relation to the works or uses covered by the Certificate, provided the applicant complies with any conditions imposed to protect sacred sites. Authority Certificates apply to a defined subject land, and specific proposed works within that subject land and any indemnity only applies to the holder of the Certificate. They are not transferable from one entity to another, and cannot be relied upon for works other than those specified in the Certificate. Application for an Authority Certificate is voluntary and provides an effective risk management tool for developers, and acts as site protection measures for custodians. In this manner the Authority Certificate process provides certainty for all stakeholders involved in development in proximity to sacred sites.

### **3.1.2 The Registration of Aboriginal Sacred Sites**

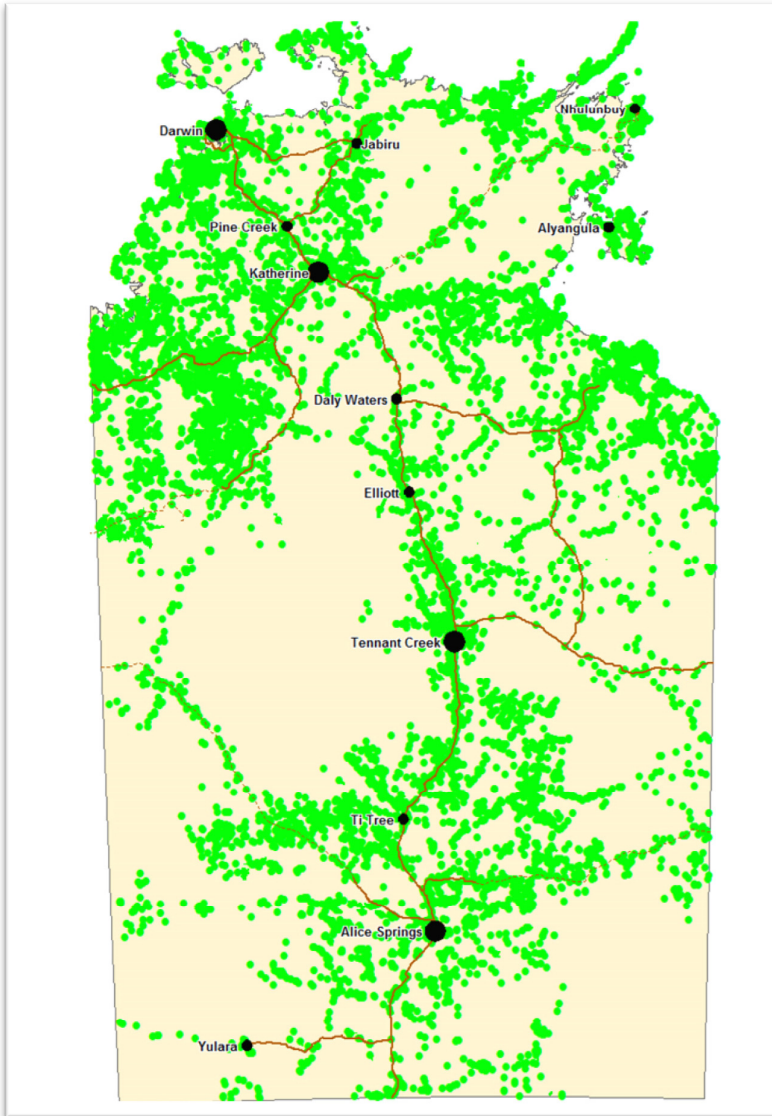
The Aboriginal Areas Protection Authority protects sacred sites in part by recording the features and narratives of such sacred sites to enter into the register of sites in accordance with the Act. The Act prescribes that the Authority shall do this by consulting the Aboriginal custodians of the sacred site who are the holders of the associated knowledge or story, song and ceremony and who have responsibilities in accordance with Aboriginal tradition for the care of the sacred site.

Custodians of sacred sites may apply to have their sites registered under Part III Division 2 of the Sacred Sites Act. The Authority will then conduct research into the site to determine the location, extent and significance of the site. In accordance with the Sacred Sites Act, the Authority ensures that sufficiently detailed documentation about specific sacred sites is recorded to warrant their inclusion on the Register of Sacred Sites by the Board and that landowners are given an opportunity to comment on issues of detriment. The benefit of registration to all stakeholders is that it provides certainty of the record of sacred sites.

