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## Amicus Curiae Brief

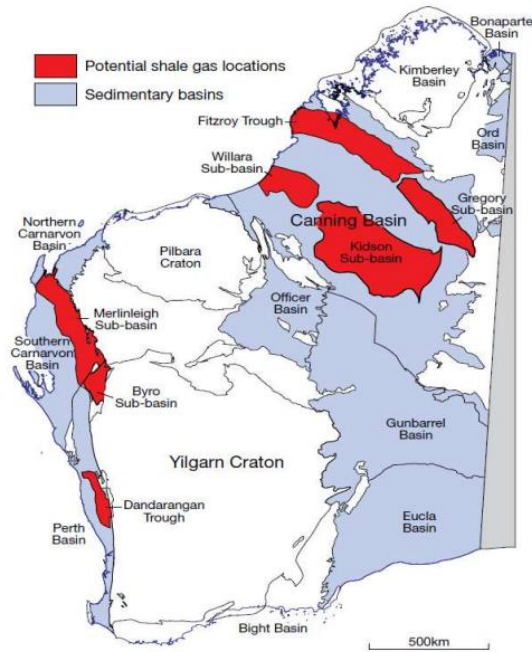
**To: Permanent Peoples' Tribunal on Human Rights, Fracking and Climate Change**  
**From: Environmental Defender's Office WA (Inc), Perth, Western Australia**

### **BACKGROUND**

1. The Permanent Peoples' Tribunal (**PPT**) Session on Human Rights, Fracking and Climate Change has invited *amicus curiae* briefs to inform its Session and hearings from 14-18 May 2018.
2. The Environmental Defender's Office WA (Inc) (**EDOWA**) is a not-for-profit and non-government organisation from Perth, Western Australia, that specialises in public interest environmental law. We provide legal advice on matters of public interest environmental law, conduct community legal education workshops and presentations and actively engage in environmental policy and law reform in Western Australia (**WA**) and across Australia.
3. WA has been estimated to hold shale gas resources of approximately 34,000 billion cubic metres (Gm<sup>3</sup>), or 1200 trillion cubic feet (Tcf),<sup>1</sup> which the WA State Government and industry are seeking to develop. While hydraulic fracturing (**fracking**) production activities have not yet commenced in WA, some exploration has commenced.

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<sup>1</sup> The State Government has stopped the use of hydraulic fracture stimulation (fracking) for onshore petroleum exploration or development in Western Australia (July 2017) Government of Western Australia, Department of Mines, Industry Regulation and Safety <[http://dmp.wa.gov.au/Documents/Petroleum/PET-HydraulicFracture\\_PolicyStatement.pdf](http://dmp.wa.gov.au/Documents/Petroleum/PET-HydraulicFracture_PolicyStatement.pdf)>.



**Figure 4.** Sedimentary basins and troughs of Western Australia showing potential shale oil and gas locations. Source: Department of Mines, Industry Regulation and Safety, WA.

4. On 5 September 2017 the WA State Government imposed a permanent ban on fracking in the Perth Metropolitan, Peel and South-West regions of WA, and a moratorium for the rest of the State until 20 June 2020.<sup>2</sup>
5. At the same time as announcing the ban and moratorium, the WA State Government also convened an Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia (**Fracking Inquiry**) which will assess and report on the potential impacts arising from the implementation of fracking on the onshore environment of WA.<sup>3</sup>
6. The Fracking Inquiry's website is at: <https://frackinginquiry.wa.gov.au/progress-scientific-inquiry>
7. In accordance with its Terms of Reference, the Inquiry will:
  - a) *Identify environmental, health, agricultural, heritage and community impacts associated with the process of hydraulic fracture stimulation in Western Australia, noting that impacts may vary in accordance with the location of the activity;*
  - b) *Use credible scientific and historical evidence to assess the level of risk associated with identified impacts;*
  - c) *Describe regulatory mechanisms that may be employed to mitigate or minimise risks to an acceptable level, where appropriate;*
  - d) *Recommend a scientific approach to regulating hydraulic fracture stimulation; and*

<sup>2</sup> *State Government halts fracking in the exploration and production of WA's onshore gas* (5 September 2017) Government of Western Australia Department of Mines, Industry Regulation and Safety <<http://dmp.wa.gov.au/News/State-Government-halts-fracking-22745.aspx>>.

