

JUMBUNNA INSTITUTE FOR INDIGENOUS EDUCATION AND RESEARCH

**Hydraulic Fracturing and Free, Prior
and Informed Consent (FPIC) in the
Northern Territory: A Literature Review**



Contents

EXECUTIVE SUMMARY	3
FOREWORD: STATEMENT FROM JUMBUNNA	5
INTRODUCTION	5
SOURCES AND METHODOLOGY.....	7
FREE, PRIOR AND INFORMED CONSENT (FPIC)	8
THE STATUS OF FPIC IN THE NORTHERN TERRITORY	12
BACKGROUND: FPIC, LAND TENURE AND THE UNCONVENTIONAL GAS INDUSTRY IN THE NORTHERN TERRITORY.....	12
QUESTION 1. DO THE LAWS APPLYING IN THE NT ENSURE THAT THE PRINCIPLE OF FPIC IS ADHERED TO IN THE ISSUING OF TITLES UNDER THE PETROLEUM ACT (NT)?	14
PERMITS APPLIED FOR OVER ABORIGINAL FREEHOLD LAND	14
PERMITS APPLIED FOR OVER LAND SUBJECT TO NATIVE TITLE.....	16
QUESTION 2: HAS INFORMATION ABOUT FRACKING BEEN PRESENTED TO ABORIGINAL PEOPLE IN SUCH A WAY THAT THE “INFORMED” ELEMENT OF THE PRINCIPLE OF FPIC HAS BEEN FOLLOWED?	17
<i>Is there general community understanding of fracking and its risks?.....</i>	<i>17</i>
<i>Is information presented in unbiased and accurate ways, detailing the nature and scope of projects?.....</i>	<i>19</i>
<i>Does the information present the best available science and the different views that exist?.....</i>	<i>21</i>
<i>Is Information presented in such ways as to allow people to understand and digest complex information? Are interpreters are used during consultations? Is information is presented in appropriate ways and do communities have access to independent lawyers and scientific experts?.....</i>	<i>23</i>
QUESTION 3: HAVE GAS COMPANIES HOLDING NT UNCONVENTIONAL GAS TENEMENTS UNDER THE PETROLEUM ACT (NT) PUBLICLY COMMITTED TO ENSURING THEY ACT IN ACCORDANCE WITH FPIC?	25
CONCLUSION: ANALYSIS OF FPIC IMPLEMENTATION IN ISSUED NT OIL AND GAS PERMITS	27

EXECUTIVE SUMMARY

This report considers the extent to which the principle of free, prior and informed consent (FPIC) has been implemented in the Northern Territory relative to hydraulic fracturing (fracking). The principle of FPIC is recognised in international law, and “represents the highest standard possible for the involvement of Indigenous Peoples in decision-making processes about large projects”.¹ Based on a review of publicly available information, the report finds that most – if not all – exploration permits issued in the Northern Territory for unconventional gas were issued in the absence of FPIC.

The absence of FPIC is of particular concern, given that on the 17th April 2018, the Northern Territory government lifted the moratorium on hydraulic fracturing (fracking) in the Northern Territory, and subsequent announcements by gas companies of their plans to resume work asap. On the same day as the government announcement, Origin stated their intention to “resume work as soon as practical”, and their “plans to drill and fracture stimulate a further five wells to complete existing exploration permit commitments put in place prior to the moratorium being introduced in September 2016”,² while Santos said that they would “be ready to go in the 2019 dry season”.³

Over 85% of the Northern Territory is the subject of exploration applications made under the *Petroleum Act* (NT), with exploration permits already granted over 25% of the Northern Territory.⁴ The lifting of the moratorium will allow work to be initiated on lands subject to exploration permits, and for the processing of active exploration applications in the Northern Territory.

To assess the implementation of FPIC in the NT, Jumbunna Institute for Education and Research (Jumbunna) has commissioned a literature review of the publicly available information which discusses the application of the principle of FPIC as it applies to fracking in the Northern Territory. These included the final reports and original submissions to the two inquiries into fracking initiated by the Northern Territory government: the Hawke Inquiry and the Pepper Inquiry, media reports and company reports and statements.

In assessing the extent and application of FPIC in the NT, the review considered the following questions:

¹ Oxfam 2018, *Free, Prior and Informed Consent*, viewed August 19 2018, <<https://www.oxfam.org.au/what-we-do/mining/free-prior-and-informed-consent/>>.

² Mark Schubert 2018, *Origin to resume Beetaloo exploration in NT as soon as practice*, viewed August 15 2018, <<https://www.originenergy.com.au/about/investors-media/media-centre/origin-to-resume-beetaloo-exploration-in-nt.html>>.

³ Santos 2018, *NT decision to allow onshore gas exploration to restart in 2019*, viewed August 10 2018, <<https://www.santos.com/media-centre/announcements/nt-decision-to-allow-onshore-gas-exploration-to-restart-in-2019/>>.

⁴ See for example: The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p.382.

1. Do the laws applying in the Northern Territory assure that the principle of FPIC is adhered to the issuing of titles under the *Petroleum Act* (NT)?
2. Has information presented to Aboriginal people about fracking fulfilled the “informed” element of FPIC in the issuing of permits under the *Petroleum Act* (NT)?
3. Have the gas industry companies in the Northern Territory publicly committed to FPIC?

The analysis identified a number of limitations in both Northern Territory and Commonwealth legislation, as well as in the consultation processes, which lead the authors to conclude that at present FPIC cannot be said to exist in non-conventional gas projects and exploration applications in the Northern Territory.

The absence of FPIC is due to a number of factors:

1. **Northern Territory legislation militates against FPIC.** For example, in the case of lands subject to the *Native Title Act* 1993 (Cth) (NTA), this is due to the absence of a right of veto and the time frames under which negotiations must occur, which lead to a significant power imbalance between companies and Aboriginal Traditional Owners (TOs).
2. **Lack of understanding of fracking and its risks.** Adequate and appropriate information, in community members’ own language, is a pre-condition of informed consent. Throughout both the Pepper and Hawke inquiries, concerns were raised about the level of misinformation around fracking issues in the Northern Territory. These concerns are particularly acute in the context of a lack of scientific and environmental knowledge, a lack of resources, competing agendas and polarised views. The authors also note a failure to use trained interpreters in consultations and an absence of materials translated into local languages.
3. **Lack of resourcing of land councils to conduct consultations.** Both the Central Land Council (CLC) and Northern Land Council (NLC) stated that they are not mandated, or resourced, to fund the development and delivery of information programs on hydraulic fracturing. Many submissions to the inquiry supported those costs being borne by resource companies.

Industry, government and land councils frequently state their commitment to informed consent. However, as this analysis shows, a commitment to consent does not necessarily deliver consent. A review of submissions to the Hawke and Pepper Inquiries indicate that informed consent has not, in fact, been actualised on the ground for existing fracking operations. Furthermore, the Pepper Review has occasioned a mass leap forward in understandings about fracking – which suggests that new information must be provided to communities for informed consent to be said to have occurred.

Given these findings, there is adequate information to conclude that most, if not all, exploration permits issued in the Northern Territory for unconventional gas were issued in the absence of FPIC. Given this, going forward, gas companies must take active steps to ensure that Aboriginal people in

the Northern Territory are afforded FPIC, by engaging in new consultation processes that comply with the principles of FPIC.

FOREWORD: STATEMENT FROM JUMBUNNA

Indigenous Peoples continue to suffer from the ongoing impacts of colonisation in Australia. In particular, the past ten years has seen an unprecedented targeting of the Aboriginal Traditional Owners (TOs) in the Northern Territory with extreme Government policies and practices that seek to continue violent extraction of resources from homelands.

This is exemplified in the racist Northern Territory Emergency Response – commonly known as the NT Intervention (rebranded into Stronger Futures) that has now been in place for ten years. The Intervention breaches countless international human rights standards and significantly undermines TO decision-making processes and actions on their own homelands.⁵ It has been instrumental in demolishing community-controlled organisations and has exasperated an already wasteful use of precious funding allocations for basic public services.

It is within this context that this report emerges with a specific message: there has been a gross absence of FPIC in the process of issuing petroleum exploration permits in Northern Territory.

The conclusions of this report are clear: the Northern Territory government and industry must take steps to ensure FPIC before ANY further exploration or production via fracking can begin. This process must consider FPIC in its broader regional and national context. It must also begin by referencing the authoritative testimonies and voices of TOs to ensure the proper and full implementation of FPIC. These voices and contexts were not considered in this report, which was limited in scope to publicly available, published material. If governments, communities and industry are to properly respond to the conclusions in the report and address the absence of FPIC in the Northern Territory, these voices and contexts must be included in the analysis.

