NATIONAL NATIVE TITLE TRIBUNAL

Santos NSW Pty Ltd and Another v Gomeroi People and Another [2022] NNTTA 74 (19 December 2022)

Application No: **NF2021/0003; NF2021/0004; NF2021/0005; NF2021/0006**

IN THE MATTER of the *Native Title Act 1993* (Cth)

- and -

IN THE MATTER of an inquiry into a future act determination application

Gomeroi People (NC2011/006)

(native title party)

- and -

Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd)

(grantee parties)

- and -

State of New South Wales

(Government party)

FUTURE ACT DETERMINATION THAT THE ACTS MAY BE DONE SUBJECT TO A CONDITION

Tribunal:	The Honourable J A Dowsett AM KC
Place:	Brisbane
Date:	19 December 2022

Catchwords: native title – future act – future act determination application – obligation to negotiate in good faith – commencement of obligation to negotiate in good faith – conduct prior to notification day – content of obligation to negotiate in good faith – effect of reconstitution of applicant – financial support for negotiations – engagement with expert – expert valuation evidence – fixed position in negotiations – no failure to provide important information – use of s 35 application process – racial discrimination – grantee parties negotiated in good faith – s 39 criteria considered – effect of act on native title rights and

interests – enjoyment of native title rights and interests – particular significance – public interest in doing of act – effect of 1998 amendments to the Native Title Act – effects of climate change – decisions and recommendations of other bodies – cultural heritage protection under State legislation – determination that acts may be done subject to a condition

Legislation:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

Brigalow and Nandewar Community Conservation Area Act 2005 (NSW)

Commonwealth of Australia Constitution Act (Cth) s 51(xxxi)

Competition and Consumer Act 2010 (Cth) s 4E

Environmental Planning and Assessment Act 1979 (NSW) ss 4.6, 4.15

Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

Federal Court of Australia Act 1976 (Cth) Pt VB

Forestry Act 2012 (NSW)

Heritage Act 1977 (NSW)

National Parks and Wildlife Act 1974 (NSW)

Native Title Act 1993 (Cth) ss 7, 24AA, 24MD, 28, 31, 32, 35, 36, 38, 39, 40, 50, 52A, 61, 66B, 75, 139, 146, 211, 233

Native Title Amendment Act 1998 (Cth)

Native Title (New South Wales) Act 1994 (NSW) s 104A

Petroleum (Onshore) Act 1991 (NSW) ss 41, 112A, 67, 71; pts 4A, 4B

Protection of the Environment Operations Act 1997 (NSW)

Racial Discrimination Act 1975 (Cth) s 9(1)

Cases:

Bisset v Mineral Deposits Pty Ltd [2001] NNTTA 104; 166 FLR 46

Bligh Coal Limited, Idemitsu Australia Resources Pty Ltd and Bowen Investment (Australia) Pty Ltd v Jonathon Malone & Ors on behalf of the Western Kangoulu People & Another [2021] NNTTA 19

Boney v Attorney General of New South Wales [2018] FCAFC 218

Brownley v Western Australia [1999] FCA 1139; 95 FCR 152

Burragubba v Queensland [2016] FCA 984; 151 ALD 471

Burragubba v Queensland [2017] FCAFC 133; 254 FCR 175

Cameron v Queensland [2006] NNTTA 3

Charles v Sheffield Resources Ltd [2017] FCAFC 218; 257 FCR 29

Cheinmora v Striker Resources NL; Dann v Western Australia [1996] FCA 1147; 142 ALR 21

Coppin v Western Australia [1999] FCA 931; 92 FCR 465

Daniel v Western Australia [2002] FCA 1147; 142 ALR 21

Drake Coal Pty Ltd v Smallwood [2012] NNTTA 9; 257 FLR 276

Evans v Western Australia [1997] FCA 741; 77 FCR 193

FMG Pilbara Pty Ltd v Cox [2009] FCAFC 49; 175 FCR 141

FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2018] NNTTA 64

Georgiadis v Australian and Overseas Telecommunications Corporation [1994] HCA 6; 197 CLR 297

Gold Road Resources Ltd v Harvey Murray on behalf of Yilka and Another [2018] NNTTA 52

Gomeroi People v Attorney General of New South Wales [2017] FCA 1464

Gomeroi People v Attorney General of New South Wales [2016] FCAFC 75; 241 FCR 301

HL (Name withheld for cultural Reasons) and Others (Warrwa #2) v 142 East Pty Ltd [2014] NNTTA 49

Jax Coal Pty Ltd v Smallwood [2011] NNTTA 46; 260 FLR 99

Jonathan Downes v Gomeroi People [2022] NNTTA 26

Jones v Dunkel [1959] HCA 8; 101 CLR 298

Magnesium Resources Pty Ltd v Cox [2010] NNTTA 211; 259 FLR 181

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Minister for Mines (WA) v Evans [1998] NNTTA 5; 163 FLR 274

Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [2021] NSWLEC 110

Nelungaloo Pty Ltd v Commonwealth [1948] HCA 51; 75 CLR 495

North Ganalanja Aboriginal Corporation v Queensland [1996] HCA 2; 185 CLR 595

Northern Territory v Griffiths [2019] HCA 7; 269 CLR 1

O'Sullivan v Farrer [1989] HCA 61; 168 CLR 210

Seven Star Investments Group Pty Ltd v Western Australia [2011] NNTTA 53; 257 FLR 175

Smith v ANL Ltd [2000] HCA 58; 204 CLR 493

Strickland v Minister for Lands for Western Australia [1998] FCA 868; 85 FCR 303

TJ v Western Australia [2015] FCA 818; 242 FCR 283

Walley v Western Australia [1996] FCA 490; 67 FCR 366

Walley v Western Australia [1999] FCA 3; 87 FCR 565

Ward v Northern Territory [2002] FCA 171

Water Conservation and Irrigation Commission (NSW) v Browning [1947] HCA 21; 74 CLR 492

Watson (on behalf of Nyikina & Mangala) v Backreef Pil Pty Ltd [2013] FCA 1432

Weld Range Metals Ltd v Western Australia [2011] NNTTA 172; 258 FLR 9

Western Australia v Commonwealth [1995] HCA 47; 183 CLR 373

Western Australia v Daniel [2002] NNTTA 230; 172 FLR 168

Western Australia v Dimer [2000] NNTTA 290; 163 FLR 426

Western Australia v Jidi Jidi Aboriginal Corporation [2002] NNTTA 114; 169 FLR 470

Western Australia v Taylor [1996] NNTTA 34; 134 FLR 211

Western Australia v Thomas [1996] NNTTA 30; 133 FLR 124

Western Desert Lands Aboriginal Corporation v Western Australia [2009] NNTTA 49; 232 FLR 169

WMC Resources Ltd v Evans [1999] NNTTA 522; 163 FLR 333

Representative of the native title party:	NTSCORP Limited
Representative of the grantee parties:	Ashurst Australia
Representative of the Government party:	Crown Solicitor's Office

REASONS FOR DETERMINATION

DETERMINATION SUMMARY

On 20 December, 2011, the Gomeroi People applied for a determination as to the existence of native title pursuant to the *Native Title Act 1993* (Cth). The application was made on their behalf by nineteen claim group members (the "Gomeroi applicant"). The claim area is located entirely in New South Wales, bounded by the Queensland-New South Wales border in the north, the western slopes of the New England Tableland in the east, the Hunter and Goulburn Rivers in the south and the Castlereagh, Barwon and Macquarie Rivers in the west. The claim area covers an area well in excess of 100,000km^2. The claim has been registered by the Native Title Registrar but has not yet been considered by the Federal Court of Australia.

Santos NSW (Eastern) Pty Ltd and associated companies propose to conduct a gas extraction operation, described as the Narrabri Gas Project. It concerns an area of 95,000ha within the claim area and located to the south and west of Narrabri. On 1 May 2014, Santos NSW Pty Ltd ("Santos") lodged four petroleum production lease applications, covering an area of about 92,400ha, lying entirely within the Narrabri Gas Project area. On 30 September 2020, the Independent Planning Commission of New South Wales granted development consent for the Narrabri Gas Project, subject to 134 conditions. The decision was upheld by the Land and Environment Court of New South Wales. The relevant Commonwealth Minister has also granted the necessary approval.

Where a State or Territory government proposes to grant certain types of mining tenement, s 29 of the Native Title Act requires that it give public notice of such intention. On 28 May 2014, the State gave such notice concerning the petroleum production lease applications. Thereafter, the Gomeroi applicant, Santos and the State were obliged to negotiate in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants. See s 31(1) of the Native Title Act. Notwithstanding the development consent, negotiations concerning the proposed grants continued until 5 May 2021 when Santos applied to the National Native Title Tribunal for a determination that the proposed grants be made, notwithstanding the fact that the parties had not reached agreement. Negotiations continued after that date.

The Gomeroi applicant now asserts that Santos did not negotiate in good faith. If that were the case, the Tribunal could not determine that the proposed grants be made. See s 36(2) of the Native Title Act. The Gomeroi applicant made numerous assertions concerning Santos's participation in the negotiations. However the Tribunal concluded that it had not demonstrated absence of good faith. The Tribunal was therefore obliged to decide whether the proposed grants should be made, having regard to the criteria identified in s 39 of the Native Title Act.

The Gomeroi applicant submitted that the proposed grants should not be made, asserting that the Narrabri Gas Project would result in grave and irreversible consequences for the Gomeroi People's culture, lands and waters and would contribute to climate change. The Tribunal does not doubt that the Gomeroi applicant's concerns are genuine. However the Tribunal concluded that the Gomeroi applicant had failed to justify its assertions that the proposed grants would have such effect upon the matters identified in s 39(1)(a) of the Native Title Act. The Tribunal also took into account matters arising pursuant to ss 39(1)(b), (c), (e) and (f) and s 39(2) of the Native Title Act.

The Tribunal had particular regard to the anticipated benefits of the Narrabri Gas Project to the Narrabri region, New South Wales and Australia. It also had regard to the Independent Planning Commission's decision and the information upon which it relied. In those circumstances the Tribunal concluded that the proposed grants would provide a public benefit, significantly outweighing the Gomeroi applicant's concerns, particularly having regard to the limited and imprecise evidence provided in connection with such concerns. The Tribunal therefore concluded that the proposed grants should be made, in each case, subject to one condition. In each case, the condition requires that Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) take all necessary steps to ensure that the Additional Research Program, identified in para 5.7 of the Narrabri Gas Project Aboriginal Cultural Heritage Management Plan dated 21 February 2022, be implemented and completed prior to the commencement of Phase 2 of the Narrabri Gas Project.

This summary is part of the determination. It in no way affects or varies the detailed reasons which appear below.

I INTRODUCTION

1.1. The Gomeroi People's Native Title Determination Application

[1] On 20 December 2011, an application for a native title determination (**determination application**) was filed in the Federal Court pursuant to s 61 of the *Native Title Act 1993* (Cth) (**Native Title Act**). As contemplated by that section, the determination application was made by a group of persons (**Gomeroi applicant**) authorized by persons claiming common or group rights and interests according to traditional laws and customs (**native title claim group**). On 20 January 2012, the claim was entered on the Register of Native Title Claims (**Register**).

[2] As at January 2012, the persons comprising the Gomeroi applicant were Patricia Margaret Boney, Norman McGrady, Susan Smith, Michael Anderson, William Robinson, Raymond Welsh, Richard Green, Greg Griffiths, Elaine Binge, Alfred Priestley, Leslie Woodbridge, Craig Trindall, Burrul Galigabali, Bob Weatherall, Elizabeth Allan, Ray Tighe, Anthony Munro, Madeline McGrady and Jason Wilson. Members of the native title claim group are said to be the descendants of 114 apical ancestors, listed at sch A of the determination application, including persons who are descendants by adoption, according to traditional laws and customs. Each of the named apical ancestors, except one, is listed as having either a specified year of birth, or a birth place, in most instances, both. It seems that each person comprising the Gomeroi applicant, was drawn from one of 19 regions identified in the application, such areas being Ashford, Boggabilla, Caroona/Walhallow/Breeza, Collarenebri, Coonabarabran, Coonamble, Gulargambone, Gunnedah, Inverell, Moree, Mungindi, Narrabri, Quirindi/Werris Creek, South West Queensland, Terry Hie Hie, Tamworth, Tingha, Toomelah and Walgett. See *Gomeroi People v Attorney General of New South Wales*[1] at [6]. I shall refer to the Gomeroi applicant, as originally constituted as the "original applicant". On three subsequent occasions, the composition of the Gomeroi applicant has been varied.

[1] [2017] FCA 1464.

[3] The determination application was lodged on behalf of the Gomeroi applicant by NTSCORP Limited (**NTSCORP**). NTSCORP is a native title service provider funded, pursuant to s 203FE(1) of the Native Title Act, to perform the functions of a representative body for New South Wales and the Australian Capital Territory. Section 203FEA(1) provides that a body funded pursuant to s 203FE(1) has the same obligations and powers as a representative body.

a. The Native Title Claim Area

[4] The area claimed pursuant to the determination application (**native title claim area**), comprises approximately 111,317.6km^2, entirely within the State of New South Wales. The native title claim area is generally described as being bounded by the New South Wales/Queensland border in the north, the western slopes of the New England Tableland in the east, the Hunter and Goulburn Rivers in the south and the Castlereagh, Barwon and Macquarie Rivers in the west. Towns within the native title claim area include those listed in para 2, above. Schedule 1 to this determination is a map of the native title claim area.

b. The Native Title Rights and Interests Registered

[5] On 20 January 2012, the following native title rights and interests were entered on the Register in relation to the determination application:

> 1. Where exclusive native title can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), the Gomeroi People as defined in Schedule A of this application, claim the right to possession, occupation, use and enjoyment of the lands and waters of the application area to the exclusion of all others subject to the valid laws of the Commonwealth and the State of New South Wales.
> 2. Where exclusive native title cannot be recognised, the Gomeroi People as defined in Schedule A of this application, claim the following non-exclusive rights and interests including the right to conduct activities necessary to give effect to them
>
> (a) the right to access the application area;
>
> (b) the right to use and enjoy the application area;
>
> (c) the right to move about the application area;
>
> (d) the right to camp on the application area;
>
> (e) the right to erect shelters and other structures on the application area;

(f) the right to live being to enter and remain on the application area;

(g) the right to hold meetings on the application area;

(h) the right to hunt on the application area;

(i) the right to fish on the application area;

(j) the right to have access to and use the natural water resources of the application area;

(k) the right to gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting implements, making artwork and musical instruments);

(m) the right to share and exchange resources derived from the land and waters within the application area;

(n) the right to participate in cultural and spiritual activities on the application area;

(o) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area;

(p) the right to conduct ceremonies and rituals on the application area;

(q) the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;

3. The native title rights and interests referred to in paragraph 2 do not confer possession, occupation, use or enjoyment of the lands and waters of the application area to the exclusion of all others.

4. The native title rights and interests are subject to and exercisable in accordance with:

(a) the laws of the State of New South Wales and the Commonwealth of Australia including the common law;

(b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of New South Wales; and

(a) the traditional laws and customs of the Gomeroi People for personal, domestic and communal purposes (including social, cultural, religious, spiritual and ceremonial purposes).

c. Changes to the Composition of the Gomeroi Applicant

[6] On 10 and 11 May 2013, the native title claim group, at a meeting convened by NTSCORP, authorized a change in the composition of the Gomeroi applicant. This change was necessitated by the passing of one person and the resignation of another. On 13 August 2013, the Federal Court gave effect to the changes, ordering, pursuant to s 66B of the Native Title Act, that the following persons thereafter comprise the Gomeroi applicant: Alfred Boney, Maureen Sulter, Clifford Toomey, Lyall Munro Junior, Norman McGrady, Madeline McGrady, Leslie Woodbridge, Jason Wilson, Michael Anderson, Alfred Priestley, Ray Tighe, Greg Griffiths, Burrul Galigabali, Susan Smith, Richard

Green, Raymond Welsh Senior, Elaine Binge, Bob Weatherall and Anthony Munro. See order of Jagot J in *Boney v Withers*.[2] The Gomeroi applicant, as so constituted, will, where necessary, hereafter be referred to as the "Gomeroi applicant (2013-2017)".

[7] At the 2013 meeting it was also resolved that:

> **Resolution #10 – Authority and Role of the Applicant**
>
> The Gomeroi People native title claim group confers authority on the people who make up the [Gomeroi applicant] in the expectation that they will act at all times in the interests of the Gomeroi People native title claim group and will not act in any way which is for personal benefit or in the pursuit of a personal interest. These expectations include:
>
> …
>
> (e) The [Gomeroi applicant] may not attempt to terminate the services of NTSCORP Limited or the Legal Practice funded by NTSCORP as solicitor acting on behalf of the Gomeroi People native title claim group in relation to their native title determination application (NSD2308/2011) and any future acts arising in relation to it, or engage another solicitor for those purposes, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising them to do so;
>
> …
>
> Any person comprising the [Gomeroi applicant] may be replaced for acting contrary to these expectations and therefore exceeding the authority conferred on them by the Gomeroi People native title claim group.

[8] Notwithstanding such "expectations", on 10 February 2015, Sam Hegney Solicitors became the solicitor on the record for the Gomeroi applicant, in place of NTSCORP. NTSCORP (by its legal officer, Mr R Powrie) subsequently applied to have that firm removed as solicitor on the record, and for Mr Powrie's reinstatement. The application was heard by Jagot J. Her Honour refused the relief sought. See order of Jagot J in *Gomeroi People v Attorney General of New South Wales*.[3] On 13 May 2015, her Honour made orders, convening a meeting of the native title claim group, apparently for the purpose of resolving the question of legal representation. On 30 May 2016, the Full Court set aside those orders. See *Gomeroi People v Attorney General of New South Wales.*[4] Subsequently, NTSCORP convened a meeting of the native title claim group, which meeting took place on 19 and 20 July 2016. The meeting resolved to apply to the Federal Court, pursuant to s 66B, to reconstitute the Gomeroi applicant (2013-2017) (then represented by Sam Hegney Solicitors). On 7 December 2017, Rangiah J ordered that the Gomeroi applicant thereafter be comprised of the following 19 persons: Jason

[2] Federal Court of Australia, NSD2308/2011, 13 August 2013.
[3] Federal Court of Australia, NSD2308/2011, 10 March 2015.
[4] (2016) 241 FCR 301.

Wilson, Leslie Duncan, Marcus Waters, Malcolm Talbot, Barry French, Garry Binge, Raymond Weatherall, Steven Talbott, Donald Craigie, Dennis Griffen, Jennifer Bennett, Sheryl Barnes, Roslyn Nean, Sharon Porter, Emily Roberts, Fay Twidale, Tania Matthews, Natasha Talbott and Maria Cutmore, apparently giving effect to the resolution made at the July meeting. See order of Rangiah J in *Gomeroi People v Attorney General of New South Wales*.[5] On 21 November 2018, the Full Court dismissed an appeal against that decision. See *Boney v Attorney General of New South Wales.*[6] The Gomeroi applicant, as so constituted, will be referred to as the Gomeroi applicant (2017-2022). At some stage NTSCORP was reinstated as the solicitor on the record for the Gomeroi applicant. It continues in that capacity.

[9] On 9 September 2022, the Federal Court ordered, pursuant to s 66B(1)(a)(iii) and s 66B(1)(b) of the Native Title Act, that the members of the Gomeroi applicant thereafter be constituted by the following 19 persons: Sidney Chatfield, Peter White, Malcolm Talbot, Leslie Woodbridge, Richard Green, Clayton Simpson-Pitt, Chris McGrady, Madeline McGrady, Allan Tighe, Donald Murray, Dorothy Tighe, Ian Brown, Lee-Ann Pearl Davern, Noeline Sherill 'Sheryl' Nicholls, Shannon Draper, Christine Porter, Susan Smith, Elaine Binge and Anthony Munro. See order of Registrar Ingram in *Wilson v Attorney General of New South Wales*.[7] The Gomeroi applicant, as so constituted, will hereafter be referred to as the "current Gomeroi applicant". The current proceedings relate primarily to the period between May 2014 and 24 March 2022 or, possibly, some later date.

d. The Role of the Gomeroi Applicant

[10] This matter raises issues concerning the status of a native title applicant, the change in the composition of any group comprising such an applicant, and the ongoing relationship between an applicant and the native title claim group. In particular, as I explain below, the native title claim group has consistently sought to limit the authority of the Gomeroi applicant to act in connection with the determination application and in connection with the matters addressed in these proceedings.

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[5] Federal Court of Australia, NSD2308/2011, 7 December 2017.
[6] [2018] FCAFC 218.
[7] Federal Court of Australia, NSD37/2019, 9 September 2022.

[11] At paras 6-19 of its contentions, the Gomeroi applicant addresses its "representative" role pursuant to s 61 of the Native Title Act, and its relationship with the native title claim group. I accept, for present purposes, that a native title claim group may, to some extent, limit the authority of an applicant appointed for the purposes of s 61 of the Native Title Act. I similarly accept that the native title claim group may, from time to time, amend its authorization. However the Gomeroi applicant is the moving party in litigation in the Federal Court**.** There may be a limit to the extent to which the native title claim group can instruct the Gomeroi applicant in the conduct of proceedings in that Court, particularly having regard to pt VB of the *Federal Court of Australia Act 1976* (Cth). Further, the Native Title Act imposes duties upon the Gomeroi applicant, which duties it must perform, regardless of the views of the native title claim group. An example of this is s 31, which imposes a duty on the Gomeroi applicant to negotiate in good faith, with which provision I am presently concerned. See the paper written by Rangiah J and Mr Carter, "The role of the 'applicant' in native title disputes".[8] Finally, the status and composition of an applicant depends on the Native Title Act. Any change in composition depends upon a favourable exercise of the Federal Court's discretion pursuant to s 66B.

[12] At para 16 of its contentions, the Gomeroi applicant sets out conditions imposed on it by the native title claim group at the meeting on 24-25 June 2011, at which the native title application was authorized. Relevantly, those conditions included:

> **Resolution 6 – Acting in the Interests of the Gomeroi People**
>
> The Gomeroi People acknowledge the authority and responsibilities of the Applicant as set out in the Native Title Act 1993 (Cth).
>
> …
>
> The Gomeroi People native title claim group confers authority on the people who make up the Applicant in the expectation that they will not:
>
> - act inconsistently with the resolutions of the native title claim group or disclose information which is confidential to the native title claim group;
> - amend, resolve, have listed for trial or discontinue the native title application without first obtaining a resolution of the native title claim group specifically authorising it to do so;
> - execute any agreement that has the effect of extinguishing or confirming the extinguishment of native title, or conferring benefits on Gomeroi People, without first obtaining a resolution of the native title claim group specifically authorising it to do so.

[8] (2013) 87 ALJ 761.

[13] At para 17, the Gomeroi applicant sets out conditions imposed at the meeting held on 10-11 May 2013, as follows:

> **Resolution #5 – Retention of NTSCORP Services and Legal Representation**
>
> The Gomeroi People native title claim group resolved to continue to retain the services of NTSCORP Limited and the legal practice funded by NTSCORP Limited in relation to the Gomeroi People's native title determination application and related future acts processes on the basis that they act at all times in accordance with the instructions of the Gomeroi native title claim group and Applicants.
>
> …
>
> **Resolution #10 – Authority and Role of the Applicant**
>
> The Gomeroi People native title claim group acknowledge the authority and responsibilities of the Applicant as set out in the Native Title Act 1993 (Cth).
>
> The Gomeroi People native title claim group confers authority on the people who make up the Applicant in the expectation that they will act at all times in the interests of the Gomeroi People native title claim group and will not act in any way which is for personal benefit or in the pursuit of a personal interest. These expectations include:
>
> (a) The Applicant must do all things necessary to implement the resolutions and decisions of the Gomeroi People native title claim group meeting and must not act inconsistently with those resolutions and decisions;
>
> (b) The Applicant must not disclose to third parties who are not Gomeroi information which is confidential to the Gomeroi People native title claim group;
>
> (c) The Applicant must not amend, resolve, have listed for trial or discontinue the native title application without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising it to do so;
>
> (d) The Applicant must not execute any future act agreement, Indigenous Land Use Agreement or any other agreement that has the effect of extinguishing, impairing or otherwise affecting native title or confirming the prior extinguishment, impairment or effect on native title in the area under claim, unless they are expressly authorised by a resolution of the Gomeroi People native title claim group;
>
> (e) The Applicant may not attempt to terminate the services of NTSCORP Limited or the Legal Practice funded by NTSCORP as solicitor acting on behalf of the Gomeroi People native title claim group in relation to their native title determination application (NSD2308/2011) and any future acts arising in relation to it, or engage another solicitor for those purposes, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising them to do so;
>
> (f) The Applicant must not execute any agreement conferring benefits or obligation on Gomeroi People, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising it to do so;
>
> (g) The Applicant may not establish a Corporation or other legal entity to hold benefits on behalf of the Gomeroi People native title claim group without first obtaining a resolution of the native title claim group specifically authorising it to do so.
>
> Any person comprising the Applicant may be replaced for acting contrary to these expectations and therefore exceeding the authority conferred on them by the Gomeroi People native title claim group.

[14] At the meeting held on 19-20 July 2016, when the native title claim group again resolved to change the composition of the Gomeroi applicant, the following resolutions were adopted:

> **#13. Authority and Role of the Applicant**
>
> The Gomeroi People native title claim group acknowledge the authority and responsibilities of the Applicant as set out in the Native Title Act 1993 (Cth).
>
> The Gomeroi People native title claim group confers authority on the people who make up the Applicant in the expectation on the condition [sic] that they will act at all times in the interests of the Gomeroi People native title claim group and will not act in any way which is for personal benefit or in the pursuit of a personal interest.
>
> The particular conditions placed on the authorisation of the Applicant are:
>
> (a) The Applicant must do all things necessary to implement the resolutions and decisions of the Gomeroi People native title claim group meeting and must not act inconsistently with those resolutions and decisions;
>
> (b) The Applicant must not disclose to third parties who are not Gomeroi information which is confidential to the Gomeroi People native title claim group;
>
> (c) The Applicant must not amend, resolve, have listed for trial or discontinue the native title application without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising it to do so;
>
> (d) The Applicant must not execute any future act agreement, Indigenous Land Use Agreement or any other agreement that has the effect of extinguishing, impairing or otherwise affecting native title or confirming the prior extinguishment, impairment or effect on native title in the area under claim, unless they are expressly authorised by a resolution of the Gomeroi People native title claim group;
>
> (e) The Applicant must not attempt to terminate the services of NTSCORP Limited as solicitor acting on behalf of the Gomeroi People native title claim group in relation to their native title determination application NSD2308/2011, and any future acts arising in relation to it, or engage another solicitor for those purposes, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising them to do so;
>
> (f) The Applicant must not execute any agreement conferring benefits or obligations on Gomeroi People, without first obtaining a resolution of the Gomeroi People native title claim group specifically authorising it to do so;
>
> (g) The Applicant must not establish a Corporation or other legal entity to hold benefits on behalf of the Gomeroi People native title claim group without first obtaining a resolution of the native title claim group specifically authorising it to do so.
>
> Any person comprising part of the Applicant will be replaced for acting contrary to these conditions and therefore exceeding the authority conferred on them by the Gomeroi People native title claim group.
>
> In this circumstance, NTSCORP Limited is instructed to convene a meeting of the Gomeroi People native title claim group at the first available opportunity for the purpose of considering replacing the Applicant.

[15] The words “in the expectation” in the second paragraph of the last-mentioned extract are inconsistent with the words “on the condition that”. This matter has been conducted

on the basis that the first-mentioned words were deleted. Clearly, paras (d), (f) and (g) purport to limit the capacity of the Gomeroi applicant to execute agreements to be negotiated under s 31 of the Native Title Act. These limitations were to have a significant impact upon the capacity of the Gomeroi applicant to negotiate with Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) (collectively, **Santos**) as discussed further below.

e. The Narrabri Gas Project

[16] Santos NSW (Eastern) Pty Ltd (on behalf of its joint venture partners) proposes to extract natural gas from coal seams in the Gunnedah Basin in New South Wales, southwest of Narrabri (**Narrabri Gas Project**). The primary objective of the Narrabri Gas Project is to commercialize natural gas from coal seams for the Australian east coast gas market and to support the energy security needs of New South Wales. The term "Narrabri Gas Project" is used to describe the project and the area occupied by it.

[17] On 1 May 2014, Santos NSW Pty Ltd lodged, in accordance with the *Petroleum (Onshore) Act 1991* (NSW) (**Petroleum (Onshore) Act**), four Petroleum Production Lease Applications, numbered PPLA13, PPLA14, PPLA15, and PPLA16. The Narrabri Gas Project depends upon the grant of such applications. The grant of these applications is necessary for the conduct of the Narrabri Gas Project.

