AUSTRALIA PROCEDURAL RIGHTS

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DR. AMANDA KENNEDY: Hi, my name is Amanda Kennedy and I'm an associate professor at the University of New England in New South Wales, Australia.

Since 2012 I've been working on research concerned with the regulation of coal seam gas development predominantly in Australia but also looking at the state of Queensland in Australia and Pennsylvania in the USA.

Coal seam gas, or CSG as it's commonly abbreviated here, is a type of unconventional natural gas and may also be referred to as coal bed methane.

As you would already be aware it is extracted by drilling through to the coal seam and pumping out the water or dewatering until the gas flows to the surface.

In some cases other techniques may be required to increase the permeability of the seam, including hydraulic fracturing.

I have been particularly interested in exploring from the perspective of environmental justice how decisions are made to approve or reject coal seam gas developments. And together with my colleagues Revel Pointon and Evan Hamman we have put forward an Amicus

Brief to the Permanent Peoples' Tribunal session on Human Rights Impacts Of Fracking.

And I'm here today to speak to that submission which draws, in part, on some of the work that I've been involved with in recent years.

So the focus of our submissions is on procedural rights. And the pursuit of procedural justice is a fundamental stage in the attainment of environmental justice, that is, the fair and equitable distributions of environmental risks and benefits throughout society.

As lawyers and legal scholars my colleagues and I are first and foremost concerned about proper process as well as just decision-making and adequate avenues of appeal. Indeed these are all fundamental elements of a functioning democratic society.

In the human rights literature which focuses on which human rights legally exist and how they are implemented procedural rights are commonly recognized as a pre-condition for the attainment of more substantive human rights that are enshrined under international law.

On most occasions these procedures may need to be read into international treaties or upheld by protocols or implementation bodies. On other occasions they are explicitly referred to within human rights

instruments themselves.

In recent years arguments have been made for the emergence of a possible right to a healthy environment. But there is some disagreement as to whether such a substantive right exits.

Certainly the Aarhus Convention on Access To Information, Public Participation In Decision Making And Access To Justice In environmental Matters, highlights the right of every person to live in an environment adequate to his or her health and well-being.

The three pillars of Aarhus, which include access to information, public participation and access to justice represent the minimum standard by which governments should seek to protect procedural rights in environmental matters.

Whether or not a specific right to a healthy environment exits it seems clear that substantive rights rely on the ability of people, both individual and collectively, to access information and to participate and/or legally challenge decisions which affect their lives.

In short, the achievement of substantive rights is contingent upon the availability and successful implementation of procedural rights.

While Australia is not a signatory to the

Aarhus Convention the treaty is widely acknowledged as the best available international legal framework for the protection of procedural rights in environmental matters.

It presents the clearest attempts at creating legal rules for the fulfillment of procedural rights in environmental matters. We have, therefore, adopted it within our submission as a normative framework to evaluate decision-making processes concerning coal seam gas development.

The Aarhus Convention clearly links the implementation of procedures to the attainment of substantive human rights, including the right to life, and the right to health.

For instance, Article 1 of the convention provides that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being each party should guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this convention.

While the focus of our submissions is on procedural rights we have assumed that these are

fundamental to the attainment of substantive human rights, in particular, the right to health, the right to life and the right to a healthy environment.

We have thus used these three pillars from the Aarhus Convention to assess procedural rights within decision-making concerning coal seam gas development in Australia.

So turning first to explore access to information. Access to information is the first pillar of the Aarhus framework. It is the key aspect of achieving substantive human rights. The general premise of this right is that people ought to know about information that is held about them or information held by others which might adversely affect their community or general health.

Article 4 of the convention describes the access to information obligation as follows;

Each party shall ensure that public authorities, in response to a request for environmental information, make such information available to the public within the framework of national legislation, including copies of the actual documentation containing or comprising such information. And further, that information is to be provided at the least within one month after the request has been submitted.

