



# ABORIGINAL PEOPLE AND THEIR CULTURE

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## Chapter 11 Aboriginal people and their culture

*"When I see a map of country I see land, sea and family. When they see a map of country, they see mining fantasies. When I see the seabed, I see sacred sites. When they see the seabed, they see dollar signs. When I see a map of exploration permit 266, I see them trying to reduce my country to three digits... People ask me for my story, but my story is your story".<sup>1</sup>*

### 11.1 Introduction

The wellbeing of Aboriginal people and communities is underpinned by cultural traditions that ascribe significance to the landscape and link Aboriginal people to their country.<sup>2</sup> Moreover, in order to ensure that their ownership rights continue to be recognised, Aboriginal landowners must be able to maintain their cultural traditions relating to that land from one generation to the next.

In the NT, it has long been recognised that places of spiritual or religious significance to Aboriginal people need to be protected *"to avoid the harm to the Aboriginal people identified with such places that would arise if they are damaged"*.<sup>3</sup> As noted by Woodward J in his seminal report about Aboriginal land rights in the Northern Territory, *"too often in the past grave offence has been given and deep hurt caused by their inadvertent destruction...It is hardly necessary to say that all relevant legislation must continue to protect Aboriginal rights of access to sacred sites."*<sup>4</sup>

Many submissions to the Panel noted that, without appropriate mitigation measures, the development of any onshore shale gas industry may damage sacred sites and cause conflict within Aboriginal communities and between Aboriginal people and the shale gas industry.<sup>5</sup> It was put to the Panel that: *"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."*<sup>6</sup>

Damage to sacred sites is one way that any onshore shale gas industry can have an impact on Aboriginal people, their culture and traditions. Aboriginal culture and tradition is much broader than the meaning of 'sacred sites' as it appears in legislation. As noted by the Northern Land Council (NLC): *"the protection of culturally significant sites is important, it is but one of the multitude of aspects of Aboriginal society and culture that needs to be considered"*.<sup>7</sup>

In addition to the possibility that sacred sites might be damaged, is the risk that Aboriginal people are not able to maintain their cultural traditions relating to land from one generation to the next. Aboriginal people must transfer traditional knowledge across generations for their ownership rights in land to continue to be recognised.<sup>8</sup> Further, Aboriginal people must be able to freely access traditional country both during and after the development of any onshore shale gas industry.<sup>9</sup>

There is also a risk that any onshore shale gas industry will inject *"stresses into the social and cultural fabric of land-owning groups"*,<sup>10</sup> because traditional owners are required to balance the economic returns associated with development with traditional cultural concerns.<sup>11</sup> There is also an issue surrounding the distribution of financial benefits. Under the relevant Commonwealth

1 Ms Alice Eather, *My Story is Your Story*, 24 November 2014, <https://www.youtube.com/watch?v=l4q4uR2gK84>. Permission given to reproduce extracts from the poem by Ms Helen Williams.

2 Aboriginal Areas Protection Authority, submission 234 (AAPA submission 234); Northern Land Council, submission 214 (NLC submission 214); NLC submission 471; Central Land Council, submission 47 (CLC submission 47).

3 Woodward Report, p 100.

4 Woodward Report, p 100.

5 Scambary and Lewis 2016, p 222; AAPA submission 234, p 21.

6 AAPA submission 234, p 16.

7 NLC submission 471, p 20.

8 For example: CLC submission 47; NLC submissions 214 and 471; AAPA submission 234.

9 NLC submission 217, p 37.

10 NLC submission 471, p 22.

11 NLC submission 471, p 22.

legislation, financial benefits from petroleum agreements flow to traditional Aboriginal owners and native title holders, not the broader Aboriginal community. The Land Councils are cognisant of these risks.<sup>12</sup>

The Panel has also heard that development can have a disruptive effect on social cohesion in Aboriginal communities. Tension can arise from various sources, including as a result of lack of information about hydraulic fracturing and any onshore shale gas industry more broadly. Aboriginal people have been “recruited by individuals/organisations with an interest on either side of the [hydraulic fracturing] debate”.<sup>13</sup>

## 11.2 Indigenous land in the NT

Around 98% of land in the Northern Territory is either Aboriginal freehold under the Land Rights Act, leasehold under the *Pastoral Land Act 1992* (NT), or held under other forms of tenure that exists concurrently with native title, such as vacant Crown land.

As shown in **Figure 11.1**, all of the known prospective onshore shale gas areas, including the Beetaloo Sub-basin, are on areas that are either Aboriginal land under the Land Rights Act, or where native title exists (**Indigenous land**). The effect of this is significant for any onshore shale gas industry and for Aboriginal people. Each time a gas company makes an application to the Government for the grant of a petroleum interest under the Petroleum Act, the statutory processes set out in the Land Rights Act and the *Native Title Act 1993* (NT) (**Native Title Act**) must be complied with first. The Land Rights Act and the Native Title Act provide a legal framework whereby traditional Aboriginal owners and native title holders are informed about, and consulted in respect of, development on their land.

### 11.2.1 Aboriginal land under the Land Rights Act

Aboriginal land is a communally held and inalienable form of title established under the Land Rights Act, which is Commonwealth legislation that only applies in the NT. Approximately half of the NT land mass, and approximately 70% of the coastline, is Aboriginal land. Seven exploration permits have been granted on Aboriginal land.

#### 11.2.1.1 Aboriginal Land Trusts and Land Councils

Aboriginal land is held by Aboriginal Land Trusts, which are corporations that may acquire, hold, and dispose of real property.<sup>14</sup> Land Trusts can only exercise their powers and functions in accordance with the rules set out in the Land Rights Act and with a direction given to the Land Trust by the relevant Land Council.<sup>15</sup>

#### 11.2.1.2 Land Councils

The Australian Government accepted the recommendation of the Aboriginal Land Rights Commission, that Land Councils be established as independent entities to carry out functions under the Land Rights Act. Woodward J recommended the establishment of Land Councils for several reasons. First, during the Commission, Woodward J observed a lack of formal submissions received from Aboriginal people and saw the need for an institution to consult with and express the views of Aboriginal people.<sup>16</sup> Second, his Honour wanted to ensure that Aboriginal people's consent would be given without the risk of coercion or manipulation. He opined that Land Councils could assist Aboriginal people to negotiate against powerful and well resourced extractive industry companies.<sup>17</sup>

12 NLC submission 471, p 22.

13 NLC submission 417, p 17.

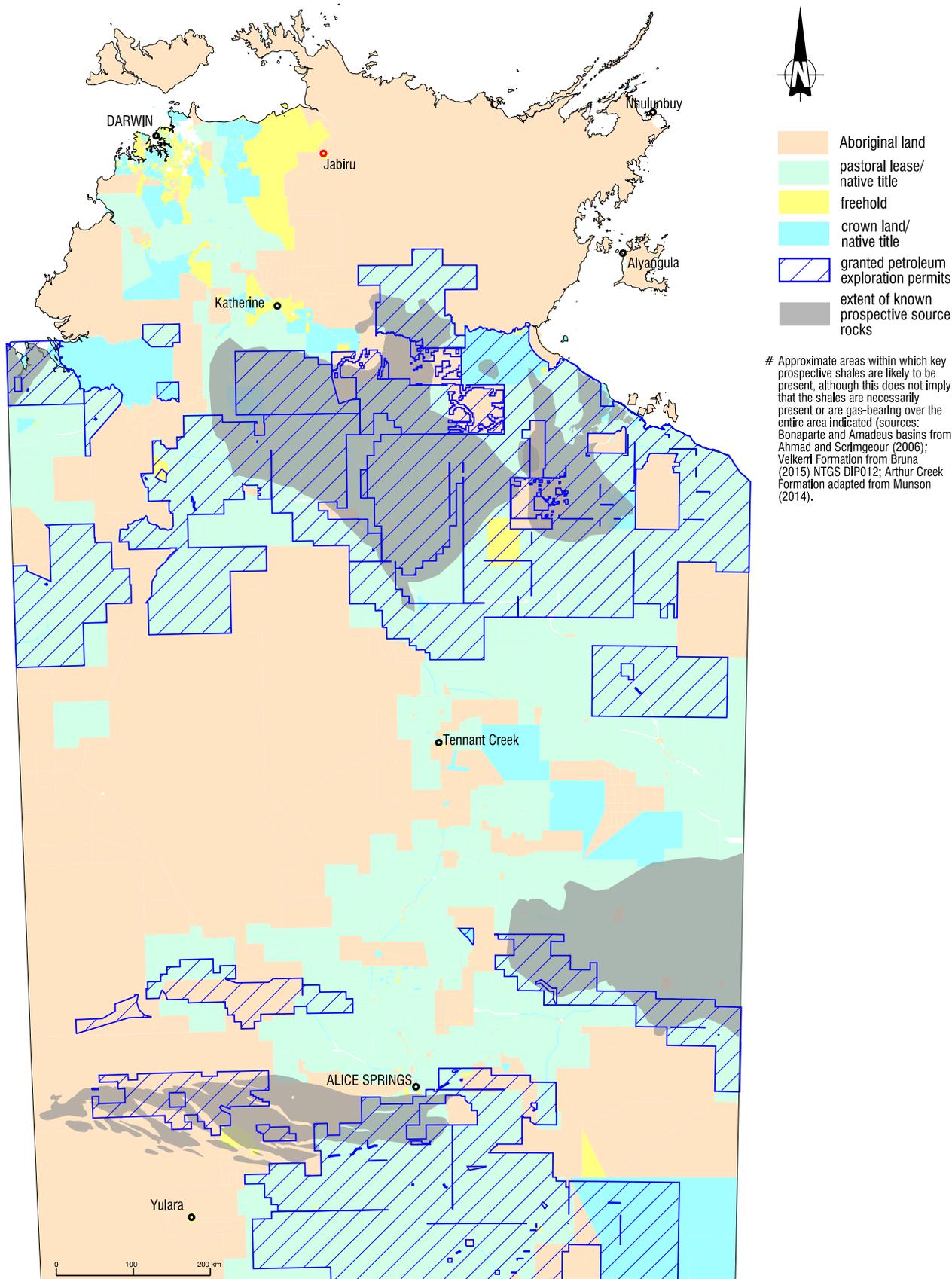
14 Land Rights Act, s 4(3).