INTRODUCTION

On the 17th April 2018, the Northern Territory government lifted the moratorium on unconventional gas hydraulic fracturing (fracking) in the Northern Territory. The moratorium was put in place on the 14th September 2016, ahead of a 15-month scientific inquiry into the sector. Companies were quick to announce their plans to resume work. On the same day as the government announcement, Origin stated their intention to “resume work as soon as practical”, and their “plans to drill and

⁵ Nicholson et. al. 2009, *Will they be heard?*, viewed August 9 2018, <<http://www.concernedaustralians.com.au/media/Will-they-be-heard-report.pdf>>.

fracture stimulate a further five wells to complete existing exploration permit commitments put in place prior to the moratorium being introduced in September 2016”, while Santos said that they would “be ready to go in the 2019 dry season”.⁶

Fracking is currently a very immature industry in the Northern Territory, with no production permits issued for unconventional fracking operations in the Northern Territory. However, the lifting of the moratorium will allow work to be initiated on lands subject to exploration permits, and for the processing of active exploration applications in the Northern Territory (NT). As has been frequently noted by activists and media, over 85% of the Northern Territory is the subject of exploration applications made under the *Petroleum Act* (NT), with exploration permits already granted over 25% of the Northern Territory.⁷

The majority of exploration permits in the Northern Territory have been issued since 2011. Describing this process in their submission to the Pepper Inquiry, the Central Land Council (CLC) stated:

Fracking in the CLC region emerged as an issue following a rush of exploration licence applications potentially targeting unconventional gas during 2011. Exploration companies had applied for most of the available ground in the CLC region by the end of that year and the CLC began processing the applications as required under the ALRA and the NTA.⁸

The Northern Land Council (NLC) has already “negotiated approximately 30 agreements on behalf of traditional Aboriginal owner and oil and gas companies seeking access to land subject to *Aboriginal Land Rights (Northern Territory) Act* 1996 (ALRA) or *Native Title Act* 1993 (Cth) (NTA) for the purposes of onshore petroleum exploration and/or production infrastructure development”.⁹

The reasons for this rush are attributable to (a) the NT’s ‘first-come first served’ awarding of exploration permits, which were initially able to be applied for over all of the NT; and (b) the US shale gas revolution which saw many companies looking for prospective areas for shale gas.¹⁰ From January 2014, the *Petroleum Act* (NT) was amended to enable the Government to invite applications from gas companies only over areas that had been ‘released’. Both the Hawke and

⁶ Santos 2018, *NT decision to allow onshore gas exploration to restart in 2019*, viewed August 10 2018, <<https://www.santos.com/media-centre/announcements/nt-decision-to-allow-onshore-gas-exploration-to-restart-in-2019/>>.

⁷ See for example: The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 382

⁸ Central Land Council 2018, *Submission 47: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 4.

⁹ Northern Land Council 2018, *Submission 214: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/?a=424048>>, p. 5.

¹⁰ Department of Primary Industries and Resources 2018, *Submission 226: Scientific Inquiry into Hydraulic Fracturing*, viewed August 9 2018, <<https://frackinginquiry.nt.gov.au/?a=424936>>, p.13.

Pepper Inquiry questioned the utility of this change, given most land was already subject to application. This issue was similarly noted in the NT Government Departmental submissions.¹¹

The fracking industry has a number of potential impacts on Aboriginal people, culture and country. These are comprehensively detailed in Chapter 11 of the Pepper Inquiry, entitled *Aboriginal People and their Culture*. The outset of this chapter notes:

Aboriginal people from regional communities who made submissions to the Panel almost universally expressed deep concern about, and strong opposition to, the development of any onshore shale gas industry on their country¹².

Given the concern expressed in the inquiry, and the lifting of the moratorium, Jumbunna believed it was timely to review the principle of Free, Prior and Informed Consent (FPIC) as it applies to fracking in the Northern Territory (NT). As detailed in the following section, free, prior and informed consent (FPIC) relates to self-determination and the provision of positive rights for Indigenous peoples to protect their legal and customary rights.

Fracking has proven a divisive issue in the NT (as elsewhere) and much has been written about the various risks and benefits of the process. This review, however, only seeks to assess the extent to which the principle of FPIC has been implemented in the NT with regards to fracking. The scope of this review is limited to an assessment of how the following questions are answered on the basis of publicly available information:

1. Do the laws applying in the NT assure that the principle of FPIC is adhered to the issuing of titles under the *Petroleum Act* (NT)?
2. Has information presented to Aboriginal people about fracking fulfilled the “informed” element of FPIC in the issuing of permits under the *Petroleum Act* (NT)?
3. Have the gas industry companies in the NT publicly committed to FPIC?

SOURCES AND METHODOLOGY

The authors have conducted a literature review of the publicly available information which discusses the application of the principle of FPIC as it applies to fracking in the Northern Territory (NT).

¹¹ See for example: The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 382; Department of Environment and Natural Resources 2018, *Submission 429: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/submission-library/department-of-environment-and-natural-resources-submission-429-submission-of-information-requested-by-the-inquiry>>.

¹² See The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report – Chapter 11*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>.

To date two inquiries have been undertaken in the NT, commissioned in both cases by the NT Government, to review the risks associated with fracking in the NT. Those inquiries are the 2014 Independent Inquiry into Hydraulic Fracturing in the Northern Territory (The Hawke Inquiry) and recently released 2018 Independent Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (the Pepper Inquiry). These inquiries have produced large bodies of publicly available information.

In addition to the material produced for these inquiries – including submissions – this review has considered the following sources:

- Media reporting
- The CLC and NCL websites
- The websites and public statements of companies operating petroleum titles in the NT.

FREE, PRIOR AND INFORMED CONSENT (FPIC)

Free, prior and informed consent (FPIC) “represents the highest standard possible for the involvement of Indigenous peoples in decision-making processes about large projects”.¹³ The principle of FPIC is recognised in international law, for example, Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order 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 mineral, water or other resources.¹⁴

The obligations to adhere to FPIC under international law are not confined to states. Under various human rights instruments, the responsibility to adhere to FPIC, along with all internationally recognised human rights, also applies to companies.¹⁵ Many companies now explicitly commit to

¹³ Oxfam 2018, *Free, Prior and Informed Consent*, viewed August 19 2018, <<https://www.oxfam.org.au/what-we-do/mining/free-prior-and-informed-consent/>>.

¹⁴ Article 32(2) *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st sess, 107th plen mtg, UN Doc A/68 (13 September 2007).

¹⁵ The UN Human Rights Council approved *UN ‘Protect, Respect and Remedy’ Framework and Guiding Principles* sets out a framework for business and human rights. Accessible at Business & Human Rights Resource Centre (2018) *UN ‘Protect, Respect and Remedy’ Framework and Guiding Principles*, viewed August 11 2018 <<https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>>.

the principle of FPIC, and Indigenous peoples' right to FPIC are core principles required by groups like the International Finance Corporation (the private sector arm of the World Bank).¹⁶

FPIC is about self-determination and the provision of positive rights for Indigenous peoples to protect their legal and customary rights. FPIC can be defined as:

The right to participate in decision-making and to give, modify, withhold, or withdraw consent to an activity affecting the holder of this right. Consent must be freely given, obtained prior to implementation of such activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question; hence the formulation: free, prior and informed consent.¹⁷

[emphasis added]

This is far from the only definition. For example, the International Council on Mining & Metals in their 2013 position statement, *Indigenous Peoples and Mining* noted:

In ICMM's view, FPIC comprises a process, and an outcome. Through this process Indigenous peoples are (i) able to freely make decisions without coercion, intimidation or manipulation; (ii) given sufficient time to be involved in project decision making before key decisions are made and impacts occur; and (iii) fully informed about the project and its potential impacts and benefits.

The outcome is that Indigenous peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognised human rights and is based on good faith negotiation.¹⁸

In 2012, the Forestry Stewardship Council (FSC) published their guidelines for FPIC, which include the following, strengthened definition of FPIC:

A legal condition whereby a person or community can be said to have given consent to an action prior to its commencement, based upon a clear appreciation and understanding of the facts, implications and future consequences of that action, and the possession of all relevant facts at the time when consent is given. Free, prior and informed consent includes the right to grant, modify, withhold or withdraw approval.

¹⁶ IFC 2012, *Guidance Note 7: Indigenous Peoples*, viewed August 9 2018, <https://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012%20pdf?MOD=AJPERES>.

¹⁷ Colchester, M. and MacKay, F. (2004), 'In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent', *10th Conference of the International Association for the Study of Common Property*, Oaxaca, <<http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicpsaug04eng.pdf>>.