[18] Pursuant to s 29 of the Native Title Act, the State of New South Wales (**State**) gave notice of its intention to grant the four Petroleum Production Lease Applications (**proposed grants**). The notification day, for the purposes of s 29 was 28 May 2014. Subsequently, Santos sought to amend the coordinates appearing in the notices. The State acceded to such request and gave further notifications, each having the notification day of 4 June 2015.

[19] In response to an application made on 1 February 2017, on 30 September 2020, the Independent Planning Commission of NSW (**Independent Planning Commission**) granted development consent (**Development Consent**) to the Narrabri Gas Project. The consent was preceded by a lengthy development application process, including various environmental assessments, public submissions and a public hearing. Aspects of that

process are discussed below. The Development Consent is a publicly available document.[9] The Development Consent does not include approval for a gas transmission pipeline.

[20] Schedule 2 to this determination is a map showing the approved Narrabri Gas Project area as described in the Development Consent. The Development Consent states that it covers an area of approximately 95,000ha (950km^2). The Narrabri Gas Project area includes the area of the proposed grants and a further area described as Petroleum Production Lease 3 (PPL 3). See Schedule 2. The Brigalow Park Nature Reserve is excluded from the Narrabri Gas Project area.

f. The Santos Project Area

[21] The area included in the proposed grants will be referred to as the **Santos project area**. Not infrequently, the parties and witnesses have used the terms "Narrabri Gas Project" and "project area" interchangeably. I shall try to avoid ambiguity in connection with this terminology. This determination application relates only to the areas affected by the proposed grants, that is the Santos project area.

g. Subdivision P

[22] Section 29 is contained within Subdivision P of Division 3 of Part 2 of the Native Title Act (**subdiv P**). Section 25 provides that subdiv P is concerned with "future acts", including "certain conferrals of mining rights". The word "act" appears in s 226 as follows:

> **Act**
>
> *Section affects meaning of **act** in references relating to native title*
>
> (1) This section affects the meaning of ***act*** in references to an act affecting native title and in other references in relation to native title.
>
> *Certain acts included*
>
> (2) An ***act*** includes any of the following acts:
>
> (a) the making, amendment or repeal of any legislation;

[9] See NSW Government (2020) <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-6456%2120200929T234612.186%20GMT>.

(b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;

(c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;

(d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;

(e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;

(f) an act having any effect at common law or in equity.

Acts by any person

(3) An ***act*** may be done by the Crown in any of its capacities or by any other person.

[23] The term "future act" is defined in s 233 as follows:

Future act

Definition

(1) Subject to this section, an act is a ***future act*** in relation to land or waters if:

(a) either:

(i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993;

(ii) it is any other act that takes place on or after 1 January 1994; and

(b) it is not a past act; and

(c) apart from this Act, either;

(i) it validly affects native title in relation to the land or waters to any extent; or

(ii) the following apply:

(A) it is to any extent invalid; and

(B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and

(C) if it were valid to that extent, it would affect native title.

…

(3) Subsection (1) does not apply to any of the following acts:

(a) an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under a law mentioned in the definition of ***Aboriginal/Torres Strait Islander land or waters*** in section 253;

(b) any act affecting Aboriginal/Torres Strait Islander land or waters.

[24] For present purposes the proposed grants fall within s 226(2)(b) and are future acts pursuant to s 233(1)(a)(ii).

[25] Mineral deposits are generally vested in the Crown in right of each State or Territory, in this case New South Wales. The interests of the Gomeroi applicant and Santos in this matter are obvious. However the interests of the State cannot be overlooked. It has a clear interest in exploiting mineral deposits, for the benefit of the State and its citizens, including Aboriginal citizens. Exploitation of mineral deposits can only be conducted with the appropriate consent of the State, in this case, pursuant to the petroleum production leases. However access to mineral deposits for extraction purposes frequently requires the consent of relevant landholders. Mining legislation usually requires that the miner obtain appropriate access by negotiating with those landholders. Where there is no agreement, the legislation may provide for some form of arbitration. Subdivision P, in effect, provides the mechanism for obtaining rights of access over land over which there is a native title determination or a registered native title claim. Within the broader operation of the Native Title Act, s 31 requires negotiation in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants. In this case, the State, the Gomeroi applicant and Santos must participate in the negotiation. Should no agreement be reached, there is provision for arbitration. The Tribunal may be the relevant arbitrator.

h. The Future Act Determination Applications

[26] On 5 May 2021, Santos lodged an application for Future Act Determinations relating to the proposed grants. The proposed grants (and therefore the Santos project area) cover a total area of approximately 923.9km^2, situated southwest of the town of Narrabri in New South Wales. The map at Schedule 2 to this determination depicts that area. A preliminary environmental assessment report dated March 2014 describes the Narrabri Gas Project as follows:

> The project would be located within part of Petroleum Exploration Licence (PEL) 238, Petroleum Assessment Lease (PAL) 2, and Petroleum Production Lease (PPL) 3, all of which are located to the south and west of Narrabri (refer to Figure 1). It is proposed to create four PPLs within the project area by converting all of PAL 2 to a PPL and creating three additional PPLs to the north, east and south of PAL 2. These PPLs would each be less than four graticular blocks; the maximum allowable area for a PPL. An application is currently under preparation.
>
> The total project area is approximately 98,000 hectares in size, however, surface infrastructure would directly impact approximately one percent of the total project area. The majority of the proposed development is located within an area known as the 'Pilliga', with the remainder of the proposed development (approximately 30%) located on agricultural land supporting dry-land cropping and pastoral (livestock)

> activities. It is important to note that none of the agricultural land has been mapped as prime 'biophysical strategic agricultural land' under recent NSW Government coal seam gas legislative amendments (refer to Section 4).
>
> The collective term 'Pilliga' represents an agglomeration of forested area that totals in excess of 500,000 hectares within north-western NSW around Coonabarabran, Baradine and Narrabri. Nearly half of the Pilliga is currently allocated to conservation, and is managed under the NSW National Parks and Wildlife Act 1974. Within the Pilliga the project would be developed primarily within State Forest, and also on some privately managed land, but would avoid conservation areas such as the Pilliga National Park, the Pilliga State Conservation Area and the Pilliga Nature Reserve. The Brigalow Park Nature Reserve is also excluded from the project area. Whilst the Brigalow State Conservation Area is within the project area, surface infrastructure (and a buffer of at least 50 metres surrounding the State Conservation Area) would also be excluded.
>
> Resource exploration has been occurring in the area since the 1960s initially for oil but more recently coal and gas. A number of existing exploration and production wells are located within PEL 238, PAL 2 and PPL 3. These are in varying stages with some active, some suspended and others abandoned and rehabilitated, or awaiting rehabilitation.

[27] Since March 2014, the "total project area" (that is the Narrabri Gas Project area) has been reduced to approximately 95,000ha in area, as reflected in the Development Consent. In the evidence, the terms "Pilliga", "the Pilliga" and "the Pilliga forest" are sometimes, but not always, used interchangeably. Each of the proposed grants will be a future act, as defined in s 233 of the Native Title Act. Hence it was necessary that the State notify its intention to make the proposed grants. See s 29 of the Native Title Act. These notices engaged subdiv P of the Native Title Act. For present purposes, pursuant to s 38 of the Native Title Act, this Tribunal must determine whether such grants should be made, with or without conditions.

[28] In 2014, Ashurst Australia (**Ashurst**), Santos's solicitor, undertook a native title audit report. It sought to identify the existence of native title within the Santos project area. It concluded that in 37 parcels of land within that area, it was unlikely that native title had been extinguished. It seems that those 37 parcels of land occupy approximately 46% of the Santos project area. The Gomeroi applicant does not necessarily accept Ashurst's assertions as to the extent of extinguishment. The map at, Schedule 2 to this determination, reflects Ashurst's findings. There are minor differences between those findings and the records held by the Tribunal. Such differences are not presently relevant.

i. Legislative Provisions

[29] The current application is principally governed by ss 31, 33, 35, 36(2), 38 and 39 of the Native Title Act. Of particular importance are the following provisions.

[30] Section 31 provides:

> **Normal negotiation procedure**
>
> (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
>
> (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
>
> (b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
>
> (i) the doing of the act; or
>
> (ii) the doing of the act subject to conditions to be complied with by any of the parties.
>
> Note: The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned. See subsection 41(2).
>
> (1A) Despite paragraph (1)(b), the Government party does not need to negotiate about matters that the Government party determines do not affect the Government party if the other negotiation parties give written consent.
>
> (1B) However, the Government party must be a party to the agreement.
>
> *Registered native title claimants*
>
> (1C) The requirement that a native title party that is a registered native title claimant be a party to the agreement is satisfied if:
>
> (a) a majority of the persons who comprise the registered native title claimant are parties to the agreement, unless paragraph (b) applies; or
>
> (b) if conditions under section 251BA on the authority of the registered native title claimant provide for the persons who must become a party to the agreement--those persons are parties to the agreement.
>
> (1D) The persons in the majority must notify the other persons who comprise the registered native title claimant within a reasonable period after becoming parties to the agreement as mentioned in paragraph (1C)(a). A failure to comply with this subsection does not invalidate the agreement.
>
> *Negotiation in good faith*
>
> (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.
>
> *Arbitral body to assist in negotiations*

(3) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement.

Information obtained in providing assistance not to be used or disclosed in other contexts

(4) If the NNTT is the arbitral body, it must not use or disclose information to which it has had access only because it provided assistance under subsection (3) for any purpose other than:

(a) providing that assistance; or

(b) establishing whether a negotiation party has negotiated in good faith as mentioned in paragraph (1)(b);

without the prior consent of the person who provided the NNTT with the information.

[31] Section 33 provides:

Negotiations to include certain things

Profits, income etc.

(1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or

(b) any income derived; or

(c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

Existing rights, interests and use

(2) Without limiting the scope of any negotiations, the nature and extent of the following may be taken into account:

(a) existing non-native title rights and interests in relation to the land or waters concerned;

(b) existing use of the land or waters concerned by persons other than native title parties;

(c) the practical effect of the exercise of those existing rights and interests, and that existing use, on the exercise of any native title rights and interests in relation to the land or waters concerned.

[32] For present purposes, the Tribunal is the relevant arbitral body.

[33] Section 35 provides:

Application for arbitral body determination

(1) Any negotiation party may apply to the arbitral body for a determination under section 38 in relation to the act if:

(a) at least 6 months have passed since the notification day (see subsection 29(4)); and

(b) no agreement of the kind mentioned in paragraph 31(1)(b) has been made in relation to the act.

Withdrawal of application

(2) At any time before a determination in relation to the act is made under section 36A or 38, the negotiation party may withdraw the application by giving notice to the arbitral body.

Negotiations for an agreement

(3) Even though the application has been made, the negotiation parties may continue to negotiate with a view to obtaining an agreement of the kind mentioned in paragraph 31(1)(b) before a determination in relation to the act is made under section 36A or 38. If they make such an agreement before such a determination is made, the application is taken to have been withdrawn.

[34] Subsection 36(2) provides:

Arbitral body determination to be made as soon as practicable

Determination not to be made where failure to negotiate in good faith

(2) If any negotiation party satisfies the arbitral body that any other negotiation party (other than a native title party) did not negotiate in good faith as mentioned in paragraph 31(1)(b) (other than as provided by subsections 31(1A) and (2)), the arbitral body must not make the determination on the application.

Note: It would be possible for a further application to be made under section 35.

[35] Section 38 provides:

Kinds of arbitral body determinations

(1) Except where section 37 applies, the arbitral body must make one of the following determinations:

(a) a determination that the act must not be done;

(b) a determination that the act may be done;

(c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

Determination may cover other matters

(1A) A determination may, with the agreement of the negotiation parties, provide that a particular matter that:

(a) is not reasonably capable of being determined when the determination is made; and

(b) is not directly relevant to the doing of the act;

is to be the subject of further negotiations or to be determined in a specified manner.

Matters to be determined by arbitration

(1B) A determination may, with the agreement of the negotiation parties, provide that a particular matter that:

(a) the manner specified is arbitration (other than by the arbitral body); and

(b) the negotiation parties do not agree about the manner in which the arbitration is to take place;

the arbitral body must determine the matter at an appropriate time.

Profit-sharing conditions not to be determined

(2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:

(a) the amount of profits made; or

(b) any income derived; or

(c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

[36] Section 39 provides:

Criteria for making arbitral body determinations

(1) In making its determination, the arbitral body must take into account the following:

(a) the effect of the act on:

(i) the enjoyment by the native title parties of their registered native title rights and interests; and

(ii) the way of life, culture and traditions of any of those parties; and

(iii) the development of the social, cultural and economic structures of any of those parties; and

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(e) any public interest in the doing of the act;

(f) any other matter that the arbitral body considers relevant.

Existing non-native title interests etc.

(2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:

(a) existing non-native title rights and interests in relation to the land or waters concerned; and

(b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

Agreements to be given effect

(4) Before making its determination, the arbitral body must ascertain whether there are any issues relevant to its determination on which the negotiation parties agree. If there are, and all of the negotiation parties consent, then, in making its determination, the arbitral body:

(a) must take that agreement into account; and

(b) need not take into account the matters mentioned in subsection (1), to the extent that the matters relate to those issues.

[37] Sections 31, 33, 34 and 36(2) relate particularly to the question of good faith negotiation. Section 39 prescribes the criteria for making a determination pursuant to s 38. Below, I outline the Gomeroi applicant's case, concerning both of these aspects, referring in some cases to contentions advanced by Santos and/or the State. The issue of good faith and the issues arising pursuant to s 39 are discrete matters and are, in this determination, largely dealt with separately.

j. State Development Approval Process

[38] After a lengthy development approval process under the New South Wales legislative regime, the Narrabri Gas Project was granted Development Consent by the Independent Planning Commission on 30 September 2020. It was granted subject to 134 detailed conditions. The Development Consent is annexed to the affidavit of Mr James MacLeod.

[39] The Narrabri Gas Project is described by Santos at paras 26-28 of its contentions as follows:

26. The Project includes construction and operation of a range of activities and infrastructure including:

(a) gas exploration and appraisal - seismic testing, chip holes, core holes and appraisal wells;

(b) development and operation of a gas field – converting pilot wells into production wells, drilling new production wells and monitoring bores, developing gas and water gathering and treatment systems and in-field compression facilities; and

(c) decommissioning and rehabilitation – sealing production wells, removing surface infrastructure and rehabilitating sites.

27. This development will be undertaken progressively in four stages in accordance with the Development Consent, leading ultimately to the development of up to 850 new wells on a maximum of 425 well pads over

> the lifetime of the Project. Santos may only progress to a new phase of development once is has achieved certain milestones as set out in the Development Consent. Development is to occur in phases as described below:
>
> (a) **Phase 1 exploration** – ongoing exploration and appraisal activities;
>
> (b) **Phase 2 construction** – construction activities for production wells and associated infrastructure;
>
> (c) **Phase 3 production** – gas production activities; and
>
> (d) **Phase 4 rehabilitation** – gas and well infrastructure decommissioning, rehabilitation and mine closure.
>
> 28. Field planning would continue to be informed and refined by exploration and appraisal activities that would occur across the Project Area over the life of the Project.

[40] In its submissions, Santos has referred to "the flexibility available in regard to CSG well location" and "flexibility to relocate any proposed infrastructure". The evidence in support of these contentions appear at paras 84-86 of the affidavit of Mr Todd Dunn, which states:

> 84. The location of CSG wells for the Project depends on the location of gas reserves as defined by the appraisal program. While the location of each well must correspond to the location of gas reserves, there is a considerable degree of flexibility available in the siting of CSG wells, as was noted by DPIE at paragraphs [411] – [416] 194 of its Assessment Report (TD-2).
>
> 85. In general, potential well sites are identified based on a number of factors including:
>
> (a) results of core hole drilling;
>
> (b) geophysical analysis of existing seismic data;
>
> (c) orientation of the coal fracture system;
>
> (d) known land use constraints at the surface (including Aboriginal cultural heritage); and
>
> (e) coal seam reservoir modelling.
>
> 86. There will be, as set out in Table 1 of the [Independent Planning Commission Statement of Reasons]…, only one well pad per 225 hectares of the Project Area.

[41] The parties seem to accept that the location of gas field infrastructure has not yet been confirmed, or that any development will be subject to consultations, regarding matters listed from (a) to (e) above. I accept such evidence.

[42] The Gomeroi applicant does not accept that the available flexibility and application of the factors listed from (a) to (e) above will be sufficient to address their concerns about the Narrabri Gas Project. I deal with their contentions below.

The Independent Planning Commission

[43] At this point it is useful to say a little about the process by which the Narrabri Gas Project has been approved. On 26 May 2014, the State gave notices pursuant to s 29 of the Native Title Act, specifying the notification day as 28 May 2014. Elsewhere in this determination, particularly in connection with the good faith issue, I have said a little about events which occurred thereafter. In February 2017, Santos submitted a development application and Environmental Impact Statement to the Department of Planning, Industry and Environment (**Department**) in relation to the project. The Environmental Impact Statement included chapters entitled "Aboriginal heritage" (including Appendix N2 – Cultural Heritage Management Plan) and "Greenhouse gas" (including Appendix R - "Greenhouse gas assessment") (the **GHG Assessment**). These documents were prepared by Santos. Each presents a detailed assessment of Aboriginal cultural heritage and the projected greenhouse gas emissions. The Environmental Impact Statement was exhibited by the Department. Approximately 23,000 submissions were received in response. The public submissions included submissions from the Dharriwaa Elders Group, Gomeroi Traditional Custodians and the Narrabri Local Aboriginal Land Council. Santos asserts that submissions were received from members of the Gomeroi applicant. However, the source of such information is not clear.

[44] In accordance with the requirements of the *Environmental Planning and Assessment Act 1979* (NSW) (**Environmental Planning and Assessment Act**), the development application was referred, by the State Minister, to the Independent Planning Commission, as the designated consent authority. The Minister also requested that the Independent Planning Commission conduct a public hearing. The public hearing was held over 7 days in late July to 1 August 2020. In September 2020, the Independent Planning Commission granted the Development Consent, in accordance with the relevant State approvals process.

[45] In November 2020, pursuant to arrangements under a bilateral agreement between the New South Wales and Commonwealth Governments, the Commonwealth Minister considered the Department's Report and, under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**Environmental Protection Act**), approved the project as a controlled action, subject to conditions.

[46] Under s 4.15, the Environmental Planning and Assessment Act sets out certain matters, which matters a consent authority must take into account, if relevant to the development application process in question. Section 4.15 "Evaluation" provides, in part, that:

> (1) **Matters for consideration – general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application–
>
> (a) the provisions of–
>
> (i) any environmental planning instrument, and
>
> (ii) …
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,
>
> (d) any submissions made in accordance with this Act or the regulations,
>
> (e) the public interest

[47] Under s 4.6 of the Environmental Planning and Assessment Act, assessment of the proposed development undertaken by the Department may be done on behalf of the Independent Planning Commission, without limiting any other assessments that the Independent Planning Commission may wish to make. At p 22 of the Commission's Statement of Reasons, it set out the list of material considered by it, including the Department's Report dated 11 June 2020. The Department's Report is annexed to the affidavit of Mr Todd Dunn. It included a detailed consideration of the matters identified in s 4.15 of the Environmental Planning and Assessment Act, including groundwater and produced water management impacts, biodiversity, Aboriginal heritage, greenhouse gas emissions and climate change, economic and social impacts and other issues.

[48] Chapter 6 of the Department's Report provides an assessment of the GHG Assessment and also considers research from the Commonwealth Scientific and Industrial Research Organisation (**CSIRO**). The Department concluded that:

> … there is a demonstrable need for the gas generated by the project, and that the project is consistent with NSW's and Australia's commitments to a low carbon future.

[49] Chapter 5 of the Department's report sets out the details of community engagement, including an analysis of the public submissions. The report indicates that of the 23,000 submissions received, 98% were opposed to gas development in New South Wales. The arguments included the need for New South Wales to take urgent action to address

climate change; unacceptable quantities of direct, indirect, and fugitive emissions produced; downstream impacts of emission and impacts upon land, water and biodiversity. Submissions regarding unacceptable impacts included:

> … diminishing the heritage values of the region, including intangible cultural heritage values of the Aboriginal community and their connection to country.

[50] It is not clear whether these submissions were referring to climate change as a cause, direct or indirect, of such unacceptable impacts. Seventeen agencies provided advice and submissions to the Department, including the Narrabri Shire Council, Environment Protection Authority and NSW Health and Transport. None of the agencies opposed the Narrabri Gas Project. However clarification was sought on a range of issues, including fugitive emissions, Aboriginal heritage consultation and other matters. Agency advice may be viewed on the Department's website.

[51] The Independent Planning Commission, in its Statement of Reasons, had regard to substantial public comments and submissions, some of which were received at the Public Hearing. At para 57 of its Statement of Reasons, the Independent Planning Commission explains that the matters for consideration under s 4.15 of the Environmental Planning and Assessment Act are not exhaustive, and that it may consider other matters when determining the development application.

[52] The Independent Planning Commission Statement of Reasons indicates that 366 speakers addressed the Public Hearing. Of the speakers, 346 objected, and 18 were in support. "Climate change impacts from greenhouse gas emissions" and "Impacts on Aboriginal cultural heritage" were significant issues.

[53] The Independent Planning Commission's Statement of Reasons addressed public comments related to the environmental impacts of scope 1-3 greenhouse gas emissions, and the contribution of the Narrabri Gas Project to global climate change. These comments included assertions that estimates provided in the Environmental Impact Statement for CO2 and fugitive methane (CO4) emissions were too low, and that these low estimates led to a false conclusion that gas-fired electricity would, overall, reduce emissions otherwise produced by coal-fired electricity. It was further asserted in the public comments that scope 3 emissions from the project would exceed Australia's carbon budget under the Paris Agreement.

[54] In making its findings, at para 170 of its Statement of Reasons, the Independent Planning Commission had regard to responses from the State and Santos. Although it accepted the data provided in the Environmental Impact Statement regarding CO2 and CO4 emissions estimates, it also accepted that any increase in the projected emissions would negate the benefits of gas-fired electricity generation. For that reason, the Independent Planning Commission imposed conditions B20 and B21, which conditions require that any emissions beyond the predicted scope 1 and 2 emissions be fully offset. On the basis of the Environmental Impact Statement emissions estimates, the Independent Planning Commission concluded that the emissions from the project are justifiable, having regard to the ongoing and increasing needs of the domestic market for energy, and targets agreed by the Commonwealth and New South Wales Governments at the international and local levels.

[55] The Independent Planning Commission imposed a further condition B19, requiring the establishment of a Greenhouse Gas Emissions Advisory Group to inform the proper management and reporting of emissions from the Narrabri Gas Project. It is not clear whether scope 3 emissions are to be monitored by the Advisory Group.

[56] The Independent Planning Commission also considered public comments regarding bushfire risk, biodiversity impacts, groundwater dependent ecosystems, Aboriginal cultural heritage, social impacts, economic impacts, ecologically sustainable development and other matters. However, with the exception of bushfire risk, the Independent Planning Commission did not examine, in detail, the extent to which climate change might affect each of these matters.

[57] At paras 415 to 438, the Independent Planning Commission's Statement of Reasons addresses the "public interest" in the context of the objects of the Environmental Planning and Assessment Act. At para 416, the Independent Planning Commission stated:

> The Commission notes that the CSG resources are located within existing exploration licence areas, are in saline aquifers that are largely not used for productive agriculture and are within seams that are permeable enough to not require fracking to release the gas. The Commission is of the view that the extraction of CSG as a part of the Project is an efficient use of the land and represents a suitably managed use of the State's natural gas resources. The Commission is satisfied with the Department's assessment outlined in the Department's [Assessment Report] and finds that the Project will provide ongoing socio-economic benefits to the people of NSW, a diversification of industry in the Narrabri region, and ongoing employment opportunities for members

> of the local community. Further, the Project is likely to produce sufficient gas to meet up to 50% of NSW's gas demand. This would be in circumstances where currently only about 5% of NSW's gas demand is met from the State's own resources, and (absent this Project) is likely to reduce to nil by 2024. The Project therefore has the potential to contribute to gas security for NSW and could be available for the production of electricity and for use in homes and in NSW's industries and businesses. Therefore, the Project accords with Object (a).

[58] The Independent Planning Commission concluded that:

> The Commission finds that on balance, and when weighed against the relevant climate change policy framework, objects of the EP&A Act, ESD principles and socio-economic benefits, the potential impacts associated with the Project are manageable, and the risks of adverse impacts on the environment are low. The likely benefits of the Project warrant the conclusion that an appropriately conditioned approval is in the public interest.

The Development Consent Conditions

[59] The Development Consent conditions are aligned to each of the phases of the Narrabri Gas Project as described above, and include Aboriginal cultural heritage conditions in "Part B – Specific Environmental Conditions". Part B contains various provisions regulating Santos's activities concerning water, biodiversity, heritage, hazards and risk, rehabilitation and social issues, amongst other topics.

[60] Development Consent condition B1 requires Santos to comply with locational criteria applicable to natural and heritage features and areas within, and in the vicinity of the Narrabri Gas Project area. The features identified for protection by avoidance and other measures include conservation areas, water resources, biodiversity and heritage. For example, buffer zones are required for watercourses, and disturbance limits are placed on vegetation types and threatened flora and fauna.

[61] Conditions B2 and B3 require the implementation of an approved Field Development Protocol prior to the commencement of Phase 1. The Field Development Protocol provides a compliance framework, including plans and processes for siting of gas field infrastructure. Such plans and processes must comply with the locational criteria, and other constraints, designed to minimize environmental and related impacts. For example, The Field Development Protocol provides for in-field micro-siting comprising ground-truthing surveys, ecological surveys and cultural surveys, amongst other things, to be completed prior to the construction of any gas field infrastructure.

[62] Conditions B4-B6 require the preparation and approval of a Field Development Plan prior to the construction of any gas field infrastructure. The Field Development Plan is to include the results of micro-siting surveys and detailed plans, showing existing and proposed gas field infrastructure. It must be prepared in consultation with a number of advisory groups. Those advisory groups include landowners, the Aboriginal Cultural Heritage Advisory Group, Greenhouse Gas Emissions Advisory Group, and the Water Technical Advisory Group. Condition B5 provides that Santos must not commence Phase 1 until the Field Development Plan is approved by the Planning Secretary.

[63] Should the Petroleum Production Lease Applications be granted, Santos will be bound by the Development Consent conditions listed above.

The Aboriginal Cultural Heritage Management Plan

[64] Condition B59 of the Development Consent requires Santos to prepare an Aboriginal Cultural Heritage Management Plan prior to the commencement of Phase 1. Condition B60 requires implementation of the Aboriginal Cultural Heritage Management Plan, once approved by the Planning Secretary. Conditions B53-B57 provide for the avoidance of all known Aboriginal cultural heritage items, procedures for the discovery of human remains and previously unknown Aboriginal cultural heritage items, and the recording of Aboriginal cultural heritage. Condition B58 includes the establishment of an Aboriginal Cultural Heritage Advisory Group comprised of Aboriginal heritage representatives, including at least one member of the Gomeroi applicant. Mr Dunn's affidavit advises that the Aboriginal Cultural Heritage Advisory Group met three times in 2021 and included two representatives of the Gomeroi applicant (2017-2022).

[65] The Aboriginal Cultural Heritage Management Plan received approval on 15 March 2022 and is a publicly available document.[10] It contains detailed provisions which meet the requirements of the Development Consent conditions and additional matters such as the establishment and operation of an Aboriginal Cultural Heritage Working Group (which includes at least four Gomeroi representatives) as well as an Additional Research Program. The Additional Research Program is intended to confirm existing information and provide an opportunity to gather further information regarding unknown tangible

[10] See Santos (2022) <https://narrabrigasproject.com.au/wp-content/uploads/2022/11/2_ACHMP-Rev-0_Redacted.pdf>; see also NSW Government (2022) <https://narrabrigasproject.com.au/wp-content/uploads/2022/11/1_ACHMP-DPE-Approval_Redacted.pdf>.

and intangible Aboriginal cultural heritage. The Aboriginal Cultural Heritage Management Plan currently provides for the completion of the Additional Research Program within 12 months of the commencement of Phase 2. Santos now proposes that the program be completed prior to the commencement of Phase 2.