15 Land Rights Act, s 5(2).

16 Finlayson 1999, p 17.

17 Cullen 1991, p 159; Woodward Report, p 127; Mansfield Review.

**Figure 11.1:** Indigenous land in the NT and granted exploration permits.



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Land Councils are established by the relevant Commonwealth Minister. Council members must be “*Aboriginals living in the area*” of the Land Council who are “*chosen by Aboriginals living in the area*”.<sup>18</sup> The Land Council’s functions are set out in the Land Rights Act and include to:

- consult with traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Land Council with respect to any proposal relating to the use of that land;
- provide assistance to Aboriginal people to protect sacred sites in the area of the Land Council;<sup>19</sup> and
- negotiate with persons wanting to obtain an estate or interest in land in the area of the Land Council on behalf of traditional Aboriginal owners (if any) of that land and of any other Aboriginals interested in the land.<sup>20</sup>

The NLC and the Central Land Council (**CLC**) represent traditional Aboriginal owners (and native title holders under the Native Title Act) of the land in all the known onshore shale gas basins.

### **11.2.1.3 Traditional Aboriginal owners and the Aboriginal community**

Under the Land Rights Act, the term “*traditional Aboriginal owners*” is defined as: “*a local descent group of Aboriginals who (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land*”.<sup>21</sup>

Land Councils must use this definition to determine who the traditional Aboriginal owners are for a particular area. Traditional Aboriginal owners have a statutory right to be consulted and to consent to the grant of an exploration permit. These rights are stronger than the rights given to ordinary freehold landowners and native title holders, who cannot say ‘no’ to development on their land. If, however, the traditional Aboriginal owners do not exercise their right to say ‘no’ at the exploration stage then they cannot say ‘no’ at a later stage in the process, for example, at the production stage. The legal mechanisms by which traditional Aboriginal owners are consulted and consent is explained in Section 11.3.1 below.

The Land Rights Act also refers to other groups of Aboriginal people. These people are referred to as “*other Aboriginal groups*”, “*affected Aboriginals*”, or “*the Aboriginal community*”. These terms are not defined in the Act and, again, the Land Council determines the people that comprise these groups. Neither other Aboriginal groups nor the broader Aboriginal community have the right to say ‘no’ to development. These people have the right to be consulted and express their views to the Land Council on certain matters, but this is something less than the right to consent, or refuse to consent, to development. Before entering into an agreement with a gas company the broader Aboriginal community must be given an “*adequate opportunity to express to the Land Council its views concerning the terms and conditions*” of an exploration agreement.<sup>22</sup>

## **11.2.2 Native title**

The existence of native title in Australia was recognised by the High Court in *Mabo v Queensland (No 2)* (1992).<sup>23</sup> That case overthrew the longstanding legal fiction that Australia was *terra nullius*, or an empty land, at the time of colonisation in 1788. The Commonwealth responded to the Mabo decision by enacting the Native Title Act the following year.

The term “*native title*” is defined in the Native Title Act as the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters that are possessed under traditional law and custom.<sup>24</sup> Native title rights and interests are sometimes described as a ‘bundle of rights’, including, among other things, the right to hunt, fish and gather. Native title is not a leasehold or a freehold interest in land.

Most granted petroleum exploration permits, and areas that are prospective for onshore shale gas, are on land subject to native title, which is often also pastoral land (see Figure 11.1). In *The Wik*

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18 Land Rights Act, ss 21(1), 29(1).

19 Land Rights Act, s 23(ba).

20 Land Rights Act, s 23(1); NLC submission 214, p 3.

21 Land Rights Act, s 3.

22 Land Rights Act, s 42(2)(b).

23 175 CLR 1; [1992] HCA 23.

24 Native Title Act, s 223.

*Peoples v The State of Queensland; The Thayorre People v The State of Queensland*<sup>25</sup> the High Court of Australia held that native title could coexist with pastoral land. Where a petroleum exploration permit application is made over land subject to both native title and pastoral interests, both land access regimes apply. The land access regime for pastoral leases is set out in Chapter 14.

The legal mechanisms by which native title holders are consulted in respect of development on native title land are discussed below in Section 11.3.

### 11.3 Laws protecting Aboriginal culture, traditions, and sacred sites

Two Commonwealth Acts, the Native Title Act and the Land Rights Act, together with complementary NT legislation, the *Northern Territory Sacred Sites Act 1989* (NT) (**Sacred Sites Act**) as well as the EAA and the *Heritage Act 2001* (NT), establish a legal framework that enables Aboriginal people to maintain cultural traditions, including, but not limited to, protecting sacred sites from the adverse impacts of resource development.

This section, first, describes the laws and processes that must apply under Commonwealth legislation (the Land Rights Act and the Native Title Act) that must be complied with prior to the grant of an exploration permit or activity. Second, it describes the NT laws that work to protect sacred sites, namely, the Sacred Sites Act and the EAA.

The discussion has been informed by several major reports, including:

- the report into mining at Coronation Hill by Stewart J,<sup>26</sup>
- the review of laws protecting Aboriginal heritage by Hon Elizabeth Evatt QC,<sup>27</sup>
- the review of the Land Rights Act by Mr John Reeves QC,<sup>28</sup>
- Mansfield J's review of Pt IV of the Land Rights Act,<sup>29</sup> and
- PwC's review of the NT's sacred sites legislation.<sup>30</sup>

#### 11.3.1 Land Rights Act

The Land Rights Act gives traditional Aboriginal owners the right to be consulted about, and to consent, or refuse to consent, to the grant of a petroleum exploration permit on Aboriginal land. The Land Rights Act protects culturally significant places by allowing (but not mandating) traditional Aboriginal owners to carve out areas from a granted permit for any reason, including that they may contain a sacred site. In other words, traditional Aboriginal owners can say 'yes' to development in some areas and 'no' to development in others. It is a level of control over land that is not seen in any other Australian jurisdiction for any other type of tenure.

Part IV of the Land Rights Act contains the provisions relating to petroleum development. Part IV is prescriptive about what must occur prior to a petroleum exploration permit on Aboriginal land being granted. The process is designed to ensure that petroleum exploration permits are only granted if the traditional Aboriginal owners of the relevant country have given their informed consent to exploration. The process is set out below and in **Figure 11.2**.

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25 (1996) 187 CLR 1; [1996] HCA 40.

26 Stewart 1991.

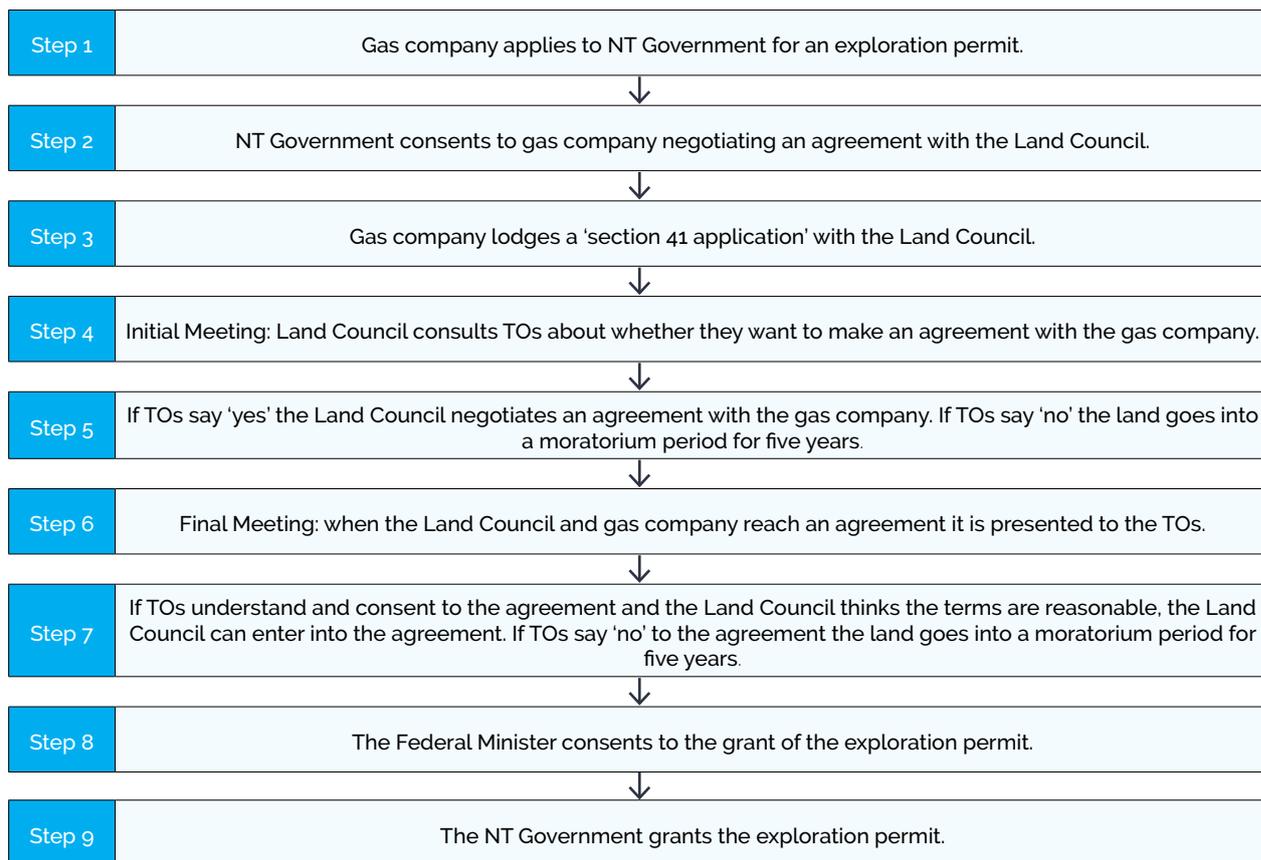
27 Evatt 1996.