The Authority holds records of more than 12,000 sacred sites in the Northern Territory (See Map 1). Of these, approximately 2000 are registered sites. Site registration ensures that certain information about these sacred sites is publically available including details about the geographic extent of the sacred site, and who the custodians are. The Board of the Authority are responsible for entering sites on to the register after a rigorous process of research and documentation. Once registered by the Board the registration must be taken as *prima facie* evidence that a site is a sacred site for the purpose of the Sacred Sites Act.

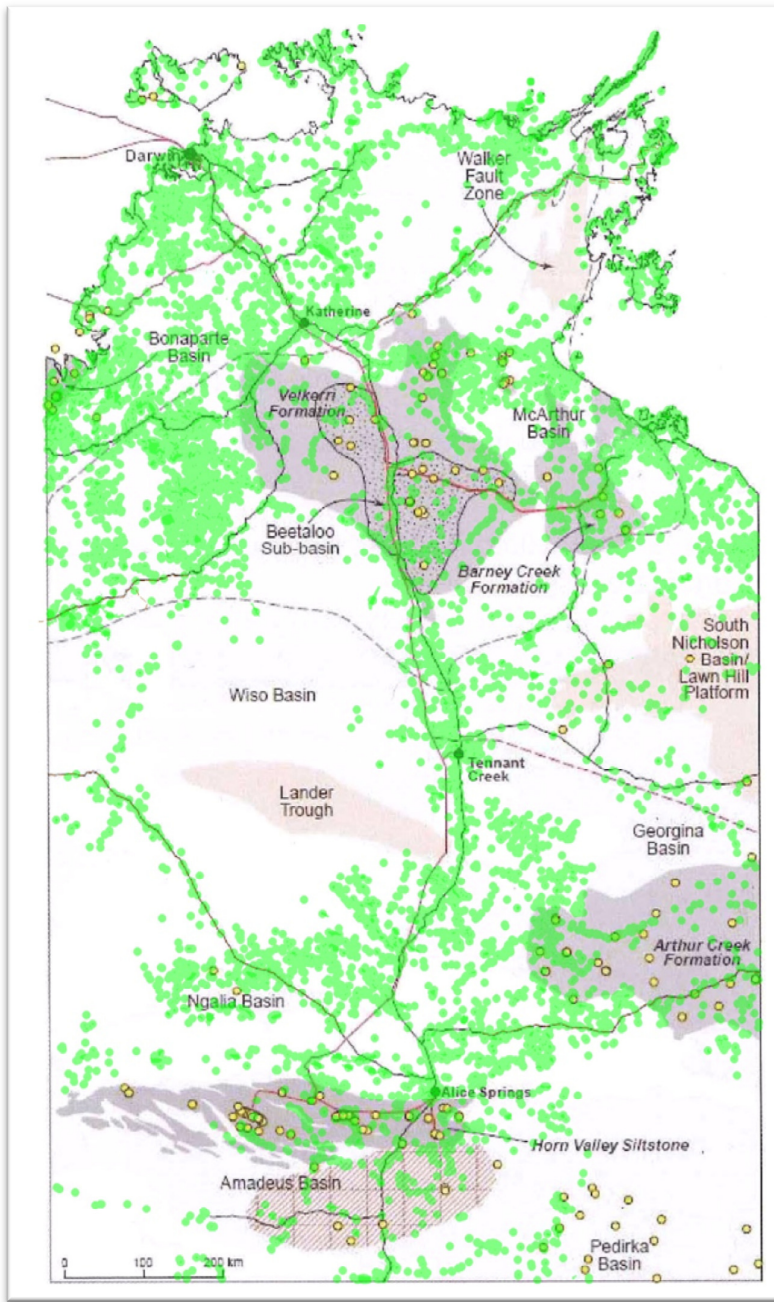
The Authority holds records of approximately 10,000 recorded sacred sites which are also protected by the Sacred Sites Act. In many cases the Authority holds detailed information in relation to these sites, but they have not been before the Board for registration. Other

recorded sites are less well documented. There is no doubt that the records held by the Authority concern only a fraction of sacred sites in the Northern Territory, with vast numbers still to be documented.



