# 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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Ms Ariane Wilkinson (affirmed), Lawyer, Environmental Justice Victoria.

**The CHAIR** — Thank you, Ariane. We have your submission, and you might want to present regarding that and also the document that you have just distributed.

**Ms WILKINSON** — Certainly. Thank you very much to the committee for having us today. It is certainly a pleasure to be able to come and speak about these issues. Just by way of introduction, because you have read our submission you would have seen who we are and what kind of lawyer I am. I am a lawyer who acts, not for profit, in the public interest. Clients who approach me have to have an issue that they are concerned about that does not go to their private profit. It has to go to a legal issue that is for protecting the environment. You might be familiar to us as environment defenders offices.

Working on these particular issues, I can say for the benefit of the committee that I have been a Queensland practitioner as well, so I have certainly seen coal seam gas and unconventional gas expansion in Queensland and had the opportunity to do a small amount of comparisons since practising here for the last two years.

In terms of the issues I would like to raise with you today, I would like to speak across three themes with respect to our submission. Acting as lawyers, I have the benefit of working with other lawyers and mostly I litigate in court and speak to judges, so we get to cut through the spin and the arguments. It is really just about what kind of evidence can stand up in court. The kind of laws that we like to be able to work with are laws that have fairness, transparency and accountability. Those are the three things I would like to speak to because I think those are three things that we can probably all agree with: that we want a legislative regime with respect to unconventional gas in Victoria that is fair, that is transparent and that is accountable.

On the issue of fairness, and we have not spoken deeply about this in our submission because it goes to private interests, but the issue of fairness is about negotiating land access and leverage. When I first started practice as a private practitioner I negotiated with mining lawyers; I negotiated land access agreements in Queensland. My view is that everyone should have the right to a fair argument when you are talking about accessing your land. That was under a different legislative regime, but there is a lot of very clever, very good mining lawyers who are negotiating with these farmers — all expert land access negotiators. We need a fair system so there is a fair discussion and negotiation, and the laws can help with that.

Transparency — certainly we need better data. We need the right data to make the right decisions and to have good environmental decision-making. As you will see in my submission, there are certain areas where we say there is not enough evidence, there is not enough science. In the absence of science which supports a finding that people will be safe, we therefore think you need to have a legislative regime that properly protects them. That is that issue.

The final one is accountability. We all know that burning coal causes climate change. This is a problem. We need to transition. The document that I have handed around to you I thought may assist the committee, and you will forgive that I am not across what other documents you have seen with respect to fugitive emissions. I found this document useful because I have been trying to figure out where the science stands. I am not a scientist but I have had science training and I think that environmental law is important because it tries to bring in the best scientific evidence. That document is a 2014 piece. It has a handy graph. It talks to you about what the different fugitive emissions findings have been, and it points out quite clearly that there is disagreement and that certain studies which perhaps were not industry funded have found high levels. It certainly goes to the methodology. I am not in position to tell you exactly the position that Environmental Justice Australia has taken on that; we never do so without expert advice. But I just think that is a useful document if you have not had the benefit — I do not know if you have had a scientist talk to you about the fugitive emissions issue — to look at the different studies and where the committee might fall in terms of the risk of fugitive emissions with respect to climate change.

Environmental Justice Australia is very concerned about climate change and the protection of the natural environment. We think that developers need to be accountable for the environmental harms that are a natural consequence of their development. If you are uncertain about the environmental harm of a fresh gas field because you cannot measure the fugitive emissions or you do not know, it would seem clear to me that that kind of information needs to be in front of a decision-maker before they can weigh the risks and benefits of whatever the benefits are versus the risks on the real data and the real information. That is my point with respect to accountability. Thank you very much.

**The CHAIR** — My question is where to start on all of this, but thank you for your submission, which I have read at some length. You point to some of the issues we dealt with earlier in the day around the ownership of resources and so forth, but I think perhaps more important thing for my question now is about the transparency and the evidence that is available when decision-makers make a decision.

