

**Senate Environment and Communications
Reference Committee**

**Inquiry into Oil and Gas Production
in the Beetaloo Sub-basin**

July 2021

NURRDALINJI NATIVE TITLE ABORIGINAL CORPORATION

ICN 9392

Introduction

The board and members of NurrDALINJI Native Title Aboriginal Corporation (“NurrDALINJI”) thank the Committee for this opportunity to bring to the Committee’s attention the following matters.

NurrDALINJI was registered with the Office of the Registrar of Indigenous Corporations on 9 October 2020. Our membership includes over 50 native title holders from 11 determinations of native title across the Beetaloo Sub-basin area. Our name “NurrDALINJI” is an Alawa language word meaning “mixed tribe”, which reflects the fact that our membership is drawn from a wide area and several different language groups.

The decision to incorporate NurrDALINJI was made unanimously at a large meeting of Beetaloo Sub-basin region native title holders made in September 2020. The meeting decided that once established, NurrDALINJI should replace the Top End Default Prescribed Body Corporate (TED PBC) as prescribed body corporate (PBC) for native title holder groups in the Beetaloo Sub-basin region. This purpose is reflected in NurrDALINJI’s formal objects, and native title holders have made efforts to have NurrDALINJI become the PBC. In the meantime, and since the TED PBC is not representative in any sense, NurrDALINJI is an important and legitimate vehicle for voicing the concerns and seeking to protect the interests of its members and native title holders in the Beetaloo Sub-basin area generally.

Executive Summary

Many native title holders of the Beetaloo Sub-basin region are deeply concerned that while we have achieved formal recognition of our native title, we have no governance structure to facilitate planning our future and making our own decisions, and virtually no control or say over what happens on our country. That is due in large part to current representation and agency arrangements involving the Northern Land Council (NLC) (the native title representative body for the Top End), and the TED PBC.

This issue is coming to a head because of plans by companies including Origin Energy Ltd (Origin Energy) to intensively frack the Beetaloo Sub-basin. Refer for example to:

<https://www.smh.com.au/business/companies/the-next-ferrari-of-shale-may-be-hiding-in-the-nt-outback-20190502-p51ja7.html>

<https://www.afr.com/companies/energy/hottestplay-on-the-planet-beetaloo-explorer-aims-high-20201026-p568jo>

The Commonwealth Government describes the entire Beetaloo as a centrepiece of its “Gas -Led Recovery” plan, yet no one wants to talk to us about the cumulative impacts and risks that large-scale fracking will impose on our country and our people.

At present, Origin Energy is fracking our country under exploration permits granted some 15 years ago to other companies, and later assigned to Origin Energy. Our people did not understand what fracking was at the time they were advised to enter into agreements consenting to the grant of those exploration permits. How could they? The exploitation of unconventional gas reserves using extensive fracking was new and barely understood in Australia at that time.

Many of our people are now worried about the risks of fracking, and especially about the risks to the interconnected subterranean waters that sustain all life there. Our people are also worried about the risks of contamination to country, our cultural heritage and all living creatures. We still do not know the extent of Origin Energy’s plans and the plans of other companies, and what those plans might mean for the use of our water.

Meanwhile, NLC continues to facilitate fracking in our country without proper consultation, with no genuine mandate and against the wishes of the majority.

Existing cultural heritage protection laws and practices appear to us to be inadequate to address the risks of fracking, especially on our country. Origin Energy and NLC are not consulting with all people whose interests may be affected by those risks.

Our people have raised these and other concerns with the NLC and Origin Energy on numerous occasions over recent years. Origin Energy hides behind the NLC. The NLC first ignored our concerns, and more recently has behaved disrespectfully and aggressively towards us.

Many of us feel trapped by the NLC/TED PBC representation and agency arrangements, and we need urgent help to change those arrangements so that we are given respect as native title holders, and so that we can start to make decisions about our country and our future with proper advice from faithful representatives and agents.

At present there is no prospect that the free, prior informed consent of native title holders will ever be sought or achieved in relation to Beetaloo Sub-basin fracking because there is no opportunity for the region’s native title holders to become informed, to actually understand the benefits as well as the cumulative impacts and risks of the Beetaloo project as a whole on the region’s native title holders and their interests. Without that knowledge, informed decisions cannot be made.

In addition we find it very concerning that companies can be receiving public money in an area where there is clearly so much need for public money to be invested in the benefit of all communities in the region. Resources could make a considerable contribution to the living conditions of those right across the Beetaloo, an area experiencing extreme poverty among our communities.

Top End Default PBC

The *Native Title Act 1993* (Cth) (NTA) requires native title groups to nominate a prescribed body corporate (PBC) to act as their agent in their dealings with the outside world. In most parts of Australia native title groups, having been recognised by a formal determination of native title, have their own PBC, which is owned and controlled by the group, and in which their own people are members and directors.

This is not the case in the Top End. To our knowledge, most, if not all determined native title groups in the Top End have been advised by the NLC to nominate the TED PBC as their agent PBC. But native title holders cannot be members or directors of TED PBC: its sole members and its directors are the members of the NLC's Executive Council.

In other parts of Australia native title groups engage and instruct their representatives and advisors (such as the regional native title representative body) through their PBC. We are not able to do that because we have no control over TED PBC. In the Top End, the PBC and the representative body are virtually one and the same: the NLC. The NLC acts on our behalf as it sees fit, rather than in accordance with our instructions.

