T R A N S C R I P T

STANDING COMMITTEE ON THE ENVIRONMENT AND PLANNING

Inquiry into unconventional gas in Victoria

Torquay — 13 August 2015

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The CHAIR — Professor Hepburn, I will ask you to make a short presentation, and then we will follow with some questions.

Prof. HEPBURN — I have a fairly detailed submission so I am going to focus on four core areas of community and environmental concern. I hope I have copied enough for you all; otherwise maybe if it is possible to just share briefly and I will send more around. The scope of this submission identifies four core areas, obviously on the assumption that there are existing reserves, or potentially future existing reserves based on the evidence that I have just heard. The first issue, and this is directly relevant to coexistence and resource conflict, is land access arrangements. This will touch on issues relating to the ownership entitlements that exist between private landholders and resource titleholders and how those arrangements might be better coordinated. I have articulated a number of areas of broad possible reform for the existing regulatory framework.

The first area is land access arrangement. The second is the scope of existing compensation entitlements for private landholders and the methodology for assessing and negotiating such entitlements and how to potentially improve that process. The third is a broader area looking at the nature and scope of resource conflicts. Now this is particularly obviously relevant to Victoria. Domestic and agriculture land usage is going to involve a range of conflicts if onshore unconventional gas or conventional gas progresses to a further extent. How do we better manage the process for future coexistence? Finally, the regulatory and policy safeguards needed to develop onshore unconventional gas exploration and development, and I am really talking about implementing new regulatory tools — a shift in the way in which we evaluate this process. So consideration as to how we might better monitor, enforce and consider impact-mitigation responses. The overriding issue too is to take account of the internationally recognised principles of ecologically sustainable development.

I am just going to mention some of the relevant concerns to these four areas. Obviously economic, social and ownership issues here. The fact that supply of gas from unconventional onshore sources in the eastern states has expanded to meet rising domestic and international energy needs. I think we can talk about gas as a transition resource in a carbon economy. We know that gas has significantly reduced emissions from coal. We have to appreciate the economic implications of potentially expanding if resources exist. There is also the issue of ensuring that the domestic price of gas remains competitive, and of course the federal energy white paper indicates that accelerating unconventional gas projects is one means of achieving this, absent of domestic reservation policy.

The importance of ensuring that we respond to the social licensing. This is crucial. This is hugely relevant for Victoria. We have already clearly mentioned that we have got a range of different sectors that would be impacted by an expansion of unconventional gas, so we need to make sure that the regulatory and policy framework is responsive to community expectations. How do we achieve this? Maximising community engagement and approval through introducing an optimal framework for information transparency — that is, communities must be given the opportunity not only to understand if the project is going ahead what the project is going to be, what the scope of the project might be, potential social and environmental impacts, but also to respond to those issues in a fair and reasonable and timely manner. We need to improve the regulatory framework to achieve all of those goals. We need to understand, to begin with, what our framework is. I have only got 10 minutes, so stop me —

The CHAIR — Keep going.

Prof. HEPBURN — if I get too bogged down. First of all, what I would like to say is that we need to understand that the existing framework is an interesting conglomeration of an inherited feudal system based upon obviously a constitutional assumption that the Crown is the ultimate owner of all land. Obviously the state in right of the Crown has vested subsurface resources into their ownership rights. That is a statutory vesting. Outsider of that we have got private landholders who retain ownership pursuant to common-law estates that have been issued by the Crown. We have got this interesting situation. Previously we could argue that we did not have so much of a concern relating to this sort of interface because we had reasonably segregated areas of mining, agriculture and private landholding. This is starting to change. Obviously we have got much greater information, and this has been particularly apparent with the unconventional gas expansion in other eastern states.

We now need to consider the interface entitlements, and that is basically access. So if you have a situation where the state has issued a resource title to a petroleum unconventional, or conventional, for exploration or production, effectively the licence is conferring upon the titleholder rights to explore for or extract, and that is a

product of those statutory vesting provisions, section 9 in the Mineral Resources (Sustainable Development) Act and section 13 in the Petroleum Act.

Then you have a situation where private landholders, and this is of course the product of the common-law framework, own the land. They have private autonomy, exclusivity in control of their land, a right to exclude — that is the fundamental definition of a land ownership right. So you get this situation where under common law it would not be possible to disaggregate the subsurface resource from landownership because it would create chaos, because it is within the land and you have got a problem if you are saying that the surface estate owner has full control. That is the situation under common law. Statutes change that. What we need to do is make sure that the access entitlement arrangements, the interface arrangements, are properly regulated. Now my submission argues that they are not at the moment.