**Map 1 – Known Sacred Sites in the Northern Territory**

The areas of potential shale gas resources highlighted in the Background and Issues Paper (Fig7: 10) identifies some areas of the Northern Territory where the Authority has limited records of sacred sites. This is due in part to the absence of previous development in these areas that may have necessitated research and consultation over sacred sites.



**Map 2 – Potential Shale Gas Resources and Sacred Sites in the Northern Territory.**

### **3.1.3 Requests for Information**

Members of the public may seek advice on registered and recorded sacred sites by requesting access to the Register of Sacred Sites. The Authority provides abstracts of information to advise the public where sacred sites are known to exist and to provide advice on potential risks if works were to be carried out without more detailed information being sought first. Typically an abstract of records will depict the extent of any known sacred site, and also any restrictions that may have been placed on works in relation to known sacred sites. An abstract of records does not indemnify the holder or applicant from the offence provisions of the Act. This is largely because there is no consultation process with custodians of sacred sites involved in the issuing of an Abstract of Records or Register Inspection. It is often the case that an Abstract of Records may depict scant information about the existence or otherwise of sacred sites, which reflects that the Authority may not have undertaken research in the area of enquiry and therefore has no records of sacred sites.

The Authority scrutinises and interprets information prior to release and on the basis of this may advise an applicant that they should not carry out works in the area without an Authority Certificate.

#### **4. The cultural values relating to traditionally significant sites (sacred sites) including their amenity value.**

A sacred site is defined by the *Northern Territory Aboriginal Land Rights (NT) Act (1973)* (Cth.) as:

*a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.*<sup>7</sup>

Sacred sites are places within the landscape that have a special meaning or significance under Aboriginal tradition. Hills, rocks, waterholes, trees, plains, lakes, billabongs and other natural features can be sacred sites. In coastal and sea areas, sacred sites may include features which lie both on and above the water.

Sacred sites derive their status from their association with particular aspects of Aboriginal social and cultural tradition. This body of tradition is mainly concerned with the activities of ancestral beings, sometimes referred to as 'Dreamings' whose travels across the land and sea created the physical and social world that people now inhabit.

Sacred sites are most commonly identified by physical features in the landscape. Such features can be spectacular landscape features such as Uluru in central Australia. They can also be far less obvious in their features which might be a single tree, or an ephemeral water source. Regardless of their features, sacred sites are imbued with meaning and significance through the processes of Aboriginal tradition. Sanctions apply in a corpus of Indigenous law to the use and protection of such places, and transgression of these is likely to cause significant socio-cultural repercussions. Often such repercussions are played out amongst traditional Indigenous landholding groups, consisting of networks of kin. However, there are numerous sacred landscapes across the Northern Territory where inappropriate dealings are considered to bring ill will on the broader Australian populace. Custodians of sacred sites are motivated by a desire to comply with the sanctions that apply to sacred sites in order to keep themselves, their kin and the broader population safe from retributions associated with traditional law.

What makes a site sacred is that it is a place of significance to Aboriginal people in accordance with a body of Aboriginal traditions. Essentially the place that forms a sacred site and its features have religious value, and for Aboriginal people, these sacred sites are intrinsically linked through mythic narratives, sometimes referred to as song-lines or dreamings, that traverse the landscape documenting the activities of mythic and heroic ancestors. Such narratives, whilst situated in the creative period are considered to be alive and contemporary and give rise to a view of landscape as sentient.

