T R A N S C R I P T

STANDING COMMITTEE ON THE ENVIRONMENT AND PLANNING

Inquiry into unconventional gas in Victoria

Hamilton — 23 September 2015

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Ms Harriet Shing — Deputy Chair
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Mr Damein Bell, Chief Executive Officer, Gunditj Mirring Traditional Owners Aboriginal Corporation.

The CHAIR — I welcome Damein Bell, CEO of the Gunditj Mirring Traditional Owners Aboriginal Corporation. I ask you, Mr Bell, to make a short statement, and then we will follow it with some questions.

Mr BELL — My name is Damein Bell. I am a Gunditjmara person. I am fortunate to hold the role of chief executive officer of the Gunditj Mirring organisation, which is representative of Gunditjmara people on Gunditjmara country. I would like to welcome you here to Gunditjmara country and also acknowledge my elders, past and present.

Gunditjmara people inherently identify the boundaries of Gunditjmara country as being the Glenelg, Wannon and Hopkins rivers, with the inclusion of sea country along the ever-changing coastal boundary. Deen Maar Island off the coast from Yambuk is critically important to Gunditjmara people. Traditional beliefs, practices, obligations, languages, tools and customs were created by our spiritual ancestors and inherited through generations of Gunditjmara clans and families to our community today and will be inherited again by our community into the future.

Our interpretation of the term 'traditional ownership' reflects the ownership of our inherent and asserted rights and obligations to care for our country. Throughout time traditional ownership was inherited and then recognised by the clans of the Gunditjmara nation and by other nations across the continent. We understand and recognise how our inherent and asserted rights and obligations to care for our country cannot be fully inclusive within the legal instruments of the Crown, which includes the constitution of the commonwealth of Australia, the constitution of Victoria, the Aboriginal and Torres Strait Islander Heritage Protection Act, the Aboriginal Land (Lake Condah and Framlingham Forest) Act, the Native Title Act, the Aboriginal Heritage Act in Victoria, the Traditional Owner Settlement Act in Victoria and the Victorian Equal Opportunity Act.

The governance model determined by Gunditjmara people in 2006 and implemented through the establishment of the Gunditj Mirring Traditional Owners Aboriginal Corporation provides a monthly full-group meeting. The monthly full-group meeting is open to all Gunditjmara native title holders and Gunditj Mirring corporate members to gather together to consider and discuss business and to make decisions. The monthly full-group meeting is constituted with a monthly schedule to respond to statutory processes under the Native Title Act and the Aboriginal Heritage Act where both acts require a 28-day response from native title groups and registered Aboriginal parties respectively. The integrity of the monthly full-group meeting is based on ensuring that the principles of free, prior and informed consent of Gunditjmara people are respected and upheld. The role of our elders, past and present, is vital to our cultural governance process.

Under the Native Title Act 1993 and through the consent determinations by the Federal Court of Australia in 2007 and 2011 the state of Victoria and the commonwealth of Australia recognised a set of native title rights and interests in relation to Gunditjmara people. They include the right of access to lands and waters, the right to camp, the right to use and enjoy lands and waters, the right to take resources of the lands and waters, the right to protect places and areas of importance on the lands and waters, and the right to take water from the waterways, which is limited to domestic and ordinary use. The native title rights and interests are recognised over 143 000 hectares of vacant Crown land.

Under the Aboriginal Heritage Act the Victorian Aboriginal Heritage Council appointed Gunditj Mirring as a registered Aboriginal party in the south-west of Victoria in 2007. Further council decisions in 2009 and 2013 broadened the Gunditj Mirring RAP boundary. The council is still considering the Gunditj Mirring RAP applications for the areas between the Shaw and Hopkins rivers and the general area from Edenhope to Harrow.

Over the past 30 years freehold title properties have been acquired by the state of Victoria, the commonwealth of Australia and the Indigenous Land Corporation on behalf of the Kerrup Jmara and Gunditjmara peoples. At the present time around 2000 hectares of these properties, which include Lake Condah and the Lake Condah Aboriginal Mission site, have been vested to Gunditj Mirring. All of the properties are located along the Mount Eccles lava flow, which is also known as the Budj Bim cultural landscape. Under the Aboriginal Heritage Act the Mount Eccles lava flow and the Mount Napier lava flow are expressly protected.