¹⁸ ICMM 2013, *Indigenous Peoples and Mining Position Statement*, viewed August 10 2018, <<https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement>>.

It is worth clarifying the four elements of FPIC through the collation of various sources which have sought to provide more detail around each element and what is meant by them:

Free means that consent is given in the absence of coercion, intimidation or manipulation.¹⁹

Prior means that information must be provided in such a way that:

- There is sufficient lead time to allow information-gathering and information sharing;
- Ideally, the community is asked about the initial idea
- Information is provided in such a way as is required to allow understanding by communities including by appropriate translation or verbal dissemination and by allowing sufficient time-frames for traditional decision-making processes to take place;
- A plan or program must not begin before the above steps are undertaken.²⁰

Informed means that all the relevant information is presented to communities and civil society in an accurate and accessible manner independent of vested interests. Various manifestations of the meaning of informed in the context of FPIC can be observed. For people to be 'informed' for the purposes of FPIC, information must be fulsome and should:

- Allow communities to fully understand the nature and scope of a project (including its duration and if something forms part of a larger project);
- Allow communities to fully understand the localities/areas that will or may be affected by a project;
- Provide communities with access to the best scientific, environmental, social and financial information available to allow determination of the risks and benefits of any decision – taking into consideration the precautionary principle;
- Informs the community as to the reason/purpose for the project; and
- Allow communities to consider information reflecting all views and positions on a project. This includes being able to access experts on law and technical issues to help communities make their decisions.²¹

¹⁹ Oxfam Australia 2014, *Guide to Free, Prior and Informed Consent*, viewed August 10 2018, <www.oxfam.org.au/explore/mining/free-prior-and-informed-consent>.

²⁰ See: Carmen, A. 2010, 'The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress', in J. Hartley, P. Joffe, & J. Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, Purich Publishing Ltd, Saskatoon, p.120; Forestry Stewardship Council 2012, *FSC guidelines for the implementation of the right to free, prior and informed consent*, viewed August 9 2018, <<http://www.fao.org/sustainable-forest-management/toolbox/tools/tool-detail/en/c/217966/>>.

²¹ Oxfam Australia 2014, *Guide to Free, Prior and Informed Consent*, viewed August 10 2018, <www.oxfam.org.au/explore/mining/free-prior-and-informed-consent>; Human Rights Council (2010), *Progress report on the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/15/35; Permanent Forum on Indigenous Issues (2005), *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc. E/C.19/2005/3;

Finally, the literature consistently acknowledges that for the FPIC principle to be adhered to, the information above must be provided to Indigenous People in such a way as to allow adequate time to consider it and form a view as to the risks and benefits of the proposal being considered.²²

Consent means the right to say 'yes' or 'no'. Consent is not the same as engagement or consultation. The highest standard of consent, if consent is granted, will involve ongoing consultation and consent confirmation with FPIC being sought before every significant stage of project development.²³

In *The Right to Decide: Company Commitments and Community Consent*, Oxfam noted that:

...the elements of FPIC are interrelated, and set the conditions for the consent of Indigenous peoples. The "free", "prior" and "informed" ensure a fair consent process. Violation of any of these three elements may invalidate agreement said to have been made between extractive industry companies and Indigenous peoples.²⁴

Various sources note that sufficient information is a precondition to the achievement of FPIC.²⁵ Without sufficient information, FPIC is impossible.

The processes described by many of the NT's gas companies amount to consultation. Consultation is not consent and FPIC is not achieved by simply following a consultation process. Respecting the right to FPIC requires the respect of Indigenous peoples' collective right to self-determination. Full adherence to FPIC requires that Indigenous people have the right to determine what type of process of participation, consultation, and decision-making is proper for them and this includes their own time-frame to make these decisions.

Carmen, A. 2010, 'The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress', in J. Hartley, P. Joffe, & J. Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, Purich Publishing Ltd, Saskatoon, p.120.

²² See for example: Indigenous Bar Association 2011, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples, An Introductory Handbook*, Indigenous Bar Association and University of Manitoba, Winnipeg, viewed August 9 2018, <http://www.indigenousbar.ca/pdf/undrip_handbook.pdf>; Permanent Forum on Indigenous Issues, United Nations Economic and Social Council 2005, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, viewed August 10 2018, <<https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/international-workshop-on-methodologies-regarding-free-prior-and-informed-consent-and-indigenous-peoples.html>>.

²³ Permanent Forum on Indigenous Issues, United Nations Economic and Social Council 2005, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, New York, viewed August 10 2018, <<https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/international-workshop-on-methodologies-regarding-free-prior-and-informed-consent-and-indigenous-peoples.html>>.

²⁴ CAER and Oxfam Australia 2013, *The Right to Decide: Company Commitments and Community Consent*, viewed August 9 2018, <www.oxfam.org.au/explore/mining>, p. 7.

²⁵ See for example: Rumler, M. 2011, *Free, prior and informed consent: a review of free, prior and informed consent in Australia*, viewed August 10 2018, <<https://www.business-humanrights.org/en/pdf-free-prior-and-informed-consent-a-review-of-free-prior-and-informed-consent-in-australia>>.

THE STATUS OF FPIC IN THE NORTHERN TERRITORY

BACKGROUND: FPIC, land tenure and the unconventional gas industry in the Northern Territory

The regulatory regime applicable to fracking operations in the NT depends on the tenure of the land over which a petroleum title is sought. The extent to which the principle of FPIC is delivered depends upon whether a permit is sought/issued on land which is subject to native title under the NTA or is Aboriginal freehold land under the ALRA.

The Northern Territory has form of land tenure unique in Australia by virtue of the *Aboriginal Land Rights (Northern Territory) Act 1996 (ALRA)*. According to the CLC, ALRA “put into law the concept of inalienable freehold title”.²⁶ Land granted under ALRA cannot be bought, acquired or mortgaged, nor can it be compulsorily acquired by the Commonwealth. ALRA sees approximately 50% of the NT’s land mass owned outright by Aboriginal people as freehold. The majority of remaining land tenure in the NT co-exists with native title held pursuant to the *Native Title Act 1993 (Cth) (NTA)*.

Aboriginal people make up 25.5% of the population of the NT.²⁷ That percentage increases dramatically in remote and rural areas outside of Darwin. These factors mean that FPIC has a more extensive and enhanced role to play in the Northern Territory.

The principle of FPIC is not formally recognised by the Northern Territory Government through explicit reference in legislation. However, FPIC is – partially - realised in a formal statutory sense via the application of the ALRA (which provides special rights for both indigenous land ownership and the mining and petroleum processes which occur on that freehold land).

Land Councils, established under the ALRA, are given statutory authority to determine the *traditional Aboriginal owners (TO)* of land and have the following functions:

- Determining and expressing the wishes and opinions of Aboriginal people living in the area subject to a Land Council on the management of Aboriginal land in that area;
- Protecting the interests of TOs;
- Consulting with TOs with respect to any proposal relating to the use of Aboriginal land;
- Assisting Aboriginal people pursue any claims they may have to land, including providing legal assistance to those people.²⁸

²⁶ Central Land Council (n.d.), *The Aboriginal Land Rights Act*, viewed August 9 2018, <<https://www.clc.org.au/articles/cat/land-rights-act/>>.

²⁷ Australian Bureau of Statistics 2016, *2016 Census Quick Stats: Northern Territory*, ABS, Canberra, viewed August 12 2018, <http://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/7?opendocument>.

²⁸ Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s. 23.

The ALRA prohibits a Land Council from giving consent to a development unless the Land Council is satisfied that the TO of that land understands the nature and purpose of the proposed action and, as a group, consents to it.²⁹ This threshold applies to consents to exploration for unconventional gas made under the *Petroleum Act* (NT) and has been the subject of some controversy, as discussed in more detail during the literary review.³⁰

Mining and petroleum activities on Aboriginal freehold land are treated separately to alternate types of development proposals.³¹ Notably, the ALRA, provides a scheme for the granting of an exploration tenement on Aboriginal freehold land which gives the TOs a right of veto at the exploration stage. However, at the production stage, substantially weaker rights are afforded to TOs. The difficulties for TOs of having to give their consent at the earliest stage of a development have been widely noted. For example, the CLC notes on the mining page of their website:

Once consent is given by traditional owners to exploration, they cannot refuse any subsequent mining. An agreement for mining must be made to allow mining to proceed. Mining generally involves substantial impacts to the environment and can affect neighbouring communities. The decision, therefore, that traditional owners are required to make at the exploration licence application is quite onerous.