We always operate, I think, in an environment of imperfect information. We never have the complete set of information. The question is: where do you draw the line? Is it at the point where you can take a step and get some more, so you say some reasonable period of time or reasonable step to add to the stock of information that you have in front of you? I would perhaps contend that a perfect world is not the one we live in and we generally do not have a perfect set of information. All decisions will be made in an environment of imperfect information.

As a sort of parallel point with that, a precautionary principle approach — and there is a lot of philosophical discussion around this — often does not weigh the negatives of not making a decision. It privileges a position where there is some risk, so a need for caution, so we do not act, but there is always a balancing side to a decision-making process.

**Ms WILKINSON** — Is that a question?

**The CHAIR** — Yes, it is a question.

**Ms WILKINSON** — Sure. I certainly agree with your point about decision-makers having to act on imperfect information. I am not 100 per cent sure that I would agree with the way you have described the precautionary principle, but as you say it is a philosophical question, so we probably do not have time for the debate.

In terms of imperfect information, sure, that is the point of having third-party rights. That is the point of having a really good environmental impact assessment process that actually works and is actually Australian best practice, if that is what you want. I can certainly say that, in my view, it is nowhere near as good as the environmental impact assessment process in Queensland, and I have had a lot to do with that both acting for proponents — gas and mining companies earlier in my career — and then moving across to act for community groups. That is certainly my observation. I am not a comparative law expert, and you might be able to find a senior silk who can tell you whether he agrees with me, but that is my observation.

Yes, absolutely, you have got imperfect data, but you do not even have the checks and balances. There are no third-party rights to appeal to VCAT.

**The CHAIR** — So a better process is the first step.

**Ms WILKINSON** — Yes, that is right. In the absence of information you need at least the basic information, so a non-industry funded study. I guess you have got CSIRO but there are certainly some questions about the methodology there, and we do not have access to a huge amount of resources so you can only fund the studies that you have got access to, but checks and balances of third-party appeal rights. In the event that there is a particular development that does get approved, and there has been an error made in the environmental impact assessment process and the particular community was not properly consulted and does not want it, that particular community, should they wish to do so, can go to VCAT. I can assure you that there is no floodgates argument here. It takes a lot of energy and effort to get anyone to even consider going that far. It is a lot of energy and effort for the community. So having that third-party appeal right is, in our view, a very reasonable check and balance.

With respect to the precautionary principle, I just do not agree that it is accurate to say that if you invoke the precautionary principle you will always weigh on the side of not going ahead with development. Courts have been applying the precautionary principle in judicial decision-making for many years, and I could — —

**The CHAIR** — Perhaps it might be fairer to say that in the court of public opinion it is used often as a default to not proceed.

**Ms WILKINSON** — Certainly. I think our submission kind of provides a little bit of a middle ground there. If you turn to page 6, if I may:

> The current framework for the regulation of the unconventional gas industry in Australia does not provide appropriate safeguards (for example … to limit impacts …

Forgive me. I am on page 8, that paragraph at the top, starting with 'EJA'. It is our view that if the Victorian government cannot prove beyond reasonable doubt that unconventional gas activities do not pose public health risks, they must ensure that strong protection is afforded to the health and safety of the community through robust risk management strategies. So that is your answer. In the absence of — —

**The CHAIR** — No; that is what I was wanting you to get to. The actual standard is 'reasonable doubt' as opposed to a — —

**Ms WILKINSON** — Balance of probabilities?

**The CHAIR** — Yes, or some absolute standard or some point where the precautionary principle is used as a trump.

**Ms WILKINSON** — Certainly. I think a good point to note there is that we are talking about public health risks, so I guess the standard there is what standard do we want with respect to public health risks?. Do we want 'beyond reasonable doubt', do we want 'on the balance of probabilities'? There has been a lot of talk in the media, if you follow Queensland mining stuff, about a yakka skink that stopped the biggest open-cut coal mine in the Southern Hemisphere recently in the Federal Court. We are not talking about a yakka skink. We are talking about public health risks, so we have used that high standard, 'beyond reasonable doubt', as opposed to 'on the balance of probabilities', which is the lower standard.