28 Reeves Review.

29 Mansfield Review.

30 Sacred Sites Review 2016.

**Figure 11.2:** The process for the grant of a petroleum exploration permit on Aboriginal land.



A gas company makes an application to the Government for an exploration permit (**Step 1**) and the Minister for Resources consents to the gas company entering into negotiations with the relevant Land Council to reach an exploration agreement (**Step 2**).<sup>31</sup> The purpose of the exploration agreement is to set out the areas where exploration can and cannot occur and, where it can occur, the rules for how exploration must occur.<sup>32</sup>

Once the Minister for Resources has consented to the commencement of negotiations, the minister is no longer involved in the process until the negotiations between the land council and a gas company are completed and there is evidence of an agreement between those two parties. Neither the Government nor the Commonwealth has any involvement in, or control over, the processes outlined below regarding how Land Councils identify and consult with traditional Aboriginal owners or other Aboriginal people.

Upon the consent of the Minister, the gas company lodges an application (sometimes called a 's 41 application') with the relevant Land Council setting out details about the proposed exploration work (**Step 3**).<sup>33</sup> The Land Council identifies the traditional Aboriginal owners for the application area and consults with them about whether or not they are interested in exploration happening on their country and, if so, whether they consent to the Land Council negotiating an agreement with the gas company (**Step 4**). This meeting is often referred to as an 'initial meeting'. If the traditional Aboriginal owners say 'no' to exploration at this point, then the process comes to an end and the application area is placed into a moratorium and gas companies cannot apply to access the land for five years, at which point traditional Aboriginal owners have an opportunity to say 'yes' to negotiations or institute another five year moratorium.

If traditional Aboriginal owners say 'yes' to the Land Council negotiating an agreement with the gas company at the initial meeting, the Land Council and the gas company negotiate the terms of an exploration agreement (**Step 5**). The parties negotiate for 22 months. In practice this period

31 Land Rights Act, s 41.

32 Land Rights Act, s 42(2)(a)(iii).

33 Land Rights Act, s 41(6); CLC submission, p 10.

can be, and often is, extended beyond this timeframe. During the negotiating period, the Land Council works with traditional Aboriginal owners to undertake a survey of the application area to identify parcels of land that traditional Aboriginal owners want to be excised from the granted permit area.<sup>34</sup> The carving out of certain areas explains why some tenements on Aboriginal land look fragmented (see, for example, EP 154 depicted in **Figure 11.3**).

The exploration agreement reached between the gas company and the Land Council will typically be conjunctive, which means that it covers the terms of exploration and production. Exploration agreements on Aboriginal land are conjunctive because traditional Aboriginal owners and Land Councils do not have the right to say 'no' to the grant of a production licence on Aboriginal land. All of the bargaining power is concentrated in the exploration phase of any development. Land Councils use this bargaining power to negotiate terms that will apply to production as well as exploration.

Once the agreement between the Land Council and the gas company has been finalised, the Land Council formally presents the agreement to traditional Aboriginal owners at a private meeting (**Step 6**). The meeting is sometimes referred to as a 'final meeting' or a 's 42 meeting' because s 42 of the Land Rights Act prescribes how the meeting must occur. Gas companies are allowed to present at the final meeting only if the traditional Aboriginal owners agree to this course.<sup>35</sup>

The Act provides that the Land Council must be satisfied that traditional Aboriginal owners "*understand the nature and purpose of the terms and conditions [of the agreement] and, as a group, consent to them*".<sup>36</sup> If traditional Aboriginal owners understand and consent to the terms and conditions of the exploration agreement and the gas company's exploration proposals at the final meeting, and if the Land Council is satisfied that the terms of the agreement are reasonable, then the Land Council may enter into an agreement with the gas company (**Step 7**).<sup>37</sup> If the traditional Aboriginal owners say 'no' to the agreement, or otherwise do not understand the terms of the agreement, then the Land Council cannot enter into the agreement.<sup>38</sup>

Traditional Aboriginal owners are not a party to the agreement that is entered into. The only parties to the agreement are the Land Council and the gas company. The Land Rights Act does not expressly provide that traditional Aboriginal owners can, or must, see and read the exploration agreement. However, in *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs*<sup>39</sup> Kenny J held that traditional Aboriginal owners are entitled to see copies of the relevant agreements, whereas Aboriginal communities and affected groups are not entitled to see the agreement.<sup>40</sup>

The responsible Commonwealth Minister must also consent to the grant of the exploration licence (**Step 8**).<sup>41</sup>

Once the agreement has been executed by the gas company and the Land Council, and the Commonwealth Minister has consented to the grant, the Minister for Resources can grant the application (**Step 9**).

The process above for any onshore shale gas developments presents challenges to Land Councils and the Aboriginal Areas Protection Authority (**AAPA**) that distinguish it from other types of extractive development, including mining and conventional gas projects.

First, petroleum exploration permit applications and exploration work programs (for example, seismic survey work) cover vast areas. The CLC noted that applications for petroleum exploration permits can extend to areas of up to 16,000 km<sup>2</sup>. The applications may include multiple Aboriginal land trusts and many Aboriginal language groups, and the Land Council may need to consult with, and obtain the consent of up to, 20 different estate groups.<sup>42</sup> This renders the consultation process complex, time consuming, and expensive.

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34 NLC submission 214, p 36.

35 Land Rights Act, s 42(4).

36 Land Rights Act, s 42(6)(a).

37 Land Rights Act, s 42(6).

38 Land Rights Act, s 42(6).

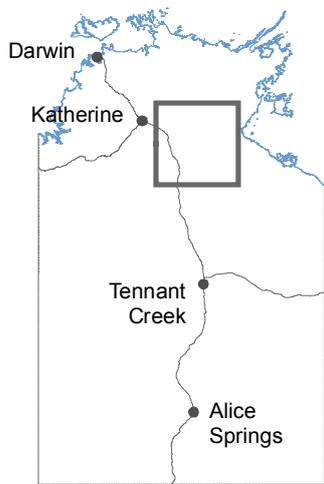
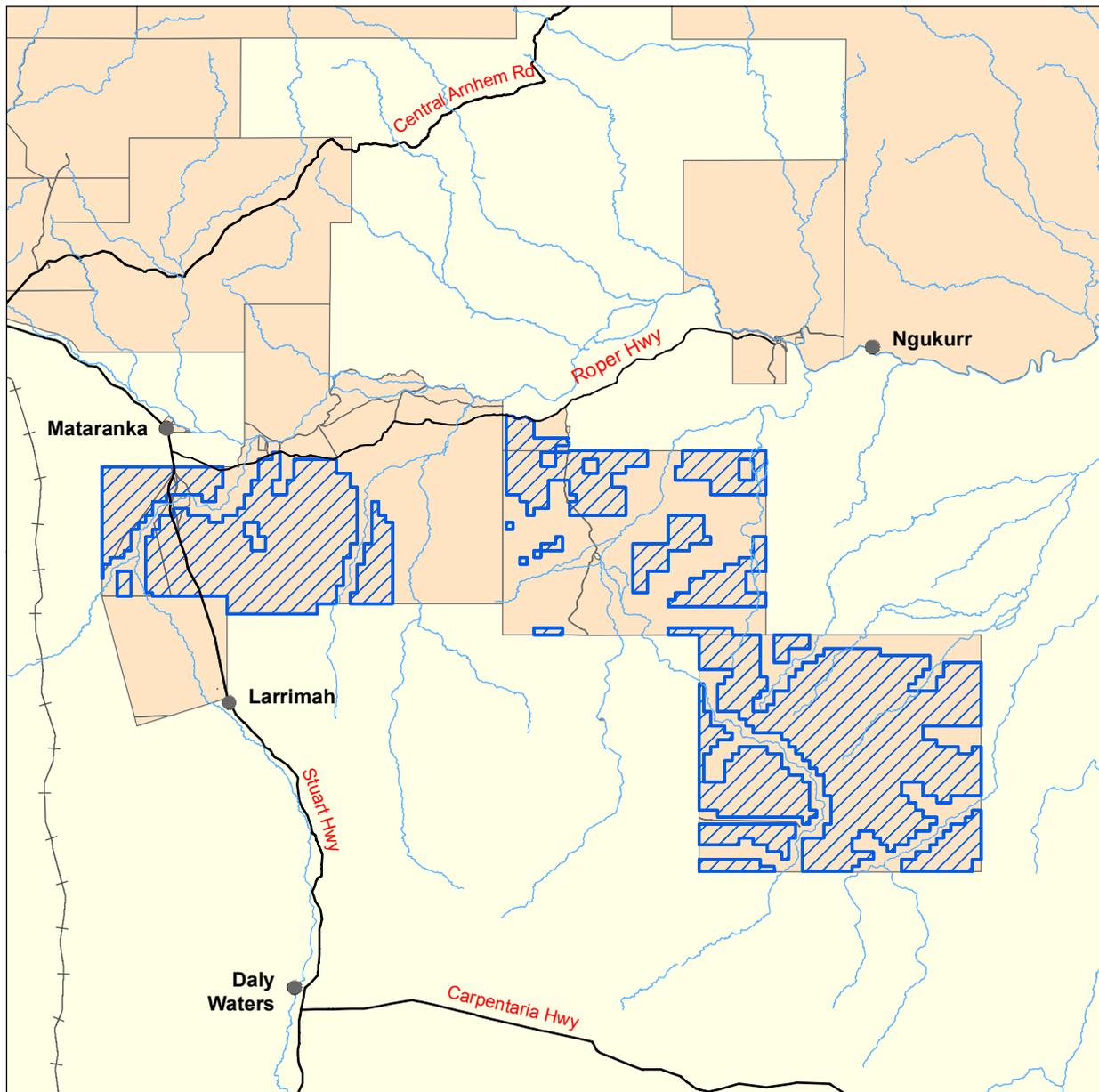
39 [2014] FCA 25.

40 [2014] FCA 25 at 92, 100.

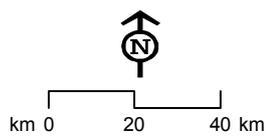
41 Land Rights Act s 40.

42 CLC submission 47, p 4 of Attachment.

**Figure 11.3:** Exploration permit no 154 showing areas that have been vetoed by traditional Aboriginal owners under the Land Rights Act.