[66] The Aboriginal Cultural Heritage Management Plan already contains data and a management framework. The framework informs the operational procedures to be adopted, prior to the commencement of Phase 1 in the Field Development Protocol and Field Development Plan for the avoidance and protection of Aboriginal cultural heritage. The procedures require notification to, and consultation with the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group throughout the life of the project. They include measures required by condition B59(d). Schedule 3, for example, sets out a table listing site types which must be avoided completely. The table includes material objects such as carved and scarred trees. It also provides for non-material cultural heritage, for example, "[p]laces of traditional and Anthropological Significance identified in the cultural heritage audit review or in a Cultural Heritage Compliance Plan". The details of such Plan are described as "[s]ites previously identified by Santos as a Place of Traditional and Anthropological Significance or otherwise identified in the Additional Research Program." Schedule 5, para 11 provides a further description of such places. Schedule 4 identifies other specific types, such as stone artefacts, which may be managed by means other than avoidance.

[67] Should the Petroleum Production Lease Applications be granted, Santos will be bound by the Development Consent conditions B53 – B60 concerning Aboriginal cultural heritage.

Other Controls Applicable to the Narrabri Gas Project

[68] In November 2020, the Narrabri Gas Project was declared to be a controlled action under the Environmental Protection Act. The controlling provisions relate to listed threatened species and ecological communities, water resources related to coal seam gas development, and Commonwealth land. The approved conditions impose specific measures on the Narrabri Gas Project, such as a clearance limit of 989 hectares of native vegetation.

[69] Mr Dunn's evidence indicates the commitment of Santos to the implementation of all of the Development Consent conditions, including restrictions on the location of gas field infrastructure. His evidence refers specifically to the investigative and enforcement powers of the Department and the NSW Environment Protection Authority, and to the penalties and consequences applicable for non-compliance.

[70] Mr Kreicbergs' evidence refers to additional protection for Aboriginal cultural heritage in New South Wales law, including an offence regime, the Aboriginal Heritage Information Management System under the *National Parks and Wildlife Act 1974* (NSW) (**National Parks and Wildlife Act**) and the State Heritage Register under the *Heritage Act 1977* (NSW) (**Heritage Act**). Santos's contentions refer to further protections for Aboriginal cultural heritage available under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

[71] The State submits that the relevant State regulatory regimes should be taken into account by the Tribunal in considering s 39(1). The State contends that should the Petroleum Production Lease Applications be granted to Santos, conditions included in the "sample lease", such as measures to prevent or minimize harm to the environment, and site rehabilitation, are relevant factors which the Tribunal should consider. The State contends that breaches of any lease condition could lead to its cancellation, amongst other measures.

[72] The State refers to the *Protection of the Environment Operations Act 1997* (NSW) and Environmental Protection Licences issued under that Act for the purpose of a development consent. The State contends that Environmental Protection Licences are relevant to avoiding or minimizing environmental harm and provide measures dealing with matters such as regulating groundwater and produced water storage, and the publication of monitoring data relating to the same. It appears from Mr Dunn's cross-examination at the hearing, that Santos does not yet hold an Environmental Protection Licence in respect of the Narrabri Gas Project.

[73] The parties do not dispute the validity of the Development Consent conditions, the Aboriginal Cultural Heritage Management Plan or the operation of s 67 of the Petroleum (Onshore) Act. I should point out that for the purposes of ss 39(1)(a) and 39(2), the

proposed grants are "acts" and, for the purpose of subdiv P of the Native Title Act, such acts are "future acts".

[74] Clearly, the State's protection regime is extensive, as regards both Aboriginal cultural heritage and environmental matters. Considerable time and effort has been spent by both Santos and the State in obtaining and granting appropriate consents and/or approvals. I see no reason to doubt that the State will enforce its legislative regime, particularly as there will be ongoing interest in the Narrabri Gas Project, on behalf of both the Gomeroi people and the broader Narrabri community.

The "Pilliga", the Narrabri Gas Project Area, the Santos Project Area, and the Maximum Disturbance Area

[75] At para 44 of Mr Dunn's affidavit, he refers to the term "Pilliga" as representing:

> an agglomeration of forested area that totals more than 500,000 hectares within north-western NSW around Coonabarabran, Baradine and Narrabri. A maximum of 0.2% of the Pilliga forest area will be disturbed by the Project (assuming that the maximum disturbance of native vegetation permitted under the conditions within the Project Area occurs entirely within Pilliga forest). This means that access to 99.8% of the Pilliga will be unaffected by the Project.

This description corresponds with the Gomeroi applicant's description at para 188 of its revised contentions. I accept Mr Dunn's description of the term "Pilliga" and "Pilliga forest".

[76] The combined area of the proposed grants and PPL 3 are approximately 95,000 hectares (950km^2). The parties do not contest Santos's estimate that the Narrabri Gas Project will disturb no more than a maximum area of 1,000 hectares (10km^2), approximately 1% of the total Narrabri Gas Project area. It is uncontested that the bulk of the Narrabri Gas Project will occur in the "Pilliga", including mostly State forest areas identified as suitable for "forestry, recreation and mineral extraction", under the *Brigalow and Nandewar Community Conservation Area Act 2005* (NSW) (**Brigalow Act**). The Development Consent conditions limit vegetation disturbance to a maximum of 988.8 hectares. Santos estimate that only 27-67% of that area is likely to be cleared.

[77] The Gomeroi applicant does not challenge Santos's estimate that the Narrabri Gas Project covers a maximum area equivalent to 0.85% of the total native title claim area, (of which the project footprint is approximately 0.009%) of the native title claim area,

or 0.2% of the Pilliga forest. Santos contend that the progressive (or staggered) nature of the Narrabri Gas Project, and the flexible siting of infrastructure will minimize impacts, and that the effect upon the Narrabri Gas Project area will be "limited, manageable and acceptable". The Gomeroi applicant submits that such an approach fails to consider impacts upon areas surrounding project infrastructure. Nevertheless, it appears to be beyond dispute (and I accept) that the Narrabri Gas Project area (including the Santos project area) will comprise no more than one-fifth of the Pilliga forest, and less than 1% of the native title claim area.

k. Difficulties and Delay

[78] The Narrabri Gas Project is inherently complex. Negotiations have continued over many years. The written evidence before the Tribunal occupies thousands of pages. It is not easy to identify the relevant issues for the purposes of these proceedings. Much time has been spent in the examination of events which occurred between 2011 and the notification day, 28 May 2014. The Gomeroi applicant asserts that the obligation to negotiate in good faith, pursuant to s 31(1), arose prior to the notification day, possibly upon the commencement of communications between NTSCORP and Santos in 2011. For reasons which appear below, I consider that such duty arose no earlier than the notification day. I accept that earlier events may be relevant to the extent that they cast light on events occurring after that day but, in this case, I see no such relevance.

[79] Insofar as concerns the question of good faith, as early as 7 August 2013, in notes of a "Santos Meeting", there is a statement that, "good faith test will be interesting". Given that the meeting is described as a "Santos Meeting", it seems probable that the note was made by somebody from NTSCORP or the Gomeroi applicant. I find it curious that such a person would, at that early stage, be concerned about good faith. Further, in September 2014, Ms Hema Hariharan, of NTSCORP, raised good faith in the context of circumstances which she seemed not to have understood. I deal with those circumstances at a later stage. This early preoccupation with the question of good faith appears to be largely responsible for the extended and, in my view, irrelevant consideration of events occurring prior to 28 May 2014 and shortly after that date, and prior to the change of the Gomeroi applicant's solicitors in late-January 2015. There has also been substantial delay as the result of such change, and as a result of the attempted

reconstitution of the Gomeroi applicant in July 2016. I shall return to these matters. Despite unexplained assertions by the Gomeroi applicant to the contrary, there is no evidence that Santos was, in any way, responsible for those events.

[80] Further, substantial delay in the conduct of negotiations seems to have arisen out of the limitation imposed upon the Gomeroi applicant's authority by the native title claim group. Experience demonstrates that the convening and conduct of native title claim group meetings often pose difficulties. Between early 2020 and early 2022, the matter was further complicated by the COVID-19 pandemic. There was an obvious need for a more functional form of authorization. However nothing was done about the matter. Curiously, in the course of these proceedings, the Gomeroi applicant has asserted that Santos did not send appropriately authorized representatives to negotiation meetings. I discuss this assertion in more detail at a later stage. It is clear that the Santos representatives had instructions as to the negotiation. However such authority was limited, particularly as concerned a "production levy" or "royalty" payment, to which issue I shall return.

1.2. Summary of the Parties' Contentions: Good Faith

[81] At this stage, I would normally summarize the evidence, before addressing the submissions. However, the evidence, especially the documentary evidence, is so extensive that such an approach would be pointless. Hence I shall attempt to identify the parties' contentions, referring to the evidence where necessary.

a. The Gomeroi Applicant

[82] The Gomeroi applicant asserts that Santos failed to negotiate in good faith with a view to obtaining its agreement to the proposed grants, with or without conditions. For "convenience", in the points of claim, the Gomeroi applicant initially identified four "negotiation periods" as follows:

- 6 May 2011 to 29 (or 30) January 2015;
- 30 January 2015 to 18 July 2016;
- 20 July 2016 to 7 December 2017; and
- February 2018 to the "present".

[83] In its contentions, the Gomeroi applicant refers to these periods respectively, as the first to fourth negotiation periods. At a late stage in the proceedings, the Gomeroi applicant truncated the fourth negotiation period by creating a fifth negotiation period, commencing on 5 May 2021 (or 28 May 2021) and continuing, possibly until 25 March 2022, the day after the native title claim group had rejected Santos's then current offer.

[84] The Gomeroi applicant asserts that during the first negotiation period, Santos:

- falsely represented certain matters to the Gomeroi applicant;
- met with the Gomeroi applicant in the absence of its legal advisers; and
- encouraged the Gomeroi applicant to act contrary to NTSCORP's legal advice and limitations placed upon it by the native title claim group.

[85] As to the second negotiation period, the Gomeroi applicant asserts that Santos purported to negotiate with the Gomeroi applicant (2013-2017) whilst it was, as Santos knew, acting beyond its authority. It is said that during the third negotiation period, Santos purported to negotiate with the Gomeroi applicant (2013-2017) after the native title claim group had, to Santos's knowledge, withdrawn its previous authorization and reconstituted the Gomeroi applicant (2017-2022).

[86] Prior to the constitution of the fifth negotiation period, the Gomeroi applicant asserted that during the fourth negotiation period, Santos:

- offered compensation, "significantly below market value";
- failed to respond to expert opinion which demonstrated the inadequacy of the offer;
- adopted a fixed position on compensation;
- failed to provide important information; and
- "used the Future Act Determination lever".

[87] As to the fifth negotiation period, the Gomeroi applicant asserts that:

- it was unreasonable for Santos not to agree to a claim group meeting before lodging its s 35 application;

- it was unreasonable for Santos not to agree to conditions proposed by the Gomeroi applicant and to assert that it did not understand the need for such conditions; and
- it was unreasonable for Santos to reject the terms of a "counter-offer" by the Gomeroi applicant.

[88] At a very late stage in proceedings, the Gomeroi applicant sought to assert that the State had failed to negotiate in good faith, no such assertion having previously been made. I shall deal with that matter at a later stage.

b. Santos

[89] Santos submits that the Narrabri Gas Project involves:

- gas exploration and appraisal – acquiring seismic data, drilling chip holes, core holes and pilot wells;
- development and operation of a field – converting pilot wells to production wells, drilling new production wells and monitoring bores, developing gas-and-water-gathering and treatment systems and in-field gas compression facilities; and
- eventual decommissioning and rehabilitation – sealing production wells, removing surface infrastructure and rehabilitating sites.

[90] Concerning the question of good faith negotiations during the first negotiation period, Santos says that it cannot respond to the serious and unparticularized allegations made against it, particularly having regard to the passage of time. Santos also challenges the relevance of such allegations, to the extent that they relate to events which occurred prior to the notification of the proposed grants (on 28 May 2014).

[91] With regard to the second and third negotiation periods (30 January 2015 to 18 July 2016, and 20 July 2016 to 7 December 2017), Santos again asserts that it cannot respond to unparticularized assertions, particularly having regard to the passage of time. Further, it submits that any such conduct was in accordance with the Native Title Act. In any event, no negotiations were concluded, nor agreements reached in the period between the authorization of the Gomeroi applicant (2017-2022) in July 2016, and the Federal

Court's determination of the s 66B application, by which the Gomeroi applicant was reconstituted (on 7 December 2017).

[92] Concerning the fourth negotiation period, Santos denies the relevance of "market value" for present purposes, or that its offers were significantly below "market value". It denies that it adopted a fixed position in negotiation, or that it failed to respond to expert opinion. It otherwise denies the matters alleged by the Gomeroi applicant. Events during the fifth negotiation period are too confused to be summarized at this stage.

[93] In effect, Santos submits that it has negotiated with the aim of reaching agreement. It submits that such negotiations have not been helped by the limited capacity of the Gomeroi applicant to enter into a binding agreement, without a further meeting of the native title claim group.

c. The State

[94] The State did not initially address the good faith question.

1.3. Summary of the Parties' Contentions: Section 39

a. The Gomeroi Applicant

[95] As to the s 39 considerations, the Gomeroi applicant addresses:

- the native title claim group's obligations to care for country;
- the particular spiritual significance of the Pilliga forest, and of special sites there and at Yarrie Lake;
- the exercise of the native title claim group's registered native title rights and interests within the Pilliga forest;
- fragmentation and isolation of areas of vegetation;
- access by the native title claim group to country within the Narrabri Gas Project area, which access is likely to be disrupted;
- risk of environmental damage as the result of leaks or spills of substances, including radioactive uranium, methane and other pollutants, to groundwater and other damage;

- disruption of Gomeroi social, economic and cultural structures, of the native title claim group; and
- the extent to which increased greenhouse gas emissions will cause significant damage to the environment, the economy, and the mental and physical wellbeing of human beings.

b. Santos

[96] Concerning the s 39 considerations, Santos submits that the proposed grants will have only a limited, manageable and acceptable effect upon the enjoyment of native title rights and interests. In particular, the Narrabri Gas Project area:

- will cover approximately 0.83% of the overall native title claim area;
- may disturb up to 1,000ha over the life of the project, so that there will be only temporary restrictions over limited areas; and
- will involve the progressive commissioning and rehabilitation of the wells, thus minimizing the extent of disturbance at any particular time.

[97] Santos further submits that:

- the statutory regime and associated approvals provide sufficient protection of cultural heritage, so that there will be no impact, or only minimal impact upon it;
- it will consult with the native title claim group to develop cultural heritage management documents, which documents will identify suitable well locations;
- any impact will be reduced by the fact that there has been extinguishment of native title over about 50% of the relevant area; and
- the non-extinguishment principle applies to the proposed grants.

[98] Santos does not admit the Gomeroi applicant's assertions concerning caring for country and associated matters, as identified in paras 11-13 of its points of claim. Santos also denies that the proposed grants will result in significant land clearance with associated "fragmentation and isolation" of areas of vegetation or limited access thereto. It denies that access will be reduced, or that there will be a significant, permanent and adverse

impact upon the environment. Santos further denies that there will be damage as the result of leaks or spills.

[99] Santos declines to respond to unspecified allegations in para 17 of the Gomeroi applicant's points of claim. It denies that its conduct has caused disruption to Gomeroi social, environmental and cultural structures, or that it will do so in the future. Further, if the proposed grants occur, Santos will, "continue to co-operate and liaise with the Gomeroi community".

[100] Santos points out that much of the land is subject to existing non-native title uses. Such uses currently impact on the exercise of native title rights and interests. Santos also points to the economic and other benefits of the proposed grants to the Gomeroi people and more broadly, to the public. It denies that the proposed grants will cause increased impact through climate change, and asserts that such matters have been previously addressed by the Independent Planning Commission and the New South Wales Land and Environment Court (**Land and Environment Court**).

[101] Finally, Santos submits that it is, "a high profile and established Australian company". It aims to create mutually beneficial relationships with Aboriginal communities across Australia. It asserts that the proposed grants are in the public interest. Santos disputes the proposition that any grants should only be made, "in accordance with an agreement with the Gomeroi claim group". It accepts that any determination may be subject to conditions.

c. The State

[102] With respect to the s 39 considerations, the State does not admit the Gomeroi applicant's assertions as to caring for country and associated matters. It denies that the proposed grants will, of themselves, result in the clearing of vegetation and says that such assertion lacks particularity. The State admits that if the proposed grants are made, and if the relevant rights are exercised, access may be affected. However the State claims that the Gomeroi applicant's assertions concerning this matter are unparticularized. The State denies that the proposed grants will, of themselves, have any ecological impact and says that any such impact was assessed as part of the development application process. It refers to reasons and favourable determinations concerning the project made

under State legislation, especially that of the Independent Planning Commission. It further points out that the proposed grants will contain rehabilitation conditions, including a requirement that wells be capped. The State denies that the proposed grants will, of themselves, have any effect on greenhouse gas emissions, or otherwise harm the environment, again referring to decisions under State legislation concerning the project.

[103] The State asserts that the Tribunal may determine that the proposed grants be made without condition, and that there is no cogent reason for imposing a condition requiring authorization of the proposed grants by the Gomeroi applicant.

d. The Gomeroi Applicant's Contentions in Reply

[104] The Gomeroi applicant has replied separately to the contentions by Santos and the State. I shall deal firstly with the reply to the State's response. A particular difficulty arises out of para 5 of the Gomeroi applicant's points of claim, the State's response to it and the Gomeroi applicant's reply. In para 5 of the points of claim the Gomeroi applicant makes bare assertions, largely based on the wording of s 39(1). At para 5B of the State's response, it asserts that such claims are, "generalized, and of themselves, do not assist the Tribunal". At para 2 of the Gomeroi applicant's reply, it indicates that particulars are to be found in pt C of its statement of contentions, a document dated 26 November 2021. Part C is 20 pages in length. It mixes evidence with submissions. In no way could pt C be described as providing particulars of the Gomeroi applicant's case, based on s 39. The reply also contains a few inconsequential admissions, denials and assertions. No point would be served by my addressing these matters. The Gomeroi applicant's reply to Santos's response does little more than join issue on almost all factual matters. Again, no point would be served by a detailed summary of that document.

II NEGOTIATIONS IN GOOD FAITH

[105] Concerning the question of negotiation in good faith, I adopt the following passage from the judgment of White J in *Charles v Sheffield Resources Ltd*[11] at [94]-[97]:

> Negotiating in good faith has been said to involve acting honestly, without ulterior motive or purpose, with an open mind, willingness to listen, willingness to compromise, an active and open participation of the other parties, and the making of

[11] (2017) 257 FCR 29.

> every reasonable effort to reach an agreement: *Brownley v Western Australia (No 1)* [1999] FCA 1139; (1999) 95 FCR 152 at [20], [23]-[24]; *Walley v Western Australia* [1999] FCA 3; (1999) 87 FCR 565 at [7]. Delay, obfuscation, intransigence and pettifoggery have been said to be indicia of a want of good faith: *Brownley* at [25]. Negotiation in good faith is not confined to the making of a reasonable offer: *Walley* at [15].
>
> The conduct of the negotiating parties is to be assessed objectively. In *Western Australia v Taylor* (1996) 134 FLR 211, the Tribunal listed a number of indicia (known as the Njamal Indicia) which may bear on the question of whether a party has negotiated in good faith.
>
> The obligation imposed by s 31(1)(b) is a single composite obligation. The Negotiating Parties are obliged "to negotiate in good faith" with a view to obtaining agreement of the stipulated kind. Section 31(1)(b) is not to be understood as imposing separately an obligation to negotiate and an obligation to do so in good faith. It may be natural for the purposes of some analysis to separate out these aspects of the obligation. This was the understanding of s 31(1)(b) for which the appellants contended. However, I consider it plain that the statute imposes a single composite obligation.
>
> Section 31 does not in terms specify any period during which the obligation to negotiate in good faith remains current. It seems implicit in s 31 that the obligation commences upon the Governing party giving the s 29 notice. There is no reason to suppose that the expiry of the six month period fixed by s 35(1)(a) operates by itself to terminate the obligation. Obviously enough, the obligation concludes on the making of an agreement of the s 31(1)(b) kind.

[106] His Honour dissented from the majority view that voluntary negotiations, conducted after a s 35 application has been made, must be conducted in good faith. However there is no reason to doubt the correctness of the above passage. His Honour makes four points. First, s 31(1)(b) requires that there be negotiation in good faith, with a view to obtaining agreement as to the proposed grant. It is the absence of such negotiation in good faith which will engage s 36(2). Second, the relevant conduct must be assessed objectively. Such assessment will be that of the objective and informed bystander. Third, it is implicit in s 31 that the obligation to negotiate in good faith commences upon the giving of the relevant s 29 notice. Fourth, negotiation in good faith is not confined to the making of a reasonable offer. Of these propositions, the Gomeroi applicant challenges only the third. I do not understand Santos or the State to challenge any of them. Not all dealings between the parties will necessarily amount to negotiation.

[107] I should say something about his Honour's reference to the decision of Member Sumner in *Western Australia v Taylor*.[12] Member Sumner identified a number of "useful indicia" which may indicate whether a party has negotiated in good faith. Such indicia may assist the Tribunal in considering good faith. However they are not statutory considerations. The statutory requirement is simply that there be negotiation in good faith. See s

[12] (1996) 134 FLR 211.

31(1)(b). Section 36(2) requires that a party, alleging absence of good faith against another party, must satisfy the Tribunal as to such assertion. The Tribunal must consider the whole of the latter party's conduct, not simply identify those "indicia" which may be present in a particular case. Obviously, the conduct of one party may be relevant in assessing the conduct of another party.

[108] The indicia as stated by Member Sumner in *Western Australia v Taylor*[13] at 224 (often referred to as the "Njamal Indicia") are:

(a) unreasonable delay in initiating communications in the first instance;
(b) failure to make proposals in the first place;
(c) the unexplained failure to communicate with the other parties within a reasonable time;
(d) failure to contact one or more of the other parties;
(e) failure to follow up a lack of response from the other parties;
(f) failure to attempt to organise a meeting between the native title and grantee parties;
(g) failure to take reasonable steps to facilitate and engage in discussions between the parties;
(h) failing to respond to reasonable requests for relevant information within a reasonable time;
(i) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
(j) unnecessary postponement of meetings;
(k) sending negotiators without authority to do more than argue or listen;
(l) refusing to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement;
(m) shifting position just as agreement seems in sight;
(n) adopting a rigid non-negotiable position;
(o) failure to make counter proposals;
(p) unilateral conduct which harms the negotiating process, for example, issuing inappropriate press releases;

[13] (1996) 134 FLR 211.

(q) refusal to sign a written agreement in respect of the negotiation process or otherwise;

(r) failure to do what a reasonable person would do in the circumstances.

At a later stage, I shall say more about these "indicia" and about notions of "reasonableness" and "unreasonableness" in the present context.

[109] The Gomeroi applicant's identification of discrete negotiation periods is arbitrary in the sense that it is not, in any way, related to the provisions of the Native Title Act. For reasons discussed below, and having regard to the views of White J, cited above, I conclude that the obligation to negotiate commences upon the notification day identified in the State's notice. As I have said, conduct prior to notification may, in some circumstances, provide a relevant context for the assessment of later conduct. The Gomeroi applicant asserts that the first negotiation period commenced on 6 May 2011, prior to the notification day (28 May 2014). The former date appears to be the date upon which NTSCORP first spoke to Santos. The termination of the first negotiation period on 29/30 January 2015 appears to have coincided with the replacement of NTSCORP as solicitor for the Gomeroi applicants, by Sam Hegney Solicitors.

[110] The second negotiation period, from 30 January 2015 to 18 July 2016, covers the period between that change of solicitors and the resolution by the native title claim group to reconstitute the Gomeroi applicant. The third negotiation period covers the period between such resolution and the date upon which Rangiah J made an order for reconstitution, pursuant to s 66B of the Native Title Act, on 7 December 2017.

[111] There is some uncertainty as to the end of the fourth negotiation period and the commencement of the fifth negotiation period. In its submissions dated 4 April 2022, the Gomeroi applicant suggests that the relevant date was 28 May 2021. However, in para 1 of the same document, it is asserted that the fifth negotiation period commenced on 5 May 2021, the date on which the s 35 application was made. No apparent significance attaches to the alternative identification of 28 May 2021 as a possible commencement date. The date upon which the fifth negotiation period is said to end is 25 March 2022, the date upon which NTSCORP advised Santos that the native title claim group had rejected Santos's then current offer. It is not clear whether or, if so, when negotiations ended. There seems to have been ongoing communication between

Santos and the Gomeroi applicant until the conclusion of mediation by the Tribunal on 19 March 2021. Thereafter, communications continued until the native title claim group meeting at which Santos's offer was rejected. Events between 25 March 2022 and April 2022 concerned the scheduled Tribunal hearing, after which hearing there was another unsuccessful attempt at mediation in the Tribunal.

[112] The Gomeroi applicant, at different times, has asserted either that the good faith obligation commenced at some time prior to notification pursuant to s 29 of the Native Title Act, possibly in 2011. The proposition is said to be justified by the reasons of Carr J in *Walley v Western Australia*.[14] The page reference is not given. The Gomeroi applicant may be referring to pp 381-382. However I find no support, in that decision, for the submission that the obligation to negotiate in good faith arose prior to the s 29 notification. In any event, his Honour appears to have been discussing the now abandoned proposition that negotiation in good faith is a condition precedent to a s 35 application, a view which was rejected by the Full Court in *FMG Pilbara Pty Ltd v Cox*[15] at [19]. Whatever Carr J may have meant in *Walley v Western Australia*, his later decision in *Coppin v Western Australia*[16] at [21], makes it clear that the obligation to negotiate arises at, or possibly after, the giving of the s 29 notice. The Gomeroi applicant, in its contentions at paras 48-49, incorrectly submits that *Charles v Sheffield Resources Ltd*[17] is authority for the proposition that the obligation arises, "from the commencement of discussion about a particular future act". In that case, the majority did not, as far as I can see, address the point at which the obligation to negotiate in good faith arose. As I have observed above, White J addressed the question at [97], clearly indicating his view that the obligation arose upon the giving of the s 29 notice. Unfortunately, in its contentions at para 45, the Gomeroi applicant cited his Honour's reasons at [94]-[96], but did not cite [97]. I accept his Honour's view and am, in any event, probably bound by the decision in *Coppin v Western Australia*.

[113] As a matter of statutory construction, the Native Title Act must be considered as a whole. Sections 29(7) and 31(1) contemplate the possibility that the State's notice may include a statement that it considers that the expedited procedure applies. In those

[14] (1996) 67 FCR 366.
[15] (2009) 175 FCR 141.
[16] (1999) 92 FCR 465.
[17] (2017) 257 FCR 29.

circumstances, s 31 does not apply and s 32 is engaged. Section 31 will not be engaged unless the Tribunal determines, pursuant to s 32(5) that the expedited procedure does not apply. It would seem to follow that the obligation to negotiate in good faith cannot arise prior to the notification day.

[114] The Gomeroi applicant asserts that Santos's conduct during each negotiation period demonstrates an absence of negotiation in good faith. However it is not sufficient for the Gomeroi applicant simply to identify conduct of which it disapproves. There may be circumstances in which conduct, in itself, demonstrates absence of good faith. However, in the present case, absence of good faith will depend on the availability of the inference that Santos was no longer seeking to reach agreement with the Gomeroi applicant and the State, as to the proposed grants. Section 31(1) does not require continuous negotiation in good faith from a date, arbitrarily chosen by one party, and continuing until the obligation is terminated by operation of the Native Title Act. The question posed by s 31(1)(b) is whether there has been negotiation in good faith, with a view to obtaining the agreement of the relevant native title party.

[115] The fact that a negotiation party finds another party's conduct to be offensive, or simply annoying, does not necessarily lead to the conclusion that the latter is not negotiating in good faith. There are many ways to negotiate. Methods may reflect the personality and/or professional and life experience of each negotiator. Methods may also reflect a negotiator's perceptions of the respective strengths and weaknesses of the parties. Negotiation may be in good faith, even if a party drives a hard bargain, perhaps reflecting perceptions as to such strengths and weaknesses. Section 31(1)(b) does not focus on "good faith". Rather, it focusses on negotiation in good faith, "with a view to obtaining the agreement" of the Gomeroi applicant, to the doing of the relevant acts. That purpose informs the scope of the duty to negotiate in good faith.

[116] In the three years prior to 28 May 2014, the impugned conduct is, in general, either described in the parties' correspondence and other documents, or constituted by such correspondence and documents. In my view, the Gomeroi applicant has not demonstrated the relevance of such conduct (prior to 28 May 2014) to the question of good faith in negotiations occurring after that date. Nonetheless, I should set out the communications which occurred during that earlier period, lest such communications are, at some later stage, or in other proceedings, considered to be relevant.

