

ENVIRONMENTAL DEFENDER'S OFFICE

WESTERN AUSTRALIA

MAY 16, 2018 3:30-4:30

MR. DECLAN DOHERTY: Hello, my name is Declan Doherty and this is Sarah Flynn from the Environmental Defender's Office in Perth, Western Australia.

We'd like to thank the Permanent Peoples' Tribunal for the opportunity to file our Amicus Brief in this important inquiry and for taking the time to hear our presentation today.

But before we begin we would wish to acknowledge that we're recording this message at our office in Perth, Western Australia, which is located on the land of the traditional owners, the Wajuk people of the Noongar Nation. We, therefore, wish to pay our respects to the elders past, present and future.

But first some background to the Environmental Defender's Office. The Environmental Defender's Office of WA, or the EDOWA is a not for profit and non-government organization from Perth that specializes in public interest and environmental law.

We provide legal advice on matters of public interest in environmental law and take some matters to court on behalf of the community. We conduct community
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1 legal education. We actively engage in policy and law
2 reform discussions across WA and across Australia with
3 our colleagues and other Environmental Defenders
4 offices. And it all has a focus on access to
5 environmental justice.

6 And we are part of a broader network of
7 Environmental Defenders offices in Australia and a
8 network of community of legal centers in Australia that
9 focus on access to justice and human rights for
10 Australians.

11 Firstly some context about fracking in WA and
12 the resources sector generally. Western Australia has a
13 long history of dependence on the resources sector. We
14 have a history of state governments heavily supporting
15 and sponsoring the mining, oil and gas industry and it
16 continues to do that today.

17 The government does it through setting up
18 departments such as the Department Of Mines & Industry
19 Regulation whose key focus is to promote industry and
20 insure that resources are extracted as quickly as
21 possible and exported to customers offshore.

22 One of the ways that this is being done over
23 history is through state government entering into state
24 agreements or contracts that are legally binding between
25 government and industry that facilitate the development
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1 of resources and often in a way that streamlines or
2 reduces the requirements to certain regulatory approvals
3 designed to protect the environment.

4 We also have a poor record in Western
5 Australia of enforcing environmental laws. There've
6 been very few prosecutions under the main piece of
7 legislation, the Environmental Protection Act. Most of
8 the focus from agencies goes towards the approvals and
9 assessment process rather than regulation and
10 enforcement. And we don't see any sign of that
11 changing.

12 In terms of onshore gas Western Australia has
13 been estimated to hold shale gas resources of
14 approximately 34,000 billion cubic meters.

15 While hydraulic fracturing or fracking
16 production activities have not yet commenced in WA some
17 exploration has begun and approvals have been granted
18 for exploration in a very quick manner. This gives us
19 great concern given the significant potential for shale
20 gas resources and significant lobbying from the
21 petroleum industry, it's likely that the government will
22 be just as willing to support a new fracking industry in
23 WA.

24 What does give us some hope though is that in
25 September 2017 the WA state government imposed a
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1 permanent ban on fracking in the Perth metropolitan and
2 southwest regions of WA and a moratorium on the fracking
3 for the rest of Western Australia until June 2020. And
4 it also announced an inquiry into fracking, which I'll
5 turn to next.

6 So, as I said, the WA government convened an
7 independent scientific inquiry into fracking to assess
8 and report on the potential impacts arising from
9 implementation of fracking on the onshore environment of
10 WA, should it go ahead.

11 However, previous inquiries in Western
12 Australia and some other inquiries in other states have
13 not recommended a permanent ban on fracking and some
14 states have recommended permanent bans. So we're not
15 sure where this inquiry will lead to.

16 One of our key concerns for the current
17 inquiry is that the panel has a very limited scope in
18 terms of reference and powers. For example, there are
19 no public hearings or powers to compel evidence or for
20 submissions from parties to be tested and rebutted.

21 So, for example, the Environmental Defender's
22 Office would not be able to challenge claims made by
23 industry that fracking is safe. Whereas if there was an
24 independent public inquiry we might be able to do so.

25 Nonetheless, the Environmental Defender's
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1 Office submitted a submission to the fracking inquiry in
2 March of this year which was attached to the Brief that
3 we submitted.

4 Our submission focused on the regulatory
5 mechanisms that may be employed to mitigate or minimize
6 the risk of fracking and we highlighted the issues
7 regarding the inadequacy of AW's current regulatory
8 regime that would apply should fracking go ahead. That
9 is not to say that we advocated or condoned that
10 fracking should occur. We actually stated in our
11 submission that there should be a ban state-wide.

12 While the fracking inquiry in terms of
13 reference do not explicitly refer to human rights we
14 indirectly addressed the impact of fracking and their
15 regulation by WA on human rights in our submission but,
16 unfortunately, inquiries in terms of reference don't
17 extend to looking at whether there should be a permanent
18 ban on fracking across the state. Therefore, we're
19 concerned that the inquiry will recommend that fracking
20 can occur safely but with stronger regulation and then,
21 going by the track record of previous governments, the
22 recommendations for stronger regulation will not be
23 implemented or enforced but, nevertheless, fracking will
24 be allowed to continue and this gives us great concern.