Regarding onshore conventional gas in Victoria, firstly, our community is extremely disappointed that the interim report does not contain any reference to traditional owner groups in Victoria, native title or cultural heritage. Secondly, Gunditjmara people, through Gunditj Mirring, have responded through the Native Title Act 1993 future act notification process that triggers our native title right to negotiate. The right to negotiate brought our community to the table with companies who have been granted exploration licences by the state of Victoria

for various future acts that sought to extract minerals and other earth resources. Up to 2013 the Gunditjmara had successfully negotiated several Indigenous land use agreements with several companies, which allowed them to progress their exploration activities as prescribed in their respective exploration licences.

In late 2013 we received payment from one of these companies to activate the progress of their exploration licence. In early 2014 Gunditj Mirring became aware that one of the companies we had signed an ILUA with was including the practice of fracturing to extract unconventional gas if they were granted a production licence. Through several full-group meetings in 2014 our members discussed the previous negotiations with the company and whether the process of fracturing had been raised as a potential production method. At the same time Gunditj Mirring and our legal representatives, Native Title Services Victoria, reviewed our documents and the documents provided by the company for any reference to the fracturing method. We had found that while the earlier documents, the Indigenous land use agreement documents, that we had signed did not contain any mention of the fracturing method, we did find the term fracturing mentioned once in the actual exploration licence. From our own inquiries we had determined that we had not been informed of the potential fracturing method, and we had in fact signed the exploration licence. The full group then determined to raise the issue of fracturing with the company through the dispute clause in the ILUA. We requested that the company attend the full-group meeting to present the information again with an emphasis on their potential use of the fracturing method. We also requested that the state of Victoria attend the full-group meeting to present on the licensing and monitoring of the process of minerals extraction, with an emphasis on the fracturing method.

I will also mention that we also gained and distributed information from the Lock the Gate movement and the Friends of the Earth movement in Melbourne to members. Again, we have that responsibility of ensuring free, prior and informed consent. We went through that process to make sure that we got all sides of the story. Both the company and the state of Victoria attended our full-group meeting in July at the Lake Condah Aboriginal Mission site and made their respective presentations separately. In respecting the good faith requirements of our negotiations under the Native Title Act, we cannot provide details of the discussions that had taken place at the full-group meeting in July; however, our members found that while the presentation and discussion with the company was relatively open and forthcoming with details, in comparison the presentation by the state of Victoria was much more guarded, with some fleeting responses when asked more detailed questions by the Gunditjmara people in attendance of the full group.

I will talk about the Budj Bim cultural landscape. Through successive Victorian governments over the past decade, the state of Victoria has expressed its strong support for the Budj Bim cultural landscape to be nominated and listed for world heritage listing under UNESCO. In 2014 Premier Napthine visited Lake Condah to announce the state of Victoria's formal nomination of the Budj Bim cultural landscape to the commonwealth's world heritage tentative list, and in 2015 Premier Andrews visited Lake Condah to announce that the Budj Bim cultural landscape was now the state of Victoria's no. 1 priority for world heritage listing. We ask that the state of Victoria provide the appropriate resources to study the potential impacts of the fracturing method and the construction of gas fields on the stated universal heritage values of the Budj Bim landscape that the state of Victoria has determined.

In further consideration Gunditjmara traditional owners and native title holders intend to await the delivery of the final report of this inquiry as part of our consideration for any future decision regarding the fracturing method in gas fields on our traditional country. We would ask the committee to refer to our *Ngootyoong Gunditj Ngootyoong Mara South West Management Plan* that we recently completed. It was recently launched by Mr Anthony Carbines, the parliamentary secretary. The south-west plan is a landscape plan that includes a strategic management tool for the next 15 years across 145 parks and reserves. We developed that plan in conjunction with DELWP and its previous entities and Parks Victoria.

Finally, on behalf of the Gunditjmara community, we would like to acknowledge to the local non-Aboriginal community in the far south-west for their activism in raising the issue of the fracturing method and unconventional gas fields and the potential effects that the practices may have on Gunditjmara country.