[117] The Gomeroi applicant and Santos identify different notification days. The former identifies 28 May 2014 as the notification day, whilst the latter identifies 4 June 2015 as such day. As I have said, Santos amended the coordinates describing the areas of the proposed grants. For that reason, it seems that the State chose to give new notices, all with the later notification day. There is no suggestion that the earlier s 29 notices were defective. Nor have the parties challenged the validity of the later notices. A duty to negotiate in good faith clearly arose on 28 May 2014 and continued thereafter.

2.1. Negotiations Prior to Notification Day: May 2011 – 27 May 2014

[118] Before considering the evidence, I should indicate that I do not propose to consider the evidence by reference to the negotiation periods identified by the Gomeroi applicant. However it may be useful if I set the events in a context which I consider to be helpful. It is appropriate and necessary that I distinguish between events before and after the notification day. Although I shall consider events prior to 28 May 2014, events of importance occurred after that date, including conduct by the Gomeroi applicant and/or NTSCORP, particularly in September 2014. In early 2015, NTSCORP was dismissed as solicitor. However negotiations continued between Santos and the Gomeroi applicant (2013-2017) until 7 December 2017 when Rangiah J gave effect to a July 2016 resolution, varying the constitution of the Gomeroi applicant. Hence, on 7 December 2017, there was a significant change in the composition of the Gomeroi applicant, perhaps reflected in the Gomeroi applicant's approach to negotiations.

[119] There is evidence of early meetings between NTSCORP and Santos on 6 May 2011 and on 27 February 2012. In an email dated 5 November 2012, NTSCORP advanced itself as being able to provide, "community facilitation service", including "arranging logistics for meetings, accommodation, field trips, etc." At a later stage, this matter was to cause friction between NTSCORP and Santos. Shortly after the meeting on 6 May 2011, on 14 June 2011, Mr Jones, an employee of Santos, told Mr De Silva of NTSCORP, that Santos would not pay royalties out of profits.

[120] Concerning the early negotiation, the Gomeroi applicant complains primarily that Santos communicated directly with the original Gomeroi applicant and later, the Gomeroi applicant (2013-2017), rather than communicating through NTSCORP. In a letter dated 22 February 2013, NTSCORP stated that the original Gomeroi applicant

was concerned that Santos was releasing misleading statements to stakeholders. However, at that stage, the Gomeroi applicant did not complain about direct communication. NTSCORP asked that Santos employees be sent a "reminder" that communications were to be sent through NTSCORP. In a letter dated 9 April 2013, NTSCORP asserted that as the original Gomeroi applicant was legally represented, Santos employees should communicate with it through NTSCORP, and asked that staff members be so informed. NTSCORP asserted that no meetings or communications should be "convened" without NTSCORP being present.

[121] The Gomeroi applicant refers to a file note dated 9 April 2012, but probably made on 9 April 2013, concerning events on that day. It seems that a Mr Priestley was, at that time, a member of the original Gomeroi applicant. He asked Mr Mackay, apparently an employee of NTSCORP, about a meeting to be held on 10-11 April 2013. As it turned out, that meeting was of the native title claim group and had nothing to do with Santos. However Mr Mackay erroneously thought that Mr Priestley was referring to a meeting which Santos was convening on those days. When Mr Mackay told him of that proposed meeting, Mr Priestley was upset that he had not been invited. As far as I can see, the matter has no relevance for present purposes.

[122] On 11 April 2013, Santos sought clarification as to whether NTSCORP was acting for the Gomeroi applicant in connection with matters other than its application for a native title determination. It appears that Santos had been told by the Gomeroi applicant that it had not yet "appointed advisors in respect of", its discussions with Santos, presumably concerning proposed future acts. Santos advised NTSCORP that it had received such information. On 16 April 2013, Ms Martignoni responded, asserting that, on 25 June 2011, Mishka Holt Legal Practice and NTSCORP had received instructions to act in relation to all future act matters. By way of explanation, I should add that NTSCORP had a close relationship with "Mishka Holt Legal Practice". Save where necessary, I shall treat the practice as being, effectively, part of NTSCORP.

[123] On 18 April 2013, Santos sent an email to NTSCORP as follows:

> Julie [Ling] has informed me that:
>
> - Our project engagement team met with a number of the Gomeroi claimants last week to provide a high level overview of Santos' proposed Narrabri Gas Development Project.

- The purpose of this meeting was not to undertake negotiations on any topic, but was of the nature of providing information only.
- Julie had specifically offered the claimants resourcing for a legal adviser to attend this meeting, in order to also receive the initial information about the proposed project. The claimants advised they did not wish to take up this offer as they were yet to decide who would be their lawyer.
- At the meeting, the claimants again confirmed this was their position, and stated they would advise of who they had chosen in due course.

The resolution of choice of legal advisors is not an issue that Santos is involved in, and I can only suggest that you may need to contact the claimants about their ongoing instructions.

I should also point out more generally that:

- Santos was not aware that NTSCorp had any ongoing retainer with the Gomeroi applicants in matters beyond representing them in the Gomeroi native title determination application, and I will ask our project engagement team to ensure they seek confirmation of this prior to any further engagement;
- there has been no direct communication between Santos lawyers (internal or external) and the Gomeroi claimants in the preparation of the meeting referred to above;
- it is appropriate (and very common) for project staff (excluding lawyers) to communicate directly with any key stakeholders for a project, particularly to disseminate information; and
- it is always Santos' preferred position that any counter party to formal negotiations or agreements be legally represented, and in the case of native title negotiations (such as RTNS or ILUAs), usually offer resourcing for such services - this will also be the case with the Gomeroi claimants if and when such negotiations commence.

I trust this information responds to you [sic] queries.

[124] In an email dated 24 April 2013, NTSCORP responded as follows:

With regard to the meeting of members of the Gomeroi Native Title Applicant arranged by Santos and held in the week of 8 April 2013, referred to in your email, we note that:

- Santos has previously acknowledged that NTSCORP is a key stakeholder in this process. We confirm that NTSCORP were not made aware of the meeting, nor invited to attend.
- As the legal representative of the Gomeroi People native title claim, we request a copy of the meeting minutes or other materials produced at those meetings. Please ensure these are forwarded immediately, so that we can then ensure that we have all of the necessary information required to provide independent advice on the information presented, and to be able to ensure that those members of the Applicant, who were not present at your meeting, have access to all of the information presented.
- Even if the nature of such a meeting was only to disseminate information, it is our role as legal advisors to monitor, and advise on this information for the benefit of both the Gomeroi Applicant and the Gomeroi People native title claim group. NTSCORP has an obligation and responsibility to present information and advise the entire Gomeroi People native title claim group which would in turn assist in their decision making processes.

- We refute that is it [sic] "*appropriate* (*and very common) for project staff (excluding lawyers) to communicate directly with any key stakeholders for a project*". It is not common practice in NSW for proponents to engage directly the native title claim groups who are legally represented. In NSW (unlike some other states and territories) it is common practice for traditional owner groups to have their legal representative present at all meetings to do with development on traditional country. In NSW, we encourage the principles of free, prior informed consent where all traditional owner groups have access to independent advice on all matters concerning development on traditional lands.
- Please note, we have received complaints from members of the Gomeroi applicant following the meeting with Santos. Some were not aware that NTSCORP and our firm were not invited until arriving at the meeting and were uncomfortable with this.
- One of the consequences of NTSCORP and our firm not attending such meetings is the miscommunication and misinformation that can result. For example, some clients reported that no offer to fund a legal representative was made, just the offer to fund an external expert regarding coal seam gas. This information has subsequently been relayed to other members of the native title claim group, with enquiries then directed to NTSCORP and our firm for clarification. I would assume that it is neither in the interests of Santos or the Gomeroi native title claim group to have information regarding your projects relayed amongst the Gomeroi People without the ability for it to be clarified or explained by NTSCORP or our firm.

We reiterate that we have standing instructions to act on Gomeroi future act matters from the Gomeroi native title claim group, and as such there is no need to seek further confirmation of this issue.

(Original emphasis)

[125] As I understand legal practice, the solicitors acting on behalf of one party may not communicate directly with another, legally represented party. There is, however, no restriction upon direct communications between parties to a particular transaction or dispute, even if either or both parties has or have legal representation. Such communication may sometimes be unwise. It is for the solicitors to advise the parties as to the associated risks, and for each party to decide whether to accept such advice. There is no suggestion that, at least prior to 10 February 2014, NTSCORP had advised the original Gomeroi applicant not to communicate directly with Santos, or that the original Gomeroi applicant had indicated that it required the presence of NTSCORP at future meetings. There is no evidence from any member of the original Gomeroi applicant to the effect that it did not wish to communicate directly with Santos. There is also no evidence that Santos sought to create a "wedge" between the original Gomeroi applicant and NTSCORP, or to, "contradict instructions held by Gomeroi's lawyers", as the Gomeroi applicant now seems to assert. I also note that NTSCORP did not seek to explain the fact that the original Gomeroi applicant had asserted that it had not yet retained a solicitor in connection with its dealings with Santos.

[126] On 3 May 2013, Santos wrote to NTSCORP, advising that it had been contacted by a firm other than NTSCORP, which firm claimed to expect instructions to act for the Gomeroi people. Ms Hariharan responded on 21 May, "confirming" that such assertion was "incorrect".

[127] On 7 May 2013, Santos wrote to the original Gomeroi applicant, referring to a meeting on 10-11 April 2013. The letter demonstrates that Santos had agreed to fund the Gomeroi applicant in obtaining legal advice, and was expecting it to nominate its relevant legal adviser. The letter also demonstrates that the original Gomeroi applicant had asked Santos to engage "Sandlewood" as a service provider. As previously observed, NTSCORP had asserted expertise in that area. Other correspondence suggests that Santos, as a matter of policy, preferred that legal advisers not provide non-legal services, apparently because it considered that legal firms lack the necessary expertise. Santos was to pay for Sandlewood's services. The letter suggests that the meeting was for the purpose of providing information.

[128] On 11 June 2013, Ms Jann-Nell White (Santos) sent an email to Ms Hariharan (NTSCORP). She noted that Ms Hariharan had advised that at a native title claim group meeting on 10-11 May 2013, the Gomeroi people had resolved to retain NTSCORP and the legal practice funded by NTSCORP. Ms White also indicated that Santos would like to discuss the details of communication protocols between Santos, NTSCORP and the Gomeroi people, particularly the question of direct communication between Santos and the Gomeroi people. She included a copy of the letter of 7 May, referred to above, and documents distributed at the meeting on 10-11 April.

[129] In an email dated 16 July 2013, Ms Hariharan referred to a letter dated 9 April 2013 from NTSCORP to Santos, pointing out that discussions had commenced almost two years previously, concerning a communications protocol, land access agreements and funding arrangements. There is no evidence as to the circumstances concerning such delay. Ms Hariharan also noted that in January 2013, NTSCORP had forwarded a template funding agreement and was yet to receive a response. Ms Hariharan asserted that, "misinformation is continuing between Santos and Gomeroi People." She asserted that by, "ensuring that correspondence and contact go through NTSCORP … you can be assured that there is consistency of information communicated…". It seems that NTSCORP either had not discussed with its client the matter of direct communication

with Santos, or was unable to convince it that it should not communicate directly with Santos. The Gomeroi applicant and Santos were at liberty to adopt such a course, regardless of NTSCORP's attitude. Although NTSCORP implies the possibility of abuse by Santos of such contact, there is no basis for inferring that such abuse occurred.

[130] On 26 July 2013, Mr Gavin Scott from Ashurst (Santos's solicitors) provided NTSCORP with a draft agenda for a proposed meeting, to be held on 7 August 2013, and inquired as to persons who would be representing NTSCORP. Agenda items included "Scope of NTSCORP as the Gomeroi People's legal advisers", communications protocols and a cultural heritage management regional agreement. A proposed agenda for a subsequent meeting included "cultural heritage audit" and "CH Regional Agreement".

[131] There is a file note concerning that meeting, probably prepared by NTSCORP. It seems that the question of direct communication between Santos and the Gomeroi applicant was, again, addressed. No doubt because the Narrabri Gas Project was at an early stage, many of the notes are quite vague. However, given the subsequent history of the matter, it is curious that the NTSCORP representative noted that, "good faith test will be interesting." I have previously referred to this curiosity.

[132] On 13 August 2013, the original Gomeroi applicant was reconstituted by order of the Federal Court. The reconstituted group will be referred to as "the Gomeroi applicant (2013-2017)".

[133] On 9 September 2013, NTSCORP provided a draft communications protocol. On 25 September 2013, it provided a draft funding agreement for consideration by Ashurst. On 18 November, Ashurst responded, commenting on both documents. Concerning the communications protocol, Ashurst made it clear that Santos was concerned to ensure that its project team could, where appropriate, engage directly with the Gomeroi applicant (2013-2017) and the native title claim group. Ashurst confirmed that Santos accepted that communications occurring in a "legal process" such as a "Right to Negotiate process" should be conducted in a formal manner with "specific points of contact agreed between the parties". Further, Ashurst confirmed that Santos would communicate with NTSCORP where the latter was acting as a legal adviser, whilst otherwise retaining its right to communicate directly with the Gomeroi applicant (2013-

2017). Ashurst also indicated Santos's dissatisfaction with the proposed funding agreement, and that Santos would prefer to keep the supply of legal services separate from the provision of logistical services. In the end, NTSCORP did not provide such services. As previously noted, the Gomeroi applicant had chosen to retain Sandlewood. Finally, Ashurst indicated that there would be a meeting on country before the end of the year, and that NTSCORP would be invited to send a legal adviser.

[134] On 20 November 2013, Ms Hariharan spoke to Mr Green, apparently a member of the Gomeroi applicant (2013-2017). In the course of the conversation, Mr Green asked about "paper work" from Santos. Ms Hariharan said that Santos had rejected the protocols mentioned in the letter from Ashurst dated 18 November. Ms Hariharan asserted, perhaps inaccurately, that no substantial reasons were provided for such rejection. She also noted that "they" wanted to discuss dates for a meeting. Mr Green told her that there was to be a meeting in Sydney on 11-13 December. It seems that Ms Hariharan had not previously been aware of the proposed meeting. Ms Hariharan contacted Ashurst on 21 November, complaining that she had learnt of such dates from her clients. Presumably, Ashurst had previously indicated that it would discuss meeting dates with NTSCORP. However, Santos had apparently taken matters into its own hands. Mr Scott (Ashurst) subsequently confirmed the meeting dates as "on or around" 12-13 December, in Sydney. He gave a broad outline of the likely agenda, and said that NTSCORP would be invited to attend. Santos was to organize the logistics for the meeting. By any standards, this was a minor matter.

[135] Ms Hariharan responded on 6 December 2013. She complained that the Gomeroi applicant had been advised of the dates before NTSCORP was advised, and without prior consultation. It may be that Ashurst ought to have consulted about dates at an earlier stage. However, Ms Hariharan knew of the dates on 20 November, as appears from the internal email, recording her discussion with Mr Green. Ms Hariharan noted that neither she, nor anybody else from NTSCORP could attend. Given her previous complaints about NTSCORP not being invited to earlier meetings, one might have expected her to be more inclined to arrange attendance. It is surprising that nobody from NTSCORP was able to attend. At the very least, such a response suggests that NTSCORP's attendance was not, at that time, a matter of great significance from its point of view. Ms Hariharan wrote that Sandlewood had advised that NTSCORP could meet with the Gomeroi applicant for half a day on 11 December, such arrangement being

consistent with the meeting being called on 11-13 December. Ms Hariharan also complained that the meeting was now to be held in Sydney and not on country, as suggested in Ashurst's letter of 18 November.

[136] Ms Hariharan complained that there might be discussions at the meeting concerning native title rights and interests, in the absence of NTSCORP, given its inability to attend. She said that "we are … disappointed" that Santos should proceed with the meeting before a communication protocol and a funding agreement had been established. That concern was not really relevant to the question of when the meeting was to be held. The subsequent paragraphs demonstrate that between the meeting on 7 August and December 2013, the protocol and the agreement were canvassed. The evidence is of some importance given the content of para 99 of the Gomeroi applicant's contentions, to which I shall return.

[137] Finally, in the letter of 6 December 2013, NTSCORP referred to the question of its involvement in organizing meetings, apparently in place of Sandlewood, which company had been selected by the original Gomeroi applicant in May 2013. NTSCORP seemed to suggest that any such appointment had been superseded by a resolution of the native title claim group, adopted at the meeting on 10-11 May 2013. However, that resolution seems to have related to legal representation. NTSCORP asserted that the Gomeroi people had instructed that NTSCORP continue to provide the "one-stop-shop" native title services. NTSCORP asserted that some of its clients considered that Sandlewood had a "perceived conflict of interest" in acting for Santos in relation to matters pertaining to the native title rights and interests of the Gomeroi people. NTSCORP then offered to work together to provide logistical support. Santos had previously indicated that it did not support the "one-stop-shop" arrangement, and was not willing to enter into such an agreement with NTSCORP. On 10 December, Ashurst noted that NTSCORP would not be attending the meeting. It advised that it understood that no legal issues would be discussed at the meeting, and that Ashurst itself would not be attending.

[138] On 6 January 2014, Sandlewood advised NTSCORP that a meeting was to be held on 6-7 February 2014. In the same letter, Sandlewood advised that at a meeting of the native title claim group on 12-13 December 2013, it had been appointed to be the service provider. On 14 January 2014, Santos advised NTSCORP of the meeting on 6-7

February, and provided an agenda. Apparently, at the meeting on 12-13 December, it had been agreed that there would be another meeting in Sydney on 6-7 February. On 22 January, NTSCORP responded, complaining about not having been consulted about dates, and asserting that it might not be able to send anybody to the meeting. Perhaps surprisingly, the Gomeroi applicant (2013-2017) had not advised NTSCORP, its solicitor, of the proposed meeting. The agenda for the meeting was subsequently amended, probably to ensure that certain matters would not be raised in NTSCORP's absence. Again, Ashurst also did not attend.

[139] On 30-31 January 2014, NTSCORP met with the Gomeroi applicant. It confirmed that NTSCORP should be present at all future Santos meetings. On 7 February 2014, Ashurst advised NTSCORP that meetings had been scheduled for 4-6 March in Narrabri, 2-4 April in Sydney and 7-9 May in Moree, with details to follow. There appears to have been little or no relevant correspondence between March 2014 and 28 May 2014, the notification day.

[140] The Gomeroi applicant's submissions concerning conduct prior to the notification day appear at paras 102-109 of its contentions. Insofar as the Gomeroi applicant complains that Santos dealt directly with it, and not through NTSCORP, there is little or no evidence of any contemporary opposition to such contact from either the original Gomeroi applicant or the Gomeroi applicant (2013-2017). As I have said, one might infer that NTSCORP would have tried to persuade the Gomeroi applicant to refrain from communicating directly with Santos, as well as seeking to deter Santos from making such contact. If NTSCORP did not raise the matter with the Gomeroi applicant, one wonders why it did not do so. If it raised the matter, its advice seems not to have been accepted. Section 31(1) of the Native Title Act requires that the parties negotiate. The section does not expressly contemplate negotiation through legal representatives, although such negotiation is, no doubt, permissible. Nonetheless, the requirement is that the parties negotiate. Whether the meetings complained of by NTSCORP can be characterized as negotiation is difficult to determine at this stage.

[141] The Gomeroi applicant asserts that Santos incorrectly represented that it would pay for any lawyer chosen by the Gomeroi applicant (2013-2017) to represent it, referring to an email from Santos to NTSCORP, dated 18 April 2013. It submits that at the time, Santos was aware that, by virtue of the native title claim group's instructions, the Gomeroi

applicant could not retain solicitors other than NTSCORP. This appears to be a reference to an assertion made in an email dated 16 April 2013, to which I have previously referred. In it, NTSCORP asserted that on 25 June 2011, the native title claim group had instructed it to act for the Gomeroi people, in relation to future act matters. Nonetheless, it was apparently thought necessary to renew such instructions at a later meeting held on 10-11 May 2013.

[142] It is difficult to see any impropriety in Santos's making the offer to fund legal advice, even if it were aware of any limitation upon the Gomeroi applicant's authority to appoint a solicitor other than NTSCORP. The resolution was to the effect that the native title claim group had an "expectation" that the Gomeroi applicant would not attempt to terminate NTSCORP or its associated firm of solicitors, as solicitor acting on behalf of the native title claim group. This limitation had certain consequences to which I shall return. In any event, Santos made an offer of financial assistance. Whatever the status of NTSCORP or its solicitors' firm may have been, Santos did not, in any respect, mislead. It simply made an offer.

[143] In its contentions at para 104, the Gomeroi applicant seems to assert that Santos had represented to it that it was not aware that NTSCORP had instructions to act for the Gomeroi with respect to future acts. It asserts that Santos knew that such statement was incorrect, in that NTSCORP had so asserted in a letter dated 16 April 2013. In fact, Santos made the relevant statement to NTSCORP, not to the Gomeroi applicant. It is true that NTSCORP had advised, in its email of 16 April 2013, that it had instructions to act for the Gomeroi applicant. However the fact is that in April 2013, Santos had reason to doubt that NTSCORP had instructions to act in the transaction in question. Both the original Gomeroi applicant and an unnamed solicitor had given Santos reason so to believe. It advised NTSCORP accordingly. There is no challenge to this evidence. There is no justification for the assertion that Santos's conduct was, in some way, reprehensible.

[144] In para 105 of its contentions, the Gomeroi applicant asserts that Santos was, "reckless or indifferent", to the effect of its conduct on the, "unique and difficult circumstances of the Gomeroi applicant in discharging its right to negotiate functions under the Act". The "unique and difficult" circumstances are not specified. Nor is there any explanation as to how Santos's conduct may have led to any deleterious effect on the Gomeroi

applicant's position. The words "reckless or indifferent" seem to have been borrowed from a pleading in tort. The submission makes little or no sense. In summary, paras 102-105 are misconceived in so far as they concern the probity of Santos's conduct.

[145] As to para 106 of the contentions, nothing in para 48 of Mr MacLeod's evidence suggests dissension within the original Gomeroi applicant at the relevant time (July 2013) or at any time thereafter, save possibly for the reconstitution resolution in July 2016, as given effect by Rangiah J on 7 December 2017 and, perhaps, the dismissal of NTSCORP as its solicitor. Although Mr Wilson disagreed with the decision, we know little more about it. Nor is there direct evidence of dissension between the Gomeroi applicant (2013-2017) and the native title claim group. Any problem seems to have arisen from the fact that, at the beginning of 2015, the Gomeroi applicant (2013-2017) decided to change solicitors. There is no evidence as to how Santos may have contributed to any problem as a result of its "approach to the negotiations". The "approach" is not described, so that the contention is meaningless. There is no evidence which supports the assertion that Santos's conduct caused discord or weakened the Gomeroi applicant's, "already weak bargaining position in the negotiations". Such "weakness" has not been demonstrated. Further, it is by no means clear that, at that time, any negotiations were in train. Paragraph 107 is incomprehensible.

[146] Paragraph 108 contains a further allegation of reckless or indifferent conduct with regard to, "dissension and the expense and inconvenience known to attend s 66B applications." It seems to be suggested that such application was necessary because the Gomeroi applicant (2013-2017), "was no longer authorised or had exceeded its authority". Again, there is no evidence which suggests that Santos, in any way, contributed to the desire (or need) to reconstitute the Gomeroi applicant. The contention has no merit.

[147] Having regard to the above observations, I conclude that the events which occurred prior to 28 May 2014 provide no substantial basis for the assertion that Santos's conduct fell short of negotiation in good faith.

2.2. Negotiations with the Gomeroi Applicant (2013-2017)

[148] Between the notification day (28 May 2014) and 30 January 2015 (when its instructions were withdrawn), NTSCORP attended at least two meetings with Santos and the Gomeroi applicant, on 17-18 June 2014 and 26-27 August 2014. There was also ongoing correspondence. Relations seem to have declined somewhat, following Santos's agreement to make available the sum of $100,000, "for the Gomeroi people to obtain independent external advice and to resource the Gomeroi applicant for matters relating to cultural heritage". The grant was announced at a meeting on 26-27 August 2014. Subsequent events seem to have led to the assertion by the Gomeroi applicant, at para 99(o) of its contentions, that Santos had failed to provide reasonable funding, "in relation to the conduct of negotiation". I do not necessarily accept, at face value, the unexplained assertion that the Gomeroi applicant had any entitlement to demand "reasonable funding" from Santos. However Santos was willing to assist. This sum of $100,000 was, by no means, the only funding assistance offered by Santos. The evidence suggests that since early 2016, Santos has provided the Gomeroi applicant with in excess of $1 million in support, including funds for legal services.

[149] The circumstances surrounding the proposed grant of $100,000 say much about the relationship between Santos and the Gomeroi applicant/NTSCORP. The meeting on 26-27 August 2014 was attended by NTSCORP, Ashurst, the Gomeroi applicant, Santos and an organization described as "Regional Economic Solutions". At Item 7 in the record of the meeting, the following passage appears:

> **Funds for external advice and cultural heritage**
>
> For the purpose of negotiations arising from the RTN process, Santos has made available up to $100,000 in funds for the Gomeroi people to obtain independent external advice and to resource the Gomeroi Applicant for matters relating to cultural heritage.
>
> In addition to the $100,000, if deemed necessary by the Gomeroi Applicant, Santos will make available an additional $25,000 for the same purpose if the length of the meeting scheduled in November is reduced to two days (as opposed to the proposed three day meeting currently scheduled).
>
> As Jon Bok explained during our last meeting, these funds are provided on the basis that the Gomeroi Applicant understand the funds represent the complete package of support for the RTN process.
>
> The funds are also provided on the basis that the Applicant recognise the statutory processes that Santos must complete for the approval of its project (including the approval of an Environmental Impact Statement) and work cooperatively with Santos within those processes.

[150] On 28 August 2014, Mr Bok (Santos) sent an email to Ms Hariharan (NTSCORP), asking that she confirm acceptance of Santos's offer. He also referred to a proposed cultural heritage planning event in Sydney. He said that Santos would prepare a record of the August meeting. Ms Hariharan replied on 29 August. Her email makes it clear that the identified sum of $100,000 was to be applied in funding attendance at Registered Aboriginal Party consultation meetings, a 4-day "cultural heritage work [sic]" in Sydney and "external advice". As I understand it, the 4-day activity in Sydney was in addition to the proposed November meeting. Ms Hariharan also accepted that should such amount be insufficient for the Gomeroi applicant's needs, a further sum might be made available by reducing the length of the planned November meeting, referred to in the above quotation. Hence it seems always to have been contemplated that the sum of $100,000 might not be sufficient for relevant purposes. I infer that the cost of attendance at the proposed November meeting was also to be paid by Santos. On 8 September, Mr Thorneycroft (a Santos corporate lawyer) confirmed these arrangements. He referred to the possible shortening of the November activity in order to make available a further sum of $25,000. The funds were provided upon the basis that they, "represented the complete package of support for the RTN process". There were other conditions.

[151] On 9 September 2014, Mr Bok advised Ms Hariharan that budget approval had been granted for the costs of the Sydney cultural heritage event in the amount of $76,538.12, which sum was to come from the amount of $100,000. Mr Bok also advised that a further amount of $6,500 had already been allocated in connection with attendance at Registered Aboriginal Party consultation meetings. Ms Hariharan responded, describing the information as "alarming", as the $76,538.12 was well over NTSCORP's own estimates. She asserted that, "had we known of the budget beforehand Gomeroi Applicant [sic] would not have agreed to a $100k cap on expert advice". This assertion is difficult to accept. At the meeting on 26-27 August, it was clearly understood that a one day meeting would cost $25,000, giving some indication as to the likely cost of three or four day activities. Notwithstanding the clear explanation of the basis upon which the $100,000 had been made available, Ms Hariharan sought the removal of the $100,000 "cap" on expenditure for expert advice. On 10 September, Santos refused the request, but made suggestions as to how the Gomeroi applicant could make savings. The cost of the cultural heritage event was reduced by Santos's agreeing to pay an "admin fee", reducing the cost of the September event to $70,000, including GST. It should be

noted that these events occurred within a period of less than four months after the notification day.

[152] At para 99(o) of its contentions, the Gomeroi applicant asserts that these events demonstrate that Santos failed to provide reasonable funding in relation to the conduct of negotiations. The contention clearly lacks merit. The terms upon which the sum of $100,000 was to be provided were clear and agreed. It was known that the likely daily cost of a meeting was in the vicinity of $25,000. The budget for the event in September was likely to be in the order of at least $75,000. Hence Ms Hariharan's "alarm" is surprising. There is no basis for the assertion by the Gomeroi applicant that Santos failed to provide reasonable funding in connection with the conduct of negotiations. Further, the Gomeroi applicant has provided no evidence as to the amount which it would have accepted as being reasonable, or how such an amount would have been calculated. Indeed, the Gomeroi applicant asked that expenditure not be capped in relation to providing expert advice. In any event, there is no general obligation imposed by the Native Title Act upon a party to fund another party's involvement in negotiations. See *Western Australia v Daniel*[18] at [146]-[147]. There is no basis for the assertion in para 99(o) of the contentions.