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<sup>7</sup> *Aboriginal Land Right (NT) Act 1976* , Part 1(3)

The story or ancestral narrative associated with the activities of ancestral beings are said to have shaped the land and to have imbued it with meaning by their activities in the ancestral epoch As Myers notes:

*frequently known as totemic ancestors in the anthropological literature, the mythological personages of The Dreaming travelled from place to place, hunted, performed ceremonies, fought, and finally turned to stone or 'went to ground', where they remain. The actions of these powerful beings – human, animal and monster - created the world as it now exists...Places where exceptionally significant events took place, where power was left behind, or where the ancestors went into the ground and remain are special sacred sites (yartayarta) because ancestral potency is near<sup>8</sup>*

Custodianship of narratives and associated sacred sites in the landscape are tied to systems of kinship that across the Northern Territory form a complex of Indigenous land tenure where rights to speak for and make decisions about land, sacred sites, access permissions and resource use are highly codified. Different rights in relation to land arise from descent from the patriline and the matriline, noting that most people will have rights and interests and associated responsibilities for both their mother's and father's estates. Whilst there is significant regional variation in kinship rules and structures across the Northern Territory, a broad principle exists that there should be a consensus of decision making between those with rights derived from their father (Kirte in Central Australia, and Mingirringgi in the Top End), and those with rights in an area of land derived from their mother (Kurduungulu in Central Australia and Junggayi in the Top End). Seniority of decision making is also a key factor, with seniority for both men and women being established through the accumulation of ceremonial knowledge. Traditional law and its application to sacred sites can also be gendered in that the authority to access, speak for and make decisions about such places may be the domain of women or men to the exclusion of the other. The terms men's business or women's business typically refer to matters that are secret or sacred to one gender or the other

For the Aboriginal people who hold rights in these stories, it is believed that Ancestral beings by their actions established the laws or codes of conduct to be followed by law abiding people. Such codes inform ceremonial practices and the transmission of knowledge between generations to this day. The consequences of transgressions of traditional law may impact on the persons immediately involved, but may also have far wider reaching implications for the law holders. The cultural implications of the failure to uphold the law or conduct ritual responsibilities in relation to the protection and maintenance of sacred sites are many and likely to have far reaching ramifications in a community of people joined by ritual affiliations with the sacred site (See Section 5 below).

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<sup>8</sup> Myers (1996: 49-50), in Lewis and Scambary (2016: 226)

Ceremonial life and associated songs and narratives of the travels of ancestral beings also provide essential information about resource use and sharing protocols for dispersed groups of Aboriginal people. The song lines and associated paintings provide an oral and sometimes visual map of the landscape. Sacred sites often double as markers of these important resource locations:

Sacred sites are typically identified by their landscape features which are symbolic of the power or essence of ancestral beings that created them. Lewis and Scambary<sup>9</sup> have documented a range of instances where landscape features associated with sacred sites are overlaid with meaning and significance by non-Indigenous interests—notably in the context of mining and resource extraction. A number of examples are provided that include the variant interpretations of uranium in the Finnis River and Kakadu regions of the NT and its traditional association with leprosy in the Finnis River region and with an apocalyptic ancestral being called Bula in the Kakadu region. At Bootu Creek Mine on Banka Banka Station to the north of Tennant Creek, the surface outcrops of manganese are symbolic of the blood of two mythic marsupial women who fought over bush fruit. At Argyle mine in northern Western Australia diamonds are considered to be the embodiment of the scales of the barramundi creation ancestor who created the landscape and its features in the country the mine is situated in.

Whilst the legislative framework protecting sacred sites in the Northern Territory does not extend to the protection of subsurface and mineral/resource values, there is no doubt that Aboriginal beliefs about the sanctity of land encompass beliefs, knowledge and sanctions that do extend to the subterranean. Many narrative accounts depict ancestral heroes travelling underground, or being embedded in the earth at locations typically referred to as sacred sites.

Water too, is of the utmost importance both in terms of resource use and its associated cultural values. There are numerous instances of water being a key feature of sacred sites. For example, in the Top End the flow of water is a key cultural value of Kungarakan people and is typically associated with women's law. Water as a life source is also integrally associated with identity and country, and conception. People refer to themselves as freshwater or saltwater people, and use water to introduce themselves and strangers to country to ensure that the ancestors who are imbued in the landscape recognise them and do not harm them.