The CHAIR — Damein, thank you your important submission. I begin by placing on record my thanks to you and the Indigenous owners here for the stewardship of the country for so long and for the form that it is in these days, and the very strong heritage values that are part of it. In doing that, I also note that our report was an interim report and one of the key points there is that we wanted to visit this part of the state. We will have more to say no doubt in our final report. To cut to the chase, my simple question is: what changes would you wish to

see in the regulatory oversight that would ensure that Indigenous owners are recognised adequately and that the various regulatory processes take account of your views through the various steps?

Mr BELL — I would say that the Native Title Act, which is a commonwealth act, provides us with a first port of call. I would say that the processes under the Victorian government need to take into account and provide the opportunity for the non-Aboriginal community to have a comment. The way it works now is that the actual exploration licence is provided and basically there are two parties there — it is the state of Victoria on behalf of non-Aboriginal Victorians and native title holders, which in our case are the Gunditjmara native title holders. The company that is after the expiration licence has to sit down with us first and negotiate an Indigenous land use agreement. We have to participate in that process in good faith, in strict good faith, because if the company or the state or other proponents say that we are not acting in good faith, we get dragged before the National Native Title Tribunal — and that is an arbitrary process — as opposed to non-Aboriginal Victorians and communities there or landholders more specifically. If they are determined to not be acting in good faith they have the opportunity — —

First off, it seems they will be dragged to VCAT and ordered with a compulsory access order. While we have the opportunity under native title on Crown land when native title is recognised, through my experience I think it is unfair in making our decision that we do not get to hear the voice of the broader community at the same time. I only got here before and I would like to acknowledge Darrell's verbal submission, which contains a wealth of information.

Ms SHING — Thanks, Damein, for your evidence and your very warm welcome to country today on behalf of the Gunditjmara. I would like to get your take in relation to the views of Indigenous communities in other jurisdictions where unconventional gas exploration and extraction has taken place, and to be guided by those views around any risks, concerns or consequences of fracking or unconventional gas extraction occurring, for example, in New South Wales and Queensland or Western Australia.

Mr BELL — The resources that we have available to gain that information are online. It is mainly through the films that have been produced and placed online by traditional owners in Queensland and northern New South Wales. When we have our negotiations with the companies, we ask them about their relationships with other Indigenous communities around Australia and also around the world. We always get presented with 'Oh well, we have the relationships there', and all that kind of stuff, but when you drill down to it, it is not a relationship based on inherent rights. It is based on them addressing the disadvantage issues of those communities there. I do not know of any other traditional owner groups who have their native title recognised who have entered into an agreement with companies for unconventional gas extraction.

Ms SHING — Perhaps to that extent you might like to take that on notice and to provide any additional material to the committee in relation to the overlay of native title on the one hand with the extraction of unconventional gas in other jurisdictions.

Mr BELL — With that, can I ask that the committee ask the native title unit within the Department of Justice and Regulation to fulfil that brief. We are welcome to review what they have drafted and pass it on.

Ms SHING — I am just saying you might also want to provide some information directly, but we can certainly do that too.

Mr BELL — You have the resources.

The CHAIR — That is maybe not true, but we will see.

Mr BELL — No, it is, Chairman.

Ms BATH — Damein, I welcome that you are here because I am most interested to hear from Indigenous representation, so I appreciate you coming. By the sounds of it you have been conducting your own inquiry in terms of listening to voices of environmental groups, communities, mining — —

Mr BELL — Industry and government.

Ms BATH — Sure. Would you have a position at this point on your thoughts and those of the people you are representing on unconventional gas?

Mr BELL — We have an Indigenous land use agreement — that is an agreement between us and the company — that has been signed off by the state and the commonwealth. We were made aware of the issues of unconventional gas extraction and the fracturing method. We chose to revisit that with the company. We had to do that through a dispute resolution clause, because that forced them back to our table. With the information that has been provided by the company, by the state of Victoria, by community activists, by Friends of the Earth and the Lock the Gate alliance, we are going to take that into account as well as the final committee report from here because we need to be fully informed of the process, let alone any potential impacts and what industry and government propose to do when things go wrong.

Ms BATH — With regard to some of the impacts, and if we could just look at the negative potential impacts in terms of flora and fauna, so our trees and animals, what do you see that could happen there?