[153] As previously mentioned, on 17-18 June 2014, shortly after the notification day, the first negotiation meeting was held. It was attended by various members of the Gomeroi applicant and representatives of NTSCORP, Santos and Ashurst. It was recorded that:

> *Authority*: J Bok advised that he and the Santos negotiating team would be authorised to negotiate and complete agreement on behalf of the project. This authorisation will be obtained in the period prior to the next RTN meeting.

[154] The next meeting was held on 26-27 August, at which meeting financial support in the amount of $100,000 was agreed, as mentioned above. Little else appears to have occurred at that meeting. The next meeting was to be scheduled, "once an offer had been prepared by Santos".

[155] Events thereafter were somewhat curious. It seems that quite apart from any further negotiation meeting, there was to be a "Gomeroi People community forum" in Boggabilla on 29 September 2014. On 15 September 2014, Ms Hariharan sent an email to Mr Bok concerning the forum. She seems to have understood that Mr Bok was

[18] (2002) 172 FLR 168.

organizing it**,** and would be sending out appropriate notices. Alternatively, she suggested that if he intended that NTSCORP send the notices, he should advise as to the venue and agenda items. She also recommended that, "due to the late notice", the meeting be deferred from Monday 29 September to Wednesday 1 October. The reference to 29 October is obviously an error; the reference should have been to 29 September. At 8.00am, on 17 September 2014, Mr Bok replied to the email. He said that, as had been the case with earlier forms, Santos understood that the forum would be run by the Gomeroi applicant and NTSCORP. He then said:

> As such, if you are of the opinion that the date needs to be changed or a notice to be sent out then please feel free to do so.

Mr Bok also said that Santos had no, "proposed notice, venue or other items proposed for this meeting". He indicated that if Ms Hariharan wanted a presentation on Santos's proposed activities, or any other matter, he would be happy to assist. He also said that if Ms Hariharan wanted Sandlewood to arrange the venue and catering, she should advise him, and Santos would facilitate such arrangements. He invited her to advise him if any other assistance was required.

[156] Coincidentally, at 9.38am on 17 September 2014, Mr Thorneycroft emailed Ms Hariharan. The record of the June meeting shows that no date for the next meeting had been fixed. At the August meeting, it was agreed that the next meeting would be held, "once an offer had been prepared by Santos". It appears from Mr Thorneycroft's email that, in the course of previous negotiations, the Gomeroi applicant had given Santos an "open account" of the possible impacts of the project on native title rights and interests, and upon Gomeroi concerns and aspirations relating to any native title agreement. In his email of 17 September 2014, Mr Thorneycroft indicated that Santos intended to make an offer to the Gomeroi applicant, having regard to that information, but that it would not be in a position to do so by 30 September. It seems that notwithstanding the record of events at the June and August negotiations meetings, he and Ms Hariharan both expected that a meeting might be scheduled for 30 September 2014. Mr Thorneycroft proposed that the meeting be "held over" until the next scheduled meeting on 30 October 2014.

[157] Ms Hariharan responded to both Mr Bok and Mr Thorneycroft in one email, at 1.19pm on 17 September 2014. To say the least, her response was surprising. Most of the reply

related to Mr Bok's email. The response to Mr Thorneycroft seems to have been almost an afterthought. First, Ms Hariharan asserted that Santos had committed to the Boggabilla forum, and that Mr Bok's email was "not consistent with" an earlier meeting at which the forum had been scheduled. Ms Hariharan then complained that at previous meetings and information sessions, Santos and Sandlewood had made arrangements and coordinated logistics. Mr Bok had clearly offered to facilitate such matters at the forthcoming meeting, if Ms Hariharan so wished. He merely indicated that he understood that previous forums had been conducted by the Gomeroi applicant and NTSCORP.

[158] Ms Hariharan seems to have understood that, at the meeting, Santos would provide an update on its projects. Ms Hariharan asserted that failure to honour the commitment, "equates to not discharging [Santos's] obligation to negotiate in good faith". Of course, Mr Bok had, in his email of 17 September, offered to make any presentation that Ms Hariharan required. Neither he nor Santos had "reneged" on anything. Ms Hariharan, herself, had raised the question of delaying the meeting. Mr Bok had merely indicated that he would acquiesce in any such proposal by NTSCORP.

[159] Nothing in Mr Bok's email justified Ms Hariharan's response. The email exchanges may reflect some confusion on her part. These events do not demonstrate that Santos failed to negotiate in good faith.

[160] Concerning correspondence with Mr Thorneycroft, Ms Hariharan referred to an email sent by her on 29 August 2014. That email dealt primarily with the offer of $100,000, discussed above. However, at para 5 of that email, Ms Hariharan recognized the possibility that Santos might not have been able to make an offer by September, indicating that in any case, the Gomeroi applicant would like the meeting to proceed, for the purpose of discussing other matters. In her email of 17 September, Ms Hariharan then asserted that, "[w]e are disappointed that the Santos negotiators have sought to refuse to attend a scheduled meeting with the Gomeroi People Applicant". The response seems to have been unduly hostile and was not entirely accurate. Opinions may well have differed as to the value, in monetary terms, of having a further meeting prior to the delivery of Santos's anticipated offer. Other evidence suggests that Santos was paying for such meetings.

[161] On 17 September at 4.14pm, Mr Thorneycroft replied, explaining the thrust of Mr Bok's email, and then addressing Ms Hariharan's response to his own earlier email. He said that his understanding of the previous meeting was that it had been agreed that if Santos was not in a position to provide an offer at the next meeting, the meeting should be postponed. He said that if there were other matters to be discussed, he would consider the possibility of another meeting. He stressed that the Santos negotiation team had not refused to attend any meeting. On 19 September, he sent a further email to Ms Hariharan. In it, he confirmed his earlier view that the most efficient way to progress the matter was to table the offer at a meeting on 30 October. In an email dated 22 September 2014, Ms Hariharan again asserted the Gomeroi applicant's preference for there being a meeting in the following week. On 22 September, Mr Thorneycroft responded, confirming that Santos would take an offer to the meeting fixed for 30 October, and that the meeting scheduled for 30 September would be "postponed".

[162] At this stage, another issue arose. In the email dated 22 September 2014, Ms Hariharan had also said:

> We note that since the RTN has begun, to date there has only been one RTN meeting where Santos has had full authority to negotiate.

[163] Her intention is not entirely clear. At that stage the first (and only) negotiation meeting had been held on 17-18 June. The meeting held on 26-27 August appears not to have been a negotiation meeting.

[164] In his reply dated 22 September 2014, Mr Thorneycroft said, under the heading, "Santos authority to negotiate":

> In your email you asserted that Santos has not had full authority to negotiate with the Gomeroi Applicants.
>
> To be clear, Jon Bok has authority to negotiate an agreement with the Gomeroi Applicants on behalf of Santos. This has been the case since the s29 notice was advertised.

[165] On 24 September, Ms Hariharan responded, asserting that the Gomeroi applicant still wished to go ahead with the meeting on 30 September and was disappointed that it had been cancelled. In the same email, Ms Hariharan sought to explain her earlier reference to the question of the authority held by the Santos negotiators. She said:

> To clarify, my comments regarding Santos authority to negotiate relates to the discussion at our June meeting (subsequently recorded in the meeting minutes) that

> the Santos team at the time advised that they required 2 months for the Santos negotiating team to be authorised to negotiate and complete agreement and that this authorisation would be obtained prior to the next RTN meeting (in Coonabarabran).

[166] One of the complaints made by the Gomeroi applicant, from time to time, in these proceedings has been that Santos was not represented at negotiations by persons who had appropriate authority. It is curious that the Gomeroi applicant should take such a point, given the strict limits placed upon its own authority by the native title claim group. Mr Thorneycroft's assertion concerning Mr Bok's authority may not be strictly correct. At the meeting held on 17-18 June 2014, Mr Bok had indicated that the Santos negotiation team would, at the next meeting, be authorized to negotiate and complete an agreement. However it is hardly surprising that at the first meeting, held about a month after the notification day, specific authorization may not have been given. It is also hardly surprising that Mr Thorneycroft was not aware that such a statement had been made at that early stage. In any event, there is nothing surprising about there being limits upon the authority of a negotiator, particularly at such an early stage.

[167] Events up to this point (September 2014) do not support the allegation of absence of good faith against Santos. The Gomeroi applicant had, on occasion, broached the question of good faith with little or no reason for so doing. There was no attempt to demonstrate that Santos had any particular motive which would have explained the amount of time and money which it had devoted to negotiation, including the provision of substantial financial assistance to the Gomeroi applicant. In these early days, there may have been errors, oversights or misunderstandings. However there is no reason to doubt that Santos was seeking to reach agreement with the Gomeroi people as to the proposed grants. It may have, from time to time, asserted firm positions, contrary to the Gomeroi applicant's preferences, but it was entitled to do so.

[168] On 30 January 2015, Sam Hegney Solicitors advised NTSCORP of its appointment as the Gomeroi applicant's solicitor. Events occurring after 30 January 2015 and prior to 7 December 2017 are relevant, both in explaining the inordinate delay which has occurred in this matter, and in demonstrating the progress made over this period by the Gomeroi applicant (2013-2017) and Santos. It is particularly unfortunate that, between January 2015 and the decision of the Federal Court on 30 May 2016, NTSCORP sought to displace Sam Hegney Solicitors as solicitor for the Gomeroi applicant, and to have itself reappointed to that position, an exercise which was unsuccessful and probably

misconceived. Those proceedings were commenced on 27 February 2015. At first instance, the application was heard by Jagot J. Her Honour rejected it, effectively finding that Sam Hegney Solicitors had been validly appointed as the Gomeroi applicant's solicitor. However her Honour sought to facilitate a meeting of the native title claim group for the purpose of resolving any dispute concerning the withdrawal of NTSCORP's instructions. The Full Court considered that her Honour erred in making that order. See *Gomeroi People v Attorney-General of New South Wales*.[19] The Full Court's decision was delivered on 30 May 2016, so that 16 months had, by then, elapsed since the (valid) change of solicitor. During that period, and thereafter, Santos continued to negotiate with the Gomeroi applicant (2013-2017). The Gomeroi applicant, in these proceedings, now complains that Santos knew that the Gomeroi applicant (2013-2017) had acted in excess of authority in appointing Sam Hegney Solicitors as its solicitor. However Jagot J and the Full Court have determined otherwise. Even if I am not bound by those decisions, I see no basis for doubting their correctness.

[169] The Gomeroi applicant seems to put some store by the fact that a member of the Gomeroi applicant (2013-2017), Mr Jason Wilson, disagreed with the decision by the Gomeroi applicant (2013-2017) to terminate the instructions given to NTSCORP. He considered that it was not entitled to do so. Whatever Mr Wilson's opinion, the other members of the Gomeroi applicant (2013-2017), Jagot J and the Full Court held different views.

[170] Following this unfavourable outcome, on 20 July 2016, the native title claim group resolved to reconstitute the Gomeroi applicant, apparently with the intention that NTSCORP be reappointed as its solicitor. However, of itself, that resolution had no effect upon the existing constitution. Section 66B of the Native Title Act requires that any change in the composition of an applicant be made by order of the Court. It has long been established that in making an order pursuant to that section, the Court exercises a discretion. See *Ward v Northern Territory*[20] at [16]; *Daniel v Western Australia*[21] at 285; and *TJ v Western Australia*[22] at [107] and [113]-[117]. In *TJ v Western Australia*, Rares J demonstrated that a change in the composition of an applicant for the purposes

[19] [2016] FCAFC 75.
[20] [2002] FCA 171.
[21] (2002) 194 ALR 278.
[22] (2015) 242 FCR 283.

of s 61 of the Native Title Act will not take effect until that discretion has been exercised. Hence, the reconstitution did not take effect until 7 December 2017, when Rangiah J made an order to that effect.

[171] The Gomeroi applicant complains that during this lengthy period, Santos continued to negotiate with the Gomeroi applicant (2013-2017), and that such negotiation was, for that reason, not in good faith. The contention is untenable, for at least two reasons. First, it was not possible to predict how the Court's discretion in relation to s 66B might have been exercised, particularly given the circumstances of this case. Second, to have ceased negotiation would have been inconsistent with the duty imposed upon the negotiation parties by s 31. Where a change in composition is uncontested, there may be no problem in making some sort of informal arrangement pending the Court's order. However where, as here, the change is contested, the position must be otherwise. Both Santos and the Gomeroi applicant (2013-2017) were bound by s 31(1) to continue negotiations.

[172] The delay between the meeting on 20 July 2016 (when the resolution to reconstitute the Gomeroi applicant was passed) and the making of the application to the Court pursuant to s 66B (on 31 October 2016) is unexplained. It seems that thereafter, the application became a matter of some substance. It was heard on 16-18 May and 15 June 2017. Obviously, the parties took time to prepare for the hearing. There would have been further delay in finding suitable hearing dates. Given the length of the hearing, and the complexity of the issues (as they appear in the reasons of Rangiah J), it was inevitable that there would be a delay in the preparation of those reasons. Hence, Santos, the Gomeroi applicant (2013-2017) and the State had to deal with their ongoing obligations to negotiate in good faith. The only party with which Santos and the State could negotiate was the Gomeroi applicant (2013-2017). I should add that Santos was not advised by NTSCORP of the resolution of 20 July 2016 until 5 September 2016.

[173] Meetings between Santos and the Gomeroi applicant (2013-2017) occurred on 1 February 2017, 7-8 March 2017, 23-24 March 2017, 11-12 May 2017, 12-13 June 2017, 11-14 July 2017 and 30-31 August 2017. The minutes suggest that the Gomeroi applicant (2013-2017) continued to prosecute the negotiations with some enthusiasm. It obtained an expert's report at Santos's expense, received an offer from Santos and subsequently made two counter-offers.

[174] On 7-8 March 2017, the Gomeroi applicant (2013-2017), Santos and others met. Following an overview, there were specialist presentations, concerning water, biodiversity and Aboriginal cultural heritage. On 21 March 2017, Santos provided a "summary of compensation package", apparently in anticipation of a meeting on 23-24 March. It included financial benefits, including compensation calculated at 5% of Santos's statutory annual royalty payment to the State (the "production levy"). The production levy is an important aspect of this case. At the meeting on 23-24 March, the Gomeroi applicant (2013-2017) asked that Santos pay for further expert advice. The expert advice was to include matters of economics, water, biochemistry and ecology. Santos asked that costings be obtained. The Gomeroi applicant (2013-2017) prepared instructions for the preparation of such reports. It also sought financial assistance for a series of eight regional meetings. Santos again asked for costings. A timetable was prepared, leading to finalization of the negotiations by August 2017. There was also a proposal for community meetings, for which Santos was asked to pay.

[175] In April 2017, Mr Meaton's report had been provided. I shall discuss that report at a later stage. At a meeting on 11-12 May 2017, Mr Meaton spoke to his report. There were other presentations. On 9 June 2017, a water and ecological review of the Santos Environmental Impact Statement was received. At a meeting on 11-14 July 2017, various matters were considered, including Mr Meaton's advice and Santos's compensation proposal. On 18 July, a counter-offer was made by the Gomeroi applicant (2013-2017). At a meeting on 30-31 August 2017, the Gomeroi applicant (2013-2017) indicated its intention to make a further counter-offer. At the meeting, there was discussion concerning the earlier counter-offer. The Environmental Impact Statement was also discussed.

[176] On 5 September 2017, NTSCORP wrote to Ashurst, complaining about Santos's continuing engagement in negotiation with the Gomeroi applicant (2013-2017). This complaint was apparently because of an erroneous view as to the effect of the July 2016 resolution. NTSCORP was not, in September 2017, acting for the Gomeroi applicant (2013-2017). On 6 October 2017, Ashurst responded, expressing views which were in accordance with my views concerning s 66B, as set out above. On 7 December, Rangiah J delivered his judgment, reconstituting the Gomeroi applicant. There was an appeal against the decision. On 21 November 2018, it was dismissed. See *Boney v Attorney*

General of New South Wales.[23] However Santos seems to have dealt with the newly constituted Gomeroi applicant from the date of the order made by Rangiah J, namely 7 December 2017.

[177] At para 125 of its contentions, the Gomeroi applicant seems to assert that following the resolution of 20 July 2016, and prior to the decision on 7 December 2017, the Gomeroi applicant (2017-2022) was the "true" Gomeroi applicant. For reasons given above, I reject that proposition. At paras 126 and 127 of the contentions, the Gomeroi applicant advances a somewhat different argument. It asserts that the "legal uncertainty" of the position made it, "ill-considered" and "irrational", for Santos to continue negotiating with the Gomeroi applicant (2013-2017). There was no legal uncertainty. Santos's conduct was, in my view, in accordance with its obligations under s 31(1).

[178] Setting aside the delay between early 2015 and July 2016, it seems most unlikely that Santos was, for a period of 18 months, from July 2016 until December 2017, participating in an elaborate farce. The evidence suggests that it was trying to maximize the prospects of reaching agreement with the Gomeroi applicant, however constituted. I see no basis for concluding that Santos was negotiating other than in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants. However, given the limitations imposed by the native title claim group upon the Gomeroi applicant (2013-2017), resolution was always subject to its approval.

2.3. Negotiations with the Gomeroi Applicant (2017-2022)

[179] At para 128 of its contentions, the Gomeroi applicant contends that Santos's conduct after February 2018 fell, "within the ambit of the following 'Njamal factors'" and therefore did not conform with its duty to negotiate in good faith, such factors being:

> (a) failure to do what a reasonable person would do in the circumstances, in particular by:
>
> i. making an unreasonable offer of compensation; and
>
> ii. maintaining a fixed offer;
>
> (b) failing to engage with the Gomeroi's counteroffers or contrary expert advice;
>
> (c) failing to send negotiators with authority to vary the unreasonable offer of compensation;

[23] [2018] FCAFC 218.

(d) declining or otherwise failing to comply with agreed outcomes of meetings;

(e) unexplained delays in complying with outcomes;

(f) refusing reasonable requests for information;

(g) refusing reasonable requests to fund expert advice.

[180] The "Njamal factors" were identified by Member Sumner in *Western Australia v Taylor*[24] at 224-225, to which decision I have previously referred. He identified 18 such factors. Some of the factors set out above do not appear in Member Sumner's list. In any event, the list has no statutory authority. The question to be answered is that posed by s 31(1)(b), namely whether there has been a failure to negotiate in good faith, with a view to reaching agreement as to the proposed grants.

[181] The Gomeroi applicant asserts that because Santos's conduct fell "within the ambit" of seven of the "Njamal factors", it did not comply with its duty to negotiate in good faith. That proposition is misconceived. The correct approach necessitates a consideration of the totality of Santos's conduct in the context of the negotiations (including the Gomeroi applicant's conduct) for the purpose of deciding whether it may be inferred that Santos failed to negotiate in good faith, that is, with a view to reaching agreement with the Gomeroi applicant as to the proposed grants.

[182] The Gomeroi applicant asserts that the seven identified factors describe an "ambit" within which Santos's conduct fell, and that it therefore did not negotiate in good faith. The word "ambit" means, "a circuit, a compass, a circumference", or "[t]he confines, bounds, or limits of a district, etc … extent, scope, sphere". See the New Shorter Oxford English Dictionary. In other words, the Gomeroi applicant seeks to identify an area or space, defined by the seven identified factors, and then to look to see whether the conduct identified by those factors falls within such area or space. That process is circuitous. The relevant conduct will inevitably fall within the "area" or "scope" defined by such conduct.

[183] This contention ignores positive aspects of Santos's conduct and the Gomeroi applicant's own conduct. For example, the fact that Santos actively engaged with the Gomeroi applicant for many years, strongly suggests a desire to reach agreement as contemplated by s 31(1)(b). Further, the substantial amount of financial support which

[24] (1996) 134 FLR 211.

Santos was willing to provide to the Gomeroi applicant is also inconsistent with the absence of good faith.

[184] Member Sumner described his list of considerations as being based upon a, "common sense approach to the context and purpose of the right to negotiate provisions in the Act". He also suggested that these matters are "useful indicia" as to whether a party has negotiated in good faith. It has been said that the criteria do not constitute a check list or series of conditions. See *Western Australia v Dimer*[25] at [85]. In *Charles v Sheffield Resources Ltd*[26] at [95], White J observed that the "Njamal Indicia" comprise a list of matters, "which may bear on the question of whether a party has negotiated in good faith." In other words, the indicia do not impose a "standard" or describe an "ambit" which defines the limits of negotiation in good faith. Further, the cases demonstrate that negotiation does not impose an obligation to capitulate. See *Strickland v Minister for Lands*[27] at 312; *Western Australia v Daniel*[28] at [40]. That the parties fail to reach agreement is not, by itself, evidence that one party or another has failed to negotiate in good faith. There is no prohibition on hard bargaining. The concept of "reasonableness" or "unreasonableness" must be treated with care. The standard of reasonableness may vary, depending upon a party's point of view. I shall return to this problem at a later stage.

[185] At paras 129-136, the Gomeroi applicant sets out dealings between it and Santos in the period from February 2018 until December 2020, largely by reference to Mr MacLeod's affidavit and the documents there mentioned. Presumably, such dealings are said to demonstrate the Gomeroi applicant's reliance upon the Njamal factors. Although the summary takes up only one page in its contentions, my discussion of the correspondence will inevitably be somewhat longer.

[186] Following the decision of Rangiah J on 7 December 2017, NTSCORP advised Ashurst of the outcome. On 12 February 2018, NTSCORP wrote to Ashurst, advising that it was convening a meeting of the reconstituted Gomeroi applicant and asking for details concerning negotiations or dealings to date. On 23 February 2018, Ashurst responded,

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[25] (2000) 163 FLR 426.
[26] (2017) 257 FCR 29.
[27] (1998) 85 FCR 303.
[28] (2002) 172 FLR 168.

providing details of Santos's last offer. That offer had been impliedly rejected by virtue of the counter-offers made by the Gomeroi applicant (2013-2017).

[187] In a letter dated 6 August 2018, Santos supplied further information. On 9 October 2018, in anticipation of a negotiation meeting, Santos made a further offer. In the covering letter, Santos said:

> The length of time the Negotiations have been running without resolution is significant and sufficient for Santos to seek an arbitral determination to this matter. While it remains Santos' preferred position to reach a negotiated outcome, and Santos remains committed to negotiating in good faith to achieve such an outcome, Santos reserves its right to seek an arbitral determination should a negotiated outcome not be reached in the near future.
>
> While Santos is available to respond to any questions or queries the Applicants may have regarding Santos' past and future activities and details of the compensation package, Santos seeks a response to the latest offer by Monday 5 November 2018.

[188] The anticipated meeting occurred on 20 October 2018. In a summary of the meeting written by NTSCORP, it is asserted that this was the first negotiation meeting "under [the] future act regime". Of course, it was not the first such meeting. Meetings had been held on various occasions since the notification day. There had also been meetings between Santos, the Gomeroi applicant (2017-2022) and NTSCORP on 27 March 2018, 20 May 2018 and 15 August 2018. At the meeting on 20 May 2018, Santos provided the Gomeroi applicant (2017-2022) with a USB stick containing the Environmental Impact Statement. On 6 August 2018, Santos provided the Gomeroi applicant with a folder containing hard copies of such documents.

[189] The note concerning the meeting on 20 October 2018 indicates that there had been a private meeting on 19 October, presumably involving the Gomeroi applicant (2017-2022) and NTSCORP. The focus appears to have been upon requests for funding further reports. Mr Meaton's report was also discussed. NTSCORP's note of the meeting included the following:

- references to a "draft costs agreement";
- an assertion that Santos had previously agreed to an "economic assessment";
- an assertion that the "applicant" had agreed to a costs agreement;
- an assertion that Santos was to consider a funding agreement;
- another reference to an economic assessment;

- a statement that Santos would consider funding an independent consultant to analyse cultural heritage; and
- a request that the CEO of Santos, "come sit on country on [sic] us".

[190] On 23 October 2018, Santos provided to the Gomeroi applicant, Ashurst's native title audit report concerning extinguishment. On 7 November 2018, Mr Joshua Gilroy (Santos) provided his summary of the meeting of 20 October 2018, to Mr Frank Russo (NTSCORP). Mr Gilroy requested an invoice for attendance by Gomeroi representatives at the meeting, and at an earlier meeting. Mr Gilroy noted that NTSCORP was to reply by 5 November, to the letter from Santos dated 9 October 2018, referred to above. Mr Gilroy also noted that funding for an economic assessment was dealt with in the funding agreement. A number of other matters were recorded, including NTSCORP's request that a "senior manager" from Santos attend a future meeting. Mr Gilroy noted that the matter would be discussed at the next meeting. Mr Gilroy did not refer to any other undertakings regarding funding. On 9 November, Mr Russo acknowledged the letter, and suggested a further meeting, "around the weekend of 1-2 December or the weekend of 8-9 December". Mr Russo also dealt with the question of payment of attendance money. He indicated that the Gomeroi applicant would respond to a current offer by Santos, after it had considered the native title audit report. On 3 December 2018, Mr Russo wrote to Mr Gilroy, concerning the offer contained in the letter dated 9 October 2018. Mr Russo also referred to the statement by Santos, concerning previous delay.

[191] Although the parties had agreed (on 20 October) that NTSCORP would respond to Santos's amended offer by 5 November, it did not do so until 3 December 2018 when it advised that the Gomeroi applicant (2017-2022) would not respond until it had received the contemplated economic assessment. However, "a number of additional issues" were to be discussed at a meeting to be held in Tamworth on 10 December 2018. Mr Russo also asserted that some of the provisions in the counter-offers made by the Gomeroi applicant (2013-2017), "recast many of the terms of their original counter-offer to ensure that benefits would be transferable to the 'Gomeroi applicant'", apparently suggesting misconduct on the part of those comprising the Gomeroi applicant (2013-2017). Mr Russo seemed also to suggest that the Gomeroi applicant (2017-2022) could not be held responsible for any delay brought about by the Gomeroi applicant (2013-2017), or by its negotiations with Santos.

[192] Such an approach is somewhat unrealistic. Santos's conduct in dealing with the Gomeroi applicant (2013-2017) was entirely appropriate. Indeed, as I have said, the Native Title Act effectively required ongoing negotiation. Santos cannot be held responsible for conflict or confusion involving the Gomeroi applicant, however constituted, the native title claim group and/or NTSCORP. The Gomeroi applicant cannot simply avoid the consequences of the events which occurred between early 2015 and late 2017, or blame Santos for them. Further, it seems that during that period, negotiations between Santos and the Gomeroi applicant (2013-2017) had been progressing.

[193] A brief note records the outcomes of a meeting said to have occurred on 10 December 2018. It indicates that Santos was to investigate the possibility of bringing a cultural heritage coordinator from another Santos project, "for a future briefing". It also shows that Santos was to consider funding information sessions with other independent experts. The note does not seem to be otherwise relevant. Its source is unclear.

[194] The next meeting was held on 18 May 2019 at Tamworth. There is a note concerning proceedings at the meeting, which note was prepared by NTSCORP. When the meeting commenced, Santos was not present, apparently because the Gomeroi applicant wished to discuss matters in its absence. The record of that part of the meeting has been redacted. The meeting with Santos lasted for some time. The notes are fragmented. Relevant observations include:

(a) assertions by Mr MacLeod that the, "significance and controversial nature of the project needs to be reflected in compensation payable";
(b) the Gomeroi applicant's assertion that the matter could only move forward if Santos agreed to pay for further expert advice;
(c) Santos representatives could not reveal the extent of their delegated authority for the purposes of the negotiation; and
(d) the Gomeroi applicant requested that Santos be represented at the negotiation by people who were authorized to make decisions.

[195] In negotiations, it may not be practicable for negotiators to be given full plenary power. In a commercial corporation, decisions are made at various levels, including at Board level, by the CEO or by other senior employees. The Santos representatives undoubtedly had limited authority, the extent of the limitation being undisclosed. There is no

evidence which suggests that significant delay was caused by any such limitation. I have previously pointed out that the Gomeroi applicant, as variously constituted, apparently had only limited authority and was required to refer any proposal back to the native title claim group for authorization.