Aboriginal custodians have identified many such water sources and water bodies as sacred sites in the records held by the Authority. Contamination of such waterbodies is a key concern, with a common belief being that ritual cycles and the meaningful exchange of resources between clans may be threatened. Aboriginal people commonly attribute fertility and health of humans to the health and ceremonial maintenance of sacred sites. These are the wider potential cultural impacts that make up the relationships between persons, the land, sacred sites, ritual activities and interpersonal and wider inter-group social responsibilities today.

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<sup>9</sup> Lewis and Scambary (2016)

## **5. Part Two: The nature and extent of the impacts and risks that hydraulic fracturing and the associated activities could have on cultural values in the Northern Territory, including culturally significant sites.**

There are a number of potential impacts and risks for sacred sites that arise from hydraulic fracturing and associated activities. Many of these are highlighted in the Background and Issues Paper prepared for the Scientific Inquiry into Hydraulic Fracturing Enquiry in the Northern Territory. There is the potential for there to be direct impacts on sacred sites from hydraulic fracturing, particularly in terms of water and vegetation clearing where these may form a feature of a sacred site. Access too, has the potential to impact on sacred sites. Secondary impacts are also possible and could arise from issues associated with water, vegetation clearing, access, social impacts, and the adequacy of the regulatory framework.<sup>10</sup>

As noted in Section 4 above, water holds significant cultural value for Aboriginal people across the Northern Territory. The potential impacts of hydraulic fracturing on water are numerous. Any increase or decrease in surface water as a result of the activity could potentially impact on the sanctity of water based sacred sites. Typically inland sacred sites associated with water take the form of springs, waterways such as rivers and creeks (or part thereof), permanent water sources such as billabongs, and waterholes; and ephemeral water sources such as soaks and traditional wells<sup>11</sup>. In addition knowledge of aquifers and their association with the travels or songlines of ancestral heroes is not uncommon.

Whilst the Sacred Sites Act protects the surface features of sacred sites, there is a potential that subsurface disturbance of groundwater could impact water levels or water quality some distance from the initial surface disturbance associated with sinking a well. The capacity of the current regulatory framework under the Sacred Sites Act is outlined in Section 6 and 7. However, the cultural impacts that may be associated with these sorts of outcomes can be profound and include social rupture, traditional payback, loss of knowledge and consequent loss of capacity for intergenerational transfer of cultural knowledge.

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<sup>10</sup> Background and Issues Paper, Scientific Inquiry into Hydraulic Fracturing in the Northern Territory

<sup>11</sup> For an example of the significance of water in an arid environment see the film 'Putuparri and the Rainmakers', Directed by Nicole Ma. <http://putuparriandtherainmakers.com/>

At stake are the key relationships between sacred sites and kin, and the notion that damage to sacred sites is experienced in a merging of ‘the physical, temporal, spiritual and social realms’<sup>12</sup> of Aboriginal people as ancestral beings associated with such sacred places are invoked in the social present. Loss, grief, anger and betrayal are common themes of Aboriginal responses to sacred site damage. These can compound into social tensions at the local level in terms of blame and the relative responsibilities and accountabilities that different categories of kin may hold in relation to a sacred site. At the emotional level ‘site damage is generative of emotional distress and grief and is often associated with physical illness and death’<sup>13</sup>

Causality associated with site damage may also entail significant social impacts. Unexpected death, illness or bad luck may be attributed to an incident of damage or changed circumstance of a sacred site. Blame and ensuing sanctions for breach of responsibility for a sacred site resulting in its damage, whether directly attributable to a custodian or not, can cause social rupture. Such rupture can rebound through local social relationships as blame and retribution is exacted, and extends to disruption of regional social and ceremonial relationships. This may in turn impact on the ability of individuals to attain ceremonial authority and lead, in a short time, to social breakdown as traditional authority structures begin to erode.

Such impacts, as well as being profound, can be intergenerational. As Lewis and Scamby note ‘at both individual and collective levels, site damage often results in shame—that powerful social force of humiliation where custodians lose face for failing to protect their sites regardless of cause, blame or ability to prevent damage’<sup>14</sup>.