<sup>3</sup> *Terms of Reference*, Independent Scientific Panel Inquiry into Hydraulic Fracture Stimulation in Western Australia 2017 <<https://frackinginquiry.wa.gov.au/terms-reference>>.

e) *Hold community meetings in Perth, and the Midwest and Kimberley regions.*<sup>4</sup>

8. EDOWA submitted a comprehensive submission to the Fracking Inquiry on 19 March 2018 focusing in particular on (c) above, that is the regulatory mechanisms that may be employed to mitigate or minimise the risks of fracking, and highlighting issues regarding the inadequacy of WA's current regulatory regime that would apply to fracking activities should the moratorium be lifted. This submission was based on concerns regularly raised by our clients and also drew on a range of scientific literature and credible secondary sources referring to scientific material.
9. Please find this submission attached to this brief (**Submission**).
10. While the Terms of Reference for the WA Fracking Inquiry do not explicitly refer to human rights, we addressed the impact of fracking activities and their regulation in WA on human rights in the Submission.
11. Fracking activities in WA are regulated by various pieces of legislation including but not limited to the *Petroleum and Geothermal Resources Act (PAGER Act)* and its associated regulations, the *Environmental Protection Act 1986 (WA) (EP Act)* and the *Aboriginal Heritage Act 1972 (WA) (AH Act)*. As stated in 7.1.1 of the Submission, the PAGER Act and its related regulations provide the framework for proponents to obtain title and carry out petroleum and geothermal extractive activities in WA. The EP Act is the primary environmental legislation in WA and provides for an Environmental Protection Authority (**EPA**), for the prevention, control and abatement of pollution and environmental harm, for the conservation, preservation, protection, enhancement and management of the environment and for matters incidental to or connected with the foregoing. Among other things it provides for environmental impact assessment of "significant proposals", licensing of emissions, and controls on pollution, environmental harm and clearing of native vegetation (see Submission, 7.5). The AH Act is intended to provide for the preservation of Aboriginal heritage sites.<sup>5</sup>
12. In our Submission to the WA Fracking Inquiry we emphasise the detrimental impacts the regulation of fracking under the PAGER Act would have on the environment, the rights of landholders, Native Title holders, Traditional Custodians and the public. Our view is that the current regulatory system in WA is insufficient and not equipped to manage the human rights and environmental impacts from fracking, and as such the ban and moratorium should remain, even after the WA Fracking Inquiry has concluded.

## **PPT SESSION ON HUMAN RIGHTS, FRACKING AND CLIMATE CHANGE**

13. We understand that in the PPT Session on Human Rights, Fracking and Climate Change, the petitioners seek an advisory opinion from the Tribunal on four fundamental legal questions associated with the impacts of fracking and climate change:

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<sup>4</sup> <https://frackinginquiry.wa.gov.au/terms-reference>

<sup>5</sup> *Environmental Factor Guideline Human Health* (December 2016) EPA, 2

<[http://www.epa.wa.gov.au/sites/default/files/Policies\\_and\\_Guidance/Guideline-Human-Health-131216\\_2.pdf](http://www.epa.wa.gov.au/sites/default/files/Policies_and_Guidance/Guideline-Human-Health-131216_2.pdf)>.

- a) *Under what circumstances do fracking and other unconventional oil and gas extraction techniques breach substantive and procedural human rights protected by international law as a matter of treaty or custom?*
- b) *Under what circumstances do fracking and other unconventional oil and gas extraction techniques warrant the issuance of either provisional measures, a judgment enjoining further activity, remediation relief, or damages for causing environmental harm?*
- c) *What is the extent of responsibility and liability of States and non-state actors for violations of human rights and for environmental and climate harm caused by these oil and gas extraction techniques?*
- d) *What is the extent of responsibility and liability of States and non-state actors, both legal and moral, for violations of the rights of nature related to environmental and climate harm caused by these unconventional oil and gas extraction techniques?*

14. We understand that the Tribunal will be asked to provide an advisory opinion on the above four questions with a view to the following six areas of concern:

- a) *The human health case will address the human rights dimensions of adverse impacts on all dimensions of human physical and mental health.*
- b) *The climate impacts case will address all the human rights and earth rights dimensions, for both present and future generations, of fracking and climate change, including of governments' continued subsidizing of fossil fuels.*
- c) *The environmental, ecosystem, hydrologic and seismicity cases will address the human rights and earth rights dimensions of adverse environmental, ecosystem and wildlife impacts as well as impacts on air, surface water, groundwater and earthquakes.*
- d) *The public participation case will include the human rights dimensions of public participation (or lack thereof) in decision-making about unconventional oil and gas exploration, extraction and policy-making.*
- e) *The fuels infrastructure case will address the human rights and earth rights dimensions of exploration, drilling, fracking, extraction and delivery processes as well as of the infrastructure needed for transport, storage and export of product and waste (e.g., pipelines, storage facilities, waste treatment facilities, waste water disposal, LNG terminals, compressor stations, etc).*
- f) *The social costs case will address the human rights dimensions of social and cultural impacts on individuals, families and communities.*

15. In this brief we will focus on the first legal question, being the circumstances in which fracking activities and the risks they pose to the natural environment, health, communities and Aboriginal heritage, breach substantive and procedural human rights protected by international law.

16. Given we are a community legal centre with over 20 years' experience in matters of public interest environmental law, our perspective is from a climate impacts, environmental, human rights and public participation case, and the lack of suitable regulation in WA to manage these issues in the State.
17. As fracking has not substantially commenced in WA (pending the outcome of the WA Fracking Inquiry), we are unable to outline specific examples of fracking impacts in WA. However we hope that the information contained within this brief and the attached Submission will assist the PPT in undertaking its work.

## **BREACH OF SUBSTANTIVE AND PROCEDURAL HUMAN RIGHTS**

18. As outlined in our Submission to the WA Fracking Inquiry, we are aware of substantial evidence highlighting the risks posed by fracking activities to the environment, health, communities and Aboriginal heritage in other jurisdictions, which may consequently breach substantive and procedural human rights contained in international treaties ratified by Australia.
19. Australia has ratified the seven main international Conventions which protect human rights, including the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights. These international instruments guarantee various human rights relevant to fracking activities, including the right to life;<sup>6</sup> to privacy;<sup>7</sup> to the enjoyment of the highest attainable standard of physical and mental health;<sup>8</sup> to cultural development;<sup>9</sup> and to take part in cultural life.<sup>10</sup> While the Universal Declaration of Human Rights (**UDHR**) is not a treaty and thus does not create legally binding obligations, it is argued to be binding customary international law. Of particular importance to fracking activities is the UDHR's recognition of the right to own property and prohibition of arbitrary deprivation of property.<sup>11</sup>
20. The United Nations Human Rights Council (**HRC**) has recognised that "environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights".<sup>12</sup> Further, the UN Special Rapporteur on Human Rights and the Environment recently promulgated a set of Framework principles on human rights and the environment, in recognition of the fact that "human rights are intertwined with the environment in which we live".<sup>13</sup> Regarding fracking activities in particular, a report submitted to the HRC in 2011 argued

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<sup>6</sup> ICCPR art 6.

<sup>7</sup> ICCPR art 17.

<sup>8</sup> ICESCR art 12.

<sup>9</sup> ICESCR art 1.

<sup>10</sup> ICESCR, art 15.

<sup>11</sup> UDHR, art 17.

<sup>12</sup> Document A/HRC/RES/16/11, Resolution adopted by the Human Rights Council: Human Rights and the environment, distributed 12th April 2011. See also New Frontiers in Environmental Constitutionalism 16.

<sup>13</sup> UN expert calls for global recognition of the right to safe and healthy environment' 5 March 2018 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E>

that the environmental damage caused by hydraulic fracturing for natural gas poses “a new threat to human rights”.<sup>14</sup>

21. As stated by the Australian Panel of Experts on Environmental Law (**APEEL**), procedural environmental rights to access information, public participation and access justice contained in the Aarhus Convention enable the benefit or protection of more substantive human rights to be exercised and realised.<sup>15</sup>
22. As reflected in our attached Submission, we are concerned about the impact fracking activities and their regulation under this legislation has on the substantive and procedural human rights of landholders, Native Title holders, Traditional Custodians and the general public.