Because there is a lack of priority, the assumption has been that private landowners who have that control of the surface estate therefore are potentially able to veto. I would argue that that probably is not the case. We have a situation where — and the petroleum legislation does actually confer this — ancillary rights to do everything necessary to support the licence would probably include a right to access the resource. Indeed access is one of the fundamental ownership rights. Even if we would say that the entitlement to the resource is derived from a statutory provision, it is still a product of our constitutional framework. It is still a product of the Crown being the ultimate owner. It still means that the resource titleholder — the state or the petroleum company — has a right to access. If we work from that basic assumption, it is my submission that it is inappropriate to be talking about rights of refusal or veto, because it simply does not work with our existing framework, and our existing framework is very difficult to change.

What is more appropriate is to talk about mandating negotiation — and I have argued this in my submission; I think it is an excellent way forward — to mandate conduct and compensation agreements prior to any access being exercised. You are not saying that one party has a greater right than the other, because you are actually trying to achieve a reconciliation between those two effectively conflicting ownership rights. The best way forward is to say, 'Right, in this situation what we need to do rather than have the flimsy situation that we have got at the moment' — for example, under the Mineral Resources (Sustainable Development) Act, where consent might be required, but if consent is not given, then the petroleum titleholder can simply go to VCAT. That gives the assumption to the landowner that they have some entitlement, which they actually do not have because the system does not support it. It just does not work properly.

It is far more effective to say, 'Right, here's what your right is, landholder. Your right is that you are entitled to enter into a mandated' — and let us use the language of Queensland, because it has been quite effective there — 'conduct and compensation agreement'. By conduct what we mean is let us define what is going to happen on the land. Assuming that there is a resource that needs to be accessed and explored for — developed — let us define what type of activities are going to be carried out, when they are going to be carried out, where they are going to be carried out, and let us also define the amount of compensation that would be available.

Given the kind of detailed submission on compensation I have provided, I am aware that I only have 10 minutes, and it is probably not far from lunchtime, but I am happy to go through that. The existing regime for compensation is inadequate as well. Queensland has — and I am using this as a comparative analysis — recently undergone a fairly significant review of the compensatory regimes to expand the amount available for loss of amenity for surface estate holders, also to include legal costs associated with landholders wanting to get advice regarding perhaps the type of negotiation, the type of provisions that would be included and perhaps having someone negotiate for them on their behalf. I think that is crucial.

Obviously it is not possible to incorporate the value of the resource, given that the resource does not belong to the landholder, but what we need to do within this shared sort of arrangement is make sure that we understand that the landholder has ownership rights alongside the resource. So if you have got a surface estate industry that is significantly impacted, then that is something that needs to be taken account of. In the current framework there is no mandated requirement to enter into a compensation agreement. It may be something that goes before their cap. But say you did not have a compensation agreement, then the legislation only gives you three years, so it may well be that three years go by and then you do not have time to actually seek compensation, so that is not going to work either. This is why I think that problem with time would be removed if we mandated the entering into of an agreement and also expanded the categories of compensation that are available.

I am just going to refer you, in particular, to my submission on compensation entitlements, which starts at page 34. There are some recommendations from the Victorian task force report, which was 2013, recommending increasing the upper limit of the compensation threshold from 10 to 20 000, plus CPI adjustments for loss of amenity. That is fine, but once again it is something that we need to take account of. Possibly we should not have an upper limit. Definitely if we are going to mandate compensation agreements, perhaps it is the sort of arrangement that could depend upon private negotiation rather than necessarily having an upper limit. I think that it is also important to make sure — and this is fairly clear in the mandatory requirements in the Queensland framework — that we separate out the conduct element from the compensation element so it is very clear what the different provisions are.

One more thing on compensation — this is at the bottom of page 42. It has been recognised in the Queensland land court that even if you do have a particular quantum of compensation within a conduct and compensation agreement, if the compensation extends beyond that, it is possible for a court to determine that further award of compensation be available — that is, it is not rigid. So we can bear that in mind as well.

Let us move on to the environmental assessment process. I just really want to mention in my submission the regulatory limitations. I think it is very clear that the existing framework is problematic. The regulatory limitations are on page 50 for the environmental, but I just want to go back to page 17. These are the reforms that I would love to see: the implementation of a single uniform legislative framework rather than bifurcating the framework with the Mineral Resources (Sustainable Development) Act and the Petroleum Act. I can understand a separation between on and offshore, but the separation between the Petroleum Act and the Mineral Resources (Sustainable Development) Act is unclear — —

The CHAIR — It is artificial.