[196] At the meeting on 18 May 2019, a proposed timeline was prepared, apparently by the Gomeroi applicant. It provided that, among other actions, NTSCORP would send Santos correspondence, "re outcomes of the meeting" by early in the week commencing 20 May 2019. Santos was to respond, particularly confirming "resourcing of experts", by the end of the week commencing 20 May. The Gomeroi applicant was to meet with experts in early to mid-June and make a counter-offer in late-July. There was to be a further meeting in "early-mid August."

[197] On 20 May 2019, NTSCORP wrote to Santos concerning the meeting of 18 May. The Gomeroi applicant's primary concern seems to have been funding for further expert advice, and the request that "senior management" be engaged in the negotiation process. The Gomeroi applicant asserted that Santos had delayed negotiations by failing to respond to repeated requests for such funding, and by not sending appropriately authorized representatives to meetings. Again, I point out that the Gomeroi applicant was, itself, not authorized to make any significant binding decision except, perhaps, to refer an offer to the native title claim group for consideration. The Gomeroi applicant repeated its request for funding and requested a response by 24 May 2019. It then asserted that at the meeting on 18 May 2019, Santos had suggested that in order to consider whether it would approve funding for further experts, it would require identification of the specific issues on which the Gomeroi applicant wished to seek advice. In response NTSCORP asserted that in the course of negotiations, the Gomeroi applicant has asked, "detailed and specific questions" sufficient to identify such issues. It also asserted that it would be inappropriate for Santos to have input into the various expert briefs, as it had requested.

[198] Santos did not respond in writing to the letter of 20 May 2019 until 2 August 2019. However, on 19 June, Mr Gilroy advised Mr MacLeod that Santos was, "working through the issues". In its response on 2 August 2019, Santos was very specific. In effect, it brought that line of correspondence to an end. Santos asserted that:

(a) at meetings on 20 October 2018, 10 December 2018 and 18 May 2019, it had consistently maintained that it had already provided sufficient information to enable the Gomeroi applicant to consider the current offer;

(b) such information had been resourced and supplied progressively since 2014;

(c) notwithstanding the change in composition of the Gomeroi applicant, that material remained relevant;

(d) all relevant documents had been provided to the Gomeroi applicant (2017-2022) on 6 August 2018;

(e) material had already been provided, including expert advice concerning various matters such as cultural heritage, economics, water and ecology; and

(f) in a funding agreement executed on 5 April 2019, Santos had agreed to provide a further $40,000 for expert advice from a mineral economist and up to $50,000, "towards authorizing the compensation offer with the Gomeroi nation".

[199] The writer asserted that Santos's position, as indicated at the meeting on 18 May 2019 was that, given the extent of the information already available, it was reasonable that the Gomeroi applicant provide details of any further expert advice which it might require, so that Santos could consider whether or not to fund such advice. It seems that Santos considered that further funding would not produce additional relevant information.

[200] Santos also dealt with a number of other matters. It rejected the assertion that Santos's representatives at the meeting on 18 May 2019 had lacked authority to make decisions on behalf of Santos. It also discounted suggestions that it had delayed in responding to correspondence, other than in connection with letters dated 20 May 2019 and 5 June 2019. Although both NTSCORP and Santos refer to a letter dated 5 June 2019, that letter seems not to be in evidence. Santos also denied having agreed to the "road map" identified in the letter of 20 May. Finally, Santos indicated that its outstanding offer would remain open until 30 August 2019 and that, in view of the passage of time, it reserved its right to seek an arbitral determination. The next letter from NTSCORP was dated 12 September 2019 and related to Santos's extant offer. It seems that any asserted delay by Santos was of little moment, and that its position was certainly clear on and after the letter of 2 August. Any disagreement concerning the history of those exchanges

cannot be readily resolved in these proceedings, given that there has been no cross-examination concerning them.

[201] At para 133 of its contentions, the Gomeroi applicant deals with the question of representation at meetings. It asserts that since October 2018, the Gomeroi applicant (2017-2022) had been requesting that the Santos CEO (or a "similar level executive manager") attend a negotiation meeting as a, "matter of respect and cultural importance". The request is said to have been repeated on 10 December 2018, 20 May 2019, 16 January 2020 and 14 December 2020. It is, perhaps, conceptually difficult to speak of any other manager as being at a "similar level" to the Chief Executive Officer. The latter is, by definition, superior to all other "executive level managers". It is also not clear from the evidence, on what basis the request was made.

[202] At para 158 of his affidavit, Mr MacLeod says that the request was first made by one member of the Gomeroi applicant. That person suggested that "we" would like the CEO to "come sit on country on [sic] us". It is said that the request was repeated on 10 December 2018. The page reference cited by the Gomeroi applicant at para 133 of its contentions is to a list of outcomes from that meeting, but there is no reference to any such request. It is contended that the request was repeated at the meeting on 18 May 2019 and recorded in a letter from NTSCORP, dated 20 May 2019. By this time the request was for the attendance of a senior manager. NTSCORP asserted that such attendance was desirable, particularly because, at the meeting on 18 May 2019, the Santos representatives did not have authority to make decisions on its behalf concerning funding of expert advice. In Santos's reply dated 2 August 2019 (referred to above), it rejected the assertion that its representatives lacked authority to make decisions on behalf of Santos.

[203] It seems that the matter was raised again, some eight months later, on 16 January 2020, in a letter from Mr MacLeod to Mr Kreicbergs. Mr MacLeod asserted that, although the question concerning the production levy was to have been discussed at a previous meeting, presumably that held on 15 December 2019, the Santos representatives said that they had no authority to shift from the current position. Mr MacLeod asserted that "(a)n essential tenet of good faith negotiation is that the parties' representatives have authority to negotiate". However, authority is a flexible concept. A negotiator will not necessarily have authority to deal finally with any matter which might be raised by the

other party. That no agreement was reached seems to have been a result of the parties not being willing to accommodate each other's demands. As observed elsewhere in these reasons, the requirement for good faith negotiation does not require capitulation.

[204] Finally, it seems that at a meeting on 14 December 2020, in the course of discussing the production levy, Mr MacLeod said that "we" would like to "hear [the Santos position] from the horse's mouth", apparently referring to Santos's CEO. Mr Kreicbergs said that he did not think that they could, "pull that off". A member of the Gomeroi applicant said that it was, "about showing respect too". Mr Dunn said that the CEO's attendance would not change anything. Another member of the Gomeroi applicant said that it would be "an important gesture". Given the limitations upon the authority of the Gomeroi applicant (2017-2022), any such "gesture" was unlikely to produce results.

[205] There is nothing surprising about a company's negotiators having limited authority. A company could only responsibly confer plenary power on a negotiator if the other party's likely position, and any possible changes to it, could be accurately predicted. In negotiations concerning serious matters, limitations on authority are almost inevitable. Indeed, in some cases, even the CEO may have to seek the Board's approval. In a large commercial organization such as Santos, there will be many demands upon the time of senior executive staff, particularly the CEO. Further, it cannot be assumed that a matter, of some importance to one party to negotiations, is necessarily of similar importance to the other party. In some cases negotiation may require specialized knowledge, which the CEO may not possess. In any event, it was not for the Gomeroi applicant to identify the persons who were to represent Santos in the negotiations, any more than it would have been appropriate for Santos to ask that the former members of the Gomeroi applicant (2013-2017) continue as part of the Gomeroi negotiating team, or that some other person or persons do so.

[206] The Gomeroi applicant's apparent concern about the attendance of senior management is difficult to understand. The first request seems to have been a general invitation to sit down "with us". Thereafter, it appears to have related to the, probably misguided, view that because the Santos negotiators did not have plenary power to accept or reject every emerging proposal, they were not properly authorized. In any event at the meeting on 15 December 2019, the Santos negotiators apparently had clear instructions concerning the production levy. See the letter from Santos to NTSCORP dated 22 January 2020.

[207] One must keep in mind the sporadic nature of the requests, the changing reasons (advanced in these proceedings) for such requests, and the unrealistic expectation that the Santos negotiators would have plenary power to agree, or not to agree, to all possible propositions. It may be that Santos and the Gomeroi applicant (or NTSCORP) had different understandings concerning the notion of authority. In the context of negotiations, the parties' positions frequently change. The negotiators' instructions may not cover every likely contingency. Not infrequently, it will be necessary that the negotiators take further instructions. Nothing in the evidence suggests a general lack of authority, save for bare assertions by the Gomeroi applicant (or NTSCORP). I see no basis for treating these matters, by themselves, as demonstrating a lack of good faith. Further, the Gomeroi applicant's own lack of authority cannot be overlooked.

[208] At para 135 of its contentions the Gomeroi applicant complains that in June 2020 it requested details of "approvals" which would be required of it, if the Narrabri Gas Project were to proceed. In fact NTSCORP raised this matter with Santos in a letter dated 16 April 2020. It seems that in a proposed "Ancillary Agreement", cl 5.3(b) provided that the "Gomeroi Claimants" would consent to the "Grant of all Approvals" relating to the proposed grants. The term "Approval" was defined to mean:

> [A]ny authorisation, lease, licence, permit, approval, certificate, consent, direction or notice from any Government Agency or other competent authority which is necessary or desirable for the carrying out of activities authorised by the PPLs.

[209] In that letter, NTSCORP continued:

> As you are aware, our client prefers that the consent it gives be limited to native title. However, the Applicant is willing to consider Santos' request. In order to do this, it requires more information which will enable it to understand the scope of proposed clause 5.3(b). We therefore request that you provide:
>
> (a) the details of all Approvals currently known to Santos in relation to the carrying out of activities authorised by the PPLs; and
>
> (b) where the details in (a) are not known, the categories or kinds of Approvals which are anticipated to be necessary or desirable for the carrying out of activities authorised by the PPLs.

[210] In a further letter dated 1 June 2020, the Gomeroi applicant indicated that it had been reviewing the draft ancillary agreement and had taken Counsel's advice. Drafting was proceeding. There was no reference to the letter of 16 April 2020, or the request made in it. NTSCORP indicated that there were matters on which it would have to take instructions. It indicated that it would not be able to advise the Gomeroi applicant (2017-2022) concerning various matters until it was able to meet with it in person, and that the

COVID-19 outbreak prevented such meetings at that time. Also on 1 June 2020, Santos responded to the NTSCORP letter of 16 April 2020. There is no evidence as to which of the two letters dated 1 June 2020 was the first in time. In Santos's letter, Mr Kreicbergs advised that the consents in question would be limited to consents required to allow for the grant of the petroleum production leases and the activities authorized by those leases. He indicated that the Environmental Impact Statement, previously provided to the Gomeroi applicant and to NTSCORP, "via direct presentation, information packs and via electronic copies", contained the relevant information. He also indicated that Santos was willing, "to discuss and clarify any additional matters relevant to the draft agreement". Nonetheless, Mr MacLeod observed, at para 192 of his affidavit that, in Santos's letter of 1 June 2020, "Santos did not provide details of any specific approval which would be required".

[211] It is curious that neither Mr MacLeod in his affidavit, nor the Gomeroi applicant in its contentions, refers to NTSCORP's letter of 16 April 2020. It is also surprising that in NTSCORP's letter of 1 June 2020, there is no reference to the earlier letter, suggesting that, as at 1 June, the matter was not of great significance to the Gomeroi applicant (2017-2022). In any event, Santos responded on 1 June 2020. There seems to have been no complaint about the adequacy of the reply until the reference at para 190 in Mr MacLeod's affidavit dated 11 October 2021, and in the Gomeroi applicant's contentions at para 135. No attempt has been made to identify the alleged inadequacy of Santos's response by reference to the relevant documents.

[212] In any event, NTSCORP's request is curious. Probably, the approvals in question and identified by Santos were those required by statute or regulation in connection with the proposed grants. It was appropriate that NTSCORP identify the matters which the Gomeroi applicant might be required to "approve". No doubt, it had a duty to advise it concerning such matters. It is possible that Santos could have offered some assistance, but would probably have had to seek such advice from its own lawyers. NTSCORP had a responsibility to advise the Gomeroi applicant as to such matters; Santos did not. In giving its advice, NTSCORP could not simply rely on Santos's understandings or views as to such matters, or those of Santos's lawyers. It was for NTSCORP to identify the obligations being undertaken by the Gomeroi applicant. NTSCORP's letter of 1 June 2019 suggests that it took that view. Whatever information Santos may have offered, NTSCORP would have had to check it. NTSCORP was really seeking to have Santos

(or its solicitors) discharge its own duty to the Gomeroi applicant. Finally, there is no evidence which establishes that the information provided by Santos was inadequate.

[213] At para 136 of its contentions, the Gomeroi applicant asserts that at a meeting held on 14 December 2020, Santos agreed to provide figures setting out the area of any land disturbance on an annual basis, "on native title land". At para 202 of his affidavit Mr MacLeod refers to a slide which stated that, "Santos to provide figures of disturbance of NT land (areas disturbed annually - divided into NT land and other land)." The Gomeroi applicant asserts that Santos did not honour this agreement. Santos claims that it did so. The information was said to be relevant to the Gomeroi applicant's assessment of the value of any offer made by Santos. The task was again referred to in a letter from NTSCORP dated 21 December 2020. In that letter, NTSCORP requested that Santos provide the information as soon as possible.

[214] On 12 January 2021, Mr Kreicbergs forwarded documents to Mr MacLeod, apparently, at least in his view, in discharge of the obligation undertaken on 14 December. It seems that these documents had previously been provided to NTSCORP. The documents were the Ashurst audit report, an "Overview" map and a 2018 presentation on indicative well distribution. On 15 January 2021, Mr MacLeod thanked Mr Kreicbergs for his reply and sought to meet with him and Mr Meaton to discuss the interaction between the information provided and Santos's current offer. He indicated a proposed time and date for the meeting. On 18 January, Mr Kreicbergs indicated that he could not meet at that time and asked for other available times, prior to his going on leave from 21-27 January. He also invited any "specific queries".

[215] On 19 January, Mr MacLeod sent an email to Mr Kreicbergs, asking four questions regarding the "Native Title Area" and "land disturbance". Mr Kreicbergs responded on 20 January 2021 to each of the questions put to him by Mr MacLeod and provided an example of how the calculations would apply to the utilization of land subject to native title. Mr MacLeod's affidavit in these proceedings does not exhibit or make any reference to this exchange of correspondence with Mr Kreicbergs. Mr Kreicbergs has annexed the emails at HK-10 of his affidavit.

[216] On 5 February 2021, Mr MacLeod wrote to Mr Kreicbergs asserting that the "materials Santos have provided" (including that contained in Santos's email of 12 January 2021)

did not allow the Gomeroi applicant (2017-2022) to, "assess the value of Santos' offer", as it needed, "to know the area of land that is proposed to be disturbed by Santos on an annual basis, divided into native title land and non-native title land". No mention is made of the emails dated 19 and 20 January 2021. The letter further asserts that Santos's offer had been calculated by their experts on the basis that:

> … the "Native Title Area" would equal approximately 46%, being the percentage of the total tenement area where native title continued to exist (as per the Ashurst Report provided by Santos on 23 October 2018). This approach was confirmed by Haydn Kreicbergs on a phone call to James MacLeod on 30 November 2020). However, at the meeting on 14 December 2020, Santos indicated that the "Native Title Area" would instead be calculated by reference to land disturbance on parcels where native title exists as a proportion of total land disturbance.

[217] The significance of this passage is the assertion by NTSCORP that Santos had previously indicated that the production levy would be calculated by reference to the area of land over which native title continued to exist but was now taking a different approach, basing such calculations on the area disturbed by Santos's activities, this being a considerably smaller area. However it is clear that Santos had referred to "land disturbed" or land impacted by Santos's activities as early as 2017. As much was recorded in the notes of the meeting held on 14 December 2020 and on the "slide" exhibited at that meeting. Nonetheless, the above passage from Mr MacLeod's letter of 5 February 2021 seems incorrectly to suggest that Santos had, at that meeting, abandoned use of the "total tenement area", and adopted the area of disturbance. Mr MacLeod's letter even suggests that the Gomeroi applicant's "experts" had based their calculations on a "total tenement area" basis. However, as I have pointed out, use of the disturbance area was specified in 2017 and thereafter. In a letter dated 11 February 2021, Mr MacLeod seems to suggest that the matter would be addressed in the anticipated mediation in March 2021. However, as far as I can see, that question was not addressed at the mediation.

[218] It was, in any event, not practicable to expect Santos to predict the area of disturbance at any particular future time. Pursuant to the Cultural Heritage Management Plan, areas to be utilized at any time could only be identified after such areas had been cleared of cultural heritage issues.

[219] The Gomeroi applicant has not demonstrated that the information provided by Santos was inadequate. See paras 125 – 127 of Mr MacLeod's affidavit. It is clear that the "land

disturbance" approach was reflected in the draft ancillary agreement sent to Mr MacLeod and Mr Orsborn of NTSCORP, in a letter dated 22 January 2020. That Mr MacLeod should, in early 2021, suggest that Santos had changed its position with regard to the definition of "Native Title Area" contradicts the correspondence and is unexplained. It suggests that Mr MacLeod misunderstood the information previously provided to him. The correspondence between the parties, from March 2021 onwards, demonstrates that the Gomeroi applicant did not pursue the issue further with Santos. It is relevant that the next counter-offer from the Gomeroi applicant, in March 2022, included amendments to the formula for calculating the production levy. In particular, amendments were proposed to the definition of "Native Title Area" and "impacted land" ("land disturbed").

[220] At para 169 of its contentions, the Gomeroi applicant claims that the information was necessary to inform its expert advisers. However, the NTSCORP brief to Mr Ho did not specifically refer to, or request his advice regarding the extent to which the production levy formula could be affected by the definitions of "Native Title Area" and "impacted land". Indeed, as discussed elsewhere in this determination, Mr Ho does not consider the significance of "land disturbance" or "impacted land" at all. No explanation is offered for Mr Ho's incorrect assumption that the "Native Title Area is 100% of the Project area" made at footnote 15 of his report.

[221] In any event, as I have observed, Santos could have provided only limited information as to the area of disturbance, given the terms of the Development Consent. Pending the completion of the assessments required by conditions B1 to B6, Santos was not able to provide the requested figures. The information requested by the Gomeroi applicant was eventually of no demonstrable relevance, given the approach taken by Mr Ho.

[222] A further matter of complaint by the Gomeroi applicant concerns the circumstances in which Santos made its s 35 application. Following the meeting on 14 December 2020, Santos wrote to the Gomeroi applicant (2017-2022) on 18 December 2020, indicating, amongst other things, that at that earlier meeting, it had stated that if the relevant documentation was not executed by 31 January 2021, Santos would make a s 35 application. The Gomeroi applicant asserted that there had been no reference, at the meeting, to such a deadline. Once again, the dispute between the parties cannot be

resolved in these proceedings, given the absence of any cross-examination concerning the matter.

[223] Apart from the shortness of time allegedly stipulated by Santos, the Gomeroi applicant (2017-2022) asserted that the following factors also made it inappropriate that Santos should make its s 35 application:

- a number of matters were still being negotiated;
- a member of the Gomeroi applicant had passed away in October 2019, and that there was "uncertainty" as to whether it could legally execute an agreement;
- the Gomeroi applicant could not execute an agreement without authorization by the native title claim group; and
- except for the recent meeting in Tamworth, since provision of the draft ancillary agreement, the Gomeroi applicant had been unwilling to meet in person due to risks arising from the COVID-19 pandemic.

[224] In any event, Santos continued to negotiate and participated in mediation by the Tribunal in March 2021. It eventually lodged its s 35 application on 5 May 2021. In the meantime, the Gomeroi applicant (2017-2022) had proposed arbitration, other than pursuant to s 35. Santos refused the proposal for a number of reasons, one of which being that the Gomeroi applicant was proposing that any arbitral decision would be subject to the native title claim group's approval. To my mind, Santos's refusal was appropriate. There is no reason to believe that negotiations between December 2020 and May 2021 would have been more fruitful than previous negotiations.

[225] On March 2021, prior to the s 35 application, and in anticipation of mediation in the Tribunal, NTSCORP had written to Santos, providing further information, and seeking information. The mediation took place at Tamworth on 18-19 March 2021. The mediation synopsis suggests that on 18 March, the parties focussed on non-controversial matters. On 19 March, the Gomeroi applicant (2017-2022) indicated that it "might be possible" to organize an authorization meeting in June 2021, and that Santos had committed to paying $70,000 towards the overall cost of the meeting, said to be $180,000. Santos agreed to pay the higher amount. Curiously, the Gomeroi applicant (2017-2022) said that it could bind the native title claim group, "for the s 31 Deed relating to the future act", but that the wider claim group (of approximately 40,000 claim

group members), "must authorise any agreement, as there is no provision such as s 31 for the Ancillary Agreement". No explanation was offered as to how the Gomeroi applicant (2017-2022) could bind the native title claim group to any agreement reached pursuant to s 31, but not to any ancillary agreement, notwithstanding the fact that resolution 13 (adopted by the native title claim group at the meeting on 19-20 July 2016), seems to have applied to all such agreements.

[226] Santos indicated that it would be filing a s 35 application but would continue to negotiate. There was further discussion concerning cultural heritage and other matters. Santos offered to increase the amounts to be paid upon the proposed grants being made, [redacted], and confirmed other significant proposed payments. Santos indicated that it did not consider the Gomeroi applicant's proposal, concerning water rights, to be commercially acceptable.

[227] The production levy/royalties question was also discussed. Santos maintained its offer of a production levy at 5% of the royalty payable to the State. The Gomeroi applicant (2017-2022) sought 1% of wellhead production value (equivalent to 10% of the royalty payable to the State). Santos challenged the assumptions made in Mr Meaton's report (provided in April 2017) and the information relied upon, asserting that it was not "comparable" with the Narrabri Gas Project, or was simply not relevant. The Gomeroi applicant (2017-2022) suggested that the parties submit to arbitration. However its intention was that any outcome be referred back to the native title claim group for approval. Santos rejected that proposal, upon the basis that it was commercially too uncertain. Santos also suggested that its offer was based upon a statutory formula. The meaning of that statement is unclear. He suggested that Santos was offering a "broader package", going beyond that which freehold owners would receive. The proposition appears to have been correct.

[228] On 29 March 2021, Santos wrote to NTSCORP, indicating that, as no agreement had been reached at the mediation, it intended to apply for a determination. It remained willing to negotiate and confirmed its willingness to pay $180,000 to fund an authorization meeting. It also made a further offer.

[229] On 6 April 2021, NTSCORP sent Santos an open letter and a separate "without prejudice" letter. The open letter recognized that the parties were still negotiating.

However a significant issue was said to be the "royalties" to be paid. The Gomeroi applicant (2017-2022) again suggested that the production levy/royalties question be decided by an independent arbitrator, the question for determination being, "the fair and reasonable level of royalty payments and calculation method that should apply [to the project] taking into account the other benefits that have been agreed to date". In the "without prejudice" letter NTSCORP set out, in more detail, its proposal for an arbitration. However any arbitration outcome was to be subject to approval by the native title claim group.

[230] On 12 April 2021, Santos sent both open and "without prejudice" replies. In the open reply, Santos rejected an assertion that it had not considered Mr Meaton's report and reiterated criticisms previously made of such report, namely that it:

- was false and misleading, as a matter of fact, when referencing Santos's South Australian royalty framework;
- was inappropriate due to commercial sensitivities;
- was a flawed appraisal of the Narrabri Gas Project economics;
- provided no context around the lifecycle or underlying economics of other projects; and
- did not factor in how the compensation package had been specifically designed to ensure the Gomeroi people were afforded economic benefit for the lifecycle of the Project.

[231] Santos declined to accept the arbitration proposal on the basis that it would create uncertainty "for the business and the project". It identified the uncertainty and risk from its point of view as follows:

- firstly, the issue to be determined is (in Santos' view) not capable of precise determination as it is purely a matter for commercial negotiation. It is not a matter to be resolved by way of reference to other agreements;
- secondly, contrary to the comments in your letter, Santos does not accept that an arbitrated outcome will be less costly than a contested hearing before the Tribunal and in particular notes that any proceedings before the Tribunal cannot, as a matter of jurisdiction, consider the question of the Production Levy; and
- thirdly, it is simply untenable for Santos to be expected to bind itself to an arbitrated outcome in circumstances where the Gomeroi themselves are not so bound. In the premises where there remains a distinct possibility that any agreement (even after arbitration) will not be authorised, then arbitration is not an approach that Santos can agree to.

[232] In the "without prejudice" letter, Santos sought to justify its position, including as to arbitration, indicating that it proposed to apply for a determination. It again confirmed

its offer of $180,000 to fund an authorization meeting. It identified the reasoning underlying its current offer as follows:

> The Compensation Package, specifically the Production Levy, was discussed at length at the meeting held between the parties 20 October 2018 [sic]. This has also been addressed at length at subsequent meetings and in correspondence between the parties.
>
> Santos refutes any assertion that the Santos offer is not fair and reasonable.
>
> The Compensation Package has been designed to build the capacity, governance and self-determination of the Gomeroi People, by affording:
>
> - upfront milestone payments;
> - annual lifecycle administration payments;
> - targeted funding for Employment and Training; and
> - a Production Levy.
>
> The Production Levy affords the Gomeroi access to a consistent and fair income based on a statutory framework with a royalty payment calculated in accordance with the *Petroleum (Onshore)* Act 1991 (NSW).
>
> The Compensation Package has also been designed to reflect the incremental stages of the Project and ensures the Gomeroi People are afforded economic benefit for the lifecycle of the Project.

[233] I do not accept that any of the individual actions or events which occurred after 7 December 2017 and before 5 May 2021, constitute evidence of absence of good faith. One cannot overlook the fact that from December 2017 until May 2021, the parties continued their negotiations. There may have been some delays, but given the history of the matter, including disruptions as a result of the reconstitution of the Gomeroi applicant, the COVID-19 pandemic and the Gomeroi applicant's inability to bind the native title claim group, the Gomeroi applicant (2017-2022) was not in a strong position to complain about any delay by Santos.

[234] Following correspondence in July 2021, the Gomeroi applicant (2017-2022) requested withdrawal of the s 35 application. Santos refused. There appears to have been no further correspondence until 7 October 2021. On that day, NTSCORP wrote to Santos, asserting that the Gomeroi applicant's position was that the proposed grants not be made. However it sought agreement to conditions which might be applied to any determination. It asserted that the proposed conditions were based on, "the offer from [Santos] and the [Gomeroi applicant]", with other conditions which the Gomeroi applicant (2017-2022) also sought. It asked whether Santos would consent to the proposed conditions.

[235] At this stage, the Gomeroi applicant (2017-2022) seems not to have been negotiating for the purposes of s 31(1). Had it offered to agree to the proposed grants on such terms, such offer might have constituted negotiation for the purposes of that section. However I find it difficult to treat a suggestion that the parties agree in advance to conditions which might be imposed on any determination as being negotiation pursuant to s 31(1). The purpose of negotiation pursuant to s 31(1) is to avoid a determination by the Tribunal. As to the proposed "conditions", prior to the correspondence of 7 October 2021, there appears to have been no negotiation concerning a proposed environmental bond of $100 million, or payment of $50 million into a trust account pursuant to s 52A of the Native Title Act.

[236] A further condition, described as a "[d]eferred commencement condition", provided:

> The Grantee Party shall not commence any work pursuant to the future acts unless
>
> (a) the Gomeroi native title claim group have an opportunity at an in-person meeting to consider whether to authorise the Native Title Party to enter into an agreement with the Grantee Party in relation to the future acts, on the basis of the Grantee Party's offer of 29 March 2021; or
>
> (b) a period of twelve months period [sic] following the determination has elapsed,
>
> whichever happens first.

[237] This condition is surprising and difficult to understand. First, even if the Tribunal determined that the proposed grants be made, commencement of work might still be delayed for up to 12 months. Secondly, the Gomeroi applicant seemed to be demanding a further opportunity, at a native title claim group "in-person" meeting, to consider whether to authorize the Gomeroi applicant to make an agreement with Santos, "in relation to future acts", on the basis of the offer dated 29 March 2021. The purpose of such an authorization meeting is unclear. It seems that there would be further negotiation, presumably at Santos's expense, following any such native title claim group meeting. The parties have had more than sufficient time to find a basis for agreement. I would not countenance such a condition, unless Santos and the State both agreed to it. Even then, I would need to be convinced that the Native Title Act allows the imposition of such a condition after a determination has been made.

[238] Santos was willing to proceed on the basis that its offer of 29 March 2021 was still open. It also indicated its continuing willingness to fund a native title claim group meeting as requested by the Gomeroi applicant (2017-2022). On 21 December 2021, NTSCORP

indicated that prior to any native title claim group meeting, there should be further negotiations, perhaps in the expectation that Santos might increase its offer. Alternatively, it suggested that Santos might withdraw its s 35 application. On 21 December, Ashurst replied, effectively suggesting that the Gomeroi applicant's proposal was impracticable. In particular, Santos was unwilling to delay any native title claim group meeting until after a further round of negotiations, given that the matter was listed for hearing in mid-April. Santos again maintained both its earlier offer, and its offer to fund a native title claim group meeting. See Ashurst's letter dated 22 December 2021.