## **Climate Impacts and Environmental Case**

### PAGER ACT

23. As mentioned above, we are particularly concerned about the impact of PAGER Act provisions governing fracking activities on substantive and procedural human rights.
24. Due to the limited rights afforded to landholders, farmers, Native Title holders and Traditional Custodians under the PAGER Act, their substantive human rights to own property and not to be subject to arbitrary deprivation of property may be breached.
25. Under the PAGER Act, owners and occupiers of private land are afforded very limited rights in respect of initial access by a fracking proponent and the grant of petroleum and geothermal titles on their land.
26. As outlined in 7.1.2 of the Submission, access to a petroleum or geothermal energy title holder who wishes to undertake exploration or operations can only be denied by the relevant land owner (or trustee) in circumstances where the land is:
  - a) private land under 2km<sup>2</sup>;
  - b) used as a cemetery or burial place; or
  - c) less than 150m from a cemetery, burial place, reservoir or any “substantial improvement”.<sup>16</sup>
27. “Private land” is defined to include freehold title, leases and land held under the *Land Administration Act 1997* (WA), but expressly excludes pastoral leases, timber leases and leases for the use and benefit of Aboriginal persons.<sup>17</sup> “Reservoir” is defined as any natural or artificial

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<sup>14</sup> Document A/HRC/18/NGO/91, Written statement submitted by UNANIMA International, a nongovernmental organization in special consultative status: ‘Hydraulic fracturing for natural gas: A new threat to human rights’, distributed 19th September 2011.

<sup>15</sup> Australian Panel of Experts on Environmental Law, Democracy and the Environment (Technical Paper No 8, APEEL, 2017) 11 <[https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL\\_democracy\\_and\\_environment.pdf](https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf)>.

<sup>16</sup> There has been no instance in which the Minister has had to make a judgement as to what is substantial or not (DMP, 2014). It is also noted that under section 91B the Minister can include, as a condition of the permit, etc., a prohibition on entering specified land within the relevant area. He can vary or invoke this condition through notice in writing.

<sup>17</sup> PAGER Act, s 5.

accumulation of water.<sup>18</sup> There is no definition of “substantial improvement”, and the Minister is deemed the “sole judge” of this.<sup>19</sup>

28. Outside these limited circumstances, owners and occupiers have no right to deny or veto access to, or use of, their land for fracking activities.
29. Further, there is no specific requirement under the PAGER Act for owners or occupiers of private land to be notified of an application for a PAGER Act title or even the grant of such a title over their land.
30. Native Title applicants and holders, as well as other Traditional Owner lessees, are also not afforded same rights afforded to private landholders to determine access to their land due to leases granted under the *Land Administration Act 1997 (LA Act)* for the “use and benefit of Aboriginal people” being excluded from the definition of “private land” under both the PAGER Act and Mining Act.

#### Air Impacts and Climate Change

31. As outlined in the Submission at 6.1.1, published materials have highlighted that fracking can result in the release of hazardous air pollutants which can impact the health of people, plants and animals.<sup>20</sup>
32. It is also emphasised that fracking activities will lead to large deliberate, uncontrolled and fugitive emissions of methane, and therefore have the capacity to contribute to climate change.<sup>21</sup>
33. The Australia Institute has demonstrated that emissions from unconventional gas have been significantly underestimated in Australia.<sup>22</sup> The Melbourne Energy Institute also concluded that Australia may be under-estimating the fugitive methane emissions from unconventional gas as a result of no regulations existing in Australia directly limiting methane emissions from oil and gas production.<sup>23</sup> While methane emissions are required to be reported under the National Greenhouse and Energy Reporting Scheme (NGERS), these emissions do not include estimates of ‘migratory’ methane emissions.<sup>24</sup>
34. As highlighted in the Submission at 7.5.3, page 56, even if the EPA did decide to assess greenhouse gas emissions within its environmental impact assessment of proposals under the EP Act, there is no specific obligation on the EPA to consider and assess the greenhouse gas

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<sup>18</sup> Ibid s 16(2)(a).

<sup>19</sup> Ibid s 16(2)(b).

<sup>20</sup> *Background and Issues paper*, 15.