Prof. HEPBURN — It is, I think, artificial. I do think that it just creates further confusion, which really is not needed, and it is a great opportunity to then create a single framework, and then move on to have the second ideal change that I would like to see: explicit unconventional gas provisions that deal with community engagement, compensation, environmental assessment, chemical bans, water assessment and hydraulic fracturing regulation. We could do that in the form of a code. New South Wales has a hydraulic fracturing code, a well integrity code and a land access code. Codes are quite useful. They have two purposes: one is that they can mandate required shifts in behaviour; and two is that they can set out aspirational standards which companies can move towards. I think that is a very effective means, rather than perhaps trying to put it in some sort of discretionary provisions, so I think codes would be very effective for achieving those goals.

I have clearly mentioned a detailed land access code with mandatory and aspirational best practice requirements. I have mentioned the mandated conduct and compensation agreements. It is very important to implement mandatory environmental impact assessment for all CSG, shale and tight gas projects, which takes account of principles of ecologically sustainable development. We cannot ignore the fact that we are considering all of these issues in the context of climate change, so gas and fugitive emissions and so forth are still going to be relevant, and I think it is really important to create an optimal regulatory framework that takes account of these globally important concerns, so I would really like to see that.

We also need to be aware of the fact that the national environmental legislation, the Environment Protection and Biodiversity Conservation Act, only applies to coal seam gas, not shale. It only applies to water resources relevant to coal seam gas, so that trigger will not have an application if we are dealing with an impact on shale, so that makes it even more imperative for the Victorian framework to be optimal in that regard, particularly obviously respect to environmental review.

I will just briefly mention the regulatory limitations, which I have outlined on page 50 of the existing framework. I think we can see that under the existing framework for environmental review, you can go into the planning or the Environment Effects Act. In effect if you are going under the Environment Effects Act, you are not going under the Planning and Environment Act. The Environment Effects Act will apply in essence if the minister declares a project to constitute a public works that has a significant effect on the environment. The problem with the Environment Effects Act has been well documented, but let us mention again. It is patently inadequate. It is discretionary, non-binding, has an infrequent application to petroleum projects, and the approval process can often contain little more than bare environmental evaluation.

The environmental management plan that operates under the planning act is more of an administrative than a substantive impact analysis. The framework lacks a strategic transparent compulsory assessment process. This is the type of situation that requires cumulative review. You evaluate the cumulative risks of adverse environment impacts and make sure that the framework supports this. This is crucial within the context of unconventional gas.

It is very disturbing that we do not have an informed environmental review process that is capable of responding to that, given the potentially catastrophic environmental implications. I use the word 'catastrophic' in inverted commas, but potentially if we do not take a cumulative strategic approach to impact analysis — —

We have talked about water contamination, we have talked about seismicity, we have talked about the fugitive emissions that could happen and we have talked about wastewater. These are very important and a huge opportunity to make sure that we adopt a framework that is the best not only nationally but that potentially has strong international signals as well.

I would say with regard to the environmental process that the Victorian task force report went some way. Recommendation 4 suggests an independent water science committee chaired by an independent eminent scientist who would oversee a water science and monitoring program and provide independent advice on water quality and other environmental issues. That would be crucial. Obviously that is going to require amendments to other legislation. There is going to be a need to take account of the potential to issue a separate water licence. I am sure you have had submissions regarding the water impact so I will not go too far on that. What I would like you to take away is this business of having a discretionary ad hoc approach to environmental review in this context. It simply is unsatisfactory, particularly if the onshore gas development is going to expand at a reasonably rapid rate. I think that is all I would like to say. I will just make sure that there is nothing else that I have not crossed that I want to mention.

The CHAIR — Professor Hepburn, I would say that there is a huge amount in your presentation.

Prof. HEPBURN — Yes, there is.

The CHAIR — I note another submission to the inquiry from the environmental defenders office that covers some of the same terrain. However, I might say that yours puts this in a very important context. If I can attempt to strip this down into a very short summary, we have a common-law right that comes through into landownership but overlain with an old feudal system that actually vests the power via statute in the Crown in this case. All minerals in Victoria, as in other Australian states, are owned by the commonweal, the state. It seems to me the essence of some of the points that you make, and I will come to the environmental regulation points later, is that there needs to be some improvement in mechanism and some greater clarity. Without indicating my own view, which is perhaps separate from the set of questions that I am going to ask you, it seems to me that any process where you gave a set of veto or other rights to landowners or more stringent delay processes, more stringent compensation arrangements or more stringent requirements in terms of access, all are in effect — in a sort of law and economics sense, if I can give you a framework — a transfer of a partial or a full property right to that landowner. So we have two parts to a property right, an on-surface and an undersurface, and my concern — or one concern that has been put to me, if I can put it the other way — is that what you may be doing in giving those additional rights is to transfer billions of dollars worth of assets to individuals from the state.

