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

We'd like to the 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.
legal education. We actively engage in policy and law reform discussions across WA and across Australia with our colleagues and other Environmental Defenders offices. And it all has a focus on access to environmental justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We're particularly concerned about the impact...
of the provisions in WAs petroleum legislation, up on
the slate, known as the Pager Act, which governs or
purports to govern fracking activities on substantive
and procedural human rights.

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

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

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

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

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

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

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

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

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

Turning to emissions, to air and climate
change.

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

Fracking, of course, can lead to a large
deliberate and uncontrolled emissions of methane and,
therefore, can contribute to climate change. And we
note that in our submission.
The concern that we have with the WA regulatory system in this regard is that there is no specific obligation on the environmental protection authority, which is intended to be independent from government, to consider and assess greenhouse gas emissions from fracking. The environmental protection authority's track record in assessing greenhouse gas emissions in WA is generally poor.

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

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

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

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

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

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

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

However, in Australia we've got no bill of

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rights and we have no enforceable right, in Australia, to a clean and healthy environment. We submit that these circumstances create governance gaps that make Australia vulnerable to breaches of substantive and procedural human rights as a result of fracking.

Turning to public participation.

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

There are numerous hurdles preventing the public from understanding or participating in the assessment, the approvals and compliance processes under the petroleum legislation. There is a significant lack of transparency in the petroleum assessment process which we address in our written submission in detail and also in terms of understanding whether the proponents have been compliant with the law. In short it's very secretive. There are few prosecutions. And to the extent that enforcement action is taken it's not made known to the public.
This is compounded by the fact that the department responsible for regulating fracking is also charged with promoting the industry and ensure that these resources are developed quickly for export. This regulatory capture that we point out in our submission creates conflicts of interest which result in environmental and human rights outcomes being reduced significantly.

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

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

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

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

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

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

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

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

WA's aboriginal heritage legislation is old and in need of urgent reform. Even the current Aboriginal Affairs Minister in Western Australia has recognized this and has called for a reform of the act. These laws have a poor track record of protecting aboriginal sites and instead are really just used to facilitate development approvals for industry. Recently many, many, aboriginal sites were deregistered by the agency because it wasn't sure whether it was a site or not and this situation continues to today.

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

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

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

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

Thank you.