<sup>21</sup> Lock The Gate Alliance, *Submission to the NT Inquiry into Hydraulic Fracturing and Associated Activities* (April 2017) Fracking Inquiry NT <<https://frackinginquiry.nt.gov.au/?a=424035>>.

<sup>22</sup> Rod Campbell, Bill Browne and Hannah Aulby, The Australia Institute, *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory Submission* (April 2017) Fracking Inquiry NT <<http://www.tai.org.au/sites/default/files/P393%20NT%20fracking%20inq%20submission%20FINAL.PDF>>.

<sup>23</sup> Dimitri Lafleur et al, ‘A review of current and future methane emissions from Australian unconventional oil and gas production’ (Research Report, Melbourne Energy Institute, October 2016) 9 <[http://energy.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0019/2136223/MEI-Review-of-Methane-Emissions-26-October-2016.pdf](http://energy.unimelb.edu.au/__data/assets/pdf_file/0019/2136223/MEI-Review-of-Methane-Emissions-26-October-2016.pdf)>.

<sup>24</sup> Dimitri Lafleur and Mike Sandiford, ‘The risk of migratory methane emissions resulting from the development of coal seam gas in QLD’ (Research report, Melbourne Energy Institute, April 2017) <[http://www.tai.org.au/sites/default/files/Migratory\\_emissions\\_20170417-LowerRes.pdf](http://www.tai.org.au/sites/default/files/Migratory_emissions_20170417-LowerRes.pdf)>.

emissions of fracking. Further, even if the EPA does assess emissions, no mention is made in its assessment policy, of Scope 3 and 4 emissions.

35. The Submission also emphasises at 7.5.3, page 59, the inadequacy of the current climate regulation generally, and the policies of the Australian federal and state governments, and the EPA, in adequately regulating the climate impacts of fracking. Due to Australia's national climate change regime failing to measure and regulate greenhouse gas emissions and WA State Government policy places no limits on the release of methane or requires the offsetting, measurement or reporting of greenhouse gas emissions, greenhouse gas emissions are effectively unregulated in WA despite their potential breach of substantive human rights.
36. In our view, enabling a new fracking industry in WA in circumstances where greenhouse gas emissions are effectively unregulated would only exacerbate greenhouse gas emissions and the effects of climate change in circumstances where WA should be developing and relying on renewable energy.

#### Land and Water Impacts

37. Fracking activities also risk impacting the quality of groundwater sources, such as drinking water wells and aquifers, and surface water sources such as rivers, lakes and wetlands, through pollution and contamination (Submission, 6.2.1).
38. This is supported by other published literature such as the European Commission's 2012 report into the risks that accompany shale gas fracking states that there is an overall high risk of groundwater and surface water contamination from fracking activities<sup>25</sup> and the toxic chemicals (including methane) involved in the fracking process. Further, in the United States, numerous studies have found increased levels of methane in water sources near fracking activities.<sup>26</sup> In Australia, during the exploration phase of coal seam gas development in NSW, there have been a number of recorded contamination events.<sup>27</sup>
39. As highlighted in 6.2.2 of the Submission, fracking is a highly water-intensive process<sup>28</sup> and therefore puts pressure on vital water sources and could risk serious decreases in, or depletion of, the available water supply for people.<sup>29</sup>
40. The impacts fracking pose to water and air through pollution and/or contamination present risks the violation of essential human right to life. In 2010 the UN General Assembly declared

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<sup>25</sup> Mark Broomfield, 'Support to the identification of potential risks for the environment and human health arising from hydrocarbons operations involving hydraulic fracturing in Europe' (Report No AEA/R/ED57281, AEA Technology, 10 August 2012) <<http://ec.europa.eu/environment/integration/energy/pdf/fracking%20study.pdf>>.

<sup>26</sup> Osborn SG et al, 'Methane contamination of drinking water accompanying gas-well drilling and hydraulic fracturing' (2011) 108 (20) *Proceedings of the National Academy of Sciences USA*, 8172-8176; Jackson RB et al, 'Increased stray gas abundance in a subset of drinking water wells near Marcellus shale gas extraction' al. (2013) 110(28) *Proceedings of the National Academy of Sciences USA*, 11250-11255.