25 So turning to our Brief. The context in which
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1 we have submitted our Brief is based on Western
2 Australian law and some national Australian law. And
3 our concern that should fracking proceed here the
4 existing law and its track record of implementation will
5 be insufficient to protect breaches of human rights, the
6 environmental law and the rights of nature, which have
7 been pointed out by other presentations as part of this
8 current inquiry.

9 Therefore, we have been focused on the first
10 legal question the Tribunal was considering, the
11 circumstances in which fracking activities and the risks
12 they pose to the natural environment, health and
13 community and aboriginal heritage and culture breached
14 substantive and procedural human rights protected by
15 international law.

16 Our submissions draws on the submission we
17 made to the WA inquiry and covers the climate impacts
18 and environmental public participation and social cost
19 cases.

20 We emphasize the detrimental impacts the
21 regulation of fracking in WA would have on the
22 environment and the human rights of landholders, native
23 title holders, traditional custodians and the public
24 under WA law.

25 We're particularly concerned about the impact
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1 of the provisions in WA's petroleum legislation, up on
2 the slate, known as the Payer Act, which governs or
3 purports to govern fracking activities on substantive
4 and procedural human rights.

5 This is particularly borne out by the limited
6 rights provided to landholders, farmers and aboriginal
7 and native title groups under this legislation.

8 There are significantly fewer rights under
9 WA's petroleum legislation compared even to the hard
10 rock mining or planning legislation which is, by no
11 means, perfect in WA either.

12 For example, owners and occupiers of private
13 land are afforded very limited rights in respect to the
14 initial access by fracking companies and the grant of
15 petroleum licenses on their land.

16 In our submission we note that access to
17 petroleum title holder can only be denied in very
18 limited circumstances in respect to private land.

19 For example, if it's close to a cemetery or
20 next to a substantial improvement, and there's no
21 definition of what substantial improvement is. That's
22 generally defined by the agency.

23 There's also no requirement under the
24 legislation for owners or occupiers of private land to
25 be notified of an application for a petroleum title or
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1 even the grant of title on their land. The grant of the
2 title simply occurs and land owners find out after that.

3 Further and significantly the definition of
4 what private land is is very limited. It expressly
5 excludes past re-leases and leases for the use and
6 benefit of aboriginal persons.

7 We submit that taken as a whole there is an
8 argument that this amounts to a breach of the right to
9 either own property and not be subject to the arbitrary
10 deprivation of property.

11 And also breaches accepted principles in
12 conventions such as the Aarhus Convention regarding
13 access to justice, access to information and the rights
14 of the public to participate in the decision-making
15 process.

16 Turning to emissions, to air and climate
17 change.

18 There are countless published materials that
19 have highlighted that fracking can result in the release
20 of hazardous air pollution which can impact the health
21 of people, plants and animals.

22 Fracking, of course, can lead to a large
23 deliberate and uncontrolled emissions of methane and,
24 therefore, can contribute to climate change. And we
25 note that in our submission.

1 The concern that we have with the WA
2 regulatory system in this regard is that there is no
3 specific obligation on the environmental protection
4 authority, which is intended to be independent from
5 government, to consider and assess greenhouse gas
6 emissions from fracking. The environmental protection
7 authority's track record in assessing greenhouse gas
8 emissions in WA is generally poor.

9 There's currently no coherent EPA or state
10 government policy in Western Australia for the
11 assessment of greenhouse gas emissions, from fracking or
12 the fossil fuel industry generally, which leaves
13 greenhouse gas emissions largely unregulated given there
14 is no effective national scheme for pricing or
15 regulating greenhouse gas emissions either.

16 Therefore, we submit that enabling a new
17 fracking industry in WA where there is no regulation of
18 greenhouse gas emissions would further increase the
19 effects of climate change and impact human rights of
20 individuals worldwide.

21 In relation to impacts to land and water it's
22 also well-known that fracking can cause significant
23 impacts to ground water quality. Fracking can impact
24 the quality of ground water for human consumption and
25 water for stock and environmental uses due to pollution
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1 and contamination. Our submission highlights numerous
2 published and peer reviewed sources in this regard.

3 Fracking is also a highly water intensive
4 process which puts pressure on vital water sources which
5 is a significant concern in a place such as Western
6 Australia where access to water, particularly in remote
7 areas is difficult, and water is essential for the use
8 of agriculture and aboriginal persons.

9 We submit that the impacts of fracking and
10 that fracking poses to water and air through pollution
11 and contamination and deprivation of water for the
12 environment and community risks violating the human
13 right to life.