This is the earliest point in the development process when the least information is available on the nature of any possible development. In this context the CLC is required under the Land Rights Act to ensure traditional landowners are informed as far as practicable when making decisions.³²

The procedure for obtaining an exploration permit on Aboriginal freehold land is prescribed by the ALRA, which sets out what must be included in a company's application. These matters include details of the applicant, the land, the methods proposed to be used, proposals for rehabilitation, proposals for minimising social impact and the time period of the proposed exploration.³³

Importantly, however, there is no requirement for a miner – at the exploration stage – to provide details about a production scenario following a successful exploration.³⁴ A comprehensive outline of the application of the ALRA as it applies to petroleum activities can be found in the Pepper Inquiry at Chapter 11.3.1.

²⁹ Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s. 23.

³⁰ See for example: Fitzgerald, D. 2016, 'Northern Land Council accused of poor consultation in providing consent for gas exploration in Roper regions', *ABC News*, 29 June, viewed August 9 2018, <<http://www.abc.net.au/news/rural/2016-06-29/nlc-accused-poor-consultation-fracking-roper-regions/7552578>>.

³¹ See Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

³² Central Land Council (n.d.), *Making agreements on Aboriginal land: Mining and development*, viewed August 10 2018, <<https://www.clc.org.au/articles/cat/mining/>>.

³³ Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), s. 41.

³⁴ Note that s.47(3) does require that the mining methods accepted during exploration apply also at the mining stage.

Native Title holders under the NTA have lesser rights than those with freehold under the ALRA. Broadly, the NTA affords Native Title holders a *right to negotiate* with a mining company that is seeking to explore for gas resources within the area for which they hold native title rights. Significantly, the right to negotiate does not give native title holders the right to veto an application.

A comprehensive outline of the application of the NTA as it applies to petroleum activities in the Northern Territory can be found in the Pepper Inquiry Report at Chapter 11.3.2.

Question 1. Do the laws applying in the NT ensure that the principle of FPIC is adhered to in the issuing of titles under the Petroleum Act (NT)?

Permits applied for over Aboriginal Freehold Land

The potential to achieve FPIC is far stronger when applications are made over Aboriginal freehold land. This is because Aboriginal TOs have a veto right which allows them to say no to a permit, albeit *only* at the exploration stage. The Pepper Inquiry heard various submissions that the absence of a veto right at the production phase of any unconventional gas development means that the ALRA falls short of implementing the principle of FPIC.³⁵ In their submission to the Pepper Inquiry, the NLC stated:

...the NLC considers it problematic that ALRA requires the negotiation of a conjunctive agreement during the exploration phase as a company only has limited generic information at this early stage where no resource has been discovered.³⁶

Furthermore, questions have also been raised about the quality of the consultations undertaken by the NLC with respect to onshore unconventional gas explorations permits issued on land subject to ALRA.³⁷ Two exploration permits, allowing unconventional exploration for gas using petroleum, have been granted on Aboriginal land managed by the NLC. Those permits were issued in March 2015 and have been subject of substantial scrutiny.³⁸

³⁵ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 276.

³⁶ Northern Land Council 2018, *Submission 647: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/?a=485002>>, p. 19.

³⁷ See for example: Davidson, H. 2016, 'Aboriginal landowners criticise Northern Land Council over drill permit', *The Guardian*, June 29, viewed August 6 2018, <<https://www.theguardian.com/australia-news/2016/jun/29/aboriginal-landowners-criticise-northern-land-council-over-drill-permit>>.

³⁸ Giles, A. and Tollner, D. 2015, *Media release: Landmark agreements to create Indigenous jobs*, media release, 20 March, Northern Territory Government, viewed 10 August 2018, <<http://newsroom.nt.gov.au/mediaRelease/10801>>.

In 2014, Hancock Prospecting successfully achieved agreements for exploration permits in the Mataranka region, which included areas over which the ALRA applied. The consultations undertaken by Hancock Prospecting and the NLC which led to that agreement have been widely criticised. Concerns about the consultations undertaken by the NLC are highlighted in various press reports from 2015, 2016 and during the Pepper Inquiry.³⁹ For example, it was reported that:

- “380 members of the Alawa and Mangarrayi Aboriginal land trusts covering the Roper River and historic Elsey Station say that neither the fracking company nor the Northern Land Council consulted adequately over shale gas fracking plans and its potential impacts on land and water”.⁴⁰
- “Traditional Owners are contesting the validity of the fracking agreement, arguing neither the company nor the Northern Land Council explained during consultation the scale and risks of an operational shale gas field and used no interpreters to explain complex mining techniques. An overwhelming majority of Traditional Owners argue they were excluded from consultation meetings entirely.”⁴¹
- Traditional Owners are represented by Minter Ellison in Darwin to have gas exploration permit EP154 scrapped.⁴²

One report on EP154 stated “only one signatory is believed to be publicly known, senior Mangarrayi traditional owner Sheila Conway, and she has since reneged her support, claiming she did not understand what she was signing. Conway is unable to read or write.”⁴³ Other reports noted that traditional owners opposed to the permit grant said they had not been furnished with sufficient information about the scale of potential works beyond the exploration stage and that interpreters were not available.

The NLC made statements to the effect that consultations were extensive and that the consent decisions were fully informed.⁴⁴

³⁹ See for example, the questions ABC RN Breakfast put to Adam Giles – who replied that ‘Hancock will not be responding’: ABC (n.d.), *Questions sent to Adam Giles and NLC*, ABC, viewed 10 August 2018, <<http://www.abc.net.au/cm/lb/9052638/data/questions-sent-to-adam-giles-and-nlc-data.pdf>>.

⁴⁰ CAMAA 2016, *Traditional owners fight fracking approvals at Mataranka, NT*, viewed 9 August 2018, <<http://caama.com.au/news/2016/traditional-owners-fight-fracking-approvals-at-mataranka-nt>>.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Davidson, H. 2016, ‘Aboriginal landowners criticise Northern Land Council over drill permit’, *The Guardian*, June 29, viewed August 6 2018, <<https://www.theguardian.com/australia-news/2016/jun/29/aboriginal-landowners-criticise-northern-land-council-over-drill-permit>>.

⁴⁴ Davidson, H. 2016, ‘Aboriginal landowners criticise Northern Land Council over drill permit’, *The Guardian*, June 29, viewed August 6 2018, <<https://www.theguardian.com/australia-news/2016/jun/29/aboriginal-landowners-criticise-northern-land-council-over-drill-permit>>.

In 2017, Hancock Prospecting announced it was voluntarily relinquishing portions of EP154 to allow greater buffer areas around the Mataranka Hot Springs and the Roper River.

Permits applied for over land subject to Native Title

NTA legislation does not include a right to veto – only a right to negotiate. This absence of a right to veto can be viewed as a direct contradiction to the principle of FPIC. The ability for the NTA to deliver FPIC is questioned by both the NLC and the CLC.⁴⁵ The NLC specifically states that the “the requirement for FPIC currently only applies to land governed by the Aboriginal Land Rights (Northern Territory) Act 1976 in the Northern Territory”.⁴⁶ Both the NLC and CLC have stated publicly that a veto provision, like that found under the ALRA, should apply to gas exploration applications on native title lands.⁴⁷

The NLC submission describes the consultation process for the negotiation of agreements with companies under the NTA as a “two-part process”.⁴⁸ The process outlined refers to two meetings. At the first meeting companies describe their proposals and then native title parties instruct the NLC whether or not they are willing to negotiate an agreement.⁴⁹ The NLC then negotiates an agreement on behalf of the native title holders and then at the second meeting the finalised agreement is taken to the native title holders for them to ratify its terms and conditions.

The CLC notes that their consultation processes for ALRA and NTA applications are largely aligned but occur within vastly different legislative timeframe requirements. A concerning aspect of the CLC submission was that “several applications were granted at the beginning of the rush of applications in 2011 without consultation meetings or indeed any discussion with the CLC”.⁵⁰

Due to the absence of a right of veto, and the legislated timeframes for negotiations, negotiations under the NTA occur with a significant power imbalance favouring gas companies. Combined these factors make FPIC improbable.

⁴⁵ Northern Land Council 2018, *Submission 647: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=485002>>, p. 19.

⁴⁶ Northern Land Council 2018, *Submission 647: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=485002>>, p. iii.

⁴⁷ Northern Land Council 2018, *Submission 647: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=485002>>, p. 19.

⁴⁸ Northern Land Council 2018, *Submission 214: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=485002>>, p. 36.

⁴⁹ Note: if the native title parties indicate they are unwilling to negotiate, the company has a right to seek an arbitrated outcome.