**Map Location**



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**Legend**

-  Major Rivers
-  Railway
-  Major Roads
-  Granted Exploration Permit 154
-  Aboriginal Land

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Second, the impact that any unconventional gas industry has on underground resources is different to mining and conventional gas projects. First, the extraction of gas from deep shale formations involves not only drilling a deep vertical well into the ground, but also the horizontal drilling of wells several kilometres out from the vertical well. The horizontal wells may go underneath areas where there are sacred sites.<sup>43</sup>

Third, a large amount of water is required for hydraulic fracturing, and the use of water from underground aquifers may have an impact on sacred sites that are, or rely upon, this water resource (see Section 11.4.1.2).

Fourth, the extraction process is highly technical, which is often difficult to communicate to people that have English as a second (or third) language (see Section 11.4.2.1).

Fifth, the extensive underground and uncertain nature of the impacts means that many Aboriginal groups may be affected by and involved in decision-making. It was put to the Panel that, according to Aboriginal tradition, the aquifers underlying country, which may give rise to springs and other naturally occurring water sources, can be associated with the travels of ancestral beings and link neighbouring Aboriginal groups, connecting people across the landscape. In the area surrounding the Beetaloo Sub-basin, for example, these connections find expression in the kujika song cycles.<sup>44</sup> Kujika are central to the major ceremonies linking Aboriginal groups across the region. The songs link people with sites in the landscape, celebrating the exploits of ancestral beings as they travelled above and below the ground. This interconnectedness, which is directly related to underground water systems, requires a broader group of landowners to be consulted, not just the group associated with the land directly above the areas proposed for gas wells.<sup>45</sup> This adds a layer of complexity to statutory consultations. The kujika reinforce the concept of mangalagal, or *"the way of the dreaming"*, which is an explicit imperative to honour and maintain cultural traditions.<sup>46</sup> All Aboriginal groups sharing and connected by a common aquifer must therefore be involved in decision-making that could affect the integrity of that aquifer, and downstream landowners must be consulted about proposed works on country upstream even if it is located in land traditionally belonging to another group.

Both the Northern and Central Land Councils submitted that, notwithstanding these challenges, they were experienced and accomplished in this area, and had entered into various exploration agreements where traditional Aboriginal owners and native title holders had given their consent to petroleum activities.<sup>47</sup>

### 11.3.2 Native Title Act

Native title holders under the Native Title Act do not have the same level of control over development on native title land as traditional Aboriginal owners have under the Land Rights Act. Native title holders do not have a statutory right to veto the grant of an exploration permit by the Government. Native title holders can, however, create contractual arrangements in native title agreements whereby gas companies are prohibited from entering into certain areas of a permit. These are called 'restricted areas', or 'no go zones'.

Native title holders have the right to make an agreement with a gas company. The grant of a petroleum exploration permit by the NT Government under the Petroleum Act is considered to be a *"future act"* for the purposes of the Native Title Act.<sup>48</sup> That is, the grant of the permit is an act that will affect native title with respect to the right to, among other things, hunt, gather and fish. Where a *"future act"* is proposed, the *"future act"* provisions of the NTA must be complied with for the act to be valid. The process is outlined below.

If the Government proposes to grant a petroleum exploration permit to a gas company, the Government must give notice to any native title parties in the application area.<sup>49</sup> Once notice has

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43 NLC submission 214, p 29.

44 Mr Raymond Dixon, Ms Eleanor Dixon, Ms Jeanie Dixon, Mr Shannon Dixon, and Ms Mary James, submission 381 (Dixon submission 381); Mr Keith Rory, Mr Nicholas Milyari Fitzpatrick et al., community consultation, Borrooloola, 23 August 2017; Mr Walter Rogers, community consultation, Ngukurr, 24 August 2017.

45 Mr Walter Rogers et al., community consultation, Ngukurr, 24 August 2017; Mr Keith Rory and Ms Maria Fitzpatrick, community consultation, Borrooloola, 23 August 2017; Dixon submission 381, p 9.

46 Mr Walter Rogers et al., community consultation, Ngukurr, 24 August 2017.

47 NLC submission 214, p 5.

48 Native Title Act, s 233.

49 Native Title Act, s 29.

been given, the Government, the native title party, and the gas company (**negotiating party**) have six months to “*negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act*.”<sup>50</sup> The Native Title Act does not prescribe what must go into the agreement. If an agreement cannot be reached within this period, any party negotiating can make an application to the National Native Title Tribunal (**NNTT**) for the matter to be arbitrated.<sup>51</sup> The NNTT cannot make a determination about the payments that will go to native title holders,<sup>52</sup> which means that native title holders are incentivised to reach an agreement with the gas company in order to secure financial benefits. To date, there has been no application made for the NNTT to arbitrate, which suggests that the parties negotiating have been able to reach agreement.

The negotiating parties and the relevant Land Council, enter into a ‘tripartite’ agreement whereby the native title party consents to the Government granting the permit to the gas company.<sup>53</sup> Separate to the tripartite agreement is an ‘ancillary’ agreement between the native title party, the Land Council, and the gas company, which deals with land access, sacred site protection, remuneration and other matters. The Government is not a party to this agreement. A copy of the tripartite agreement is provided to the NNTT and the Commonwealth Minister.<sup>54</sup> There is no statutory requirement that agreements made under the native title future act provisions of the Native Title Act be made publicly available. The agreements are confidential, and the Panel has not sighted any of them.

### 11.3.3 Agreements under the Native Title Act and Land Rights Act

Sections 11.3.1 and 11.3.2 above describe the statutory processes whereby traditional Aboriginal owners and native title holders are given an opportunity to negotiate an agreement about how petroleum exploration and production must occur on Indigenous land in the NT. The Panel has not sighted any of these agreements, however, the Panel understands that the agreements cover topics such as sacred site matters, environmental protection, roads, airstrips, cultural and social impacts, liquor and employment opportunities. The NLC and CLC have described the agreements as “*a cornerstone of traditional owner informed consent and control over use of their land*.”<sup>55</sup>

With regard to sacred site protection, the Panel understands that exploration agreements include, “*specific terms and conditions... designed to ensure that companies cannot access land or undertake exploration activities without first having those activities present to and discussed by affected traditional Aboriginal owners*.”<sup>56</sup>

This means that traditional owners have ongoing opportunities to have input into gas companies’ work programs once the permit has been granted. It is clear from the submissions made by the Land Councils and gas companies that the agreements ensure that traditional owners have oversight and control of activities that are undertaken on country on a work-program-by-work program basis. The NLC submitted that the gas companies’ proposed activities for the year are discussed with, and approved by, traditional owners at annual work program meetings.<sup>57</sup>

Origin provided the Panel with an outline of the consultation process that resulted in approval for activities associated with Amungee NW-1H well, which is on native title land and subject to a native title agreement. Before activities commenced, “*Traditional Owner engagement on the abovementioned activities, and their consent, was sought by working with Traditional Owners and their statutory representative body. Origin received the final endorsement and consent for the horizontal well and hydraulic fracture stimulation at an On-Country meeting... Traditional Owners held a private meeting to discuss Origin’s request for permission to drill on the cleared sites, and the result returned was a unanimous ‘yes’*.”<sup>58</sup>

Origin described how “*annual survey scouting and cultural heritage work*” was undertaken prior to deciding upon well locations and that the native title holders’ “*guidance and advice on where activities may or may not be suitable is factored into the decision-making process*.”<sup>59</sup>

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50 Native Title Act, s 31.

51 Native Title Act, s 35.

52 Native Title Act, s 38(2).

53 DPIR submission 226, p 23.

54 Native Title Act, s 41A(1).

55 Mansfield Review, para 165.

56 NLC submission 214, p 37.

57 NLC submission 214, p 37.

58 Origin submission 469, p 15.

59 Origin submission 469, p 15.

Santos' submission further indicated that the native title agreements provide for ongoing consultation and consent with native title holders after the exploration permit has been granted, "AAPA certification is the final approval we seek after carrying out extensive scouting and cultural heritage clearance work with traditional owners, who during these activities are supported by their statutory representative body, the northern land council. SANTOS has negotiated almost 50 agreements relating to cultural heritage, native title, and access to land based on early and fully informed consent without arbitration. We have not and we will not conduct activities until traditional owners have agreed to those activities, and sacred site certification is in place."<sup>60</sup>

### 11.3.4 NT sacred sites legislation and the AAPA

The Land Rights Act protects culturally significant places (sacred sites) on all forms of land tenure.<sup>61</sup> The Act defines a sacred site as a "site that is sacred or otherwise of significance according to Aboriginal tradition" and prohibits unapproved entry to it.<sup>62</sup> The Land Rights Act allows the NT Government to make laws, "providing for the protection of, and the prevention of the desecration of, sacred sites in the Northern Territory."<sup>63</sup>

The NT Government introduced the Sacred Sites Act in 1989. The Act is subsidiary legislation arising from s 73(1)(a) of the Land Rights Act, which establishes both the legislative basis for the protection of sacred sites and the powers of the Government to establish a body to administer that protection.<sup>64</sup> In its recent review of the Sacred Sites Act PwC noted that, "2016 marks the 27th year of operation of the NTASSA [the Sacred Sites Act]. During that time there has been no substantive changes made to the NTASSA and it has served its purpose of providing protection of sacred sites whilst allowing development on land to occur."<sup>65</sup>

#### 11.3.4.1 Sacred Sites Act

The Sacred Sites Act has been described as giving "arguably the strongest cultural heritage protection powers in Australian legislation".<sup>66</sup> The strength of the Act derives from, among other things, the statutory separation of the AAPA from the Government, and the independence and Aboriginality of the AAPA Board (see Section 11.3.4.2).<sup>67</sup>

The Sacred Sites Act is essentially a risk management framework for the protection of sacred sites in the Northern Territory. It establishes a system that protects sacred sites while providing for the development of land.<sup>68</sup> The Authority Certificate process (described in Section 11.3.4.3) balances the protection of sacred sites with development by defining conditions for the protection of sacred sites in relation to proposed developments. The policy underpinning the Sacred Sites Act is to ensure that there are mechanisms in place dealing exclusively with sacred sites, as opposed to land use more generally (which is what the Land Rights Act and Native Title Act do).<sup>69</sup> AAPA submitted the following to the Mansfield Review, "the Sacred Sites Act is the preferable means to protect sacred sites, because, inter alia, it "provides for decisions regarding the protection of sacred sites to be made independently from considerations regarding land access and land use."<sup>70</sup>

#### 11.3.4.2 AAPA

AAPA is a statutory body established under the Sacred Sites Act to administer sacred site protection in the Northern Territory. AAPA is governed by a 12 member board, ten of which are highly respected senior Aboriginal people that are custodians of sacred sites in the NT.<sup>71</sup>

The central purpose of AAPA is to:

- consult with the Aboriginal custodians of sacred sites on or in the vicinity of land where use or works is proposed to ensure that sacred sites are protected;<sup>72</sup>

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60 Santos Ltd, submission 266 (Santos submission 266), p 17.