14 The UN General Assembly has previously
15 declared that access to clean water and sanitation is a
16 human right essential to the full enjoyment of life and
17 other human rights.

18 We note that the current UN Special Rapportuer
19 On Human Rights In The Environment, John Knox, has
20 affirmed that states are obliged to take reasonable
21 justifiable measures to protect the environment and
22 related human rights, acknowledging that environmental
23 degradation can range and does adversely affect the
24 enjoyment of a broad rage of human rights.

25 However, in Australia we've got no bill of
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1 rights and we have no enforceable right, in Australia,
2 to a clean and healthy environment. We submit that
3 these circumstances create governance gaps that make
4 Australia vulnerable to breaches of substantive and
5 procedural human rights as a result of fracking.

6 Turning to public participation.

7 While the Aarhus Convention sets out three
8 pillars of procedural human rights, access to
9 information, public participation and access to justice,
10 we submit that current WA law as it would apply to
11 fracking severely limits the extent to which the public
12 can participate in the regulatory and decision-making
13 process or understand the impacts a particular fracking
14 proposal may have on their land.

15 There are numerous hurdles preventing the
16 public from understanding or participating in the
17 assessment, the approvals and compliance processes under
18 the petroleum legislation. There is a significant lack
19 of transparency in the petroleum assessment process
20 which we address in our written submission in detail and
21 also in terms of understanding whether the proponents
22 have been compliant with the law. In short it's very
23 secretive. There are few prosecutions. And to the
24 extent that enforcement action is taken it's not made
25 known to the public.

1 This is compounded by the fact that the
2 department responsible for regulating fracking is also
3 charged with promoting the industry and ensure that
4 these resources are developed quickly for export. This
5 regulatory capture that we point out in our submission
6 creates conflicts of interest which result in
7 environmental and human rights outcomes being reduced
8 significantly.

9 While under environmental legislation, as
10 opposed to the petroleum legislation, there is more
11 opportunity for public participation, particularly in
12 the environmental impact assessment process, which is
13 covered by the EPA. We're concerned that the EPA will
14 use its ability not to undertake impact assessment and
15 just rely on processes under the more secretive
16 petroleum legislation run by the department.

17 This is what has occurred to date for the
18 three exploration proposals that have been approved in
19 WA and there is a history of the EPA diverting the
20 assessment and approval of projects to other agencies
21 rather than conducting the environmental impact
22 assessment process itself.

23 WA law also doesn't consider the assessment of
24 cumulative impacts, which is a big risk, in terms of
25 both climate change and impacts from fracking more
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1 generally as well.

2 Further under WA law there are very limited
3 rights of the public to appeal the merits of
4 environmental decisions or bring actions to enforce the
5 law such as third-party enforcement.

6 We have no environmental court, unlike other
7 jurisdictions, such as New South Wales, and there are
8 significant cost risks to the community for bringing
9 legal action as there is no ability to obtain protective
10 cost orders in Western Australia unlike other states in
11 Australia.

12 Most cases are heard by the minister in terms
13 of merits review, who also makes the final project
14 decision, which can risk conflicts of interest.

15 And finally, but by no means least, aboriginal
16 people constitute a large proportion of the population
17 in Australia and in WA living in areas vulnerable to
18 fracking. We pointed out the issues that are in
19 relation to leases for aboriginal persons and not being
20 notified of fracking activities and we're also concerned
21 that the cultural rights of aboriginal people are at
22 risk of being violated.

23 Fracking can, of course, impact aboriginal
24 heritage by degrading land or water used by aboriginal
25 people and it can also damage archeological and
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1 ethnographic sites.

2 WA's aboriginal heritage legislation is old
3 and in need of urgent reform. Even the current
4 Aboriginal Affairs Minister in Western Australia has
5 recognized this and has called for a reform of the act.

6 These laws have a poor track record of
7 protecting aboriginal sites and instead are really just
8 used to facilitate development approvals for industry.
9 Recently many, many, aboriginal sites were deregistered
10 by the agency because it wasn't sure whether it was a
11 site or not and this situation continues to today.

12 We've also noted earlier in our Brief our
13 concerns that leases for aboriginal people are not
14 included in the definition of private lands and further
15 aboriginal persons have no right of veto or a right of
16 free prior and informed consent under WA law.

17 So, in summary, the current regulatory system
18 in Western Australia is insufficient to safely regulate
19 fracking in a way that protects the environment and
20 upholds basic human rights for the WA community and
21 aboriginal people.

22 We've called on the WA government to maintain
23 the moratorium while, at the same time, calling for
24 significant improvements to WA's regulatory system and
25 how it is implemented in practice in relation to
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1 fracking, should it occur, and industry more generally.

2 We'd like to thank the panel members for your
3 time and for hearing us today. We wish you well with
4 your deliberations and we'd be very pleased to answer
5 any questions that you may have.

6 Thank you.

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8 [youtube.com/watch?v=iTf_ihu70oE]

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