[239] On 24 January 2022, NTSCORP wrote to Ashurst, asserting that COVID-19 continued to impede the holding of a claim group meeting, again asking that Santos withdraw its application, and suggesting that any meeting would create a risk to public health. It asserted that if there were no meeting, the native title claim group would be, "denied the opportunity to consider Santos's offer", before the Tribunal made a decision in the matter. This assertion seems to indicate that the Gomeroi applicant (2017-2022) considered that there was some point to be served by having a claim group meeting. However, an "entirely on-line meeting" was considered to be unacceptable. By this time, Santos's offer had been on the table for almost a year.

[240] On 27 January 2022, Ashurst wrote to NTSCORP, making various procedural suggestions, including that it might be possible to have a claim group meeting before the Tribunal made a determination. However Santos was not willing to delay the decision, "for very long". Further, it would not withdraw its s 35 application. On 14 February 2022, NTSCORP wrote to Ashurst, acknowledging that Santos had agreed to an adjournment of the determination proceedings to facilitate the holding of a native title claim group meeting. NTSCORP noted that Santos's position was now that if it were successful in the Tribunal, it would not consent to any conditions, or enter into any agreement with the Gomeroi applicant (2017-2022), although it would still offer identified benefits to the Gomeroi people. The parties subsequently provided written submissions as to the appropriate conditions to be imposed if there were a determination that the proposed grants be made. Careful consideration suggests that there was only very limited agreement concerning such conditions. Further correspondence occurred in February and March, concerning both the terms of any ancillary agreement and proposed conditions to be included in any determination. At a native title claim group

meeting on 24 March 2022, the native title claim group directed the Gomeroi applicant (2017-2022) not to accept Santos's offer.

[241] The Gomeroi applicant (2017-2022) complains that Santos's conduct in filing its s 35 application on 5 May 2021 was unreasonable given that:

- the Gomeroi applicant was not authorized to enter into any agreement without the approval of the native title claim group;
- the COVID-19 pandemic posed a serious risk to the health of the native title claim group; and
- Santos only agreed to accommodate a native title claim group meeting after the parties had incurred the costs of preparing evidence and submissions.

[242] In *FMG Pilbara Pty Ltd v Cox*[29] at [19]-[21], the Full Court said:

> [19] The expression "negotiate in good faith" is to be construed in its natural and ordinary meaning and in the context of the Act as a whole: *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 319. Accordingly, the act of lodging an application under s 35, taken alone, cannot be relied upon in order to establish bad faith in the negotiating process (*Strickland* 85 FCR at 322). If negotiations reach a standoff, notwithstanding attempts in good faith to negotiate within the relevant six-month period, there are no further obligations after the completion of the six-month period on a party which wishes to lodge a notice under s 35 of the Act. There is no need, for example, to give further warning of the intention to do so.
>
> [20] It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations. See, for example, *Brownley v Western Australia (No 1)* (1999) 95 FCR 152 at [24]-[25] per Lee J; *Strickland* 85 FCR at 319-320 and *Western Australia v Thomas* [1998] NNTTA 8 at [7]-[18].
>
> [21] The scheme of the relevant provisions of the Act recognises Parliament's intention that there must be a good faith period of negotiation in relation to the future act before there is any arbitral determination in relation to the future act. The period of six months provided for in s 35 of the Act ensures that there is reasonable time to enable those negotiations to be conducted. At the same time it permits the matter to be taken forward at the end of the six-month period by way of an arbitral determination if the negotiations do not result in agreement.

[243] The majority decision in *Charles v Sheffield Resources Ltd*[30] may change the emphasis in the above extract. However, it is still the case that there is no obligation to give "further warning" of an intention to lodge a s 35 application. Santos had, for some time, been indicating such an intention. It may have been an error of judgement to suggest

[29] (2009) 175 FCR 141.
[30] (2017) 257 FCR 29.

that unless the relevant agreements were executed by 31 January 2021, it would lodge its s 35 application. However, as there was no obligation to give notice, any error of judgement is of no consequence. It is also irrelevant that a number of substantial matters were not agreed. Had they been agreed, there would have been no need for a determination. That a member of the Gomeroi applicant had passed away was, naturally, a matter of significance for the Gomeroi community, but the "legal uncertainty" said to arise concerning the Gomeroi applicant's power to act should not have affected the negotiation process. It was for the Gomeroi applicant to resolve such problems. Reliance upon the Christmas-New Year holiday period as a reason for failure to act cannot be taken too far, given the very long time over which the parties had been negotiating, with little to show for it.

[244] As to the Gomeroi applicant's other complaints, the first concerns the COVID-19 pandemic and its threat to the health of the native title claim group members. Given that by early 2021, the effect of the virus was well known, the Gomeroi applicant, their legal representatives and the native title claim group ought to have at least considered alternative communication and decision-making procedures. Such steps were being taken in other areas of our national life. Whilst the native title claim group may have preferred face-to-face meetings of the whole group, such preference may have had to give way to necessity. Again, it was for the Gomeroi applicant, not Santos, to resolve such problems. Santos's right, as identified by the Full Court in *FMG Pilbara Pty Ltd v Cox*,[31] could not be undermined by the inflexibility of the native title claim group, the Gomeroi applicant or NTSCORP.

[245] It was not for Santos to decide whether, how or when the native title claim group was to meet. Its only role was to pay for the meeting, assuming that it was willing to do so. It is said that Santos only agreed to accommodate a meeting after the parties had incurred the costs of preparing evidence and submissions. This assertion is somewhat opaque. It appears to refer to a period in early 2022 when the parties were preparing for a Tribunal hearing scheduled for April 2022. Given the fact that the native title claim group rejected the offer advanced at its meeting on 24 March 2022, and the hearing proceeded, the

[31] (2009) 175 FCR 141.

preparation costs would have been incurred in any event. I do not understand the Gomeroi applicant's submissions in this regard.

[246] In its contentions concerning events on and after 5 May 2021, the Gomeroi applicant makes other assertions concerning Santos's conduct. First, it asserts that it was "unreasonable" for Santos not to agree to the conduct of a claim group meeting before lodging its s 35 application. The decision in *FMG Pilbara Pty Ltd v Cox*[32] effectively disposes of that contention. Second, it is said that Santos acted unreasonably in not agreeing to the conditions proposed by the Gomeroi applicant on 14 February 2022, and that it is "untenable" for Santos to assert that it does not understand the need for such conditions. Third, it is said to be unreasonable that Santos rejected the terms of the counter-offer proposed by the Gomeroi applicant on 4 March 2022. Finally, the Gomeroi applicant asserts that Santos's failure to "acknowledge" the evidence of Ms Tighe, Mr Booby and Mr Wilson, and its failure to admit that it has not committed to any means by which to identify and protect native title rights and interests, indicates its lack of bona fides in the negotiations, "the protection of native title rights and interests being central to the objects and purpose of the right to negotiate provisions…".

[247] As concerns Santos's attitude to a native title claim group meeting, it seems that from the mediation in March 2021, until December 2021 and thereafter, Santos was willing to fund such a meeting. However, throughout 2021, the Gomeroi applicant (or NTSCORP) was reluctant to meet because of the COVID-19 concerns. Following the filing of the s 35 application, NTSCORP sought to have it withdrawn. See the letter of 2 July 2021 from NTSCORP to Santos. On 12 July 2021, Santos indicated that it would continue to comply with the Tribunal's directions leading to the hearing, but that it was willing to ask the Tribunal to defer any determination, pending a native title claim group meeting. Again, it asserted its willingness to pay for the meeting. This correspondence followed a previous notice of meeting, which notice was withdrawn for reasons associated with the COVID-19 pandemic.

[248] As previously stated, on 7 October 2021, the Gomeroi applicant proposed that Santos agree to conditions to be imposed in the event that the Tribunal determined that the proposed grants be made. The Gomeroi applicant asserted that some of the proposed

[32] Ibid.

conditions had previously been proposed by it or by Santos. The Gomeroi applicant also proposed additional conditions. On 20 December 2021, Ashurst advised NTSCORP and the Tribunal that Santos considered that any determination should be unconditional. However it indicated that it wished to ensure that the Gomeroi people derived significant benefit from the Narrabri Gas Project. It indicated that it would leave open its offer, put to the native title claim group in March 2021. It also confirmed that the offer to pay for a claim group meeting remained open. Ashurst also confirmed that if the offer were not accepted by the claim group, Santos would be prepared to mediate further. However it was anxious that a hearing date be set. On 21 December, NTSCORP responded to Ashurst's letter to the Tribunal. In effect, it submitted that there should be further negotiations, followed by Tribunal mediation, a further offer by Santos, and a native title claim group meeting on 24-27 March 2022. Alternatively, NTSCORP suggested that Santos might withdraw its s 35 application, "in order that negotiations might continue absent the pressure of statutory time limits". This response was clearly inconsistent with Santos's preference for a speedy determination.

[249] On 22 December, Ashurst responded, indicating that NTSCORP's proposed timetable would lead to a hearing sometime in April, if the mediation/negotiations were unsuccessful. Ashurst indicated that Santos was disappointed by the Gomeroi applicant's response and tone, and that its earlier offer remained open, including the offer to fund a meeting. Santos was also willing to engage in mediation, probably for a day. Ashurst also suggested that it might still be possible to hold a claim group meeting in late February 2022. Santos was willing to make a joint request to the Tribunal to defer any final determination until Santos's offer had been put to the claim group meeting.

[250] In a letter dated 14 February, NTSCORP noted that Santos would not consent to any conditions being imposed on the determination, and that it would not enter into any agreement with the Gomeroi applicant. It also noted that if Santos obtained a determination in its favour it would give effect to certain "intentions" which had emerged during negotiation. However, it would not pay "compensation" or provide ongoing support to the proposed corporate entity, or to a Gomeroi "liaison". Nor would it grant to the Gomeroi applicant, a right of first refusal to purchase land or water assets, no longer required by Santos.

[251] Paragraphs 6-7 of the letter state:

> It therefore appears that if Santos is successful in the Tribunal, it intends to undertake the proposed Project, without:
>
> (a) consideration of the specific concerns raised by the Gomeroi Applicant in relation to cultural heritage;
>
> (b) provision of any financial redress for the significant impact the Project will have on the native title rights of Gomeroi People, identified in this Application and in the negotiations preceding it.
>
> We are unable to reconcile Santos's stated intention that it seeks a negotiated outcome with the Gomeroi with its present "all or nothing" approach to the Gomeroi's right to negotiate. It appears to us that even if Santos is not prepared to continue to negotiate with the Gomeroi in relation to compensation, a genuine intention to obtain the Gomeroi's consent to the proposed Project would require at least consent to the imposition of conditions which reflect what, but for this Application, it has already agreed to (Kreicbergs Affidavit paragraph [115]).

[252] In a letter dated 24 January, NTSCORP had requested a further draft of the proposed ancillary agreement. See also Ashurst's letter of 27 January. On 16 February, Ashurst provided an amended draft. On the same day, Mr MacLeod made an initial comment concerning it.

[253] The Tribunal had ordered the parties to identify any agreed conditions to which the proposed determination might be subject. On 14 February 2022, the Gomeroi applicant set out its proposed conditions. On 22 February 2022, Santos responded, providing a detailed response to the Gomeroi applicant's proposed conditions. On 23 February 2022, the State provided comments on the proposed conditions.

[254] On 3 March 2022, notice was given concerning the proposed claim group meeting. On 17 March, Ashurst forwarded an amended agreement and, in the covering letter, offered improved terms, not affecting the production levy. On 23 March, Ashurst provided an "execution version" of an ancillary agreement. Although the position is not clear, it seems that NTSCORP and Ashurst had formulated a proposed agreement which was to be put to the claim group meeting. On 24 March, the claim group meeting rejected Santos's offer. On 25 March, NTSCORP advised Ashurst of such rejection.

[255] This rather detailed account of events in 2021-2022 relates to para 4 of the Gomeroi applicant's contentions dated 4 April 2022, concerning the "Fifth Negotiation Period". It seems clear that any delay in holding a claim group meeting during 2021 and early 2022 was primarily brought about by the Gomeroi applicant's concerns about the COVID-19 pandemic, leading to cancellation of the meeting scheduled for 15-18 July 2021, which cancellation was made on 2 July 2021. Notice of a further meeting was not given until 3 March 2022.

[256] In paras 4-6 of its contentions dated 4 April 2022, the Gomeroi applicant asserts unreasonable conduct on the part of Santos. The test of "reasonableness" should not be substituted for the wording of s 31(1)(b). Reasonableness cannot be easily assessed unless one has all of the relevant information upon which such assessment should be made. Further, opinions as to reasonableness will often differ, depending upon conflicting interests. As will be seen, I do not accept the Gomeroi applicant's assertion of unreasonableness.

[257] Paragraph 4(a) addresses Santos's conduct prior to lodging the s 35 application on 5 May 2021. It is said that Santos ought to have "agreed" to a claim group meeting prior to lodging its s 35 application. It was not for Santos to agree or disagree to a meeting. That was a matter for the Gomeroi applicant. Further, the decision in *Strickland v Minister for Lands*[33] demonstrates that Santos was not obliged to defer its application pending a meeting, the calling and timing of which was beyond its control. Had the hearing been delayed, it is likely that eventual resolution would also have been delayed.

[258] As to para 4(b), in the event, the claim group rejected the Santos offer. Such rejection was not unexpected. See NTSCORP's letter of 4 March 2022 at para 10. The costs associated with the hearing were probably unavoidable. In any event, it is not clear to me that Santos unduly delayed in "accommodating" the meeting.

[259] At para 5 of the contentions dated 4 April 2022, the Gomeroi applicant submits that Santos acted unreasonably in refusing to agree to proposed determination conditions, and by claiming that such conditions were not needed. The Gomeroi applicant's reasoning is difficult to follow. It appears to suggest that Santos's rejection of the conditions is untenable for two reasons. Firstly, it is said that the cultural heritage assessment, which Santos had commissioned, was based upon data that did not include culturally sensitive information, and therefore under-represented places of traditional, anthropological, historical and contemporary significance. Secondly, it is said that the Aboriginal Cultural Heritage Management Plan did not require such research to be undertaken.

[260] Dr Godwin had experienced difficulties in acquiring certain cultural information for the Aboriginal Cultural Heritage Assessment Report and so recommended that an

[33] (1998) 85 FCR 303.

"Additional Research Program" be required by the Aboriginal Cultural Heritage Management Plan. Such a requirement was inserted. Initially, it was to be completed within 12 months of the commencement of Phase 2 of the Narrabri Gas Project. However, in the course of this hearing, Santos agreed to complete the Program prior to such commencement. There is no merit in these contentions.

[261] At para 6 of the contentions dated 4 April 2022, the Gomeroi applicant asserts that it was unreasonable for Santos to reject the terms of a "counteroffer" agreement proposed by the Gomeroi applicant on 4 March 2022, the terms being to the same effect as the conditions to be placed upon any determination as suggested in NTSCORP's letter of 14 February 2022. I have explained my reasons for rejecting the Gomeroi applicant's contentions concerning those conditions. For the same reason, para 6 of the Gomeroi applicant's contentions should also be rejected. The Gomeroi applicant particularly complains that Santos responded by offering additional cash payments, instead of accepting the proposed terms, notwithstanding the fact that the Gomeroi applicant had not sought any increase in milestone payments, and that it had made it clear that the proposed "counteroffer", if put to the native title claim group meeting, would increase the prospects of its acceptance.

[262] The overall effect of this discussion concerning the dealings between Santos and the Gomeroi applicant suggest that it was inevitable that this "offer" would be rejected. It is curious that it should be thought that it was "unreasonable" to offer more money, simply because the Gomeroi applicant had not, in its letter of 14 February 2022, sought any increase in milestone payments. After all, the parties had been differing about money for some considerable time.

[263] Paragraphs 5-7 of the Gomeroi applicant's contentions dated 4 April 2022 must be understood in the context of Santos's letter of 20 December 2021, the s 35 application having been lodged on 5 May 2021. That letter demonstrates that Santos was, even then, hoping for agreement rather than determination by the Tribunal. It continued to hold open the offer made on 29 March 2021.

[264] At para 7, the Gomeroi applicant seems to assume that the process prescribed in subdiv P is primarily protective of native title rights and interests as identified by, in this case, the Gomeroi applicant. Subdivision P prescribes the right to negotiate, including the

Tribunal's determinative role. While there is a protective element in subdiv P, the requirement for negotiation in good faith, has other purposes concerning the intents of the parties. One may not assume that the Gomeroi applicant's view as to the protection of its native title interests should displace such other interests, all other available avenues having failed to produce an appropriate outcome.

[265] As to para 8, I do not understand the suggestion that Santos refused to "acknowledge" the evidence of the claim group deponents: Ms Tighe, Mr Booby and Mr Wilson (**claim group deponents**). Their evidence is discussed in connection with s 39. In any event, "failure to acknowledge" that evidence would not justify the inference urged by the Gomeroi applicant.

2.4. Five Propositions

[266] At paras 137-179 of its primary contentions, the Gomeroi applicant advances five propositions which, it submits, lead to the inference that Santos did not negotiate in good faith. This contention focusses primarily on the period between 7 December 2017 and 5 May 2021, although the propositions may have wider connotations. Those propositions are that:

(a) Santos's offer of compensation was below market value;
(b) Santos did not engage with an expert;
(c) Santos adopted a fixed position on compensation;
(d) Santos failed to provide important information; and
(e) Santos's use of the future act determination application "lever" comprised an attempt by Santos to take advantage of its stronger bargaining position.

[267] The propositions, at least at face value, offer a more coherent approach to the question of negotiation in good faith than does the piecemeal approach adopted elsewhere in the Gomeroi applicant's contentions.

[268] The first proposition relates primarily to the valuation evidence of Mr Kuo ning Ho, a chartered accountant who provided a report concerning the production levy and royalty payments. The second proposition is concerned primarily with the valuation report of Mr Murray Meaton, which report was dated April 2017. In the third proposition the Gomeroi applicant seems to assert that Santos:

- knowingly failed to make a "reasonable" offer;
- adopted a rigid, non-negotiable position in relation to the "unfair" offer of compensation; and
- took advantage of its superior bargaining position.

[269] It is not clear whether this complaint is about the overall package offered by Santos, or the offer of the production levy. In para 163 of the contentions the Gomeroi applicant asserts that Santos has substantial experience in making agreements. The purpose of such assertion seems to be to demonstrate Santos's experience in negotiating agreements of the kind sought with the Gomeroi applicant. This proposition seems to have been advanced in order to demonstrate that Santos was obliged to make a "fair" offer rather than bargain in its own interests. It is unclear whether paras 164-168 are concerned with compensation or the production levy.

[270] The fourth proposition is that Santos delayed in responding to, and then declined, the Gomeroi applicant's request for information and further expert advice. I have dealt with these matters elsewhere in this determination and so will be able briefly to dispose of this proposition.

[271] The fifth proposition relates to Santos's s 35 application, made on 5 May 2021. I have also dealt with this matter in some detail. I need not further address it at length.

Preliminary Issue: Compensation

[272] In the first three propositions, the Gomeroi applicant appears to focus on "compensation". Such focus is curious, given that the Tribunal has no power to award or calculate compensation. See s 50 of the Native Title Act. However, in some circumstances, pursuant to s 41, the Tribunal may order that the future payment of an amount be secured by bank guarantee, or that an amount be held in trust until dealt with pursuant to s 52A of the Native Title Act. It is generally understood that such provisions may be utilized to secure an amount to meet any future compensation decision by the Federal Court. However, in the present case, no attempt has been made to calculate an amount which might be appropriately the subject of an order pursuant to s 41. Rather, the parties have sought to negotiate pursuant to s 33(1), apparently with the intention

that any negotiated amount would be accepted in lieu of compensation and, apparently, without reference to the extent of any impact upon native title rights and interests.

[273] Although Mr Ho's report, and to a certain extent Mr Meaton's report, speak of calculating compensation, the discussion seems actually to be about amounts which might be agreed pursuant to s 33. In Mr Ho's report, in particular, this confusion is expressed in economic terms, which terms, I fear, further confound, rather than explain his reasoning. I should add that when the parties negotiate pursuant to s 33(1), s 31(2) may be engaged. Section 31(2) deals with negotiations concerning matters unrelated to the effect of the relevant future act on the registered native title rights and interests. In such negotiation, failure to negotiate in good faith, "does not mean that the [party in question] has not negotiated in good faith" for the purposes of s 31(1)(b). Negotiation as to a production levy seems to be about matters unrelated to the effect of the proposed grants on native title rights and interests. It seems to be assumed that if an agreed production levy is applied in discharge of any compensation claim, the negotiations will not be caught by s 31(2). I do not propose to discuss the merits of that proposition.

Preliminary Issue: Expert Evidence

[274] It seems that both Mr Meaton and Mr Ho have expertise in valuation. Mr Meaton is described by the Gomeroi applicant as an "Economic Advisor". See, for example, minutes of meeting held on 30-31 August 2017. No curriculum vitae has been supplied. Mr Ho agreed, in cross-examination that he was an expert valuer, although he described himself as an economist when signing a document, apparently provided by NTSCORP, headed "Services to be Provided by Economist". There is no evidence as to economic education or training. However he has obviously given economic advice and performed other economic functions. There has been no challenge to their being called as expert witnesses. However, I have found much of their evidence to be difficult to understand. Nonetheless, I must demonstrate my understanding of their evidence. In so doing, I must avoid trespassing upon the area of expertise of a valuer or an economist.

Preliminary Issue: Markets

[275] In Mr Meaton's evidence and that of Mr Ho, there are references to "markets", "economic principles", and "competition within markets." However they do not clearly

explain such terminology. In its contentions at para 153, the Gomeroi applicant asserts that, at various meetings held between Santos and the Gomeroi applicant, Mr Meaton explained to Santos that its offer was below the "market rate" for comparable projects. I have referred to the records of those meetings and note that there is no use of the term "market rate", at least as far I can see.

[276] At the meeting held on 14 December 2020, Mr Meaton is recorded as having said that, "I am happy to standup [sic] in the tribunal and quote the reasonable rates in other agreements." In the same document, Mr MacLeod is recorded as having said:

> [O]n the production levy, if Murray [Meaton] is saying the percentage of this nature will not materially affect the financials of the project and is not on par with other projects. [sic] What are the reasons for staying where you are and why should this group say yes?

Mr Dunn responded that "Murray [Meaton] is using one model, but not our model".

[277] These passages suggest that Mr Meaton's advice to the Gomeroi applicant was to the effect that some guidance as to "compensation" might be obtained by reference to different, but similar projects. In his report, he seems, at least at one stage, to be addressing the calculation of compensation concerning, "the impairment of native title rights". See ch 3. However, at para 3.4, there is a discussion of "benchmarks", commencing with the assertion that, "most compensation arrangements are confidential." The following discussion seems not to have addressed the quantification of compensation by reference to actual or likely impairment to native title rights. Rather, Mr Meaton bases his advice on an analysis of 14 other oil and gas projects. In connection with Mr Meaton's evidence, and that of Mr Ho, I shall refer to such agreements as **comparable agreements**, although there is no evidence as to such comparability, save for assertions to that effect, with no supporting evidence. In reliance upon such analyses he recommends "milestone payments" between $0.3 million and $1 million, and royalties at 0.75% to 1.4% of the value of production. The other projects in question were located in the Northern Territory, South Australia and Western Australia. This part of Mr Meaton's report appears to be the basis for the Gomeroi applicant's statement, at para 153 of its contentions, that, "Mr Meaton explained to Santos that their offer was below the market rate for comparable projects". One of the assertions made concerning Santos's approach to negotiations is that it did not "engage with" Mr Meaton. The assertion seems to be inconsistent with Mr Meaton having explained the matter to

Santos. I assume that "engagement" does not necessarily involve acceptance of Mr Meaton's opinion.

[278] The expression, "below the market rate for comparable projects", makes it necessary that I consider the meaning of the terms "market rate" and "comparable projects". In short, it seems to be suggested that "compensation" for impairment of the Gomeroi applicant's native title rights and interests should be determined by reference to amounts paid by other companies in connection with other projects. However no attempt has been made to compare impairment of native title rights and interests in connection with those projects with that which might be attributable to the proposed grants. The contention seems to suggest some sort of "market" in which various gas producers, including Santos, and native title parties, including the Gomeroi applicant, are participating. The term "market" and associated terms are used frequently by Mr Ho in his report and in his cross-examination. The term is also at the heart of the Gomeroi applicant's contentions. As Mr Ho's evidence expressly focusses on "market terminology", my focus will be on his evidence, rather than that of Mr Meaton. I shall be discussing the evidence of both Mr Meaton and Mr Ho at a later stage. For present purposes, I seek only to explain the language used by Mr Ho, and to a lesser extent, Mr Meaton.

[279] Mr Ho's report depends upon the "economic principles" discussed in ch 7. One concept to which he refers is that of "fair value within a free market". He says (at para 7.4) that in preparing his report, he has assumed that "an agreement made through good faith negotiations as contemplated by [s 31(1)] … has the objective of achieving an agreement that represents fair value within a free market, in economic terms, so that the economic principles I draw upon reflect this objective." The negotiation prescribed by s 31(1) of the Native Title Act does not involve concepts such as "fair value" or a "free market". Nor is there any indication as to the subject matter of any valuation exercise. The section requires that the parties negotiate in good faith with a view to reaching agreement as to the proposed grants. No doubt, such negotiation is likely to involve consideration of financial aspects, but there is no indication as to the nature of such aspects, or as to how they may be calculated. Given the frequent references to compensation in the evidence, it would seem that any financial aspect would be compensation for impairment of native title, a matter which was considered by the High Court in *Northern Territory v*

Griffiths.[34] However, as far as one can see, there has been no attempt to compare the extent of any impairment of the Gomeroi people's native title rights and interests with the extent of any impairment in the various comparable projects which have been taken into account in the reports of either Mr Meaton, Mr Ho, or both.

[280] One would have expected that any consideration of the benefits derived by the native title parties in the comparable projects (for the purpose of calculating a benefit for the Gomeroi people) would look to the whole package of benefits, not to parts of that package. Clearly, Santos's offers, considered by Mr Meaton, included financial and non-financial benefits other than the production levy. Similarly, the Proposed Terms referred to in Mr Ho's report contained other financial and non-financial benefits. Both men focussed upon the production levy and either ignored, or discounted the other benefits, financial and non-financial.

[281] The term "free market", is hardly appropriate to describe a negotiation process which is prescribed by statute and in which, failing agreement, the parties will have to submit to a determination by a third party, in this case, the Tribunal. Nor is the term appropriate to describe a negotiation process which must be conducted in good faith for a particular purpose. Further, to the extent that the question of "fair value" is to be calculated by reference to comparable projects and associated agreements, both Mr Ho and Mr Meaton rely upon knowledge as to relevant "comparability" of comparable projects and associated agreements, which knowledge they have not provided to the Tribunal, apparently because such knowledge is "confidential".

[282] Mr Ho's references to a "market" must be more carefully examined. Although he refers to a "free market, in economic terms" and to a "free market", he says little about the meaning of such terms. The courts have frequently spoken about the term "market", where it is used in economic evidence.

[283] Mr Ho says, at para 7.13:

> At the market price, the sum of the economic gains made by buyers and sellers is maximised. Most sellers will be receiving a price above their minimum willingness to sell and thereby accruing an economic gain. Similarly, most buyers will be paying a price below their maximum willingness to purchase and so accrue its own economic gain. Any movement away from the market price will reduce the willingness of the participants (either the buyer or the seller) to voluntarily transact.

[34] (2019) 269 CLR 1.

[284] Mr Ho recognizes that a market will be comprised of buyers and sellers, and involves the acquisition and disposition of particular subject matter. For example, cars might be bought and sold in one market; apples in another. Mr Ho asserts that, for present purposes, the market is for, "the right to perform acts on an area". Mr Meaton, on the other hand, asserts that the contemplated negotiation will concern compensation for the impairment of native title rights and interests. Mr Ho also refers to compensation. However neither makes any attempt to calculate compensation by reference to impairment. Both put great emphasis upon payments by way of "production levy" or royalties, which terms I have previously explained. Neither Santos nor the Gomeroi applicant has ever suggested that the negotiation is only about those matters. The evidence, particularly appendix 7 to Mr Ho's report (annexed to this determination at Schedule 3) demonstrates a much wider range of benefits offered by Santos to the Gomeroi applicant.