61 Land Rights Act, s 23(1)(ba).

62 Land Rights Act, s 3.

63 Land Rights Act, s 73(1)(a).

64 AAPA submission 234, p 4.

65 Sacred Sites Review 2016, p 21.

66 AAPA submission 234, p 7; Evatt 1996, pp 263-264, 314-320.

67 McGrath 2016, p 10; AAPA submission 234, p 7.

68 Sacred Sites Review 2016, p 17.

69 Sacred Sites Review 2016, p 16.

70 Mansfield Review, para 112.

71 AAPA submission 234, p 5.

72 Sacred Sites, Act, s 19F.

- determine the nature of the constraints (if any) on particular land use proposals; and
- issue approvals for works or use of land on, or in the vicinity of, a sacred site in accordance with the wishes of Aboriginal custodians, that grant indemnity against the operations of the offence provisions of the relevant legislation, that is, Authority Certificates.

#### 11.3.4.3 Authority Certificates

The Sacred Sites Act makes it an offence to enter or remain on a sacred site,<sup>73</sup> work on a sacred site,<sup>74</sup> or desecrate a sacred site.<sup>75</sup> It is a defence to prosecution under the Sacred Sites Act if that work was carried out in accordance with an Authority Certificate.<sup>76</sup>

The requirement for an Authority Certificate is not mandatory under the Sacred Sites Act. A gas company can undertake a petroleum activity, such as hydraulic fracturing for shale gas, without an Authority Certificate.<sup>77</sup>

Neither the EAA nor the Petroleum Act require that Authority Certificates be issued and complied with. The EPA, which administers the EAA, developed a guideline detailing when a petroleum project should be referred to it for an assessment.<sup>78</sup> The guideline provides that, if certain criteria are met, then the EPA will not assess the activity under the EAA. All of the answers to the criteria must be 'yes', or the proposal will be referred for assessment.<sup>79</sup> One criterion is whether the gas company has submitted an application to the AAPA for an Authority Certificate. But there is no guarantee that once granted, the gas company will comply with the Certificate. The EPA and the Minister for Environment and Natural Resources (**Minister for Environment**) can only recommend to the "responsible" Minister (the Minister for Resources) that the gas company should be required to have an Authority Certificate prior to development, but the Minister for Resources is not required to adopt that recommendation. Currently, the only condition placed on petroleum permits by the Minister for Resources is that, "Prior to carrying out any work in the permit area the permittee must consult with the Aboriginal Areas Protection Authority and inspect the Register of Sacred Sites. A permittee wishing to carry out work may apply for an Authority Certificate."<sup>80</sup>

It is clear that gas companies are electing not to get an Authority Certificate to undertake petroleum activities. AAPA submitted that, "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."<sup>81</sup>

The issuing of Authority Certificates by the AAPA has been described as the "key" process for protecting sacred sites in the Northern Territory.<sup>82</sup> AAPA can only issue an Authority Certificate if it is satisfied that either, "(a) the work or use of the land could proceed or be made without there being a substantive risk of damage to or interference with a sacred site on or in the vicinity of the land; or (b) an agreement has been reached between the custodians and the applicant."<sup>83</sup>

In other words, AAPA must be satisfied that one of the above two requirements has been met before an Authority Certificate can be issued. Authority Certificates can be issued following consultations between AAPA and custodians whereby custodians provide instructions on what can and cannot be done in and around sacred sites.<sup>84</sup>

An agreement entered into under the Land Rights Act or the Native Title Act as set out in Sections 11.3.1 and 11.3.2 may also be grounds for AAPA issuing an Authority Certificate under s 22(1)(b). It is often that case that matters relating to sacred sites are dealt with as part of the agreement-making process under the Land Rights Act and Native Title Act, "Land Councils usually take the approach that, for major projects, issues relating to sacred sites are negotiated simultaneously with compensation and royalties."<sup>85</sup>

73 Sacred Sites Act, s 33.

74 Sacred Sites Act, s 34.

75 Sacred Sites Act, s 35.

76 Sacred Sites Act, s 34(2).

77 AAPA submission 234, p 23.

78 NT Environmental Assessment Guidelines.

79 NT Environmental Assessment Guidelines, p 6.

80 DPIR submission 298, Attachment A, items 16 and 17.

81 AAPA submission 234, p 21.

82 AAPA submission 234, p 18.

83 Sacred Sites Act, s 22(1).

84 AAPA submission 234, p 8.

85 Sacred Sites Review 2016, p 40; see also Mansfield Review, para 112.

For AAPA to issue an Authority Certificate on the basis of the agreement, however, AAPA needs to be satisfied that the “custodians” of the particular site, who may be different from the traditional Aboriginal owners or native title holders that were consulted in respect of the agreement, consent to the terms that relate to protection of sacred sites. If AAPA is satisfied, it can issue an Authority Certificate on the basis of the agreement reached with traditional owners and the gas company.

While there are strong legal mechanisms under the Land Rights Act and native title legislation, whereby traditional owners can negotiate provisions to go in an agreement to protect sacred sites, the law does not mandate that those agreements include provisions about sacred sites and the Panel cannot confirm that they exist, or if they do, that they are adequate.<sup>86</sup> Therefore, evidence of an agreement under the Land Rights Act or Native Title Act is not evidence that sacred sites will be protected.

However, the Sacred Sites Act has been designed with the express purpose of protecting sacred sites on a case-by-case basis and the issuing of an Authority Certificate provides certainty that:

- the “custodians” for the site have been consulted;
- impacts to sacred sites have been considered independently from any other matters that are dealt with in native title and land agreements; and
- AAPA is able to enforce the conditions of the Authority Certificate.

### **Recommendation 11.1**

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

#### **11.3.4.4 Registration of sacred sites**

AAPA records the features and narratives of sacred sites in the Register of Sites. 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. The benefit of registration is that it is *prima facie* evidence of a sacred site and provides certainty to all stakeholders about the existence of a sacred site, the geographic extent of a sacred site, and who its custodians are.<sup>87</sup>

AAPA holds records of more than 12,000 sacred sites in the Northern Territory (see **Figure 11.4**). Of these, approximately 2000 are registered sites. The records held by AAPA represent a fraction of sacred sites in the Northern Territory, with vast numbers still to be documented.<sup>88</sup>

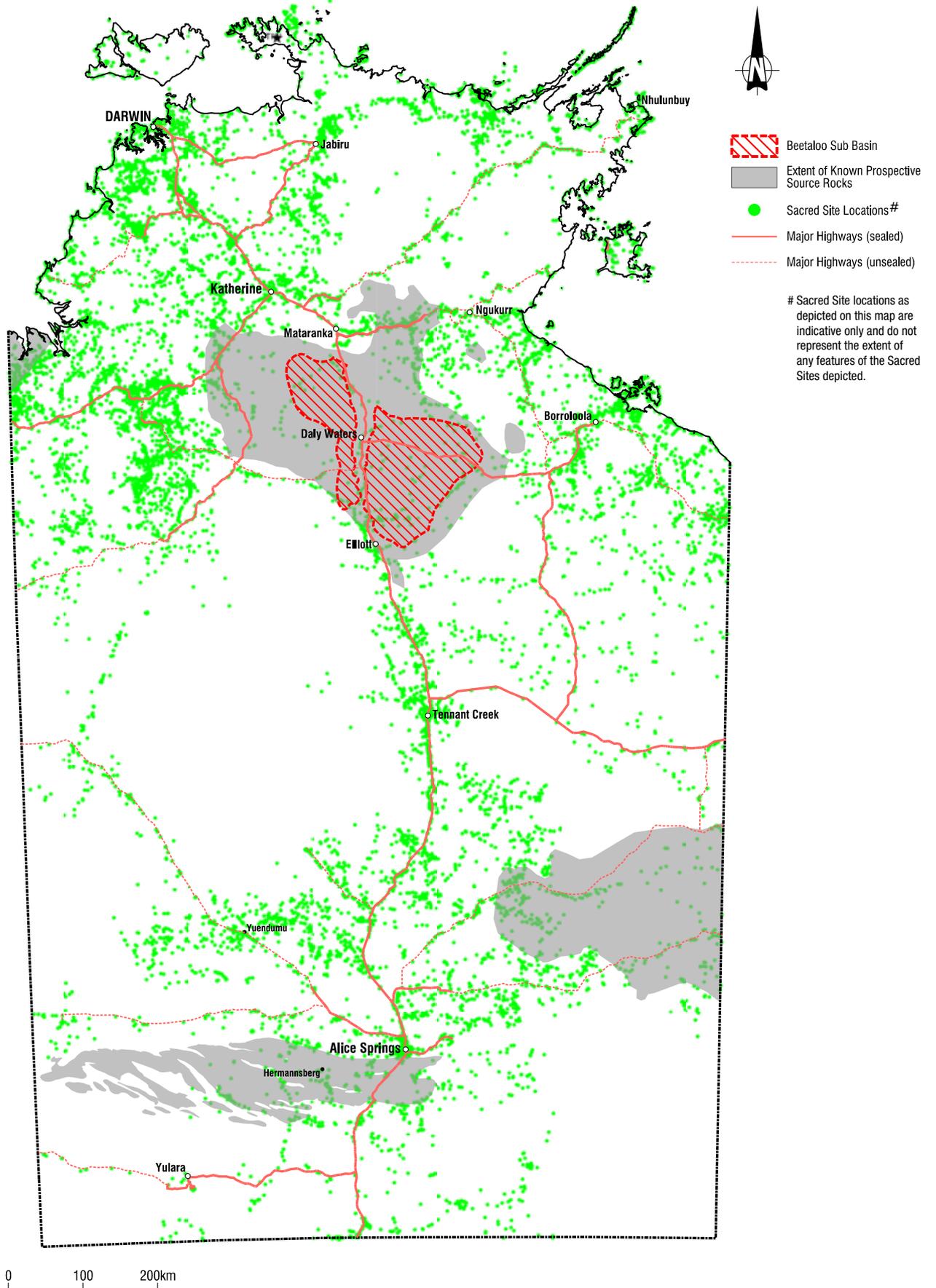
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<sup>86</sup> Land Rights Act, s 73(1)(a).