The obligation to provide information is placed upon states but it is arguable that it should also apply to non-state actors who hold vital information about community health, risks and the environment.

For example, private corporations which operate and manage extractive industries such as coal seam gas facilities ought to be expected to release, either to the state or directly to the public, information such as possible toxin levels and risk to human health as a result of their operations.

The release of such information by state or non-state actors should be timely, comprehensible and, above all, easy to obtain.

At first glance the federal and state governments in Australia fare reasonably well under the Access To Information Principle.

There are, for example, both national and state laws where any person can make an application, for a fee, to obtain information about government decisions. This includes coal seam gas projects in the assessment phase as well as in the operational phase.

However, the practical implementation of those laws appears weak and there four key reasons for this.

Firstly, Australia Freedom Of Information laws

apply only to state entities. Often it is non-state entities such as private corporations that hold information that is vital to the health and well-being of communities and the environment.

Second, Freedom Of Information laws are subject to exceptions such as commercial sensitivities, military, diplomatic or other states secrets or provisions and the protection of names and personal details.

While Aarhus does envision reasonable exceptions, in practice, this can mean that documents which are released have many pages of redacted material, at times rendering them incomprehensible and worthless for independent investigation.

Third, there are many practical challenges for community groups in accessing information, even though they may have the right to it. For example, understanding and using the information that they have received effectively.

Finally, there is a lack of interest by states in the promotion of the right to information and procedural rights more generally. Article 3.3 of Aarhus requires that states shall promote environmental education and environmental awareness among the public, especially on how to access information.

Targeted campaigns on accessing information and rights to information are rare in Australia. The information process seems more reactive in this regard and tends to be exercised most often by media organizations, activists and non-government organizations.

Overall the problem in our view seems to lie not in the ability to access information but to decipher it and to make sense of it and to use it effectively to protect substantive human rights, such as the right to health and the right to life.

To improve this process, certainly in Australia, further thought needs to be given to, firstly, the timeliness of information that is provided, secondly, the quality of information provided and, finally, the method of transmission of the information.

Turning now to public participation, the second pillar from the Aarhus Convention, the convention includes public participation necessary for sound environmental decision-making processes.

Article 6, in particular, sets out the crux of the principle. It provides that public concern shall be informed either by public notice or individually as appropriate early in the environmental decision-making procedure and in an adequate, timely and effective

manner and by allowing sufficient time for the public to prepare and participate effectively during the environmental decision-making period.

Moreover, Article 6.7 provides procedures for public participation shall allow the public to submit in writing or as appropriate at a public hearing or inquiry with the applicant any comments, information, analyses or opinions that it considers relevant to the proposed activity.

Environmental justice requires effective participation in environmental decision-making, recognition of affected stakeholders and fair distribution of benefits and burdens. While there are some opportunities for public participation in decision-making around coal seam gas activities in Australia it is once again the quality of participation and the adequacy of recognition of participants that is of particular concern.

In the state of New South Wales, for example, one of the major sources of frustration for those who object to coal seam gas development is the lack of public consultation in the approval processes relevant to the exploration phase as distinct to the approval processes that apply for full scale production.

The situation is similar in Queensland where

communities have very little participatory rights with regards to exploration activities. So this means that when a development is first being considered and debated and explored there is very little opportunity for communities to have a say at that point in time.

And even where there are rights to consult, which certainly happens further down the track in the stage of development and consent, there is still a great inequity in public participation mechanisms. Because these tend to sit with well-funded corporate entities against underfunded or even non-funded community and interest groups typically comprised of individuals who need to balance their activism and their interests in a particular cause with other responsibilities, which may include employment or career duties alongside that participation in land use decision-making processes.

In many cases public participation is often limited to written submissions or one of public hearing staff forums. The capacity for individuals to participate effectively in these sorts of opportunities is quite limited.

For example, subject applications against development proposals typically requires objectors to respond to proponent claims regarding such things as the economic benefits of a project or the risk that it will

cause environmental harm.