Prof. HEPBURN — Yes. This is so interesting, because in effect what is happening as we see the mobilisation of resource projects across the world — and that is going to be covering areas that were previously, as I said, private land, so land that maybe had purely a domestic use — we are going to see a shift in terms of the type of entitlements that connect to private ownership. I think that is exactly what you are saying. We have always assumed that land carries with it rights to exclude and control, so does that mean — —

The CHAIR — But is that true in Victoria and other Australian states? We have always known in these states that land can be acquired by the state for public purposes. Mining in this state, for example, has an extremely long history, and it has always been understood, I think, that what is underneath is owned by the Crown and thereby by the people.

Prof. HEPBURN — Yes, it is interesting. That is possibly true. It is certainly true in terms of acquisition, and the other important thing is that the state constitutions do not have just terms.

The CHAIR — Or compensation clauses, yes.

Prof. HEPBURN — Yes. So that is why of course a lot of the vesting occurs at the state level and why the commonwealth cannot really step in. The state own the resource pursuant, as I said, to the vesting provisions. That is absolutely accurate. Certainly landowners had an understanding of that when those provisions were introduced. Bear in mind, for example, the geosequestration provisions were only introduced in Victoria in 2008, so landowners now do not own the resources and do not own the subsurface reservoirs for CCS injection either. That happened in 2008.

The CHAIR — I remember the bill.

Prof. HEPBURN — Yes. So it is possible that some people know, but a lot of people do not. I think a lot of people have assumed. There is that sort of perceptual bias perhaps that industries or whatever have had that they are allowed to continue to do what they have done for a long time and that any interference with their right — maybe there is going to be some planning or environmental provisions and some sort of state regulatory provisions and council provisions that might apply, but beyond that any significant interference or diminution in the sorts of rights that they have — is something that they can prevent. In particular we know this from Lock the Gate. They can say, 'No, you can't come on my land. No access. This is mine. I control that process'. Really what I am saying and what you have summarised accurately is that that is not the case, that if we disaggregate the resource and we say, 'Right, this resource doesn't belong to you. It can't just sit in the land unable to be accessed or unable to be in any way explored'.

The CHAIR — It is in some other jurisdictions. In the United States, for example, there is a right and that right is an absolute right. You can say, 'I don't care what you offer me and what the circumstances are'.

Prof. HEPBURN — Excellent, yes, and that is probably a product of the fact that Thomas Jefferson got rid of feudal tenure, so there is of course no ultimate Crown ownership. It is an allodial framework, so the landowner is the absolute owner. So they are far more engaged in the process of creating a mineral estate than is the case here.

The CHAIR — A shift in that ownership or the veto right or an arrangement that actually saw additional capacities for landowners to mandate or require certain steps seems to me to be a transfer of value which could be a hundreds or thousands of billions of dollars windfall.

Prof. HEPBURN — Absolutely. I agree. It just comes down to — I definitely do not disagree with that — it is an economic transition and the question is: how do we best manage the fact that, yes, we have had the statutory vesting that has occurred for a long time, but it has only started to have a bit of an impact now perhaps with the expansion of unconventional gas, and we are seeing more people getting mobilised and concerned about the impact, and so how do we best deal with that and those sorts of resource conflicts?

The CHAIR — The absolutely final question is a simple one: is there some economic analysis of the advantages of a smoother set of procedures which might in the middle benefit everyone — clearer, sharper procedures that are better understood? Is there some work that we could look at to see the economic benefit of that perhaps to everyone?

Prof. HEPBURN — Yes. There is plenty of work on that, particularly in the United States, and I am happy to forward it to you. Stanford has done an excellent review. There is also work of course at the Marcellus Shale; it has a lot of academic discussions and reports. I can send perhaps some of the most pertinent ones to you from an economic perspective if you would like. Thomas Merrill has also done quite a lot of work on the economic review, but also looking at how to incorporate that economic perspective into regulatory tools. I am happy to forward that.

Ms SHING — I would like to pick up on a number of the elements of what you have talked about in referring to your submission directly and then also in answering a number of the Chair's questions. You have talked at length about economic benefit being conferred on individuals — and individuals might have a corporate identity or be an individual. I would like to get your perspective on how to reconcile, if at all, the disjunct between that conferral of economic benefit on the one hand with equitable considerations on the other hand around things which are not in and of themselves economic. In Gippsland, for example — an area which I represent, as does Melina — we have land-holders whose land assets are incredibly fertile. They have lived on

the land for generations and generations. They have a very distinct connection with the areas that are now potentially the subject of applications for exploration and/or extraction.

One of the key things that has emerged in the course of the evidence that we have heard throughout the hearings to date is the disjunct on the one hand between the economic benefit and the drivers at that end involving everything from the regulatory perspective through to community engagement and consultation — or what the community perceives to have been a huge lack of community consultation in that instance — through to the equitable interests that themselves have a value, despite the fact that it is very difficult to quantify how in economic terms, because we are ostensibly talking about apples and oranges. How can a regulatory framework better accommodate the tension between those two competing interests insofar as they involve parties needing to concede ground?