If you cannot prove beyond reasonable doubt that it does not pose public health risks, we want that high standard for human health. That is the concept of environmental justice. Who are the people who are having to live next door to these industries, and what standard do they want for their public health? I read that paragraph as the requirement: either prove beyond reasonable doubt or ensure that strong protection is afforded through robust risk management strategies. That is our submission. That is where we believe the choice should lie. Thank you.

**Mr LEANE** — I think you might have fleshed out the response to the question I was going to ask you, anyway, about the work you did in other jurisdictions, particularly Queensland.

**Ms WILKINSON** — I cannot take credit for that. We are a different law firm, but they are colleagues whom I know.

**Mr LEANE** — Okay.

**Ms WILKINSON** — And I did actually, when I was a junior lawyer, work for that law firm, but I certainly cannot take — and the yakka skink, that is the mob from New South Wales, so we cannot claim it.

**Mr LEANE** — Okay. I was not going towards the skink.

**Ms WILKINSON** — Sure.

**Mr LEANE** — I suppose, to assist us, it seems to be your submission that the regulatory or environment impact statement system in Queensland is superior to that in this jurisdiction.

**Ms WILKINSON** — That is my personal submission based on my experience as a practitioner in both jurisdictions. You are right; it is our submission in our comparative analysis from our 2012 study. What was the other question?

**Mr LEANE** — I know we are pressed for time, but can you outline the areas where you see it is superior?

**Ms WILKINSON** — I will have to be more broadbrush. There would be some comparative studies, and I have not seen any thorough ones or recent ones, but the top lines are — the first thing is that my understanding of why it is a more developed system is because they have much bigger and more developed unconventional gas activities in Queensland at this time. From my experience the requirement to undertake certain studies and the detail required in certain environmental impact assessments is generally higher. In certain schemes in

Queensland that detail is a requirement under the legislation. It does not sit as a discretion with the decision-maker; you have to do it no matter what. The proponent has to pay to get the data, not the government.

Certainly there has been a move away from that because they have a different legislative scheme set up where there can be some reductions in what is required, but overall the requirement that the proponent provide detailed data is a must. There is no discretion for the decision-maker to let them get away with not really having to look into it as much. Certainly those studies are an expense, but it should be an expense of business.

**Mr LEANE** — Thanks.

**Ms DUNN** — Thank you, Ariane, for your presentation today. You have touched on third-party appeal rights as a mechanism in terms of, I guess, community fairness in all of that. It seems that often communities are on the back foot because they do not have the sort of money to access expertise and they are trying to run their businesses and do what they do on a daily basis as well. How can we strengthen their rights and their ability to appeal, and how do we put more rigour into the information that is even presented as part of an assessment as well? It is kind of a two-pronged question, Ariane.

**Ms WILKINSON** — I think your first question goes to the access to justice issue and the issue I touched on when I started about, 'What's a fair arm wrestle?'. It is difficult because we do not work in the land access space. When I get calls from farmers — and I do — very distressed farmers, saying, 'We've got someone wanting to access our land. Can you help us?'. Unfortunately that is not the kind of law firm we are, because that is a private interest issue. There are not very many places for them to turn in Victoria. It is undeveloped in the private sector. It is undeveloped in the not-for-profit sector.

What I observed in Queensland was the state government in about 2011, I think, providing funding to a boutique law firm to run a hotline and then providing funding to legal aid for one particular lawyer to help farmers in dealing with negotiating land access, and then they had a land access code. There is something you can download. It says, 'These are your rights when you negotiate with a mining company'. Certainly access to justice is something that community legal centre lawyers are passionate about. With great respect, I do not think that the money put into the private firm was necessarily a good use of funds — for that hotline. I would always recommend perhaps legal aid or an appropriate community legal centre, perhaps regionally based, that can attract an appropriately skilled practitioner. It is generally a bit cheaper, and you can generally get quite skilled practitioners, even in not-for-profit law firms.