⁵⁰ Central Land Council 2014, *Central Land Council Submission to the Hydraulic Fracturing Inquiry in the Northern Territory*, viewed 9 August 2018, <<https://frackinginquiry.nt.gov.au/information/other-australian-inquiries/2014-northern-territory-inquiry-terms-of-reference?a=389305>>, p. 7.

QUESTION 2: Has information about fracking been presented to Aboriginal people in such a way that the “informed” element of the principle of FPIC has been followed?

As discussed above, it is generally and consistently acknowledged that for FPIC to be adhered to, Indigenous people must be provided with information about the project in such a way as to allow adequate time to consider it and form a view as to the risks and benefits of the proposal being considered. Adequate and sufficient information is a pre-condition for FPIC to existing. In assessing the information presented to indigenous communities in the NT, the report writers have considered the following questions:

- Is there a general community understanding of fracking and its risks?
- Is information presented in unbiased and accurate ways, detailing the nature and scope of projects?
- Does Information present the best available science and the different views that exist?
- Is Information presented in such ways as to allow people to understand and digest complex information? Are interpreters are used during consultations? Is information is presented in appropriate ways and do communities have access to independent lawyers and scientific experts?

Is there general community understanding of fracking and its risks?

Both the Hawke and Pepper Inquiries have highlighted the limited general community understanding about the fracking process, including its impacts, risks, and the distinctions between conventional and unconventional deposits and shale gas and coal seam gas.⁵¹ The Pepper Inquiry's Final Report noted that:

The Panel received an abundance of evidence that the broader Aboriginal community was not being appropriately informed about fracking or the potential for an onshore shale gas industry more broadly.⁵²

The responses to the presentation by the Panel at community consultations on the processes involved in fracking for onshore shale gas suggests that the knowledge of the likely impacts of

⁵¹ See for example: Hawke, A. 2014, *Report of the Independent Inquiry into Hydraulic Fracturing in the Northern Territory*, viewed 9 August 2018, https://frackinginquiry.nt.gov.au/_data/assets/pdf_file/0008/387764/report-inquiry-into-hydraulic-fracturing-nt.pdf, p. ii; and The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>, p. 276.

⁵² The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>, p. 289.

this industry within the Aboriginal community in the Beetaloo Sub-basin, and more widely, is wholly inadequate.⁵³

Further, the bodies pre-eminently responsible for ensuring FPIC in relation to specific gas developments on Aboriginal and Native Title land, Aboriginal Land Councils established under the ALRA, have noted substantial challenges associated with dealing with onshore unconventional gas developments. Those challenges include the vast nature of applications for petroleum exploration, the potential impacts to underground resources and sub-surface sacred sites, the water required by the unconventional gas industry and the difficulty of “communicating highly technical processes to people that have English as a second or more language”.⁵⁴ In 2014, ABC News reported on the NLC submissions to the Hawke Inquiry. That report stated that:

... [t]he NLC was concerned people speaking English as a second, third or fourth language would not be able to understand the highly technical information about fracking, and therefore could not properly give their free, prior and informed consent.⁵⁵

Both the NLC and CLC have noted their neutral approach to hydraulic fracturing. In August 2016, the CLC and NLC – at a joint meeting of their councils – passed a resolution stating that:

The joint meeting of NLC and CLC supports the rights of traditional Aboriginal owners to make their own decisions about the use of their land and waters free from outside influence. It is important to ensure that traditional owners have all the relevant information. The land councils will continue to make sure this happens.

We recognise that some Aboriginal people have concerns about fracking and do not want it to occur on their lands and water. But our job is to support and respect the decisions of traditional Aboriginal owners for the area in question.

Various submissions and media reports have emphasised that Government should take the lead role – along with industry - in disseminating materials that will allow the general populace to become more comfortable with the technicalities of hydraulic fracturing. Those publicly made statements and submissions have made it clear that to-date that information has been missing from the public debate. For many, the plain English materials published by the Pepper Inquiry were the first attempt to have this process and its many and varied risks and the ways to mitigate them explained in a digestible manner. The burden of both time and resources for people to try and understand this

⁵³ Ibid.

⁵⁴ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 276.

⁵⁵ Central Land Council 2014, ‘Central Land Council calls for new fracking legislation’, *The Guardian*, 4 July, viewed August 10 2018, <<http://www.abc.net.au/news/2014-07-04/central-land-council-calls-for-new-fracking-legislation/5571504>>.

complex issue and the limited information available was also noted by the Senate Select Committee into Unconventional Gas Mining.⁵⁶

Is information presented in unbiased and accurate ways, detailing the nature and scope of projects?

For FPIC to be deemed to have occurred, information about the project and the broader industry must be presented in an unbiased and accurate way and must detail the nature and scope of the project.

Information about the unconventional gas industry in the NT is currently viewed as deficient. The Hawke Inquiry noted that:

...there is little understanding about the differences – or even that there is a difference – between shale gas and CSG. The high level of distrust, frustration and misinformation, combined with polarised views, makes it challenging for honest, productive communication to occur.⁵⁷

The need for understandable and accurate information has also been acknowledged by both NT inquiries, various Governments in Australia, and the gas industry. In 2016, the COAG Energy Council made a number of commitments (approved by the Northern Territory) in relation to the unconventional gas industry which included “improving information on gas reserves and production potential” and “improving public availability and accessibility of rigorous science and factual information”.⁵⁸

A large number of submissions to the Hawke and Pepper Inquiries noted the lack of, and urgent need for, relevant and accurate information to be disseminated in the NT about fracking and the unconventional gas industry generally. Those submissions also noted the need for that information to be presented in an appropriate and digestible way.

The SEED Indigenous Youth Climate Coalition presented to the Pepper Inquiry and noted that their outreach work had found substantial knowledge gaps existed in Indigenous communities where fracking applications had either been issued or were under application. In their presentation to the Pepper Inquiry a representative of SEED stated:

⁵⁶ The Senate – Select Committee on Unconventional Gas Mining 2016, *Interim Report*, Canberra, viewed 10 August 2018, <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Gasmining/Gasmining/Interim_Report>.

⁵⁷ Hydraulic Fracturing ('Hawke') Inquiry 2014, *Report of the Independent Inquiry into Hydraulic Fracturing in the Northern Territory*, viewed 9 August 2018, <https://frackinginquiry.nt.gov.au/__data/assets/pdf_file/0008/387764/report-inquiry-into-hydraulic-fracturing-nt.pdf>, p. 34.

⁵⁸ COAG Energy Council 2017, *COAG Energy Council Gas Supply Strategy: Implementation plan for collaborative action*, viewed 10 August 2018, <<http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/GSS%20Implementation%20Plan%20-%20revised%20Aug%202017.pdf>>.

We know one of the principles that we've talked about working with SEED is like (sic), the UN rights Indigenous peoples and that's to free, informed and prior consent. And there are so many instances that we've seen over the last year where people just don't have the information about what fracking is going to mean. We've seen it in the resources that have been provided to people, we've talked to elders, people who've said that when they were approached by these companies, they were told the impact on land would be the size of a billycan.⁵⁹

Similarly, the Statement from the Aboriginal Fracking Forum, presented to the Pepper Inquiry, specifically stated that gas companies had told Aboriginal people lies about the potential impacts of the unconventional gas industry.⁶⁰

The findings by SEED and other submissions were supported by the general findings of the inquiry and the statements of the Land Councils.⁶¹ In Submission 47 to the Pepper Inquiry, the CLC stated the following:

To promote better understanding, balanced expert scientific information that is easy to understand is essential for traditional Aboriginal owners and the CLC has identified gaps in the information available. Current information tends to be either industry or anti-fracking centric and subject to bias and mis-information. For example, anti-fracking group, Lock the Gate, uses an image of a coal seam gas field on the cover of a brochure entitled Shale and Tight Gas Fracking...; and an industry brochure does not acknowledge or discuss any risk around hydraulic fracturing, instead refers to high-standard engineering, ongoing monitoring and sound environmental management.⁶²

In one part of the CLC submission, presented orally to the Pepper Inquiry, concerns were raised about information not being provided to traditional owners up-front, and that information materials provided at exploration application stage were more superficial, ignoring the structure of the ALRA legislation and the fact that the veto right only exists at exploration stage. There was concern that Government and Industry seemed to fail to understand the implications of that one-time consent.⁶³ This is exemplified by statements from companies where they admitted that many of the benefits

⁵⁹ Seed Indigenous Youth Climate Network 2017, *Submission 267: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414044>>, p. 4.

⁶⁰ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 268.

⁶¹ Central Land Council 2018, *Submission 47: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 8.

⁶² Central Land Council 2018, *Submission 47: Scientific Inquiry into Hydraulic Fracturing*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 8.