Prof. HEPBURN — Ownership carries with it rights, and rights that accumulate. What you are effectively describing are ownership rights where the value has accumulated. Perhaps the land has become fertile and then the fertile nature of the land has meant that the agricultural activities that are conducted have progressed to such a state. I saw this in the Hunter Valley, because I did quite a bit of research up there. This has happened progressively over a period of time, so you have to accept that the value that ownership confers is not just about the legal entitlements but also the activities and the economic benefits that can flow from that. I think that is what you are talking about on the one hand, and then you are talking about the economics from resource extraction and production — —

Ms SHING — I am not talking about economic benefit on both sides as far as dollars are concerned. I am talking about the investment that people make often in rural land-holdings across many generations whereby an incursion upon that value that is held by a family or by a community constitutes to them a significant invasion upon an accrued right.

Prof. HEPBURN — Yes, absolutely. This is quintessential to ownership, particularly where gas — conventional and unconventional gas in particular — might impact areas where often land has been held for a long time. Obviously that depends. You need look at the transfer and who owns it and so forth, but let assume that is the case. Then we have a situation where it is not just about the legal character of the rights but it is also what I would call a perceptual value.

It has accumulated over time, over different generations, and then it is almost, for want of a better word, an ideology that you have with the land, so that you connect to the land that you hold. I saw that very strongly in New South Wales. Then we have to accept that with the expansion — global energy demands, food security; we have got all these intersecting issues that are emerging — there will come a time when, despite the accumulation of those rights, there is going to have to be some reduction, because we have to accept that land increasingly is not just an ownership resource but it is also a habitat and essential to human flourishing. It is going to have to produce energy for us, for the world, and it is also going to have to produce food in areas where you have got all those intersecting concerns.

The $64 million question is: how do we set up the regulatory framework that is going to be able to properly balance those issues without one taking precedence over the other? It is a difficult question. I have argued reasonably extensively that the existing framework does not work. Codes are far better, because they are establishing the gradual shifts and behaviour, distinguishing between mandatory and aspirational behaviours, and I think that is really important. So you can gradually see a shift in terms of what might happen in the future.

It is also very important to make sure that we adopt sustainable practices, because if land is going to be used in a range of different ways and we are going to attempt to accommodate potential resource conflicts, we have to bear in mind that everyone is going to want to make sure that the land is properly cared for and utilised in a sustainable way. We need to draw on the principles of ecologically sustainable development, the precautionary principle and intergenerational equity. These are crucial principles that are imperative in this context. Then we need to determine the appropriate compensation regime. Assuming we decide to go ahead with this, and this is obviously what we are talking about here —

Ms SHING — All predicated on that, yes.

Prof. HEPBURN — What sort of compensation should landowners receive who are impacted in this way? There is an enormous amount not just the direct financial impact but through the sorts of value impact that you

are talking about that have been accumulated over generations. How do we take account of that? It is not just a financial thing. What we are talking about in terms of community engagement is critical.

Ms SHING — Disclosure as much as anything as well.

Prof. HEPBURN — Disclosure, and I think, as I said, a fair and reasonable involvement of community attitudes, perspectives and feedback. As Justice Button recently said in the Metgasco case in New South Wales, engagement does not mean persuasion. But it does mean involvement. It is incredibly insulting for people in that situation to be precluded from that process, so that is important. That is why I said social licensing. It is perhaps an overused term, but that whole concept of not just the legal framework and the legal entitlements but the social and community entitlements are crucial to mitigate and try and perhaps explain the progression and the impacts a bit more effectively.

Ms BATH — Professor, I realise that my years at university studying maths and science were wasted and that in order to go into politics I should have been studying law, so I am coming at it from a non-legal perspective. I have been thinking about a couple of things while you have been speaking. This is all hypothetical; this is the ifs we are talking about. If this was to go ahead and if we were to address the on-land farmers' rights and compensation, in terms of infrastructure there is often a lot of infrastructure that goes along with the building of mines. I am thinking in terms of community compensation as well because there is an overflow effect. It just does not affect 10 square kilometres; it can affect a greater area so I would like you to walk me through your conversation around framework, around regulation, around that sort of compensation.

Prof. HEPBURN — I am really glad that you raised that because it is very important to distinguish between private compensation, which is based legally upon the impact a project will have on the ownership entitlement, and community — we will not call it compensation; I think the task force called it Royalty for Regions — revenue that is generated for community purposes directly from the project. That is crucial.