<sup>87</sup> AAPA submission 234, pp 8-9.

<sup>88</sup> AAPA submission 234, pp 8-9.

Figure 11.4: Potential shale gas resources and recorded sacred sites in the NT.



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### 11.3.5 Environmental assessment legislation

Petroleum developments that will have a significant environmental impact must be assessed under the EAA.<sup>89</sup> The definition of “environment” in that Act includes “all aspects of the surroundings of humans, including...cultural aspects”. This means that the EPA is required to consider cultural matters when making its assessment. In practice, cultural matters are dealt with by the EPA by ensuring that an application has been made to AAPA for an Authority Certificate under the Sacred Sites Act in respect of the proposed activity (see Section 11.3.4.3), and giving by AAPA an opportunity to comment on EIS. The Panel's view is that this process does not ensure cultural matters are adequately addressed.

AAPA noted that while it is invited to comment on an EIS, its 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.”<sup>90</sup>

AAPA also submitted that the process required by the Sacred Sites Act “runs in parallel and exclusive of the environmental approvals process.”<sup>91</sup> The Panel's view is that cultural matters must be considered in conjunction with, and not separate from, other environmental matters. In light of the significant impacts (including social impacts) that damage to sacred sites will have on Aboriginal people and their communities, the cultural impacts of any onshore shale gas development should be an early consideration for custodians, gas companies and the regulator.

The Panel received submissions that the current framework for the protection of underground sacred sites and culturally significant places in the Northern Territory is restricted because AAPA has limited technical and scientific expertise to understand and interpret the hydrogeological impacts that horizontal drilling and large water extraction will have on sacred sites. AAPA has observed that it “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.”<sup>92</sup>

If AAPA does not understand these impacts then it is very difficult to explain the impacts to custodians (which, in turn, inhibits their ability to give informed consent), provide meaningful input into the environmental assessment process, or to draft and place appropriate conditions on Authority Certificates. Central to the effective management and protection of subsurface sacred sites is transparent, trusted, reliable and clear information about the impact that drilling and hydraulic fracturing for shale gas will have on the subsurface environment. Only if this information exists can AAPA effectively communicate the risks to custodians, contribute to the environmental assessment processes, and place appropriate conditions on Authority Certificates to ensure that sacred sites are protected. “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.”<sup>93</sup>

Accordingly, there must be “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.”<sup>94</sup>

#### **Recommendation 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.**

89 EAA, s 4.

90 AAPA submission 234, p 20.

91 AAPA submission 234, p 20.

92 AAPA submission 234, pp 2, 18, 22.

93 AAPA submission 234, p 18.

94 AAPA submission 234, p 22.

## 11.4 Risks to Aboriginal culture and traditions

### 11.4.1 Sacred sites

Concerns have been expressed in a number of submissions, and at all the community consultations that the development of any onshore shale gas industry will damage sacred sites and other places of spiritual significance to Aboriginal people.<sup>95</sup> A particular issue is damage to culturally significant features that exist underneath the surface.

If sacred sites, including sub-surface sites, are damaged, or there is a disruption to traditional practices, the adverse consequences for Aboriginal people, particularly the adverse social consequences, may be high. As AAPA noted, *"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."*<sup>96</sup>

The loss of the amenity value of a sacred site for the education of future generations could result in a feeling of powerlessness and failure engendered in the custodians of the site. The potential for this arises because of the direct personal responsibility Aboriginal people have for looking after country. An inability to protect a sacred site is likely to invoke a feeling of loss of control.<sup>97</sup> Custodians of the site are also likely to feel that they will be held accountable by neighbouring groups sharing the same traditions for failing to protect an important site that may have been part of a Dreaming track spanning thousands of kilometres and linking many Aboriginal groups. AAPA summarised these effects as follows; *"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>98</sup>

#### 11.4.1.1 Subsurface sites must be protected

It is widely acknowledged that sacred sites can, and do, extend underground. AAPA told the Panel that; *"Aboriginal beliefs about the sanctity of land encompass beliefs, knowledge and sanctions... 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."*<sup>99</sup>

The Panel is aware of cases in the NT where traditional owners have rejected mining proposals because of their traditional beliefs about what lies beneath the surface.<sup>100</sup> The Panel notes a document on land management published by the CLC in the mid-1990s with a section entitled *"Dreamings go underneath"*, which documented the fact that Aboriginal people in the study area considered that the rocks and minerals beneath the ground were an integral part of the observable features of sacred sites on the surface. *"Many respondents raised the issue that they were concerned for Dreaming trails under the ground, not just those sites above ground, and complained about the emphasis placed on the latter in discussions over mining. People said that they could not understand why whitefellas did not see the danger to the 'Dreaming underneath'."*<sup>101</sup>

That report goes on to quote an Aboriginal person who stated that: *"those whitefellas all the time worried for rock and tree but they got more in the ground. The Dreaming goes underneath, that's where the life is. Where it all came, it came out from that site, but it went down there now still. We people got to look after that one or we're all dead."*<sup>102</sup>

The CLC records that these views were expressed by Aboriginal people at Yuendumu, Lajamanu and Tennant Creek, where it is claimed that an earthquake was attributed to underground mining activities. The Panel heard similar stories about the Tennant Creek earthquake during its community consultations. At a meeting between the Chair and the Board of AAPA, several board members expressed views similar to those recorded by the CLC.

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95 See generally, NLC submissions 214 and 471; AAPA submission 234; CLC submission 47.

96 AAPA submission 234, p 12.

97 AAPA submission 234, p 16.

98 AAPA submission.

99 AAPA submission 234, p 14; NLC submission 471, p 20.

100 Scambury and Lewis 2016; Stewart 1991.

101 Rose 1995; CLC submission, p 141.

102 Rose 1995; CLC submission, p 141.

APPA has expressed a view that 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 Northern Territory.<sup>103</sup> It is arguable that only surface sites are protected by the Sacred Sites Act. By contrast the NLC has stated that, “under Northern Territory legislation all sacred sites are protected, including the sacred sub-surface elements of these places.”<sup>104</sup> The Panel’s view is that it should be put beyond doubt that features of a sacred site, and sacred sites themselves, can be underground.

### **Recommendation 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.***

#### **11.4.1.2 Groundwater must be protected**

Water is important both in terms of resource use, and its associated cultural value, and there are numerous instances of water being a key feature of sacred sites.<sup>105</sup> Water as a life source is also integrally associated with identity, country and conception. “Water...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.”<sup>106</sup>

Some Aboriginal 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: “Our water is part of our native title through our cultural and ceremonial practices that are part of the birds, animals, plants and us.”<sup>107</sup>

Aboriginal custodians have identified many water sources and waterbodies as sacred sites in the records held by AAPA. Contamination of these waterbodies and water sources is a matter of significant 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 the health of humans to the health and ceremonial maintenance of sacred sites. These are the wider potential cultural impacts that comprise the relationships between people, the land, sacred sites, ritual activities, and interpersonal and wider inter-group social responsibilities.<sup>108</sup>

This special relationship makes Aboriginal people, and therefore, Aboriginal communities, particularly vulnerable to degradation of the landscape and the ecological systems that it supports. Particular concern was therefore expressed about the potential risks to surface and groundwater sources: “groundwater-fed rivers, springs, waterholes and stream are not only of ecological importance, but, in many cases hold cultural significance.”<sup>109</sup>

Water extracted from groundwater for use in hydraulic fracturing may cause an aquifer to be depleted and a spring that is sacred under Aboriginal tradition to dry up. Not only will there be no more water and the sacred site destroyed, but there would be other social costs.<sup>110</sup> AAPA submitted that: “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.”<sup>111</sup>

The Panel notes that the policy and legislative framework for water allocation in the Northern Territory recognises a special benefit provided by certain water sources for “the condition of places that provide physical and spiritual fulfilment to Indigenous people”, referred to as “cultural flows”.<sup>112</sup> Under the Water Act, the Minister for Environment is able to declare a “beneficial use” for water in a water control district (see Chapter 7).<sup>113</sup> The use of water for cultural purposes, including to “provide water to meet aesthetic, recreational and cultural needs”, is a “beneficial use” of water.<sup>114</sup> The Minister for Environment can declare WAPs to ensure that water is allocated to the beneficial

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103 AAPA submission 234 p 2.

104 NLC submission 471, p 20.

105 AAPA submission 234, p 14.

106 AAPA submission 234.

107 NLC submission 214, p 15.

108 AAPA submission 234, pp 14-15.

109 NLC submission 214, p 15.

110 Watts 2008.

111 AAPA submission 234, p 16.

112 Tindall Aquifer Water Allocation Plan.

113 Water Act, s 22B.

114 Water Act, s 4(3)(e).

uses that have been declared. There are consumptive and non-consumptive beneficial uses for water, and non-consumptive water is allocated as a priority under the NT Water Allocation Planning Framework.<sup>115</sup> In the absence of scientific data supporting some other type of allocation, non-consumptive uses, including environmental and cultural uses, are allocated 80% of the recharge rate or resource.<sup>116</sup> Consumptive water uses are those that are allocated for domestic or industrial consumption. These uses cannot exceed 20% of the recharge rate or resource.

Cultural uses of water are often inextricably linked with environmental uses and treated as the same allocation.<sup>117</sup> The Tindall Aquifer Water Allocation Plan assumes that the: *“provision of discharge for environmental protection will also maintain the condition of places that are valued by Indigenous people for cultural purposes...”*<sup>118</sup>

However, the Plan also recognises that cultural and environmental objectives may not always be in conformity: *“it is recognised that cultural flow requirements may not align entirely with environmental requirements and any research that becomes available in this regard will be considered as part of the review process.”*<sup>119</sup>

The Panel is satisfied that the current regulatory framework ensures that cultural uses of water are factored into the water allocation process. The Government recently announced a Strategic Aboriginal Water Reserve, which will allow Aboriginal people to have water allocated to them for economic development (different to cultural uses).