⁶³ Central Land Council 2018, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 8.

would become clearer and be better articulated at later stages.⁶⁴ These types of statements were common, as were concerns that people don't have a fulsome understanding of what a production scale operation might look like at the exploration stage. For example, one anthropologist stated:

...the potential scale of a fracking industry and its difference in scale and scope to mineral exploration and mining would in my view challenge the intent of the provisions of ALRA to effectively ensure that Aboriginal people were able to give free, prior and informed consent on fracking projects. Being required to consent at the exploration phase to unknown scales of production and associated potentially landscape changing impacts would be unconscionable.⁶⁵

Similarly, the CLC submission gave explicit examples of an issue which had arisen following a consent, which hadn't been considered at the time consent was given.⁶⁶

The Pepper Inquiry considered how the Aboriginal Areas Protection Authority (AAPA), a statutory body responsible for consulting Aboriginal people about impacts to sacred sites, was placed to consult with Aboriginal people about the unconventional gas industry. The Panel noted that AAPA had, "limited technical and scientific expertise to understand and interpret the hydrogeological impacts" that fracking may have on sacred sites.⁶⁷ AAPA also noted this in their own submission.⁶⁸ The Panel found that "If AAPA does not understand these impacts then it is very difficult to explain them to custodians (which, in turn, inhibits their ability to give informed consent)..."⁶⁹

Does the information present the best available science and the different views that exist?

Fully informed decisions require access to quality science and data that enables the regulator to understand the subsurface (geological), surface and atmospheric conditions across the landscape.

⁶⁴ See, Origin Energy 2018, *Submission 1187: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=497726>>, p.13.

⁶⁵ Environmental Defenders Office NT 2017, *Submission 213: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=423995>>.

⁶⁶ This was in the context of either the Palm Valley or Mereenie onshore conventional gas permits, see Central Land Council 2018, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 8.

⁶⁷ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 283.

⁶⁸ Aboriginal Areas Protection Authority (AAPA) 2017, *Submission 234: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=428350>>, p. 20.

⁶⁹ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 283.

- The Alberta Energy Regulator, in its submission to the Pepper Inquiry⁷⁰

A central focus of the Hawke and Pepper Inquiries was the limited understanding and knowledge of the environment of the Northern Territory. It was widely recognised that by comparison to other States of Australia, the NT is relatively understudied and there are wide gaps in knowledge, particularly about groundwater.⁷¹ For example, the Pepper Inquiry Final Report included the following statement:

Based on evidence provided to the Panel, there is very limited understanding of the attributes and behaviour of surface waters and groundwater, or their relationship with aquatic or groundwater dependent, or groundwater-influenced, ecosystems. Distributions of most species are only known in general terms, and there is very limited knowledge of geographic patterns of diversity and endemism and the dependence of that biodiversity on specific subsurface and groundwater resources. Such limited information on biodiversity assets and their location in prospective onshore unconventional gas development regions represents a significant knowledge gap, impeding the ability to properly assess the risks of any unconventional gas development (especially cumulative risks over large areas).

The point was widely made in submissions to both inquiries that more considered strategic environmental assessments should be undertaken in circumstances where the unconventional gas industry will require substantial amounts of water and has the potential to cause water contamination. The difficulty for people to provide consent, absent that detailed understanding of groundwater, was noted in various submissions.⁷²

The CLC, in its submission at the Alice Springs Hearing on 6 March 2017 made references to the parallel between uranium exploration and fracking. It further referred to its significant efforts to educate its traditional owners with respect to the process of fracking and the impacts of the unconventional gas industry generally.⁷³

The CLC is an organisation that has taken large measures to make sure that traditional owners have been taken to see uranium mines, have been taken to speak with environmentalists, with

⁷⁰ Alberta Energy Regulator 2017, *Submission 483: Scientific Inquiry into Hydraulic Fracturing*, viewed 9 August 2018, <<https://frackinginquiry.nt.gov.au/submission-library/alberta-energy-regulator-submission-483-submission-of-information-requested-by-the-inquiry>>.

⁷¹ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, pp. 112-113.

⁷² See for example: Central Land Council 2018, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 9 and Northern Land Council 2018, *Submission 214: Scientific Inquiry into Hydraulic Fracturing*, <<https://frackinginquiry.nt.gov.au/?a=424048>>, pp. 6-9.

⁷³ Central Land Council 2018, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 3.

scientists, with regulatory groups, so that they can then go back to their country and when they're asked to provide their consent or otherwise to prospects (sic), they can make an informed decision.

With the fracking debate, the council itself has undertaken panel debates within its council meetings. It's invited industry representatives, representatives from local NGOs that have opposed fracking, the solicitor for the Environmental Defenders Office, and indeed, independent experts from CSRIO (sic) to present to the council, to try and come to some understanding as to what the parameters of a decision to allow oil and gas exploration, which would entail fracking.⁷⁴

These steps do play an important role in ensuring Aboriginal people are afforded free, prior and informed consent. Importantly, however, the forums referred to by the CLC – as far as the report writers can ascertain – occurred in 2015 after many exploration permit consents had already been issued.⁷⁵ Both the NLC and CLC claimed to have sufficient expertise to discharge their statutory duties, however, these claims were challenged in other submissions. In one instance a submitter to the Pepper Inquiry stated that Land Council staff had admitted to not having relevant expertise on many of the subjects they were required to consult on.⁷⁶

Is Information presented in such ways as to allow people to understand and digest complex information? Are interpreters used during consultations? Is information is presented in appropriate ways and do communities have access to independent lawyers and scientific experts?

A recommendation of the Pepper Inquiry was that interpreters were necessary when explaining complex scientific matters. This recommendation was supported by the CLC, NLC and AAPA.⁷⁷ The Panel of the Pepper Inquiry also noted the importance of interpreters being supported or trained to ensure that they understood the subject matter. The use of interpreters where they are necessary represents a crucial component of faithfully adhering the principle of FPIC which requires that before consent can be granted people must have understood what they are consenting to.

⁷⁴ Central Land Council 2018, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 3.

⁷⁵ Central Land Council 2018, *Submission 47: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 9.

⁷⁶ Monica Napper 2017, *Submission 455: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=447585>>.

⁷⁷ The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>, p. 288; See Aboriginal Areas Protection Authority (AAPA) 2018, *Submission 1150: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=484968>>.

Various submissions to both the Hawke and Pepper Inquiry noted that interpreters were not routinely used. Moreover, no references were found in the literature of where interpreters had been trained in the specific technical details of fracking so that they were able to confidently translate in this specialist field, as recommended by the Pepper Inquiry.⁷⁸ This was noted as a gap by the CLC.⁷⁹ That interpreters are not routinely used could be inferred by the response of the NLC CEO when questioned about consultations for Hancock Prospecting permits near Mataranka stating that “competent bilingual traditional owners” assisted the NLC to deliver information.⁸⁰ This would also seem at odds with the submission of the Australian Petroleum and Production Exploration Association (APPEA) where it was said that use of interpreters was standard industry practice.⁸¹

Based on their outreach work, the SEED Indigenous Youth Climate Coalition understood that interpreters weren’t used. They also expressed concerns about the format in which information was presented to Aboriginal people:

We had gas companies coming out, we know through stories we we’ve been told from people. They didn’t have translators. They didn’t have diagrams. And it’s an incredibly complex thing to explain. And also like, I feel you have to want to explain it to people as well. And I think that young people in their communities really had an agenda about wanting old people to understand what was happening. Whereas, gas company just wanted someone to sign something.⁸²

Submissions did not just focus on the use of interpreters at meetings. Others focused on the need for materials to be produced in local languages. The weight of submissions indicates that in most cases companies have not broadly translated materials into local languages and the Pepper Inquiry’s materials, translated into local languages, was for many people the first materials about fracking that they have been able to read in their first language.⁸³

⁷⁸ See recommendation 11.5 of The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>

⁷⁹ Central Land Council 2018, *Submission 47: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=422802>>, p. 9.

⁸⁰ Morrison, J. 2016, ‘Aboriginal landowners criticise Northern Land Council over drill permit’, *Guardian Australia*, 29 June, viewed August 10 2018, <<https://www.theguardian.com/australia-news/2016/jun/29/aboriginal-landowners-criticise-northern-land-council-over-drill-permit>>.

⁸¹ Australian Petroleum Production and Exploration Association (APPEA) 2018, *Submission 623: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=484971>>.

⁸² Seed Indigenous Youth Climate Network 2017, *Submission 267: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414044>>, p. 13.

⁸³ See Central Land Council 2017, *Submission 245: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414051>>, p.13; See also materials at The Scientific Inquiry into Hydraulic Fracturing 2018, *Final Report*, viewed August 10 2018, <<https://frackinginquiry.nt.gov.au/inquiry-reports/final-report>>.