This requires objectors, members of the public, to have access to as well as be able to understand a significant volume of technical data and often they need to do so within a very short time frame.

Research has detailed the difficulties that this places on individuals and community groups who, in many cases, do not possess adequate financial or other resources to fully integrate the applicant's claims.

Access to expert testimony to challenge proponent evidence tends to be difficult, either proving too costly or not accessible within the short development assessment time frames.

Other structural factors can also inhibit access to information or participation in decision-making more generally including things like morality or membership of minority cultural or language groups.

In many cases development proponents also enjoy significant political influence in land use decision-making processes. They're able to fund wide-reaching advertising campaigns and typically enjoy exclusive lobbying access to politicians.

Development assessment processes often position expert scientific opinion as objective. So for

those seeking to challenge development applications must do so using technical language and by engaging authoritative scientific opinions and methodologies. In turn this tends to marginalize other forms of knowledge such as citizen science, placed-based perspectives and also indigenous perspectives.

Finally government actions which seek to remove resources and funding for public interest legal services or which otherwise attempt to limit standing and curtail protests or which use derogatory language to characterize individuals and groups opposed to development as self-interested reinforces a lack of recognition of non-dominant interests and concerns and restricts access to environmental justice.

Certainly in Australia both federal and state governments in New South Wales and Queensland have actively sought to remove funding and also block philanthropic funding to community legal centers that specialize in public interest environmental law.

Overall, by restricting the capacity of individuals and community groups to participate effectively in land use decision-making, can cultivate perceptions of injustice and foster opposition. At the very least they certainly render provisions which allow for public participation as largely ineffective.

Finally access to justice, the third pillar of Aarhus. Access to justice is closely linked to the failure to provide adequate measures for the fulfillment of the first two pillars of the Aarhus Convention.

Article 9 of the Aarhus Convention describes the access to justice obligation as follows:

Each party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, has access to a review procedure before a court of law or another independent and impartial body established bylaw.

In addition each party shall ensure that where they make certain criteria, if any, laid down in national law members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Aarhus also considers that costs and other barriers must be removed for communities to effectively access the courts and tribunals in order to address or challenge adverse environmental impacts.

For example, Article 9.4 provides that states

shall provide adequate and effective remedies, including injunctive relief as appropriate and be fare, equitable, timely and not prohibitively expensive.

As with the other two pillars of effective decision-making on the face of it the federal and state governments in Australia once again fair reasonably well under these limbs. There are, for example, court actions available to communities where information is not provided as requested and in instances where the individual or community disagrees with the decision of the regulatory body. However, once again, the practical implementation of these laws is weak.

It must be noted that there are many challenges for community groups in accessing the courts, even though they may have the right to, most of which revolve around prohibitive costs and reasonable time frames and the inability to effectively access expertise to challenge proponents submissions.

In addition the creation of further barriers to accessing particular tribunals, and in New South Wales we see this in particular with the distinction between merits review and judicial review, with the threshold now for merits review becoming increasingly difficult for community groups and individuals to attain.

So in the last few minutes that I have I wanted to turn to our responses to the advisory questions for the tribunal.

The first of these questions asks under what circumstances do fracking and other unconventional oil and gas extraction techniques breach substantive and procedural human rights protected had by international law as a matter of treaty or custom.

On our analysis there are three circumstances where procedural rights may have been breached by the practices of CSG extraction in Australia.

Firstly, though information is legally available on CSG projects it is often too complex to decipher, too costly to obtain and too redacted to be of any practical use to communities.

Second, though the public is entitled to participate in CSG decision-making these rights are largely limited to phases of extractive development, not necessarily early exploration phases and typically do not involve a meaningful debate over whether there might be a more suitable use for the land.

Third, although some court appeal rights are available in legislation these are rarely, if ever, used due to restrictive standing provisions, a lack of technical or scientific expertise and access to expert

witnesses, short time frames available to appeal and the costs and complications of litigation more generally.