With respect to information, certainly we have outlined a range of problems in our report. Just for a start it is the information age so there should be basic notification rights, basic easily accessed online information and also just real access to information. There might be a right to access, but there might be a culture of saying 'No' or failing to provide access or, particularly, saying, 'You need to do an FOI'. Obviously even with the best laws in the world, if there are cultural problems around them, they are not going to make much difference. I think if you can fix the legislative regime, and if you can have community education so the community can actually push back and say, 'Well, actually, you are required to give us access to this information. It is right here — it is in the act'.

**Ms DUNN** — They understand, yes.

**Ms WILKINSON** — Then obviously the administrators of the act and also the proponents know that that is what the regulators expect of them. I mean, perhaps that is a little too much common sense around that stuff, but in my observation if everyone is playing their part and they are playing by the rules, it is certainly a much fairer system.

**Ms BATH** — I am going to ask a couple of questions in relation to the second submission that you gave us just now, titled 'The fugitive elephant in the room'.

**Ms WILKINSON** — Sure, thank you.

**Ms BATH** — In a minute would you mind, just for Hansard, maybe reading the document reference on the bottom? I would like you to walk me through a couple of things: one, it says 'top down' and 'bottom up', and they talk about the different ways that they collect emissions. Could you explain a little bit more about the

scientific methodology of that — the top down/bottom up way of measuring? And on the graph it has not got a vertical axis. Sorry to be annoying, but I just want to check what the numbers refer to.

**The CHAIR** — Leakage rate estimate.

**Ms BATH** — Yes, I am wondering what the measure is. So just a little bit about the graph that you have submitted to us. The reason I am asking that is because yesterday and today we have had conversations around health issues with respect to potential gas emissions from potential mines — methane being one of them — so just explain that graph to me or us.

**Ms WILKINSON** — Yes, certainly, and just to hitch it on to our submission, our estimate with respect to fugitive emissions is on page 5 of our submission, footnote 22, where we refer to the June 2014 CSIRO study and mention a few issues with respect to the methodology used in that study. As you will see, it is our submission that we need a top-down methodology. The meaning of that, and the items that I have had my helpful volunteers highlight in pink for you all, is a methodology that examines the entire extraction process, so that includes exploration, production, processing, transport and distribution, and then the key point being that it measures the atmospheric levels.

The counterpoint to that will be people who say that you cannot measure atmospheric levels or a range of other arguments, but it is our submission that these items in pink are the best practice, because they are actually measuring what is in the atmosphere as well. For the record, for Hansard, I am not a scientist. As a lawyer, I can only rely on what is put forward and what is published.

Bottom up and top down are the general two approaches to measuring fugitive emissions. The bottom-up approach, which you will see in orange, is measuring emissions from a particular well, but they do not necessarily accurately reflect the emissions of the whole production process. That is quite specific to what that particular well is emitting. So the top–down tends to be higher because it captures the wider source. That is pretty much it. I am unable — not being a scientist and not being specialised in this area — to sit here and explain to you which of those methodologies you should prefer. From what we know and as per our submission, we understand that top down is the preferred methodology to give you a more accurate description about the impact of fugitive emissions from a proposed well, and obviously it is always estimates.

I think the black ones are essentially bottom–up ones, and someone has pointed out that those are industry-funded ones, and they are the lowest. Although, I mean to be fair, the CSIRO one is right down there as well, and obviously I understand they do have industry sponsors, but it is not accurately described as industry funded. It is a matter for the committee to decide what weight you put on that particular study. Is that helpful?

**Ms BATH** — I think that is fine. I think I probably need to go and do a bit more research in this area, because it is late in the day and my brain is getting fuzzy.

**Ms WILKINSON** — Yes, we certainly need a better infographic. I am sorry, I did not answer the second part of your question, which was what is the other axis.

**Ms BATH** — It is emissions. I just wondering what it was — per parts or — —

**Ms WILKINSON** — It is actually of the production, so if you go to — —

**Ms BATH** — Take it on notice.

**Ms WILKINSON** — Sure, I am happy to — total production, the per cent of total production that ends up in the air. But if I may I will take it on notice to be 100 per cent certain, and I will call a scientist.