Question 3: Have gas companies holding NT unconventional gas tenements under the *Petroleum Act* (NT) publicly committed to ensuring they act in accordance with FPIC?

None of the gas companies currently holding tenements for unconventional gas exploration in the NT have expressly made a public commitment to act in accordance with the principle of FPIC. Santos have expressly said on their website that their operations seek to accord with internationally recognised human rights standards.

Companies have, however, generally expressed a commitment to obtaining informed consent. For example, Pangea stated “the importance of informed consent...sits behind all our agreements”.⁸⁴ On the whole, whether and how informed consent has been achieved (i.e. through interpreters, provision of independent scientific information, translated materials) was not explained in great detail in submissions to the Hawke or Pepper Inquiry.⁸⁵ For example, in their submission, Hancock Prospecting notes their successful finalisation of access agreements for its exploration permits, including areas where the ALRA applied under EP154. However, the Hancock submission does not detail how consultations occurred, over what time period, whether interpreters were used or whether TOs were provided with information as to what a production scale gasfield would look like. Agreement was reached in 2014.⁸⁶ None of the material reviewed by the authors included references to detailed explanations of what future production scale unconventional gas activity might look like when negotiating exploration agreements.

Generally, the review has shown that gas companies’ commitment to consultation and engagement with communities about their unconventional gas interests (stated either in submissions to the Hawke and Pepper Inquiries, or on their websites) goes no further than making broad statements about acting in good faith, respecting communities and ensuring that communities are informed. As examples, Beach Energy states that their standards require “its people to act honestly and with integrity and fairness in all dealings”⁸⁷, while Armour Energy states “Amour ensures an extensive engagement of all local stakeholders – from the local government through to landholders and

⁸⁴ See Pangea 2018, *Submission 220: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414051>>, p.82.

⁸⁵ See for example, Santos 2018, *Submission 168: Scientific Inquiry into Hydraulic Fracturing (section 5.4)*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414051>>, in relation to consultations for EP161.

⁸⁶ Hancock Prospecting Pty Ltd, *Submission 461: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=447576>>.

⁸⁷ Beach Energy 2018, *Sustainability at Beach*, viewed 15 August 2018, <<http://www.beachenergy.com.au/irm/content/sustainability-at-beach1.aspx?RID=306&RedirectCount=1>>.

traditional owners of the land”.⁸⁸ Central Petroleum, in their submission to the Pepper Inquiry stated that “trust is the ephemeral flower with a long gestation period grown in the soil called respect”.⁸⁹

Additionally, many gas companies noted in their submissions to the Pepper Inquiry that they comply with various legal requirements for consultation and engagement under the ALRA and NTA.⁹⁰

As discussed above, none of the material reviewed by the authors provided clarity as to whether interpreters have been consistently engaged by gas companies or used during consultations which have led to exploration permits being consented to.

Noting that the legislative regime applicable in the NT, particularly on native title land, various submissions were made to the Pepper Inquiry which argued that companies and the government needed to do more to ensure that FPIC was achieved. For example, the CLC stated:

The process for ensuring Aboriginal people have good information and understanding requires time and multiple meetings and should take place outside of decision-making meetings for specific proposals.

Significantly, both the CLC and NLC stated that they are not mandated, nor resourced, to fund the development and delivery of information programs on hydraulic fracturing. Many submissions to the inquiry supported those costs being borne by resource companies.⁹¹

⁸⁸ Armour Energy 2018, *Our Social Responsibility*, viewed August 15 2018, <<https://www.armourenergy.com.au/socialresponsibility/>>.

⁸⁹ See Central Petroleum 2017, *Submission 442: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=446830>>.

⁹⁰ See for example: Origin 2017, *Submission 153 (Part 3): Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=424843>>, p. 136; and Pangea 2018, *Submission 220: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=414051>>, p.82.

⁹¹ See for example, Central Land Council 2018, *Submission 1151: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=484973>>; Northern Land Council 2017, *Submission 471: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=452134>>, p.iii.

Conclusion: Analysis of FPIC implementation in issued NT oil and gas permits

A number of clear challenges to the achievement of FPIC in the Northern Territory presented themselves through the literature.

1. NT and Commonwealth legislation militates against FPIC

The Right to Negotiate provisions of the *Native Title Act* (Cth) fail to implement the principle of FPIC. The absence of a right of veto does not afford Indigenous people in the NT the opportunity to give their consent freely. Even on lands under the ALRA, the fact that the right of veto exists only at the exploration stage, significantly compromises the operation of FPIC as communities are not able to withdraw consent as more information of impacts is made available.

Given that the legislation militates against FPIC, it is the responsibility of companies to deliver on FPIC. Companies must take active steps to ensure that Aboriginal people in the NT are afforded FPIC. Significantly, none of the gas companies who made submissions to the Pepper Inquiry support the idea of veto for projects occurring on land subject to native title and to a legislated right of veto before a production permit is issue. Of particular note is Origin, who despite expressing a commitment to informed consent, they do not support the right of veto being included in legislation.⁹²

2. Consultation is not consent

None of the gas industry companies that submitted to the Pepper Inquiry made explicit reference to the principle of free prior and informed consent. Furthermore, none of the Northern Territory Government's Departmental submissions referred explicitly to the concept of FPIC.

However, there were broad commitments from industry and government to informed consent. However, commitment to informed consent does not necessarily deliver informed consent. Those commitments, while welcome, have not on the evidence available actualised in on ground consultations around existing fracking operations.

Furthermore, with the majority of exploration permits issued in the rush after 2011, it is difficult to reconcile statements made about the delivery of informed consent with the mass leaps forward in terms of understanding about this industry that occurred through the Pepper Inquiry.

3. The role of land councils

⁹² Origin 2017, *Katherine Hearing Submission: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=442184>>.

Land Councils have, necessarily, been pushed into the unenviable position of having a statutory responsibility for ensuring informed consent in the context of inadequate resourcing, a challenging type of industry, and a legal framework which fails to meaningfully require FPIC. As a consequence, land councils have made inconsistent and seemingly irreconcilable submissions and comments on fracking on the one hand stating that their processes have delivered informed consent where permits have been given it and, on the other, stating that problems associated variously with resources, regulatory regimes and the industry itself have undermined the ability for FPIC to be truly given.

4. Misinformation and a lack of adequate and appropriate information

Discussion about mis-information was a common theme of both the Hawke and Pepper Inquiries with criticism levelled at both anti-fracking activist information and industry information. All of those statements raise questions about the ability for people to give their informed consent in that context. This is particularly the case for people with English as a second or more language.

The lack of adequate resources, including in relation to the provision of accurate and unbiased information, were explicitly recognised by the Pepper Inquiry. Most obviously, are the number of recommendations which require the gas industry to pay for consultations and providing adequate information to communities.

5. Infancy of science regarding fracking in the NT

A unique challenge is the nature of the industry and the infancy of the science about the geological make-up and biological diversity of the NT. Companies like Origin note that further information can only be obtained through continued exploration. Given this, it can be inferred that for FPIC to occur, a right for communities to veto or consent the project at later stages must be implemented.

This report has found that the NT Government has failed to provide information to the NT community in such a way as to deliver FPIC. Furthermore, the legislative regimes applying the NT – particularly on land subject to NTA rather than ALRA mitigate against FPIC.

Given these findings, and from the findings and recommendations of the Pepper Inquiry, there is adequate information to form the conclusion that most, if not all, exploration permits issued in the Northern Territory for unconventional gas were issued in the absence of FPIC, as it is conceived of under international law.

Given this, gas companies themselves should pursue strategies to ensure that FPIC is achieved, even in cases where permits have already been issued.

APPENDIX 1: COMPANY REVIEW

Title Operators 2015	NT holdings	Listed/Private	Commitment to FPIC	Submission to Pepper Inquiry	Comments
Armour Energy Pty Ltd	McArthur Basin	ASX listed	No	Yes	"Armour believes the key to being a good neighbour lies in regular, open dialogue with the communities in which we work, commencing at grassroots level. Armour's operations team and local onsite staff are leading the effort and are actively involved with the community, enforcing our belief that the company is a part of the community." ⁹³
Baraka Energy and Resources Ltd	Georgina Basin	ASX listed	No	-	No records found
Beach Energy Ltd	Bonaparte Basin	ASX listed	No	-	"Beach is committed to: -Positive relations with the Indigenous community -Respect Indigenous traditions and cultural sites -Ensure employees and contractors are aware of their obligations regarding the protection of Cultural Heritage -Acknowledge Indigenous respect for the country" ⁹⁴

⁹³ Armour Energy 2018, *Our Social Responsibility*, viewed August 15 2018, <<https://www.armourenergy.com.au/socialresponsibility/>>.