Defunding of specialist community legal centers such as the environmental Defenders Office, by both state and federal governments, has also hamstrung the ability of Australian communities to legally protest against coal seam gas projects which negatively affect their lives.

The second question asks, in 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?

Where environmental damage can be proven, including as a result of the denial of procedural rights, we see no reason why adequate compensation and/or remediation relief should not be available to all those who have suffered through the process, including the environment.

We bring the attention of the Permanent Peoples' Tribunal to the principle of environmental law entitled The Polluter Pays Principle.

We do note, however, the remediation for environmental damage was not the focus of our

submissions to the Permanent Peoples' Tribunal. For breaches of procedural rights, however, we suggest that reparation must also be considered, for example, in the form of reasonable damages though, of course, that task is far more difficult to quantify.

The best remediation that can occur, in our view, is for states to ensure that procedural protections are sufficiently robust in the first place.

The third question asks, 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 oil and gas extraction techniques?

Based on our analysis both states and non-states are responsible for breaching procedural rights. Whilst states, through law and policy, determine the framework for participation in coal seam gas decision-making non-state actors must also be held responsible for adequately providing, in good faith, relevant and timely information and consultation opportunities that relate to the project proposed, otherwise, the risk is that neither states or non-states, including corporations, will accept responsibility for environmental transgressions and the buck will continue to be passed to innocent communities.

We acknowledge that this view creates problems for the traditional view of human rights law, including our host, which places obligations on states as opposed to non-state entities.

However, for environmental justice to be truly realized both states and non-state actors must be prepared to relinquish power in decision-making processes through the possibility of the imposition of a need for a social license to extract, to use one example.

The fourth question asks, What is the extent of the 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?

Our Brief did not cover this question and we're not in a position to comment with any authority. We do note, however, that none of the procedural rights analyzed in this brief recognize nature as conceptually having standing to sue in a court or obtain information or participate in decision-making processes or the possibility of humans acting on nature's behalf in such processes.

Giving nature a legal personality is something

which is currently being explored in other countries and we defer to the position of the Australian Earth Law Alliance in this regard who have considerable expertise on these questions.

Procedural rights, such as access to information, public participation and access to justice are a fundamental to the attainment of substantive human rights.

In the context of coal seam gas the most relevant substantive rights are probably the right to health and the right to life. There is a strong argument that there exists a right to a healthy environment which, if correct, is also highly relevant to the issues surrounding coal seam gas extraction in Australia.

Overall, our analysis has found that while Australian state and federal governments do have laws that provide for information, participation and appeals, they lack appropriate implementation at the institutional level, in particular, the support structures necessary for them to work effectively.

The systems which are in place fail to recognize the enormous power and balance which exists between the coal seam gas industry and proponents, government and rural communities.

This is why laws on paper are often not enough. Urgent attention is needed to address ways in which the existing legal frame works in Australia can be made to work better on the ground and to produce better outcomes for ordinary citizens.

That is the completion of my submission and I'm happy to answer any questions.

DR. THOMAS KERNS: Well I sure have a question.

Your last sentence, what was that last sentence again? We need ways to ensure that these rights are respected by states, something to that effect?

DR. AMANDA KENNEDY: More that we need ways in which existing legal frameworks can be made to work better.

So it's not enough simply to have legislation that provides for access to information or that sets up processes by which citizens can bring a review in court. There needs to be further support to ensure that these things can actually occur in practice.

So a common example that I've seen in my own research is small rural communities that have to pitch together to raise funds simply to access expert witnesses in order to challenge the evidence that is

brought forward by multi-national corporations who are usually behind coal seal gas development.

DR. THOMAS KERNS: Right. So do you have suggestions for how to make sure that they get implemented more effectively?

DR. AMANDA KENNEDY: It's ultimately a question of resourcing and it's always the 64-million dollar question, I guess. So it is a question of resourcing.