**Ms BATH** — Thank you.

**Mr DALLA-RIVA** — Thanks, Ariane. Just a quick question in relation to Environmental Justice Australia. Do you work there full time?

**Ms WILKINSON** — Well, we have been defunded by the federal government, so I have had to pull back to part-time in the short term, but yes.

**Mr DALLA-RIVA** — Apart from the federal government funding, is there any other funding that is — —

**Ms WILKINSON** — Certainly, we receive money from Victoria Legal Aid, which has been an ongoing yearly grant as part of our community legal centre.

**Mr DALLA-RIVA** — Any other donations from any organisations?

**Ms WILKINSON** — Absolutely. We are a donor-funded, not-for-profit law firm. We have been donor funded for a very long time, and are more so now given the lack of federal funding.

**Mr DALLA-RIVA** — Have you been funded by the Friends of the Earth?

**Ms WILKINSON** — Friends of the Earth would probably be the least likely to be able to fund anyone, as far as I am aware.

**Mr DALLA-RIVA** — I am just asking.

**Ms WILKINSON** — Certainly. I do not have access to our funding databases, but to the best of my knowledge we do not receive any donations, grants or funding from the Friends of the Earth.

**Mr DALLA-RIVA** — Not from the Australian Greens or anything?

**Ms DUNN** — We do not have enough money either.

**Mr DALLA-RIVA** — What if I said otherwise?

**Ms WILKINSON** — May I answer that question? I am very happy for that question, because the hilarious thing is: no, absolutely not. I can actually say that I was a treasurer of the Environment Defenders Office, which is a similar organisation to us, and we are accused of being a front for the Greens. Not only are we not a front for the Greens, we have never received any money from the Australian Greens.

**Mr LEANE** — Shame.

**Ms WILKINSON** — Added to that it is actually on record that the previous Attorney-General Mark Dreyfus has at least pointed out that we are not. As a not-for-profit lawyer who gave up a really decent salary in private practice I thank you for the question, but I just find it a little hilarious.

**Mr DALLA-RIVA** — You are elevated in my eyes. I take your evidence a lot more. I say that not tongue-in-cheek, but it is important to understand for our perspective where people — —

**Ms WILKINSON** — For the independence.

**Mr DALLA-RIVA** — For the independence, and you have just demonstrated to me that there is an independence.

**Ms WILKINSON** — I thank you for the question, and I apologise for being defensive, but we are generally defunded because people think we are a mouthpiece for political parties, and that is certainly not our role. As someone who chooses to do this work — —

**Mr DALLA-RIVA** — Alright, I will stop the cross examination of a lawyer!

**Ms WILKINSON** — You are welcome to.

**Mr DALLA-RIVA** — It used to happen to me on the other side. Can I then ask, very briefly, we had a presentation, a submission, from Professor Samantha Hepburn — quite a detailed submission in relation to the regulatory oversight if there were consideration for it. Are you aware of her work?

**Ms WILKINSON** — I am certainly aware of her work. I have not had the benefit of reading her submission, because it was not on the website this morning.

**Mr DALLA-RIVA** — It will be now.

**Ms WILKINSON** — I have read Professor Hepburn's articles in *The Conversation*, but I have not had the benefit of reading her submission.

**Mr DALLA-RIVA** — It will be there soon. It was quite substantial. We received it today.

**Ms WILKINSON** — Certainly.

**Mr DALLA-RIVA** — It talks about the issues that you say in terms of the regulatory regime are not robust enough, so there is a similar theme in terms of processes.

**Ms WILKINSON** — I understand she agrees with some of our positions on the legislative regime. I have seen her present and heard some of her arguments as an academic with respect to the concerns about the lack of even a land access policy and the kinds of checks and balances that at least make her fair argument. Yes, I am aware.

**Mr DALLA-RIVA** — On the basis of what you understand where the professor is at and where your submission has been, you are not actually ruling out unconventional gas. My understanding is that you are saying that there are not sufficient safeguards and that until there is a known risk and it is beyond reasonable doubt it could be considered in the context of perhaps an alternative.