In addition to the potential damage to sacred sites that might be caused by hydraulic fracturing, use of surface water in the process could also cause significant impact. Current Authority processes are likely to be adequate for management of water use and sacred site protection at the surface (See Section 6). However, in arid environments there is likely to be a significant confluence between surface water sources and sacred sites. It is not uncommon for the Authority to restrict use of surface water for works such as mining, exploration and road works where such confluence occurs. Intensive inland hydraulic fracturing activity has the potential to bring significant pressure on permanent water sources, which are likely to be of cultural significance to Aboriginal people including specific sacred sites.

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<sup>12</sup> Lewis and Scamby (2016: 240)

<sup>13</sup> Lewis and Scamby (2016: 244)

<sup>14</sup> Lewis and Scamby (2016: 244)

At the lands surface, hydraulic fracturing would not necessarily differ significantly from other surface drilling programs. Typically these entail cleared areas for the drill locations and on occasion more significant land clearing for access tracks and camps. However, exploration is a precursor to drilling programs being defined and it is the experience of the Authority that some types of exploration can result in significant land clearing.

On occasion stands of vegetation can constitute the features of a sacred site. In such cases the provisions of the Sacred Sites Act can protect these features. However, stands of vegetation can also be symbolic of the path of a mythic ancestor. In such cases it may be difficult for the Sacred Sites Act to protect the cultural values associated with a dreaming track on the basis that it is difficult to define the geographic extent of such tracks.

In addition the impacts on habitat of large scale land clearing that may be required for exploration could be significant for wildlife and biodiversity values that may be important in the maintenance of traditional livelihoods. Again impacts such as a decline in natural resources for subsistence activities may be attributed by Aboriginal people to interference either real or implied with sacred sites.

As noted the Sacred Sites Act provides a framework for managing risk in relation to sacred sites. In issuing Authority Certificates the Authority assumes any risk for developers that may be associated with sacred sites by providing an indemnity against prosecution. For custodians, certainty of the protection of sacred sites is ensured through a thorough consultation process, and a methodology that ensures custodians wishes in relation to their sacred sites are reflected in a subsequent Authority Certificate. As noted in Section 3, the framework relies on trust that the information provided by the Authority is correct, and that developers will abide by and be constrained by the authority that they are granted. When sacred sites are damaged, in addition to the impacts on Aboriginal people, there can be significant reputational costs for developers or proponents that may ultimately result in a withdrawal of the social licence to operate.

## **6. Measures that can be taken to mitigate such impacts and risks to sacred sites and associated cultural values upheld by Aboriginal people of the Northern Territory**

The key process for the protection of sacred sites under the Sacred Sites Act is the Authority Certificate process as outlined in Section 3 above. Authority Certificates provide instructions to developers on what they can and cannot do in relation to sacred sites based on the instructions of custodians that are conveyed to the Authority through face to face and on site consultation. Authority Certificates are issued for a specific project with defined works and in respect of a defined subject land. They are non-transferable.

The Sacred Sites Act has the capacity to mitigate many of the impacts of hydraulic fracturing on sacred sites through the standard practice of issuing Authority Certificates. Surface disturbance associated with rock sampling and drilling, accommodation camps, access tracks, drawing of surface water, and clearing of vegetation can all be assessed through consultation with custodians of sacred sites to define conditions, if any, that might be imposed on such developments to ensure the protection of sacred sites.

The capacity of the Sacred Sites Act to mitigate potential impacts such as the contamination of ground water, other impacts on the water table, or other features of a sacred site that are subsurface are less clear, particularly when such impacts remain below ground. The difficulty arises from the capacity to define what the feature of the sacred site might be, and what the impact on that place or feature might be.

Whilst an Authority Certificate is normally issued in respect of a particular tract of land, typically referred to as the subject land and geographically defined, there is also the potential that impacts on sacred sites, particularly those associated with water may occur at some distance from the area for which an Authority Certificate applies. Typically an Authority Certificate will be issued for all works associated with a hydraulic fracturing project and would likely include transport and access corridors, drilling locations, camp establishment, and surface water use locations. The purpose of granting an Authority Certificate over land described is to prevent damage or interference to a sacred site. To achieve this purpose the land as described in the Authority Certificate would normally, but not necessarily, include all sacred sites which might potentially be impacted by the activity.