<sup>27</sup> GHD, 'Narrabri Gas Project Preliminary Environmental Assessment' (Report, Santos NSW (Eastern) Pty Ltd, March 2014) <<https://narrabrigasproject.com.au/uploads/2015/06/Narrabri-Gas-Project-request-for-DGRs1.pdf>>.

<sup>28</sup> Ruth Wood et al, 'Shale Gas : a provisional assessment of climate change and environmental impacts' (Research report, Tyndall Center for Climate Change Research, January 2011) <[www.karooplaces.com/wpcontent/uploads/2011/06/coop\\_shale\\_gas\\_report\\_final\\_200111.pdf](http://www.karooplaces.com/wpcontent/uploads/2011/06/coop_shale_gas_report_final_200111.pdf)>.

<sup>29</sup> Ruth Wood et al, 'Shale Gas : a provisional assessment of climate change and environmental impacts' (Research report, Tyndall Center for Climate Change Research, January 2011) <[www.karooplaces.com/wpcontent/uploads/2011/06/coop\\_shale\\_gas\\_report\\_final\\_200111.pdf](http://www.karooplaces.com/wpcontent/uploads/2011/06/coop_shale_gas_report_final_200111.pdf)>.



that access to clean water and sanitation is a human right essential to the full enjoyment of life and other human rights.<sup>30</sup> Clean air also is encompassed in the inherent right to life?

At very least, these impacts to water and air risk contravention of the right to the highest attainable standard of physical and mental health, and/or the right to a clean and healthy environment detailed below.

### International Law - Right to Environment

41. As stated above and in section 6 of the Submission, it is accepted in published literature that there are numerous potential risks associated with fracking, including impacts to the environment through the pollution or contamination of air, water and soil, and land clearing, they will likely result in breaches of the human right to a clean and healthy environment which is argued to constitute an emerging principle of international customary law.
42. While the right to a healthy and safe environment has been recognised in the domestic constitutions of over 100 countries,<sup>31</sup> regional treaties and judicial decisions, its status as an international norm or custom is the subject of debate due to no binding international instrument expressly recognising the right. Despite this, the current United Nations (UN) Special Rapporteur on Human Rights and the Environment, John Knox, has affirmed that states are obliged under international human rights law to take reasonable and justifiable measures to protect environment-related human rights, acknowledging that 'environmental degradation can and does adversely affect the enjoyment of a broad range of human rights'.<sup>32</sup>
43. At the national level Australia has no Federal bill of rights,<sup>33</sup> with only limited rights being expressed or implied through the Australian Constitution. While Victoria and the Australian Capital Territory are the only Australian states to possess state-based human rights legislation, neither includes a right to environment. Accordingly, no enforceable right to a clean and healthy environment is recognised in Australian federal or State legislation.<sup>34</sup>
44. These circumstances create governance gaps that make countries including Australia especially vulnerable to breaches of substantive and procedural human rights as a result of fracking activities.

### **Public Participation Case**

#### PAGER Act

45. Despite the Aarhus Convention establishing the three 'pillars' of procedural human rights (access to information, public participation and access to justice), as outlined in section 3, page 10 of the Submission, the PAGER Act and related regulations as they would apply to fracking

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<sup>30</sup> <https://news.un.org/en/story/2010/07/346122-general-assembly-declares-access-clean-water-and-sanitation-human-right>

<sup>31</sup> Hannah Jaireth, 'Human Rights Cities: How Does Australia Fare?' (2015) 20 *Local Government Law Journal* 240, 247.

<sup>32</sup> 9 UN HR Council, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H Knox, Mapping Report, UN Doc A/HRC/25/53 (30 December 2013) [17], [79]–[80].

<sup>33</sup> Australian Human Rights Commission, 'How are Human Rights Protected in Australian Law?' <<https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>> accessed 10 March 2016.

<sup>34</sup> Meg Good, 'Legal Recognition of the Human Right to a Healthy Environment in Australia: Useful, Redundant or Dangerous?' (2017) *New Frontiers in Environmental Constitutionalism* 161 <<http://web.unep.org/ourplanet/june-2017/unep-publications/new-frontiers-environmental-constitutionalism>>.

severely limit the extent to which the public can participate in the regulatory and decision-making process or understand the impacts a particular fracking proposal might have on their land.