**Ms WILKINSON** — Yes. I think it is a fair summary of our position and submission to say that we have not said there should be no unconventional gas in Victoria. But as you are aware, what we have said is that our position is that the moratorium should not be lifted until any of the legislative regime is fixed. That is a different thing.

**Mr DALLA-RIVA** — Thank you.

**Mr RAMSAY** — I have a question that is very similar to that.

**Ms WILKINSON** — The Greens one?

**Mr RAMSAY** — No, but I know you do some work for the Australian Conservation Foundation, but that is quite another thing.

**Ms WILKINSON** — Yes; they are my clients.

**Mr RAMSAY** — My question relates more to your past life with Clayton. You did some work in native title.

**Ms WILKINSON** — Correct.

**Mr RAMSAY** — Obviously you did a lot in planning and environment.

**Ms WILKINSON** — Yes.

**Mr RAMSAY** — In the paper we had from Professor Samantha Hepburn it talked a lot about access, compensation and the rights of the landholder. The question I want to ask you is: do you have any idea of what sort of legislative changes you might propose to spring from the rights of landholders in relation to mining companies wanting access? It is all in the submission, is it?

**The CHAIR** — Lots is, yes.

**Mr RAMSAY** — Can you just briefly, in maybe two lines, so we can get it on the record — —

**Ms WILKINSON** — To strengthen the rights of landholders?

**Mr RAMSAY** — Given the time of day, and I see the Chair is getting nervous — —

**Ms WILKINSON** — I know the time of day. If it is helpful to the committee, I could answer that question by handing up a short article written by another lawyer, which at least points out what potentially happens when everything goes wrong in Queensland. I am happy for the committee to let me know whether you want this

article. It is written by a lawyer and talks about how in Queensland when they have ended up in court on a question about compensation for exploration, the judge or the member found that the compensation was $380. I understand Professor Hepburn. I am not sure if she did a comparative study, and we have been saying that the regime down here is not quite as good as up north, so in fact — —

**Mr RAMSAY** — The Queensland model is not perfect, either. That is why — —

**Ms WILKINSON** — No, certainly not.

**Mr RAMSAY** — If your submission is indicating a preference for a Queensland model, maybe I was looking for something more than, but I am happy if you want to table the document.

**Ms WILKINSON** — If it would assist. It is simply a footnote, but I thought it a good example.

**Mr RAMSAY** — Thank you.

**Ms WILKINSON** — In answer to your question of what is better than the Queensland model: access to justice for landholders and access to affordable lawyers. Do the legal aid model that they did with the one lawyer — —

**The CHAIR** — The process.

**Ms WILKINSON** — Ask him — I would have to take his name on notice — but maybe get five of them so that farmers actually have independent advice on which to base their decisions.

**Mr RAMSAY** — I would have thought a cohort of five lawyers — —

**Ms WILKINSON** — Legal aid cheap ones, and obviously not in — —

**Mr RAMSAY** — Point taken. Thank you very much.

**The CHAIR** — Ariane, I want to thank you for your evidence today. We really appreciate it. It is a very thoughtful and detailed submission, and it will make a significant contribution to the inquiry. There was probably one further thing. I will give it to you on notice because you might want to make some further point. It is about the gas commissioner system in Queensland and whether you think there is anything for us to learn or otherwise from that system. You do not have to answer that now.

**Ms WILKINSON** — Certainly. Thank you very much for your time.

**The CHAIR** — I am going to call our hearing to a close, but before I do I want to move a motion to accept all the submissions and documents that have been provided. I want to also thank all the witnesses for the contributions they have made. I want to thank the audience, the people who have been here, some all day. I want to specifically thank Andrew Katos, the local member, who was here. I thank Hansard for what has been a very long day. I thank both reporters for both days. I also thank the committee staff — Keir, Annemarie and others — for their contribution over the two days.

Finally, I want to record my thanks to the Surf Coast Shire for the facilities and particularly note the support we have had from a couple of their staff today. It has been very helpful indeed. One other thing I should note are the apologies for today. They are Jeff, Daniel and Harriet for earlier, and Colleen and Adem. Thank you.

**Committee adjourned.**