In that case of a sacred site with water features some distance from the area of proposed works and outside the subject land that is reasonably suspected of being impacted by the works, the Authority must define conditions for the protection of that site in the form of an Authority Certificate in order to apply the offence provisions under S37 (Breach of an Authority Certificate). In order to impose such conditions the Authority must have clear knowledge of the hydrology of the area, and also of the potential impacts of the activity on the hydrology and associated sacred sites in the vicinity of the application area. This poses significant challenges for the Authority in terms of having the necessary expertise to assess subsurface impacts on water flows and will be highlighted in the next section.

Similarly if the sacred site is not subject of conditions in an Authority Certificate and a site in the vicinity of the works is impacted by changed water conditions associated with hydraulic fracturing, the Authority would need to prove that the activity was responsible for the impact on the sacred site. Again this poses concerns in terms of the capacity of the Authority to investigate and prove the causality of the impact on the sacred site in order to apply to offence provisions of the Act.

## **7. The adequacy and effectiveness of these (NTASSA) measures for the protection of sacred sites and any gaps in the current approach to protecting culturally significant sites and associated cultural values**

So far in this Submission we have outlined the key processes for protecting sacred sites in the Northern Territory arising from the Sacred Sites Act; the nature of cultural values associated with sacred sites including subsurface values; and the impacts and repercussions of sacred site damage. This section discusses gaps in the regulatory scheme of the Sacred Sites Act with particular reference to hydraulic fracturing and makes a number of recommendations for how the scheme might be improved.

The key mitigating factor in the Sacred Sites Act is the capacity to apply for an Authority Certificate as a risk management measure. However, as noted the application for Authority Certificates is not mandatory, but is balanced against the offence provisions of the Act. This represents a key risk for sacred site protection for any activity, but also for the practice of hydraulic fracturing.

Other statutes such as the *Mineral Titles Act*, the *Mines Management Act*, the *Environmental Assessment Act* and the *Petroleum Act* may require evidence of an Authority Certificate prior to granting approval. However, these requirements are usually established in guidelines only and could be subject to challenge.

The Authority is invited to comment in relation to Environmental Impact Statements and Notices of Intent. The Authority's comments are confined to matters of sacred site protection and typically highlight whether an Authority Certificate application has been lodged, or not, in relation to the proposal. This allows the processes of the Sacred Sites Act to run in parallel and exclusive of the environmental approvals process. Whilst this has some merits, drawbacks include the lack of coordination between the Sacred Sites Act and other regulatory frameworks which on occasion leads to a proponent only becoming aware of the Sacred Sites Act late in the approvals timeframe. This can place undue pressure on the Authority and custodians to provide advice in relation to sacred sites in order to meet proponent's commercial deadlines.

Another element in this is the jurisdictional overlap between the Authority and the four Northern Territory Land Councils. Briefly this arises from a 1987 amendment to the *Aboriginal Land Rights (NT) Act 1976* to give Land Councils a function to assist in the protection of sacred sites both on and off Aboriginal Land.<sup>15</sup> The provision is mostly unproblematic, except in the Central Land Council region where the Central Land Council mimics the processes of the Sacred Sites Act to provide sacred site clearances that purport to provide a defence against the offence provisions of the Act. However whether such clearances could provide a defence has not been tested at law. One of the effects of

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<sup>15</sup> See S23(1)(b)(a) of the *Aboriginal Land Rights (NT) Act 1976*

this practice is that it introduces a duplication of process. Whilst the Authority takes the view that CLC certificates do not provide an indemnity under the Sacred Sites Act, we encourage application of the agreement making provisions of the Act<sup>16</sup> as a means to overcome such duplication. However, many proponents are justifiably surprised that they must seek an Authority Certificate as part of their approvals process, despite having engaged with the Central Land Council. Typically this risk is managed through effective collaboration between the Authority and NT Land Councils.

In reviewing applications for Authority Certificates related to hydraulic fracturing for the purposes of this submission it has come to light that despite Authority Certificates being a key requirement of broader environmental approvals, a number of proponents have, upon receipt of other approvals, subsequently withdrawn their applications for Authority Certificates. In addition the Authority is in receipt of a number of applications for Authority Certificates for exploration over potential shale gas resource areas which have been suspended at the applicant's request. It is unknown to the Authority if such suspensions may be pending the outcome of the Scientific Inquiry into Hydraulic Fracturing, or other factors.