The NLC/TED PBC is required by law to make sure it has the common law holders' consent before it makes such decisions. But who and how it consults, and what counts as "consent", is entirely up to the NLC/TED PBC, and we certainly have no opportunity under this arrangement to make our own plans and direct our own affairs.

Cultural Heritage Protection

The current NLC/TED PBC governance, agency and representation arrangements deny us many opportunities to use existing protections (statutory and contractual) to ensure our cultural heritage is protected.

In addition, existing cultural heritage protection laws and practices appear to us to be inadequate to address the risks of fracking, especially on our country. That is because Northern Territory law seems to assume that our cultural heritage consists of isolated sites, or "crosses on a map". Our cultural heritage is connected by the waters that flow under the ground. Those waters hold us and our stories together.

The net result is we are not being consulted or listened to about the risks to our cultural heritage arising from interference with those waters. Fracking through aquifers has the potential to affect wide areas if something goes wrong. Origin Energy and NLC are not consulting with all people whose interests may be affected by those risks.

Lack of FPIC: The *Native Title Act*

In 2007 Australia became a signatory to the United Nations Declaration on the Rights of Indigenous People (UNDRIP). A core principle of the UNDRIP is that States shall consult in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Art 19).

There is currently no prospect that the free, prior informed consent of native title holders will ever be sought or obtained in relation to the Beetaloo Sub-basin fracking project because there is currently no opportunity for the region's native title holders to understand the benefits and impacts of the project as a whole. Without that knowledge, informed decisions cannot be made.

The NTA, enacted before Australia signed the UNDRIP, and amended without the consent of Indigenous Australians¹, is unfit for the purpose of ensuring the free, prior informed consent of native title holders in circumstances like Beetaloo Sub-basin fracking principally because among other things:

- a) Under the NTA, the proposed grant of each mining tenement is considered to be a separate and discrete “future act”. Native title holders are entitled to discuss the impacts of mining activities to be performed under the specific tenement. They are not entitled to consider the *cumulative* impacts of mining or fracking even where it is well known that many mining tenements will be granted on their own or their neighbours’ country.
- b) The TED PBC native title agency arrangements deny Top End native title holders any formal ability to exercise our own initiative to demand a full consideration of the impacts and risks of fracking in the Beetaloo as a whole; and
- c) in any event, the NTA does not entitle native title holders, acting in good faith, to prevent proposed activities that involve unacceptable impacts and risks.

In the absence of proper information, the free, prior informed consent of Beetaloo native title holders will never be achieved. The NTA should be updated to enable FPIC. If not Australia should withdraw from UNDRIP instead of continuing to pretend that it is committed to the principles set out in that declaration.

Native Title “Future acts”: Process

There are a number of fracking companies that hold existing exploration permits in the Beetaloo Sub-Basin. Some or all of those companies will seek the grant of production licences. Each will work through the NLC to negotiate the terms of native title consent agreements in relation to their own specific fracking plans. For its part the NLC deals with these matters mining tenement by tenement, native title group by native title group.

In the case of exploration permits granted to fracking companies since the early 2000’s, some of which have since been assigned to companies like Origin Energy Ltd, the NLC negotiates the terms of draft native title consent agreements with the company; then holds a meeting with native title holders in which native title holders are given a take-it-or-leave-it choice, after being told that our native title rights

¹ <https://indigenoux.com.au/senator-patrick-dodson-no-one-can-ever-take-your-land-away/>

are weak under Australian law and that the proposed mining tenement is likely to be granted anyway of we refuse to enter the agreement negotiated by NLC.

In an extraordinary situation like this, where an entire region that is virtually mining-free has been designated in Canberra for massive new fracking development, the cumulative impacts and risks of the proposed fracking and related activities are at least as relevant as the impacts and risks from any single well or licence: Quantity has a quality all of its own. This concern is amplified by the way that fracking (as opposed to say an open-cut mine) can impact areas far beyond a delineated permit/ licence area.

Request for Assistance

We respectfully request that the Committee call for a pause on the grant of further rights to frack in the Beetaloo Sub-basin region until a credible plan is proposed to address the complete lack of free, prior, informed consent among the region's native title holders. We also request you to investigate the monies given to the NLC to facilitate agreements in the Beetaloo Sub-basin region.

Conclusion

We are deeply worried that public money is being given companies in a region where many of our communities need support for a range of programs from housing, employment, power, safe drinking water to name a few. Where we need to see investment in clean energies as an answer to the problem of energy insecurity, as well as economic development. We welcome options to develop our country in ways that are sustainable and we have a say over.

We also know that much of the exploration and development proposed has never had adequate input of native title holders and people with cultural authority for the area. We believe there needs to be a proper process looking at all of these together, to consider the joint and cumulative impacts right across our country.

Our people have deep connections across the vast region. We don't want to see this one by one consideration to new wells, new fracking, more impacts on country. Our clans and families talk to one another and are becoming more and more worried that this fracking is occurring right across the area. If the water is impacted in one part of our country it ultimately impacts on the story and song further away.

We need support to look into the representative arrangements we have with the NLC and the Top End Default PBC.

We look forward to talking further with you about our concerns.

Johnny Wilson
Nurrdalinji Chairperson