This is a broader component of what I would call environmental justice for communities that are impacted by mining projects. We can see this with the Hazelwood project. It is possible. There is a whole jurisprudence on the fact that communities can be more impacted by adverse environmental dangers and health impacts can potentially be increased. It obviously depends on the type of project and so forth. This makes it very important to make sure that community facilities and infrastructure, which is what I think you have been mentioning, are properly supported financially. That is probably the best way forward. So I would be a strong advocate for the Royalty for Regions program, which has been quite successful in Queensland.

Some of the problems have been administrative mainly — trying to determine what the appropriate project should be — but making sure that a component of the royalties that are generated from these projects are put aside strategically for health, education and community welfare.

Ms BATH — I have a supplementary question. On speaking with farmers and landowners in Gippsland and when I have been sitting around tables having conversations, they have a great concern around their land values if this was to go ahead and also the fact that when they purchased the land, say 10 years ago, there was no disclosure on the land agreement that there was a mining licence available on that site. Could you have a conversation around those sorts of issues?

Prof. HEPBURN — Yes, absolutely. Disclosure is very important. We have real problems here because landowners can buy land without actually knowing, because it is not mandated to be on the register. This is a regulatory failure. It is strong regulatory failure because our land framework, our registration system, is based on disclosure. It is based upon being able to search the record and find out what the encumbrances are. We do not have that and yet we are shifting towards, you could call it big data or whatever. We know there are changes with foreign investment and there is going to be a new land registry for there and so forth at the commonwealth level, so of course we would want to make sure that that sort of detail is available on the land registry. It is crucial to change that. It is incredibly unfair, I might add, that that has happened.

Ms BATH — The last thing I would comment on is that those trying to sell their land at this point would then face the opposite effect.

Prof. HEPBURN — Absolutely. They have bought without knowing because it has not been available. You could say that it is their fault if they did not bother to check, but the point is that it was not mandated to be on the register.

Ms BATH — My final comment would be that potentially there may be people out there who are happy that this would be on the land and they would have ongoing rental, so there is a flipside.

Prof. HEPBURN — Yes. There is a flipside absolutely. The flipside of course is the economics that we were talking about before and what sort of entitlements do we confer on affected landowners? How do we calculate that?

Ms BATH — Thank you.

Mr LEANE — Thank you, Professor Hepburn, for the work you have put into the submission and also your suggested recommendations. With respect to recommendation 2, which deals with the implementation of explicit unconventional gas provisions dealing with community engagement, conversation and so forth, I find myself very attracted to this recommendation but at the same time I am not. This is because I am loath to take the onus off the prospector, as in the oil companies and the gas companies. In the paper we have had Lakes Oil saying they have invested $80 million in Victoria under exploration but then if you want to spend $80 million of the shareholders money or their money, whoever's money it is, you would have a business case that would actually explore the risks and I would think a huge risk is to be run out of the village by people with pitchforks and torches, figuratively speaking. Therefore we do not want to take the onus off those companies to actually do that work. We have had submission after submission about zero engagement with the villagers, figuratively speaking as well. You can comment on that if you like, but that is what I am wrestling in relation to that particular recommendation.

Prof. HEPBURN — I am glad you raised that because I think that point is a little bit too generic. Let me be explicit. I would not be seeking to do that at all. In fact I would like to accelerate the requirements for mining and petroleum proponents in terms of their engagement with landholders and with community. I mentioned — I think it is back slightly earlier, on page 3 — 'Maximising community engagement and approval is best achieved by introducing an optimal framework for information transparency', so they must reveal.

You cannot just say, 'This is what we are going to do'. It has to be, 'This is what we plan to do prior to approval. These are the expected impacts. This is the land that is going to be affected. These are the water resources we are going to use. This is the expected impacts that are going to happen at that early stage', so you can get involvement and feedback. As I said, it cannot be persuasion. Engagement does not mean making everyone agree, but it certainly means making sure that everyone has the opportunity to be properly and carefully informed. That obviously is relevant to the land register as well.

Mr LEANE — Thank you, Professor. Following up from that, in relation to full disclosure we have heard evidence that a lot of these are speculative. How do you reconcile full disclosure with the stock market and shareholders and speculation? We are hearing that you need some level of — I would not use the word 'secrecy' but you need some level of ensuring that your data, your information is not fully disclosed such that your speculative market may not want to co-invest.