In relation to hydraulic fracturing, but also more broadly, the voluntary schema of the Sacred Sites Act creates a risk to sacred sites. Notably, whilst the Sacred Sites Act does not mandate Authority Certificates for all works, the capacity of other statutes and processes to do so is limited. It is recommended that:

- a) there be provision in the Sacred Sites Act to mandate Authority Certificates for projects that entail hydraulic fracturing;
- b) that the *Petroleum Act* mandate the possession of an Authority Certificate as a criteria for approval; and
- c) that there be greater alignment between environmental and other approvals and the Sacred Sites Act to ensure that sacred site protection is integral to all regulatory considerations for hydraulic fracturing.

Greater alignment between the processes of the Sacred Sites Act and Environmental assessments and approvals may also assist in the Authority to understand the technical aspects of hydraulic fracturing on a case by case basis, and to better inform the definition of conditions that might be applied for the protection of sacred sites in accordance with the Sacred Sites Act. In addition, it has been suggested that greater alignment could also achieve additional accountabilities in relation to sacred site protection. An example being that a valid Authority Certificate could be appended to any approved mine management plan, thus making any breach of certificate subject to the sanctions of the *Mine Management Act*. Similar mechanisms in the *Petroleum Act*, *Northern Territory Environmental Protection Act*, and *Planning Act* could potentially offer more holistic

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<sup>16</sup> See s22(1)(b) of the *Northern Territory Aboriginal Sacred sites Act*

protection of sacred sites. The key question however, is why not increase the powers of protection within the Sacred Sites Act rather than rely on other statutes?

As noted in Section 6, in the event of any impacts from the activity of hydraulic fracturing on sacred sites, the Authority will need to access information of a technical nature in seeking to apply the offence provisions of the Sacred Sites Act. Notably the Authority is of the view that prevention of sacred site damage through appropriate processes is preferable to litigating the offence provisions of the Act. However, the capacity of the Authority to assess environmental impacts of proposed works that may entail a risk for sacred sites in the vicinity of the works is limited. Specifically the Authority does not currently have the expertise to understand and interpret the potential of subterranean and hydrological interference to sacred sites. A key challenge then for the protection of sacred sites under the current Sacred Sites Act is for the Authority to increase its capacity to be able to interpret and assess the potential impacts of hydraulic fracturing on sacred sites and to address these through the imposition of appropriate conditions. An alternative to this would be to have a coordinated formal approvals process that would allow the Authority to access necessary technical appraisals from other regulatory bodies and build these into the Authority Certificate process.

## 8. Conclusion

The *Northern Territory Aboriginal Sacred Sites Act* provides legal certainty for proponents seeking to access, use and utilise the resources of the land in the Northern Territory by managing risks associated with sacred sites. It also provides a framework for agreement making about the terms of sacred site protection between Aboriginal custodians of sacred sites and proponents.

The main risks identified in this submission are that Aboriginal custodians are not provided the same degree of certainty with regard to proposals for hydraulic fracturing if:

- Proponents fail to engage in the process of seeking regulatory advice from the Authority and therefore consultations with Aboriginal custodians do not occur and instructions for the protection of sacred sites are not issued;
- The nature and extent of likely impacts of hydraulic fracturing remain obscured or poorly identified by the description of the activity in an application for an Authority Certificate and therefore are not adequately considered;
- The nature of hydraulic fracturing and its potential impacts on sacred sites is not defined by the scientific community in a manner that is easily explained to Aboriginal custodians of sacred sites or that cultural impacts are overlooked.

The nature of Northern Territory Aboriginal Sacred Sites Act and the size and scope of the Authority inevitably make it difficult, though not impossible, for the Authority to provide for protection of Sacred Sites in the context of hydraulic fracturing. The recommendations we have made above provide, in the Authority's view, the best mechanism for ensuring Sacred Sites are protected through a regulatory regime allowing hydraulic fracturing.

## References

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