46. The PAGER Act and regulations provide excessive hurdles which prevent the public from understanding or participating in the PAGER Act assessment, approvals and compliance processes. A lack of transparency evident in the “reportable incident” and compliance framework also makes it difficult for the public to ascertain what has been authorised and the level of proponent compliance with these authorisations.
47. Instead, much is left to industry self-regulation and the discretion of the proponent to be transparent with the community.
48. Throughout the PAGER Act regime there is a lack of transparency which in turn undermines public trust and accountability that is important in environment and resource development decisions.<sup>35</sup> The applications process is private, with direct prohibitions on publishing certain information. There is no opportunity for the public to comment on an application for tenure, or any provision for objections to be made on public interest grounds at this important formative stage.<sup>36</sup>
49. In addition, PAGER Act regulations excluding from disclosure trade secrets or information which could adversely affect the business, commercial or financial affairs of fracking companies may contravene procedural rights contained in ICCPR.<sup>37</sup> In the context of the recent Framework Principles on Human Rights and the Environment, these regulations are also substantially repugnant to Principle 2, since they could result in procedural injustices that would prevent the maintenance of the substantive right to a healthy environment.

#### EP Act

50. As highlighted in the Submission in section 3, page 11, while the EP Act Part IV and V processes provide for some level of public participation in decision-making about fracking through the environmental impact assessment and licence assessment processes, given the EPA’s approach to fracking exploration proposals to date, we are concerned that regulatory agencies may take the view that many EP Act processes and protections can be “dealt with” through the PAGER Act or will simply not apply.
51. Further, there is no right of appeal against an EPA decision not to assess a proposal if the EPA recommends that the proposal be dealt with under Part V (section 100(1)(a)). In our view this is not desirable from a public participation perspective and is a breach of procedural environmental rights.

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<sup>35</sup> Australian Panel of Experts on Environmental Law, ‘Democracy and the Environment’ (Technical Paper 8, April 2017), 16 [https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL\\_democracy\\_and\\_environment.pdf](https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf).

<sup>36</sup> Australian Panel of Experts on Environmental Law, ‘Democracy and the Environment’ (Technical Paper 8, April 2017), 18 [https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL\\_democracy\\_and\\_environment.pdf](https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf).

<sup>37</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

52. There is no third party right to enforce provisions of the PAGER Act or EP Act, and rights to standing for judicial review are very limited.

## **Social Costs Case**

### Aboriginal Culture

53. Given Aboriginal people constitute the majority of the population of areas in Australia considered to be suitable for fracking activities,<sup>38</sup> the cultural rights of Aboriginal people are at risk of being violated.
54. The Fracking Inquiry's *Background and Issues* paper acknowledges that fracking activities can impact Aboriginal heritage through the alteration or degradation of the environment from land clearing or water contamination, damage to sites of cultural significance or loss of bush tucker or medicine. This is highlighted in the Submission at 6.4. Fracking activities may thereby result in the violation of the rights of Aboriginal people to cultural development.
55. The AH Act requires urgent reform to adequately protect human rights. This is supported by the WA Aboriginal Affairs Minister, Ben Wyatt, who announced a review of the 'outdated'<sup>39</sup> AH Act on 9 March 2018,<sup>40</sup> stating WA's Aboriginal heritage laws are archaic, do not meet the contemporary needs of Aboriginal people and do little to protect Australia's unique Aboriginal heritage.<sup>41</sup>

## **CONCLUSION**

56. In summary, EDOWA considers that the current regulatory regime in WA is insufficient to regulate fracking and in particular without substantial amendment to this regime, should fracking be permitted in this State numerous circumstances are likely to arise that would result in the breach of substantive and procedural human rights protected by international law.
57. We hope that the information in this brief and the attached Submission will be of assistance to the PPT. We would be pleased to provide further detail or answer any further questions.

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<sup>38</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, *Background and Issues* Paper (20 February 2017) Fracking Inquiry NT, 20.

<sup>39</sup> <https://thewest.com.au/politics/state-politics/overhaul-of-unworkable-wa-aboriginal-heritage-laws-overdue-wyatt-ng-b88768154z>

<sup>40</sup> <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/03/Aboriginal-heritage-legislation-to-be-reviewed.aspx>

<sup>41</sup> <https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/03/Aboriginal-heritage-legislation-to-be-reviewed.aspx>