Mr BELL — We will await the outcomes of this committee's report because we have to make that informed decision. It is one thing for me to sit here and to say it but I am here representing my people in the role of CEO. We have a full-group process. We have our own committee. Thank you for your question.

Mr LEANE — I was going to ask a very similar question to Melina. Just a follow-up on that: the outcome of the dispute resolution around the particular clause is that the company and yourselves have agreed not to proceed with any fracturing at this stage.

Mr BELL — We never agreed to that. We are taking advantage of the moratorium that is there — that gives us some breathing space — and the outcomes of this committee's report. The company came and presented to us their information. As I said, they were a lot more open this time around, but in terms of where we are we will basically have that dispute resolution still open and we will be looking to close it one way or the other once everyone has had a good say, particularly the broader community.

Mr RAMSAY — Can I ask which company you are dealing with?

Mr BELL — No. I would rather not say, just with regard to the confidentiality of the negotiations. But if I could, you may want to look up the companies registered with PEPs across Gunditjmara country.

Ms DUNN — Thanks for that direction, Damein, and thank you for your welcome to traditional land today. I am interested in the same issue around the conversation and negotiations you are having with this company. What I am interested in exploring is whether in your view there has been appropriate consultation by government and by mining and gas companies in relation to your traditional lands and the impacts. Do you think it has been a meaningful consultation up until now? Do you think that is lacking? Any room for improvement?

Mr BELL — The first round of negotiations that ended up with the ILUA being signed off and agreed to was good. They came to several full-group meetings, discussed a variety of issues, but fracturing was not discussed. It was not raised. In our full group we thought, 'How did we miss that?'. We went through, like I said, all our documentations — and we are talking about hundreds of pages of documents that were copied and sent out to our 380 members repeatedly — and there was still no word of fracturing in it. So if you took it on face value, that initial round of consultations — and I should say negotiations because the only reason they had to consult with us or negotiate with us was the Native Title Act. I do not know how they would have consulted with the Aboriginal community if they had not been forced to.

The second round, when we raised the dispute resolution, again they had much the same friendly, good-faith negotiations. We raised why there had been no mention of fracturing in the first period of negotiations, and they said, 'It really wasn't an issue back then' — a public issue, I should say.

Ms DUNN — Yes, exactly. In your view, is it probably better practice for gas and mining companies to put up-front the techniques they intend to use in relation to how they might undertake exploration activities?

Mr BELL — They should be doing it now, yes. The omission of fracturing is a process — I am really surprised that they never raised it in the first place. I am really angry, because we have had to come back to this issue again. Alongside that, the same rigour of community consultations that is given to the Gunditjmara community through the Native Title Act where companies have to respond to that in great length, that is the

same sort of consultation that should be available to the broader community as well. We should not be hived off from one another.

Mr YOUNG — Thank you, Damein, for your submission. Forgive my ignorance in this, but could you just give me some examples of other industries or activities where an Indigenous land use agreement would be implemented?

Mr BELL — Okay. We have done ILUAs with oil companies. I will give you an example of where an ILUA was not reached with the wind farms down this way. We had a long negotiation period with a company there, Pacific Hydro, because they were proposing they put two turbines on public lands. After a fairly lengthy discussion, the full group decided not to provide its consent to that because we felt that the area — known as Point Danger, down on the coast — is an area that we have already got recognised through the Alcoa out-of-court settlement with the state of Victoria. Alongside all of that we thought that private industry should be operating on private lands, and there is enough private land around for the wind farms. That is how it has turned out now. Surely they could move those two turbines to elsewhere. But also, under the Native Title Act, if our decision or our process is deemed not in good faith, the state government has the opportunity to override our decision, and that was done.

Mr YOUNG — Can you see any obvious issues or reasons why this particular industry would fail to have a successful negotiation for an Indigenous land use agreement?

Mr BELL — To prove that they are not going to destroy our land, but we have no guarantees. And new technology — I mean, concrete will always spoil. You do not know what concrete does 2 kilometres under the ground. You do not know this, you do not know that. Plus the alternative, renewable energy, is out there and it is growing.

The CHAIR — I thank you very much, Damein. Our secretariat may be in contact with you for further discussion over the period ahead. Thank you very much.

Mr BELL — Thank you.

Witness withdrew.