I have read suggestions that have been modeled on approaches in some jurisdictions which have things like a sovereign wealth fund or things like a tax that is imposed upon corporations where monies are passed from the proponent to the communities in order to fund whether it might be a merits review or access to information or access to expert witnesses.

And we've certainly seen cases where companies have passed money on to community groups or individual citizens in order to assist them in that regard but it's typically a trickle of resources rather than something substantial.

DR. THOMAS KERNS: Sure.

DR. AMANDA KENNEDY: And I think there is also much to be done in terms of speaking the language of communities as well.

So often a lot of the information that is passed from proponents down to communities is very technical. It's quite voluminous.

So I had one community member show me a ream of paper that stood taller than them which was the technical information behind one of the coal seam gas developments that they were looking at.

The time that it takes to read through those documents and to digest them, particularly when we're talking about people that have not necessarily completed high school, you know, it's very skewed in terms of those capacities.

So it's not necessarily just a question of providing more money but it's about helping people to better understand that information and also being open to information that is not necessarily in the language of what typically a development assessment would take place in.

So being open to play space perspectives, being open to indigenous perspectives even though it may not be a question of the technical development of a particular coal seam gas development.

DR. THOMAS KERNS: Yeah. And I like your emphasis on these procedural rights being respected early in the process rather than later.

DR. AMANDA KENNEDY: So, again, to just point to another example from my own jurisdiction and also the state of Queensland, typically there's very little opportunity at the exploration phase for communities to have a say in a proposed or prospective development. That right will usually come once the exploration phase has ended and the proponent is moving more to full scale development.

And so there tends to be a perspective that it's almost a fait accompli by that point. That the development is already here and we've not really had an opportunity to have any input or say at that early phase.

And it's a fundamental principle of environmental justice that front-ended community consultations is critical.

MR. GILL BOEHRINGER: Gill Boehringer.

I agree with what you're both saying but to some extent the things that you're suggesting could also be on paper and then whipped away at the whim of any conservative or even half-assed labor government as we've seen with legal aid funding. All over the world now it's being taken away or reduced drastically.

And I was thinking of the idea of, which is not entirely irrelevant, the idea of participatory

budgeting.

It seems to me that what needs to be done is to embed the communities somehow in the process and, of course, with resources and with things you're talking about. So that, in a sense, just to build a barrier to bypassing them. And then I guess -- well, yeah, I think that's generally the only suggestion I have.

DR. AMANDA KENNEDY: Look, I think that's a fantastic suggestion and certainly something that communities have called out for and in some jurisdictions in Australia we've seen pockets of that happening. We have, in some cases, community consultive committees which are, in practice, are meant to meet with communities from the outset of the development any proposal takes place with representatives in place.

But, again, you know, there are a lot criticisms of those processes such that the committees can be stacked with people favorable to development. It's not necessarily representative but, you know, I agree. I think that's certainly another mechanism that can be part of the arsenal to ensure that there is deep and meaningful communication and consideration of issues from the outset.

MR. GILL BOEHRINGER: Yeah, I mean I realize that no system is going to be perfect and there

is certainly inequality and power imbalance.

I know of a situation in the Philippines, for example, where they have peace and order communities in every village but they're usually stacked with military people on one side and a few citizens on the other side who may or may not be interested in things other than what the military is interested in. But the military has the expertise, you know, they have the power. They're very intimidating and so that doesn't work too well either. But, yeah, anyway we'll see.

I think that I like the idea of stressing the procedural rights. I mean every lawyer knows that if the procedure is wanky the results are a going to be wanky. So good on you.

DR. AMANDA KENNEDY: Yeah, I think that's essentially the basis of the submission that the strength of the substantive rights really is very much entwined with the strength of the procedural rights.

DR. THOMAS KERNS: Beautiful. Thank you.

DR. AMANDA KENNEDY: Thanks Tom.

[youtube.com/watch?v=p38nWy4EUOc]