Prof. HEPBURN — This is an interesting question and I have been asked this before. I sort of align it to something akin to a vendor's statement — everything that you know that is going to potentially affect the land and the environment with respect to that proposed project. To a certain extent a component of that will be predictive. You cannot necessarily know what might happen. However, if we are going to adopt a risk mitigation approach, then we have to be a bit critical in terms of that. That might impact upon, I suppose — —

I think what you are saying is: how do we differentiate between confidential, secure information that should not be in the public domain? Presumably that information relates to the value and potential of the reserves, but then that might be something that we could differentiate with in terms of how that impacts on individual owners because presumably landowners should be privy to that information. I do not see why that would be a problem. Effectively what I am saying is differentiate the public from the private domain in terms of that type of information. There might be some capacity to say that. But then we have to be very careful, because we do not want to diminish the requirements for community engagement, because this has been the cause of so much angst. If I can go to the Metgasco case, that was an exploration for a conventional drill. If the company had

simply provided clear information about the type of drill and the land areas that were going to be impacted and had engaged local groups and community action groups who were interested, then it probably would have prevented the minister getting involved and the huge reduction in their share price, so it works both ways.

Mr DALLA-RIVA — Just a quick follow-up question. Are there examples you are aware of where no matter what regulatory framework and no matter what processes are put in place, the social licence has just gone? That no matter what you do and what legal frameworks there are, no matter how much you put in place, the process is so far gone down the path that it does not matter anymore? Are there examples of that?

Prof. HEPBURN — Yes, I think that is right. We have a situation sometimes, and perhaps we alluded to this earlier, and it is the absence of that proper, effective, transparent information framework that has been a cause of this. People have perhaps been relying on inaccurate information or hearing what someone said at football training or at netball about what this is going to do without being able to access the information and accurate database themselves. That has probably been a product. Maybe it has been the product of media and so forth, and to a certain extent yes. But on the other side of it, people are concerned about impacts on their land, and rightly so. That concern is exacerbated when they feel like they do not know where to turn to work out what is going on, what the project is, what the potential impacts might be and what the regulatory safeguards are that have been introduced so that they can make sure that their entitlements are properly protected. It has been something that has been a bit of a juggernaut, and I think that that is correct.

We have a situation where because that has happened in certain areas, people are simply unable to accept it. I saw that in the Hunter Valley. It is a huge issue. If it gets to that point, then it is very difficult to introduce any regulatory framework that is going to have an effect. We have seen in New South Wales layers of regulation being introduced which is still not necessarily having the desired effect. I think that is a concern.

Mr DALLA-RIVA — Thank you.

Ms DUNN — Thank you, Professor, for your submission. I want to go to the matter of compensation, because you talked about the regime being inadequate and talked about a couple of things that perhaps could be included — loss of amenity and legal costs for advice. We have had submissions from people who are making a living off the land around the impacts on property value and scenarios around that — the fact that it can affect the equity in their property and in terms of tipping the balance in terms of their mortgage on that property. Would you see that that area should be explored in terms of a matter that should be considered under a compensation arrangement?

Prof. HEPBURN — Yes, definitely and categorically. You can hear different perspectives — I have heard some farmers say that the land value has increased in Queensland, but that is of course because of the mandated conduct and compensation agreements which guarantees compensation payments, which we do not have in the Victorian framework at the moment. It is a bit parochial to simply be focusing on the direct impact that a particular drill might have when it is quite clear that it can have cumulative impacts — the impact might not be known for a while, particularly, for example, if it is impacting on a groundwater aquifer and whether the groundwater aquifer is depleted, whether it can recharge, its connectivity with other groundwater aquifers and all sorts of issues, which are beyond the scope of my paper.

Then there is the fact that you might not know when you are entering into a mandated conduct compensation agreement what impact that access is going to have on your surface industry. You can predict — it is predictive — but you may not know, which is why I said that the agreement itself is not going to be rigid. A land court could still come in and say that the agreement really could not have contemplated the extent of the impact, so it can go outside the agreement. That jurisdiction has been clearly established in Queensland and I think it probably should be a component, or certainly mentioned, if there were reforms to the legislative framework.

Yes, to go back to your original question, it is very important to take account of value, but that is going to be predictive again. I am trying to answer it, but I am trying to say that if that is not incorporated within a mandated compensation agreement, it could nevertheless still be captured outside of that if the prediction proved to be inaccurate.

Ms DUNN — You talked about some principles around the assessment process and talked about ecologically sustainable development, intergenerational equity and the precautionary principle as being part of

those considerations. What I am interested in exploring further is, as part of those principles and making an assessment, should the impact on local industries and the net impact on local economies be part of that assessment process and, flipping to another element in the triple bottom line, should the impact on community cohesion be part of that assessment process? The second part of that is: how do we get rigour into that assessment process, because we know often that when you are buying consultancies, you are paying for the answer you want, so where is the rigour in all that?

Prof. HEPBURN — There are two components to that question. The first component is that I would argue that the principle of intergenerational equity would require you to take into account existing businesses and industries, because that principle is quite nuanced but it effectively requires you to consider activities today to take care of activities of the future. It does implicitly assume sustainable practices and that we understand that land is a habitat. Land needs to be used so that it can continue to sustain future generations, but the current generation is something that comes within the ambit of that principle, and that is the principle of ecologically sustainable development. So I do not think that we are taking proper account of all of the elements of that effectively enough. That is particularly crucial for this area, and I have put that in as one of my ultimate optimal goals.