#### 11.4.2 Traditional Aboriginal owners and native title holders

International law recognises the right of Aboriginal people to be informed and consulted in respect of the resource development occurring on their country. The *International Labour Organisation's Indigenous and Tribal Peoples' Convention 1989 (Convention 169)*, which is the only international treaty specifically dedicated to Indigenous peoples, has provisions mandating that Indigenous people be consulted with respect to development on their land. Article 15 of Convention 169 requires that member states consult Indigenous people: *“with a view to ascertaining whether and to what degree their interest would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”*<sup>120</sup> The Australian Government has not ratified Convention 169.

Another example of Indigenous peoples' right to be consulted about resource development on their land is the *United Nations Declaration of the Rights of Indigenous Peoples (UN Declaration)*, which was adopted by the General Assembly in 2007. More than 143 countries, including Australia, have endorsed the UN Declaration, which contains an express obligation for member states to: *“consult with an cooperate in good faith with the indigenous peoples... to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of minerals, water or other resources.”*<sup>121</sup>

The UN Declaration is not legally binding in Australia, but it has the power to influence domestic law-makers and decision makers. Convention 169 and the UN Declaration make it clear that Indigenous people have an international law right to be consulted in good faith about development on their land. These investments do not, however, provide any definitive statement that Indigenous people have the right to consent, or refuse consent (veto), to development on their land. The right to be consulted about the development of a resource is something less than the right to consent and does not amount to the right to say 'no'.<sup>122</sup>

There is an emerging principle, however, that Indigenous people should have the right to consent, or refuse consent, to resource development on their land. It is often referred to as the principle of free, prior and informed consent (**FPIC**) and there are various international examples

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115 Water Allocation Planning Framework.

116 Water Allocation Planning Framework; DENR submission 230, p 2.

117 Tindall Aquifer Water Allocation Plan, p 5.

118 Tindall Aquifer Water Allocation Plan, p 8.

119 Tindall Aquifer Water Allocation Plan, p 8.

120 Convention 169, Art 15(2).

121 UNDRIP, Art 32.

122 See, for example, McGee 2009, p 578.

where this principle has been adopted.<sup>123</sup> The Land Rights Act is referred to in the literature as a high-water mark of how domestic law can operationalise the principle of FPIC.<sup>124</sup> The Panel heard, however, that the absence of a veto right at the production phase of development (see Section 11.3.1) means that the Land Rights Act falls short of implementing the principle of FPIC. Traditional Aboriginal owners can only exercise their veto right at the exploration phase. If traditional owners say 'yes' to exploration they also say 'yes' to production even if they know very little about the scope and scale of the project.<sup>125</sup> Therefore, if traditional Aboriginal owners want development on their country, they are forced to make a decision at a time where there is limited information available about what the size of the final project will be.<sup>126</sup>

Justice Mansfield considered this matter (in his 2013 review of Pt IV of the Land Rights Act). His Honour considered the arguments for and against the removal of the exploration veto and also considered whether the veto would be better placed at the production phase of any project.<sup>127</sup> His view was that the exploration veto should be retained because, as noted by Woodward J,<sup>128</sup> *"to deny to Aborigines the right to prevent [development] on their land is to deny the reality of their land rights."*<sup>129</sup>

However, to impose a veto at the production stage of any petroleum development would, *"provide no certainty for applicants, and could discourage [exploration applications] on Aboriginal land entirely."*<sup>130</sup> In other words, gas companies need certainty that they will be able to get a production licence provided they comply with all of their permit conditions. There was once a production veto in the Land Rights Act, but it was removed for this purpose.<sup>131</sup>

#### **11.4.2.1 Consultation under land rights and native title legislation**

The Panel is satisfied that consultation processes required under the Land Rights Act and the Native Title Act ensure that traditional Aboriginal owners and native title holders are informed and consulted about development on their country.<sup>132</sup> While there is no statutory right of veto in respect of the grant of an exploration permit, under the Native Title Act, the Panel has been told, and accepts, that the future act provisions of that Act ensure that native title holders are informed and consulted about activities that are occurring on native title land. The NLC submitted that there is a, *"negligible risk that a project would be able to proceed without the knowledge of, or without prior consultation with, Aboriginal people."*<sup>133</sup>

Traditional Aboriginal owners and native title holders are consulted at least two times in connection with a petroleum exploration permit on Aboriginal and native title land. The NLC described the process for consultation on native title land and Aboriginal Land as follows, *"The NLC uses a two-part process during its NTA negotiations. At the first meeting the company describes its proposals to the Native Title Parties, who then instruct the NLC whether or not to negotiate an agreement with the company. If the Native Title Parties instruct the NLC that they are not willing to negotiate an agreement, the company then has the right to seek an arbitrated outcome. If the Native Title Parties instruct the NLC to negotiate an agreement, the finalised agreement is taken to a second meeting to ratify its terms and conditions."*<sup>134</sup>

123 Many papers provide summaries outlining the growing acceptance of the principle of FPIC. See Doyle and Carino 2013, p 26; Ward 2011, p 54.

124 Sosa 2011, p 6; World Resources Institute 2007, p 9: *"FPIC has... been incorporated in the mining law in Australia's Northern Territory"*; Rumler 2011: *"the legislative provisions and practice together provide a good model for the implementation of the principle of FPIC."*

125 EDO submission 213; Dixon submission 381. The Panel notes that the Dixon family do not claim to be traditional owners of the area of the Origin Energy Amungee NW-1 lease area and, as such, they were not directly involved in the negotiations conducted by the NLC for the agreement with native title holders prior to the issue of the licences under the Petroleum Act: Dixon submission 381, p 6.

126 The Tiwi Land Council made similar arguments to the Mansfield Review. See Mansfield Review, para 148.

127 Mansfield Review, para 6.

128 Mansfield Review, paras 415, 429.

129 Woodward Report, para 568.

130 Mansfield Review, para 427.

131 Mansfield Review, para 417, 426.

132 In *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* [2014] FCA 25, Kenny J held that a requirement to "consult" meant that the Land Council must "confer with" traditional owners and give them "a meaningful opportunity" to present their views.

133 NLC submission 214, p 35.

134 NLC submission 214, p 35.

But the CLC has submitted that the consultation and agreement making process under the Native Title Act can be strengthened. Under the Land Rights Act, gas companies must provide Land Councils with a comprehensive proposal of the exploration activities proposed to be undertaken if the permit is granted to assist them in negotiating an exploration agreement ('s 41 applications').<sup>135</sup> A cognate requirement is not contained in the Native Title Act. The CLC submitted that the absence of this requirement in the Native Title Act undermines the ability of native title holders to fully understand the nature of the development proposed.<sup>136</sup>

#### **Recommendation 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.***

Concerns were raised from various stakeholders, including Aboriginal people, about whether traditional Aboriginal owners and native title holders understand the terms and conditions of the agreements that are entered into under either the Land Rights Act or the Native Title Act.<sup>137</sup> In particular, communicating complex technical aspects of any onshore shale gas industry, including hydraulic fracturing, is challenging. The Land Councils highlighted the difficulties associated with consulting on technical scientific and engineering matters, "*presenting complex scientific information about hydraulic fracturing to lay audiences is challenging, more so when the first language is not English, and developing understanding requires a process of information exchange that takes time.*"<sup>138</sup>

The CLC recommended that, "*In discussing a shale gas industry and/or hydraulic fracturing process, interpreters are essential as many traditional Aboriginal owners speak their own languages with English a second or third language.*"<sup>139</sup>

The Panel's experience when engaging in community consultations is that interpreters are necessary when explaining complex scientific subject matters.<sup>140</sup>

#### **Recommendation 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.***

### **11.4.3 The broader Aboriginal community**

As described in Section 11.3, the Land Rights Act and the Native Title Act set out a legal process that ensures traditional Aboriginal owners and native title holders are informed and consulted about the grant of a petroleum exploration permit on Aboriginal and native title land. Traditional Aboriginal owners and native title holders, however, form part of a broader community that will be affected by the development of the onshore unconventional shale gas industry. As the NLC observed, "*Indigenous traditional landowners and native title holders with rights to country over which there is a current petroleum title application comprise only a small portion of the Northern Territory's Indigenous population.*"<sup>141</sup>

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135 Land Rights Act, s 41(6).

136 CLC submission 47, pp 10-11.

137 EDO submission 213, Mr Daniel Tapp, submission 405 (D Tapp submission 405), p 2.

138 CLC submission, p 8.

139 CLC submission 47, p 8.

140 CLC submission 47, pp 8-10.

141 NLC submission 471, pp 18-19.

The broader Aboriginal community, like any community, is entitled to accurate, trusted, and accessible information about any onshore shale gas industry to understand the consequences of development of that industry and to make informed decisions about how their community can benefit from it. The Panel received an abundance of evidence that the broader Aboriginal community was not being appropriately informed about hydraulic fracturing or the onshore shale gas industry more broadly:

- the NLC, CLC and AAPA all raised concerns about the increased stress and social disharmony in Aboriginal communities where hydraulic fracturing has been proposed, arising as a result of lack of reliable and accessible information about the shale gas industry and a general lack of understanding about how the current legislation (including the Land Rights Act, Native Title Act and Petroleum Act) provides opportunities to redress concerns about the effects of that industry on Aboriginal culture;
- evidence from the Aboriginal environmental group Seed (an affiliate of the Australian Youth Climate Coalition), which had travelled to Aboriginal communities in the Barkly region to explain the nature and purpose of any onshore shale gas industry,<sup>142</sup> that Aboriginal people from these communities have inadequate knowledge about that industry. Seed found that the Aboriginal people they spoke to had no knowledge of the techniques used in the horizontal drilling and fracturing of deep shale rock, and when these facts were put to Aboriginal people they expressed great concern; and<sup>143</sup>
- the response to presentations by the Panel at community consultations on the processes involved in hydraulic fracturing for shale gas suggests that knowledge of the likely impacts of any industry within the Aboriginal community in the Beetaloo Sub-basin, and more widely, is wholly inadequate.<sup>144</sup>