⁹⁴ Beach Energy 2018, *Sustainability at Beach*, viewed 15 August 2018, <<http://www.beachenergy.com.au/irm/content/sustainability-at-beach1.aspx?RID=306&RedirectCount=1>>.

Blue Energy Ltd	Wiso Basin and Georgina Basin	ASX listed	No	Yes	<p>"Blue Energy interacts and engages with stakeholders in many towns and communities as part of the Company's activities on exploration tenements across Queensland and the Northern Territory.</p> <p>We are proud of our record and ongoing commitment to earn the respect of the various communities with which we are involved.</p> <p>This approach has achieved extensive community and stakeholder support for, and approval of, our operations and of the way we conduct ourselves as guests in those communities."⁹⁵</p>
Central Petroleum	Wiso Basin	ASX listed	No	Yes	<p>Many of Central Petroleum Limited's (Central) operations are located on or near Indigenous lands with more than 20,000 Aboriginal people living in our areas of operation. Central recognises, embraces and respects the Indigenous historical, legal and heritage ties to these lands. We are committed to engage openly with the Traditional Owners of land and provide employment and training opportunities to the Indigenous people.⁹⁶</p>

⁹⁵ Blue Energy 2018, *Community and Ethics*, viewed August 15 2018, <<https://blueenergy.com.au/community-ethics-human-rights>>

⁹⁶ Central Petroleum 2018, *Engagement with Landowners and Community*, viewed August 15 2018, <<http://centralpetroleum.com.au/community>>

Falcon Oil and Gas Australia Pty Ltd	Beetaloo Basin	Canadian listed	No	Yes	Mentions risks of "aboriginal claims" in media release, 15 May 2018 ⁹⁷
Hancock Prospecting Pty Ltd	Beetaloo Sub-basin and McArthur Basin	Private	No	Yes	<p>"Hancock's interaction with the community: Notwithstanding the many benefits to the NT that Hancock and others believe will come from oil and gas development, Hancock recognises that any exploration and development needs to recognise and accommodate community concerns, including those of Traditional Owners"</p> <p>-Hancock Prospecting Submission to the Pepper Inquiry, 6 Sep 2017⁹⁸</p> <p>"Hancock again confirms that it has complied with all of its obligations in regards to its NT tenements, including its obligations to consult with Traditional Owners. All work carried out to date on EP153 and EP154 has been with the agreement of the Traditional Owners of the land."</p> <p>-Hancock Prospecting Submission to the Pepper Inquiry, 2 Feb 2018⁹⁹</p>

⁹⁷ Falcon Oil and Gas 2018, *Four Additional Plays in the Beetaloo Basin, Australia*, viewed August 15 2018, <<http://www.falconoilandgas.com/uploads/>>

⁹⁸ Hancock Prospecting Pty Ltd, *Submission 461: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, < <https://frackinginquiry.nt.gov.au/?a=447576>>.

⁹⁹ Hancock Prospecting Pty Ltd, *Submission 645: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, < <https://frackinginquiry.nt.gov.au/?a=484984>>.

Imperial Oil and Gas (Empire Energy)	McArthur Basin	ASX listed	No	Yes	<p>"Lengthy and thorough process of induction and education for the ALRA Land & Native Title Traditional Owners outlining hydrocarbon development relating to company permits:</p> <ul style="list-style-type: none"> - 29 On-Country meetings with Traditional Owners 2010-2016 - 2 Final Agreements - 4 approved to negotiated final agreement - 1 Non-consented - 4 final meetings required, but deferred due to current moratorium" <p>- Imperial Oil & Gas Submission to the Pepper Inquiry, 30 Apr 2017</p> <p>"Over the period 2010 to 2017, Imperial has arranged 22 on-country meetings with Traditional Owners in addition to many on-country meetings as Imperial has undertaken exploration programs over its granted EP's."</p> <p>- Imperial Oil & Gas Submission to the Pepper Inquiry, 6 Jul 2017¹⁰⁰</p>
Mosman Oil and Gas	Amadeus Basin	UK listed	No	-	<p>"EP(A)155 is an exploration permit application; as such it is subject to successful land access negotiation with the Traditional Owners prior to the grant of the permit."¹⁰¹</p>

¹⁰⁰ Imperial Oil and Gas 2018, *Submission 162: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, < <https://frackinginquiry.nt.gov.au/?a=440744>>.

¹⁰¹ Mosman Oil and Gas Ltd 2018, *Amadeus Basin*, viewed August 15 2018, <<http://mosmanoilandgas.com/amadeus-basin>>

Origin Energy Resources Ltd	Beetaloo Sub-basin	ASX listed	No	Yes	<p>"Our activities will be guided by: -the ILO Indigenous and Tribal Peoples Convention 169 and the UN Declaration on the Rights of Indigenous Peoples" -Origin Energy Human Rights Policy 2014¹⁰²</p> <p>"We agree with this statement however we also offer that for the Aboriginal people who are host traditional owners, with the rightful cultural authority to make decisions in relation, to what does and doesn't occur on their land, have engaged consistently with us and have a good understanding of exploration activities, culminating in their consent for each exploration well which has been executed."</p> <p>"Exploration agreements are in place between traditional owners, the Northern Land Council and operators, which provide consent for exploration activities only. Clause 11 of our exploration agreements, we have two and the tripartite agreement and associated sub-clauses, prescribe that consent is required for any and all production activities, not the least of which is that a production agreement must be in place prior to development activity." -Origin Energy, Katherine Hearing Submission, 9 Aug 2017¹⁰³</p>
Paltar Petroleum Ltd	Beetaloo Basin	In administration	No	Yes	-

¹⁰² Origin Energy 2018, *Human Rights*, viewed August 15 2018 <<https://www.originenergy.com.au/content/dam/origin/about/investors-media/human-rights-policy.pdf>>;

¹⁰³ Origin Energy Ltd, *Submission 399: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, <<https://frackinginquiry.nt.gov.au/?a=445699>>.

Pangaea (NT) Pty Ltd	McArthur Basin, Beetaloo Basin and Birrindudu Basin	Private	No	Yes	<p>"The activity area has been the subject of an ethnographic sacred site avoidance survey. The Northern Land Council (NLC) develops a report which (in accordance with the Co-Existence and Exploration Deed for EPA 167, 168, 169 and 198) will clear all works to be conducted within the areas identified in the annual Work Program.</p> <p>Pangaea executed a 'Co-Existence and Exploration' Deed ('the Deed') with the NLC and native title owners in December 2012. The Deed frames Pangaea's approach to cultural heritage protection as agreed with the Traditional Owners"</p> <p>-Pangaea Submission to Pepper Inquiry, 30 Apr 2017¹⁰⁴</p>
Santos QNT PtyLtd	McArthur Basin	ASX listed	No	Yes	<p>"Engage with Aboriginal communities across the lifecycle of new projects and existing operations by:</p> <ul style="list-style-type: none"> - Seeking to fully inform Aboriginal communities and consult with them on the likely impacts and opportunities arising from our activities; - Providing Aboriginal peoples with the opportunity to reach agreements with us on our new projects where practical and appropriate."

¹⁰⁴ Pangea, *Submission 220: Scientific Inquiry into Hydraulic Fracturing*, viewed 10 August 2018, < <https://frackinginquiry.nt.gov.au/?a=424269>>.

					<p>-Santos Aboriginal Engagement Policy 2016¹⁰⁵</p> <p>"Santos systems and procedures are based on an understanding and respect for human rights with our principles consistent with the Universal Declaration of Human Rights"</p> <p>-Santos Website¹⁰⁶</p>
Sweetpea Petroleum	Beetaloo Basin	Private	No	Yes	No records found
Tom Oates	Birrindudu and Victoria River Basin	Private	No	-	No records found
Tamboran (Ngalia) Pty Ltd	Beetaloo/McArthur Basins, Pedirka Basin,	Private	No	-	No records found

¹⁰⁵ Santos 2018, *Aboriginal Engagement Policy*, viewed August 15 2018, <https://www.santos.com/media/3269/policy_aboriginal_engagement_kg_2016.pdf>;

¹⁰⁶ Santos 2018, *Human Rights*, viewed August 15 2018, <https://www.santos.com/sustainability/economic/governance-and-policy/human-rights/>

	Ngalia Basin, Birrindudu Basin				
Tri-Star Energy Company	Georgina Basin and Pedirka Basin	Private	No	-	No records found
Wiso Oil Pty Ltd	Wiso Basin	Private	No	-	No records found