The second element that you mentioned related to — —

Ms DUNN — Community cohesion.

Prof. HEPBURN — Community cohesion, exactly. That really comes down to — and this is a study that just came out of Harvard — an awareness that ownership of land carries with it responsibilities; that you do not live in a vacuum, you are a component of a community; and that the land, particularly in rural areas, is a component of the habitat where you live and contributes to industries that thrive on that land. That is also a component of the principles of ecologically sustainable development, and that is starting to be something that is recognised and has strong recognition in the United States, and I would argue it should also be applied here.

It is probably going to be the courts that are going to be moving that forward. I mean we have seen obviously the Federal Court recently with the Adani mine starting to say, 'Well, hang on, these sorts of principles might be relevant to the national environmental legislation.'. In terms of the domestic environmental legislation, in terms of state environmental review, we cannot have a framework where we simply have — —

That is right, the other point that you mentioned was that you have environmental approvals that do not have independent — and there is a potential for conflict. That has to be removed, because it must be. You can see obviously within the national harmonised framework that that quality of independence is crucial and getting in independent experts that are not paid by mining or petroleum proponents but have that independent connection and are capable of providing an expert and neutral opinion on those review processes. That is a crucial element of a revised framework as well. Thank you.

Ms DUNN — Thank you very much.

Mr RAMSAY — I appreciate that time is against us, so I will try to make this as quick as possible.

Prof. HEPBURN — Sorry.

Mr RAMSAY — It is not your fault. It has been a very interesting piece of evidence. In a past life I was involved in representing farmers and access rights, and I am reminded of the north–south pipeline which was under the pipes act and also the Sugarloaf connection where there was an agreement between the landholder and the government at the time in relation to access and compensation. The Minerals Council of Australia and the NFF had an engagement code in relation to access and compensation for mineral sands and others. You are indicating a preference for a more robust regulatory framework for that access and compensation process. Are you restricting it to onshore coal seam gas extraction or do you see it as covering minerals, petroleum, pipes and other things under certain other acts where there is a much more robust regulatory framework to have agreement about access, compensation and other things for landholders?

Prof. HEPBURN — Yes. That is interesting. At the moment I would be restricting it to onshore gas development, because that is what I have been focusing on. That does not mean that it may not necessarily have suitability in terms of other elements of onshore development, but certainly with gas projects and with the

expansion — the primary utility here is to engage landowners in a more effective way not prior to the issuance of the licence, because we will assume that the licence is obviously based upon the land framework, but prior to exercising access entitlements., because that is the rub, where you get a situation where a landholder is effectively saying, 'No, you can't come on my land', and the petroleum proponent is saying, 'Well, yes, I can, because I have got a resource title here and I'm allowed to access'.

That is the conflict. It can be brewing for a while, but in terms of the legal interface, that is where it happens. It is at that point where what we need to do is, before the access is exercised, we need to make sure that we mandate that that agreement has been entered into. It may still be that parties do not reach agreement. You may still have an impasse and it might be impossible, but if we mandate did as a preliminary process to access, then that is crucial. The access code would then delineate the mandatory requirements that would need to be negotiated in terms of the provisions in that agreement. I am not sure that I have totally answered your question.

Mr RAMSAY — I assume under that basis it actually encourages community engagement and consultation. We have heard evidence under the Petroleum Act there is not a requirement for the mining companies to engage with community.

Prof. HEPBURN — No, there is not.

Mr RAMSAY — But in fact if there is a regulatory code that has compensation within it, obviously there is going to be a pull for full and wider and broader consultation.

Prof. HEPBURN — Exactly, and what I foresee and what has actually been happening in Queensland under the land access code is that, you know, I have said you have got this bifurcation between mandatory and aspirational, and because it has been so effective, a lot of companies are now moving towards aspirational and they are achieving a far more effective engagement process than simply having what I would call disengagement here, where as soon as there is a notification that this is happening landholders feel like, 'Quick, I have to run off to my lawyer; this is going to cost a fortune. What am I going to do? I don't know what my rights are'. It is a far more engaged process and, by mandating, effectively what you are saying in the code is this is what everyone must do. The code is available, and a code provides that focused attention on that particular issue rather than having it enmeshed within a very large piece of legislation.

Mr RAMSAY — Thank you.

The CHAIR — Professor Hepburn, thank you very much. I have no doubt the secretariat will be wanting to talk to you again. I think what you have done is provide some very valuable insights for us. We are wildly behind time but we are very much indebted, so thank you very much.

Prof. HEPBURN — My pleasure, thanks.

Witness withdrew.