The lack of trusted, reliable, and accessible information about hydraulic fracturing and any onshore shale gas industry in remote Aboriginal communities has resulted in, first, the communities feeling disempowered, and second, the communities being divided between those in favour of fracking and those against it. The conflict is largely the result of either pro-fracking or anti-fracking groups that have filled an information void with misinformation. The NLC noted that, *"the direct engagement or recruitment of Aboriginal persons by individuals/organisations with an interest on either side of the [fracking] debate may pose a risk to social cohesion and to relationships/roles associated with traditional kinship systems that may exist between such individuals."*<sup>145</sup> and that, *"the politicisation [of petroleum consultations] can and does have an incredibly disruptive effect on Aboriginal culture and society and on local group decision making processes."*<sup>146</sup>

The CLC also warned that information being provided to Aboriginal groups *"tends to be industry or anti-fracking centric and subject to bias and misinformation"*.<sup>147</sup> The Panel was told that some Aboriginal people in remote communities had been given *"misinformation"* and *"unsubstantiated propaganda"*<sup>148</sup> specifically designed to frighten them about any onshore shale gas industry. In several communities, views were expressed to the Panel indicating a firm belief that the process of hydraulic fracturing would inevitably lead to environmental catastrophe. In the course of community consultations in Tennant Creek, Elliott and Borrooloola, the Panel heard evidence from younger Aboriginal people who oppose hydraulic fracturing as an essential expression of their commitment to their traditional culture and as a way of honouring their elders. They said that their opposition to hydraulic fracturing occurring on their country was analogous to their ancestors' armed resistance to colonisation in the 1900s, and therefore, central to their traditional identity. The prevalence of these views establishes the preconditions for social disharmony.<sup>149</sup>

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142 Seed Indigenous Youth Climate Network, submission 267 (**Seed submission 267**).

143 Seed submission 267.

144 See, for example, Dixon submission 381.

145 NLC submission 471, p 17.

146 NLC submission 471, p 19.

147 CLC submission 47.

148 J Sullivan, submission.

149 Mr Keith Rory, Mr Nicholas Milyari Fitzpatrick et al., community consultation, Borrooloola, 23 August 2017; Dixon submission 381.

The Panel agrees with the NLC's observation that, "there is an urgent need for the dissemination of relevant, accurate information targeting Aboriginal communities, in respect of both hydraulic fracturing and the onshore petroleum industry in general."<sup>150</sup> This gives rise to a question about which is the appropriate agency or organisation to deliver information to Aboriginal communities about any onshore shale gas industry and how the information dissemination process should be implemented.

Land Councils submitted that they had implemented a variety of measures to increase understanding of the onshore unconventional shale gas industry in Aboriginal communities. For example, the CLC noted that it had undertaken site visits, panel sessions, and presentations to Land Council members, as well as community information sessions.<sup>151</sup> The NLC, however, made it very clear that, in its opinion, it was not the statutory responsibility of the Land Councils to ensure that the broader Aboriginal community was informed about hydraulic fracturing, "general public or community education is not a function contemplated by the Lands Right Act or the Native Title Act, the NLC is not resourced to undertake pre-emptive public or regional education campaigns".<sup>152</sup>

Land Councils are not currently funded to perform this task. The NLC submitted that, with respect to informing Aboriginal people about any onshore shale gas development, the statutory role of the Land Councils is, "limited to providing information to Aboriginal people in respect of specific petroleum exploration and production tenement applications and where agreements are in place for granted tenements. The dissemination of information to the Indigenous public in respect of a growing onshore petroleum industry does not fall within the scope of Land Council's statutory functions and as a result the NLC is currently neither mandated nor resourced to undertake this work".<sup>153</sup>

The Panel does not agree that the role of the Land Councils must be so prescribed. The unique expertise and long-term relationships built up over many decades held by AAPA and the Land Councils places them in a unique position where they are able to provide the expertise and experience necessary to conduct, design and implement a process for wider consultation, if sufficiently resourced, and provided the Land Councils work in collaboration with both Government and industry.



Community members at the Inquiry's Jilkminggan community forum in August 2017.

150 NLC submission 471, p 18.

151 CLC submission 47, p 5.

152 NLC submission 471, pp 18-19.

153 NLC submission 471, p 17.

### **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.***

Concerns were raised about the lack of transparency of petroleum exploration agreements made under the Land Rights Act and Native Title Act.<sup>154</sup> The Panel heard that the confidentiality of agreements negotiated with the gas industry has contributed to a widespread belief among Aboriginal people that these agreements do not represent the wishes of all traditional owners who have traditional affiliations with the relevant country and that there are traditional owners who are beneficiaries of these agreements that have given their consent without fully understanding the nature and impact of the proposed work.<sup>155</sup> The lack of transparency appeared to be the cause of tension and conflict in some communities.

As stated above, the only people entitled to see copies of agreements under the Land Rights Act are traditional Aboriginal owners. Elsewhere in this Report the Panel has recommended the mandatory public disclosure of all draft and approved management plans, Ministerial approvals, and statement of reasons relating to the development of any onshore unconventional shale gas industry. The Panel's view is that full transparency is essential to increasing the community's trust in, and knowledge about, any onshore shale gas industry. Whenever information is kept confidential, faith in the process and the outcome is eroded. While it is ultimately a matter for the Land Councils, traditional Aboriginal owners, and gas companies, the Panel recommends that Land Councils, traditional Aboriginal owners and gas companies consider making all, or if this is not appropriate, part, of negotiated petroleum exploration agreements publicly available.

### **Recommendation 11.7**

***That Land Councils, traditional Aboriginal owners and gas companies consider making all, or if this is not appropriate, part, of negotiated petroleum exploration agreements publicly available.***

Another source of potential stress in Aboriginal communities is the different benefits (for example, compensation payments or employment opportunities) that will flow to individuals within a community. Traditional Aboriginal owners and native title holders are entitled to financial benefits resulting from the private contractual arrangements entered into under the Land Right Act and the Native Title Act, but as noted by the NLC, *"the injection of benefits and opportunities into particular land owning groups or local communities arising from resource development projects, where such developments are major, can create local and regional discrepancies in wealth. This can cause intra and inter family/community stress among Aboriginal people, who are typically bound to particular economic modes and relationships within and between families and communities by kin-based systems."*<sup>156</sup>

The Panel is of the view that distribution of financial benefits under the Native Title Act and the Land Rights Act is a matter for the Land Council and the traditional Aboriginal owners. The Land Councils are cognisant of the social impacts that royalty distributions can cause in a community.

Another source of tension felt by traditional Aboriginal owners is the stress associated with decision-making under the legislation. This arises when traditional owners are required to consider economic returns from new uses of the resources of their country against the need to protect traditional culture, *"while Indigenous people aspire to local and regional economic growth, opportunities for employment and other potential benefits, they also have responsibilities to consider the custodianship of their country and traditional law and custom which are inalienable, and will be inherited by their descendants for all time. In this context decisions and consultations around onshore petroleum proposals will at times inject stresses into the social and cultural fabric of land-*

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154 Ms Monica Napper, submission 455 (M Napper submission 445), p 3.

155 M Napper submission 455, p 1; Dixon submission 381, p 6. This issue was also raised at community consultations in Jilkminggan and Katherine.

156 NLC submission 471, p 22.

owning groups, and can impact upon the decision making process itself. This risk can be realised where a group is required to make decisions in respect of communal land ownership in response to development proposals under both the NTA and ALRA.”<sup>157</sup>

This highlights the need for a comprehensive social and cultural impact assessment to be undertaken prior to any major onshore shale gas development in all Aboriginal communities. The cultural risks associated with any onshore shale gas development must be fully understood and quantified at an early stage of the development so that they can be properly managed. This assessment should occur in conjunction with the social impact work described in Chapter 12.<sup>158</sup>

### **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.***

## **11.5 Conclusion**

The Panel understands that the cultural traditions that connect Aboriginal landowners with their country underpin the social fabric of remote communities and go beyond concerns about areas that meet statutory definitions of ‘sacred site’. At risk is the ability to freely access traditional country, the capacity to transfer traditional knowledge, and the maintenance of social cohesion in communities where the benefits and opportunities associated with any shale gas industry may not be equitably distributed.

The right to protect culturally significant places is recognised as part of native title, and is also given statutory expression in both Commonwealth and Territory legislation. The nature of this right is that it can be asserted at any time. It has been put to Panel that there is a risk of dispute between traditional landowners and industry, notwithstanding existing agreements relating to the issue of petroleum leases.<sup>159</sup> Submissions to the Panel by Aboriginal landholders emphasised the importance of maintaining the capability, as a group, to transmit traditions relating to sites on their land across generations.<sup>160</sup>

The incremental nature of the way the onshore shale gas industry is likely to develop in the NT means that for specific works (for example, drill pads, pipelines and related infrastructure) the approval process under the legislation<sup>161</sup> that provides the legal framework that enables Aboriginal people to maintain cultural traditions, is likely to be spread over several years, long after agreements have been negotiated. This has potential to exacerbate stress for Aboriginal communities. As Dr John Avery reflected, based on several decades of experience:

*“The marginal position and relative poverty of many Aboriginal people in this country should not be forgotten. Conflicts over sites can provide a point of focus for a range of grievances which are not intrinsic to site issues. Custodians may, for example, have environmental concerns for their traditional territories or they may have outstanding land claims on lands where substantial projects are planned. For people living in remote areas of Australia the prospect of large-scale changes can lead to resentment if such developments are perceived as being imposed without consideration for local people. In the absence of any institutional structure for dealing with the recurring frustrations of Aboriginal people then a range of separate concerns can meld with concerns about sacred sites in such a way that they are not easily abstracted.”<sup>162</sup>*

157 NLC submission 471, p 17.

158 NLC submission 471, p 24.

159 Scambury and Lewis 2016, p 222. Cited in AAPA submission 234. See also AAPA submission 234, pp 7, 21.

160 For example, CLC submission 47; NLC submission 417; AAPA submission 234.

161 In particular, the laws protecting sacred sites.

162 Avery 1993, pp 113-129.

The recommendations in this Chapter are designed to mitigate the risk that Aboriginal people who may feel marginalised and/or aggrieved because of what they perceive as an encroaching industry affecting their wellbeing, seek legislative redress as the only remaining opportunity to limit the development of any shale gas industry on their country.