[285] The "rights" identified by Mr Ho (to perform acts on land) will not be conferred by any specific decision of the Gomeroi applicant. That right, and any other rights of access and exploration will be conferred by the proposed grants pursuant to statute. The negotiation (and this determination) address such grants. The object of the negotiation is obtaining the Gomeroi applicant's agreement to the proposed grants, not parts of such grants. See the Petroleum (Onshore) Act at s 41.

[286] In *Miller's Australian Competition and Consumer Law Annotated*,[35] at the commentary relating to s 4E of the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**), Miller discusses the concept of "market". The term is defined in that section as follows:

> **Market**
>
> For the purposes of this Act, unless the contrary intention appears, ***market*** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

[287] The definition does not address the meaning of the word "market", save for introducing the concept of substitutable, or otherwise competitive, goods or services. At para CCA.4E.20 Miller observes that the definition of the term "market" has been left to the courts, "drawing on the law of economics". Miller also refers to the longstanding

[35] Russel V Miller (2022) 44th ed, Thomson Reuters.

proposition that the concept of a "market" is "a tool to facilitate a proper orientation for an analysis of market power" (citing Professor Brunt, "'Market Definition' Issues in Australian and New Zealand Trade Practices Litigation" (1990) ABLR 86 at 126). In some ways reflected in Mr Ho's report is the proposition advanced by Miller as follows:

> In the language used by economists and adopted by courts, it [a market] is the area of actual and potential, and not purely theoretical, interaction between producers and consumers where, given the right incentive, substitution will occur. It is an abstract concept rather than a physical place where buyers and sellers conduct their transactions. Although the concept may be abstract, markets are not artificial or contrived.
>
> The term describes the range of economic activities within which the conduct under investigation is to be assessed, based on findings of fact.

[288] The concept is applied in numerous contexts in connection with the Competition and Consumer Act. Mr Ho uses the term in connection with the valuation of, as he says, the "right to perform an act on an area". However, as I have observed, that approach overlooks the fact that the proposed grants, in their entirety, are the subject of the negotiations. If there is a relevant market, the "commodity" in question must be the Gomeroi applicant's agreement to the proposed grants.

[289] As Miller says, evaluation of a market involves, "considering the relevant products and those substitutable for them now or in the reasonably foreseeable future, the functions served by those products and the geographical area in which the substitution occurs or could occur." This proposition raises questions as to the assumption tacitly made by Mr Ho, that the comparable projects and their associated agreements are similar "products", effectively the same as, or substitutable for one another, and potentially for "new" projects such as the Narrabri Gas Project. However he offers no evidence as to such similarity. Indeed, it seems unlikely that any question of substitution could arise, whether it be as between projects or in connection with negotiation concerning the Gomeroi applicant's agreement to the proposed grants. Santos cannot acquire the proposed grants by getting somebody other than the Gomeroi applicant to give the relevant agreement. Nor may the Gomeroi applicant provide its agreement to anybody other than Santos. Santos's potential right to perform activities on land in northern New South Wales is not substitutable for a right to perform a similar act in Western Australia, South Australia or the Northern Territory, which rights Santos cannot acquire in any event, unless the relevant State or Territory government offers it an opportunity to do so.

[290] In reality, I am considering a statutory process in which the State, Santos and the Gomeroi applicant have chosen to participate. Those choices have imposed obligations upon them. The proposed grants will only be made if the parties reach agreement, or if the Tribunal makes a determination. Subject to my consideration of the submissions made by Mr Ho and Mr Meaton, I presently see no room for any suggestion of a relevant market for the disposition or acquisition of the Gomeroi applicant's agreement to the proposed grants. The parties must negotiate in good faith, with a view to reaching agreement, and subject always to the possibility of a Tribunal determination. Only Santos has been authorized by the State to negotiate with the Gomeroi applicant. The Gomeroi applicant cannot meaningfully agree to allow any other party to perform the relevant extraction activities on its land. In my view, the parties are participating in a statutory process. Such participation seems to have little similarity to the generally understood nature of a market.

[291] Although Mr Meaton and Mr Ho have focussed on financial provisions (the production levy and royalties), other matters for negotiation in the present case (and probably in the comparable projects and associated agreements) are also of considerable importance. I have in mind, in particular, matters concerning cultural heritage protection. The Gomeroi applicant is adamant that cultural heritage protection is of great importance. Such importance is likely to be reflected in the terms of any agreement, including terms protecting such heritage and making allowance for possible loss of, or damage to it, by way of repair or compensation.

[292] Both Mr Meaton and Mr Ho seem to have treated financial conditions and non-financial conditions, each in isolation from the other. Some conditions may appear to be non-financial, in that there is no financial benefit to the native title party. Nonetheless they may involve expense to the proposed grantee (in this case, Santos), although such cost may not necessarily be quantified in advance. In appendix 7 to Mr Ho's report, many of the non-financial terms will likely involve cost to Santos. To consider the financial provisions in isolation from other provisions is to assume, and perhaps create a perception as to the relative importance of each category, without any apparent justification for so doing.

[293] In the end, the relative importance of a particular term in a proposed agreement is not a matter for a valuer. It is a matter for the parties. There has been no suggestion that the

Gomeroi applicant would have, in other circumstances, agreed to the proposed grants, if the cultural heritage conditions were omitted, but enhanced financial benefits, offered. For that reason alone, Mr Ho's arbitrary decision to focus on the production levy/royalty question is misconceived and detracts from the usefulness of his evidence.

[294] With all respect, it seems to me that Mr Ho justifies his recourse to the allegedly comparable projects and their associated agreements by reference to the language of markets and competition. However the appropriateness of such usage is assumed, rather than demonstrated.

[295] Finally, I keep in mind the fact that I am considering the evidence of both Mr Meaton and Mr Ho, effectively because the Gomeroi applicant submits that their evidence, in some way, demonstrates that Santos did not negotiate in good faith with a view to reaching agreement as to the proposed grants, particularly considering the question of production levies or royalty payments. In my view, it is very difficult to see any real connection between amounts being offered in, say 2018-2022, in the course of s 31(1) negotiations for a gas project in north-west New South Wales, and amounts apparently offered in other parts of the country between 2003 and 2021, with very little evidence as to the location or nature of such other projects or the content of associated agreements reached with different native title parties.

a. Not Engaging with an Expert (Mr Meaton)

[296] As Mr Meaton's involvement in this matter preceded Mr Ho's involvement by several years, it is convenient that I consider Mr Meaton's report before considering Mr Ho's report. Mr Meaton's report is dated April 2017 and is headed "Santos Narrabri Gas Project: Native Title Compensation".

[297] Mr Meaton was retained to prepare a report for the Gomeroi people, concerning the impact of the proposed grants on native title rights, and as to an appropriate level of compensation for such impact. Mr Meaton says that his report, "provides a brief outline of [Santos], the planned production activity, an assessment of the capacity to pay compensation and recommendations on compensation for the rights impaired by gas production." In his report he recommends a basis for agreement. See paras 4.2-4.4. For

present purposes, the "cash payments" recommended in para 4.2 are of particular significance. They are:

> 1. Signature/Execution Fee - $250,000
> 2. First production payment - $250,000 (indexed to CPI)
> 3. Administration - $40,000 … per annum from signature
> 4. Production wells - $4,000 per well …
> 5. Transmission export pipelines - $6,000 per km …
> 6. Production levy based on wellhead value (WHV) of hydrocarbons recovered and sold. WHV to be determined using government royalty methods. The levy will be based on the cumulative recovery of hydrocarbons as follows:
>
> 0.75% of WHV - when cumulative recovery is less than 500PJ of gas
>
> 1.0% of WHV - when cumulative recovery is in the range 500PJ to 1,000PJ
>
> 1.25% of WHV - when cumulative recovery is in the range 1,000PJ to 1,500PJ
>
> 1.4% of WHV - when cumulative recovery exceeds 1,500PJ
>
> Floor payment in any year that production exceeds 5PJ to be $250,000 with a ceiling of $10 million.

[298] There is no detailed explanation as to the calculation of these recommended amounts. I note that on 21 March 2017, prior to Mr Meaton's report, Santos made its first offer in which it included a "production levy" calculated at 5% of Santos's annual royalty payments to the State. That feature has been included in all subsequent offers by Santos. In effect, the Gomeroi applicant contends that Santos did not negotiate in good faith in that it did not "engage with" Mr Meaton as an expert who asserted that Santos's offer of a "production levy" was "below market value".

[299] Mr Meaton also recommended conditions concerning employment and training, two of which recommend payments in the amount of $20,000 and $50,000. Other such conditions would likely incur further outgoings for Santos. Mr Meaton also advised that the Gomeroi applicant should seek preferential treatment from Santos in connection with commercial contracts.

[300] Mr Meaton says that Santos assisted him in his task:

> The company has provided broad level financial information and hence the evaluation in this report is based on this information and studies undertaken by Economics Consulting Services on a range of other oil and gas projects in Australia.

[301] In his report, Mr Meaton asserts that, at the time of the report, Santos was in a difficult financial position and, "will be cautious over expenditure on the Narrabri project". He

also asserted that the Narrabri Gas Project was, "one of the few potential gas fields that can meet a projected shortfall in gas supplies in the Eastern States and is considered important to New South Wales for that reason." Mr Meaton concluded that, "[t]his is a large project involving a big capital investment and continuing high costs in well drilling", and that "[i]t may only be marginally profitable."

[302] At ch 3 of the report, Mr Meaton considered "Native Title compensation". Quite clearly, he understood that he was to advise concerning the amount of compensation for extinguishment or impairment of native title rights. However, as I have said, the Gomeroi applicant now relies upon his evidence for the purpose of demonstrating absence of good faith on Santos's part. As I have previously observed, there appears to be no direct relationship between impairment of native title rights and interests and the calculation of "cash payments".

[303] Mr Meaton asserted that the level of compensation paid for the extinguishment or impairment of native title rights and interests is generally determined by a combination of legal rights and the "attitude" of the company and the traditional owners. He says that legal rights provide the framework, while industry benchmarks provide a reference point for all parties. The reference to the "attitude" of the parties introduces an element of uncertainty into the process. I am also unsure as to the meaning of the words "benchmark" and "reference point".

[304] Mr Meaton asserts that the process of negotiation prescribed by the Native Title Act must be "just and fair." Those terms do not appear in s 31(1). They are said to be drawn from the constitutional requirement that a citizen must not be dispossessed of property except on "just terms of compensation", apparently referring to s 51(xxxi) of the *Constitution*. He further states that, "just terms are not necessarily the same thing as the money value of the property acquired." He adds that compensation must, "amount to fair dealing", involving consideration of the interests of the "broad population" as well as of the land user and that, in this case, compensation is not for acquisition of property, but for impairment of native title rights. Finally, Mr Meaton states that the "bundle" of native title rights held by the Gomeroi people will be diminished by the oil and gas activity, but that the reduction in value of such "social rights" is difficult to assess. I do not understand the meaning of the term "social rights".

[305] Mr Meaton seems to have assumed that his task was to determine the "fair value" of compensation for the impairment of native title rights and interests, which impairment would be attributable to the proposed grants. Presumably, his understanding was based on the constitutional provision cited above, rather than the wording of s 31(1). Such an approach may lead to error. There is no challenge to the constitutional validity of s 31(1). Hence there is no reason for recourse to the *Constitution*. The correct approach to s 31(1) should not commence with the assumption that negotiations must be "just and fair". Nor must the agreed compensation constitute "fair dealing". Although such terms may be used loosely to describe the expectations associated with s 31(1), they have no place in the negotiation process, which process must be in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants.

[306] The expression "just terms", if used loosely, may mislead. As Dixon J said in *Nelungaloo Pty Ltd v The Commonwealth*[36] at 571-572:

> Now "compensation" is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. 1t is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.
>
> Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes. Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his ownership and of his consequent rights of disposition existing under the general law at the time of acquisition.
>
> (Citations omitted)

[307] See also *Georgiadis v Australian and Overseas Telecommunications Corporation*[37] at 310-311 where Brennan J said:

> The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be

[36] (1948) 75 CLR 495.
[37] (1994) 179 CLR 297.

> shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.

[308] In *Smith v ANL Ltd*[38] at [9] Gleeson CJ said:

> The guarantee contained in s 51(xxxi) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by s 51(xxxi) it must pay for them, or in some other way provide just terms of acquisition.

[309] Subdivision P is not concerned with compensation as such. It is about obtaining the consent of native title holders or claimants to proposed governmental action, using the mechanism of compulsory negotiation, with the threat of a Tribunal determination should the parties not agree. Compensation may only be determined by application to the Federal Court. See s 50 of the Native Title Act. The Gomeroi applicant seems to suggest that because Mr Meaton provided it with advice, and it chose to provide such advice to Santos, Santos was obliged to treat such advice as having some sort of prima facie weight. Clearly, that view is misconceived.

[310] As appears from ch 4 of his report, Mr Meaton's advice extended to non-financial, as well as financial matters. As I have said, the evidence suggests that the Gomeroi applicant is concerned about cultural heritage and its protection, matters not really valued by Mr Meaton. Further, it is not correct to say (as the Gomeroi applicant says at paras 152-154 of its contentions) that at six meetings, Mr Meaton, "explained to Santos that their offer was below market rate for comparable projects". At the meetings on 11-12 May 2017, the Gomeroi applicant indicated its intention to make a counter-offer which would deal with a royalty-based payment. Similarly, at the meeting on 11-14 July 2017, there was a reference to advice given to the Gomeroi applicant by Mr Meaton, and an indication that a counter-offer was being prepared. There is no explanation by Mr Meaton concerning the alleged inadequacy of Santos's offer. Similar comments apply to the meeting on 30-31 August 2017. It is difficult to see how it can be said that Santos was not "engaging" with Mr Meaton. Further, it is difficult to understand the term "below market rate". Whilst Mr Meaton seems to have been addressing impairment of native title rights and interests, there is no suggestion that any attempt was made to assess the "market rate" of such impairment.

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[38] (2000) 204 CLR 493.

[311] At the meeting on 15 December 2019, the debate seems to have been largely about Santos's earlier public commitment to the 5% production levy, and its assertion that its current overall offer was the highest on-shore offer ever made by Santos. At the meeting held on 14 December 2020, the production levy was extensively discussed. By this stage it was clear that the Gomeroi applicant did not consider that it could recommend Santos's offer to the native title claim group, given Mr Meaton's advice. At the mediation on 18-19 March 2021, the matter was again discussed. The Gomeroi applicant suggested arbitration, as I have previously mentioned. The thrust of all of this is that Mr Meaton certainly urged his point of view concerning Santos's position. Indeed, at one stage, he appeared to be quite partisan.

[312] Mr Meaton correctly observed that native title does not confer ownership of oil and gas. Hence there can be no payment to the Gomeroi applicant for the acquisition of such resources, they being the property of the Crown in right of the State of New South Wales. Mr Meaton suggests that this Tribunal has noted that Aboriginal and Torres Strait Islander peoples will be given "favourable consideration" in compensation for any disrupted special attachment to the land. The High Court's decision in *Northern Territory v Griffiths*[39] makes it clear that compensation will be payable for infringement of native title rights and interests, together with a further award of compensation for loss of cultural heritage, particularly connection to land. See the decision of Kiefel CJ, Bell, Keane, Nettle and Gordon JJ at [84]. In light of this decision, the suggestion of "favourable consideration" is a little difficult to understand. Compensation relates to legal entitlement, not favourable treatment.

[313] Mr Meaton observes that for the purposes of compensation, loss of cultural heritage involves matters such as the inability to perform initiation rites, inability to gain and enjoy full tribal rights, loss of ceremonial function and inability to take part in matters of spiritual and tribal significance. It is said that the Pilliga forest is known as an area that has a special spiritual meaning and cultural significance for the Aboriginal people of the region. However the present matter is concerned with a relatively small part of the Pilliga. Further, there appears to have been no attempt to value such matters.

[39] (2019) 269 CLR 1.

[314] At para 3.3, Mr Meaton asserts that "one key driver" for the Gomeroi applicant is to be treated fairly, and that payments in "other future act settlements" become a "benchmark for comparison". Mr Meaton offers no basis for this opinion. At para 3.4, he says that most "compensation arrangements" are confidential. Mr Ho also says that much of the relevant information upon which he relies is confidential. In those circumstances, it is difficult to know how a native title party could form a view about "fair treatment" in its particular case. Throughout Mr Meaton's report there is virtually no reference to the extent or nature of any likely impairment to native title rights and interests, or as to how appropriate compensation for such impairment, or for cultural loss, might be calculated. Mr Meaton asserts that "project circumstances" will determine the "outcome". I do not understand the term "project circumstances". He also says that it is common for both negotiating groups to begin negotiations with "benchmark studies", in which relevant factors may include native title rights, location and connection to country, as well as "industry sector and attitude to land development on both sides". The meaning of the passage "industry sector and attitude to land development on both sides" is by no means clear.

[315] As I have said, both Mr Meaton and Mr Ho say that most compensation agreements are confidential. However Mr Meaton claims to be able to provide an outline of details determined from "past negotiations". He says that benefits packages "generally include" a mix of financial support and other community assistance. However, he considers that it is difficult to measure community assistance where there are no direct financial grants or budget allocations. Benefits may include a "range of quantifiable items", "as well as more intangible components". He asserts that favourable contract opportunities and employment are hard to value, unless they involve "firm commitments". It is difficult to understand the basis of Mr Meaton's advice to the Gomeroi applicant. He appears to have made no attempt to quantify compensation by reference to the relevant impairment to native title rights and interests. He discounts or disregards favourable "opportunities" which he has considered as part of the compensation package, unless there are "direct financial grants for budget allocation". He seems to be saying that contract and employment opportunities may be offered, but should not be taken into account unless there is provision for direct financial grants or budget allocations. This seems to mean that reliance cannot be placed upon contractual commitments, a generalized assumption which cannot be justified. I stress that the Tribunal may not award compensation. Any

calculation concerning compensation can relate only to possible orders pursuant to ss 41 and 52A.

[316] Mr Meaton then addresses "direct financial payments." He says that community benefits, to offset the loss or impairment of native title rights, may be provided in different ways. Ideally, the outcome of negotiations between the parties will reflect their "aspirations and capacity", and may include, "a range of quantifiable items as well as more intangible components." The subsequent discussion relates to milestone payments, based on the occurrence of anticipated events associated with the Narrabri Gas Project, and royalties, based on the value of production from the proposed tenements. It is difficult to identify from Mr Meaton's evidence, any relationship between such financial payments and the impairment of native title rights and interests or cultural loss. Again, I point out that negotiation pursuant to s 31(1) has, as its objective, agreement as to the proposed grants. Compensation for impairment of native title rights and interests is a matter about which the parties may negotiate, but need not do so. The objective is agreement.

[317] In fact, it seems that Mr Meaton calculated compensation by reference to the comparable projects and associated agreements, with no consideration of impairment of native title rights and interests, and no allowance for cultural loss. Mr Meaton asserts that the "terms" (which he subsequently proposes) are based on 14 unidentified oil and gas projects, located in three regions, reflecting the "strength" of the "Traditional Owner rights", connection to country and the "results of negotiations in each region." The three regions are "Northern Australia", "Pilbara", and "Other Australia". There are nine "sample" projects in Northern Australia although two of them are described as "NT3", possibly suggesting double counting. There are two such projects in the Pilbara, and four in Other Australia, apparently including South Australia and Western Australia. Mr Meaton asserts that the, "decision on the benefit level which should apply to the Narrabri project is 'biased towards' the six 'Other Australia' and Pilbara projects." The reference to figures 1 and 2 are to figures appearing in ch 1. They identify the project area but add nothing to Mr Meaton's reasoning. It is, perhaps, curious that Mr Meaton has included no Queensland or New South Wales projects.

[318] There is no evidence as to the "sample" projects, in terms of size, economic viability, life expectancy or otherwise. Nonetheless, Mr Meaton recommends, without further

explanation, milestone payments of between $0.3 million and $1 million, and royalties of 0.75% to 1.4%, fixed by volume and price at the wellhead. He then supplies bar graphs for milestone payments and royalty payments across the three "sample" categories. None of these sample projects is demonstrated to be comparable to the Narrabri Gas Project. Nor is there evidence as to the extent of impairment to native title rights and interests or cultural loss in connection with such comparable projects, which impairment or loss might be compared to that likely to be associated with the proposed grants. The primary problem with Mr Meaton's evidence (as with Mr Ho's) is the failure to establish any form of comparability.

[319] Mr Meaton then observes that, "[t]his is a large and long life project with the potential to provide significant benefits and opportunities for the Gomeroi People." While financial payments are an important part of any package, "other benefits may be just as important and beneficial." He states that: "[t]he project provides an opportunity to develop a favourable relationship between a large resource company and the Traditional Owners of this land." He then describes the way in which such a favourable relationship may be developed, starting with the assertion that, "this means a commitment on both sides to building [and] maintaining a relationship based on mutual understanding and effective communication." He identifies the following steps:

- creating a communication process and liaison committee; and
- developing an indigenous participation protocol, covering training, employment and contract opportunities.

[320] Mr Meaton seems to identify the development of such "favourable relationship" between Santos and the Gomeroi people as an end in itself, rather than as a step in advancing the Narrabri Gas Project by obtaining the proposed grants, and so advancing the interests of the State.

[321] In ch 4, Mr Meaton makes certain recommendations. At para 4.1, he sets out factors which he considers to be relevant to such recommendations. They include the Gomeroi people's connection to the land, Santos's desire to obtain a production lease, that Santos is a large company with "substantial cash funds", and the size of the project in terms of revenue and impact. The observations concerning Santos's financial position, and the size of the project in terms of revenue and "impact on the Gomeroi", seem to be

inconsistent with his earlier comments concerning Santos's financial position and the possibility that the Narrabri Gas Project might be "marginal." Further, Mr Meaton provides no details concerning the Gomeroi applicant's connection to the land, any likely impairment to native title rights and interests or possible cultural loss

[322] As I have previously observed, Mr Meaton recommends six "cash payments". The production levy would vary from 0.75% to 1.4% of wellhead value. However, "floor payments" in any year in which production exceeds 5PJ would be $250,000, with a ceiling of $10 million. Mr Meaton's recommendations concerning the production levy are, in some way, related to his comparable projects, but he offers no explanation of such relationship. At paras 4.3 and 4.4, Mr Meaton discusses other matters, including the establishment of a liaison committee, further financial conditions, skills training, job opportunities and the provision of "contracting opportunities."

[323] At para 4.5, Mr Meaton asserts that his assumptions are conservative, given the level of uncertainty associated with the project. Nonetheless, he asserts that the estimated benefits (presumably to the Gomeroi people) would "total very close to $16 million in the first decade and $110 million in the following 19 years (25 years of production)". He identifies the following assumptions:

- all wells are on Gomeroi country, and 75% are on areas over which native title rights exist;
- production averages 150 TJ/day;
- gas sold at $10/GJ for 2021 to 2023 and $8.70/GJ after that;
- production commences from mid-2021 for 25 years; and
- a training budget of $50,000 per year commencing following FID in 2019.

[324] The assumption that all wells will be on Gomeroi "country" appears to mean that they are located within the external boundary of the Gomeroi people's native title determination application. There has been some extinguishment of native title within the Santos project area. Some of the wells may be located in the areas of extinguishment.

[325] The Gomeroi applicant relies upon this report for the purpose of asserting that Santos failed to negotiate in good faith in that it did not "engage with" Mr Meaton. Mr Meaton may well be an expert, but he seems to have understood that he was retained to advise the Gomeroi applicant. Fairly clearly his "report" was not intended to constitute

"evidence" in the technical sense of the word. For example, at para 1.4 he asserts that Santos is in a difficult financial position and will be cautious concerning expenditure on the project. At para 2.4 of his report, he doubts Santos's assumptions and speculates about its likely decisions. He refers to the need for "just terms", but seems only to consider justice from the Gomeroi applicant's point of view.

[326] I have previously referred to para 3.3, where Mr Meaton asserts that:

> Given that one key driver is a desire by Claimant groups and by organisations to be treated "fairly" payments made in other future act settlements become a benchmark for comparison. Project circumstances will determine the outcome but it is common for both negotiating groups to begin negotiations with benchmark studies.

[327] This statement must be seen in the context of Mr Meaton's assertion in para 3.4 that "[m]ost compensation arrangements are confidential." As I have already said, if most compensation arrangements are confidential, one wonders how a native title party, such as the Gomeroi applicant, could acquire an understanding of "fair" treatment for present purposes. The only available source of such information seems to be somebody, such as Mr Meaton, who has such knowledge, and is willing to disclose at least some of it. This is an unsatisfactory basis for either the negotiation process or any Tribunal determination.

[328] Mr Meaton seems to suggest, in paras 3.3 and 3.4, that previously negotiated agreements will be the starting point for negotiations, without reference to comparability of the projects in question, or to the assessment of impact upon native title rights and interests and cultural loss. If there is no basis for assessing comparability, any "benchmark" will effectively set a minimum, simply because there will be no basis for demanding or accepting less. Such an approach may seriously compromise the negotiations. In effect, in the present case it is being suggested that because Santos does not accept a "benchmark" fixed by reference to other projects and associated agreements of which we know little or nothing, it is not negotiating in good faith. Whilst Mr Meaton asserts that "benchmark studies" are the point at which negotiations begin, he also asserts that "project circumstance", will determine the ultimate outcome, whatever that may mean.

[329] Mr Meaton accepts that compensation is about impairment of native title rights, but says nothing about any assessment of the extent or nature of such impairment or cultural loss, or how compensation might be assessed by reference to those matters. It is difficult to avoid the conclusion that the process adopted by Mr Meaton was not designed to

produce a compensation figure which reflected the relevant impairment, including any compensation for cultural loss, as discussed in *Northern Territory v Griffiths.*[40]

[330] In the last part of para 3.3, Mr Meaton says that benchmarks "vary" with "determining factors", including native title rights, location, connection to country, industry sector and attitudes to "land development on both sides." However Mr Meaton does not discuss these factors. His advice to the Gomeroi applicant is not explained. Explanation may not have been necessary, to the extent that the purpose of his advice seems to have been strategic, designed to assist the Gomeroi applicant, not to inform Santos or the Tribunal.

[331] These considerations undermine the value of Mr Meaton's views, and the Gomeroi applicant's assertion that in failing to engage with Mr Meaton, Santos failed to negotiate in good faith, with a view to reaching agreement as to the proposed grants. In any event, the evidence strongly suggests that there was extensive discussion between Santos and Mr Meaton, over a considerable period of time. There is no basis for asserting that Santos should have abandoned its own negotiating position in favour of Mr Meaton's. To treat Santos's refusal as demonstrating absence of good faith would unjustifiably undermine its ability to negotiate freely, pursuant to s 31(1).

[332] Taking Mr Meaton's report at face value, it contains a number of weaknesses, namely:

- it appears to have been prepared as advice to the Gomeroi applicant concerning proposed negotiation with Santos, rather than for use as expert evidence;
- the recommended payments seem to be based on other projects and agreements which have not been shown to be comparable to the Narrabri Gas Project and any proposed terms, or to have comparable impact upon native title rights and interests and comparable cultural loss;
- the "comparable" projects do not include any projects in Queensland, where Santos has been operating for some time, or any project in New South Wales;
- nothing is disclosed concerning the "non-financial terms" of any of the "comparable" projects or their respective agreements, nor is it clear that all financial terms have been disclosed; and

[40] (2019) 269 CLR 1.

- the lack of information concerning the "comparable" projects and agreements creates a serious risk of at least misleading interested parties, by reliance upon selective research.

[333] In summary, it was not for Mr Meaton to determine the extent of the information required by Santos in order to assess the relevance of his advice concerning allegedly comparable projects and associated agreements. For those reasons, it cannot be said that Santos ought necessarily to have "engaged" with Mr Meaton. The nature of his advice was such that Santos had no reason to accept it as impartial or even reliable. In any event, it is difficult to see any basis for alleging absence of good faith arising out of the fact that Santos did not adopt Mr Meaton's views.

[334] Mr Meaton pays little attention to the requirements of the Native Title Act, particularly s 31(1). As previously observed, he asserts that the Native Title Act requires that the process of negotiation must be "just and fair". He then seems to formulate terms, financial and non-financial, which, I infer, he considers will be just and fair. Section 31(1) says nothing about valuation of impairment to native title rights and interests or cultural loss. Those are matters about which the parties may negotiate. As I have said, the Tribunal cannot fix compensation. Only the Federal Court may do so.

[335] It is simply incorrect to assert that Santos has not engaged with Mr Meaton. Mr Meaton attended numerous negotiation meetings with the Gomeroi applicant and Santos, in his capacity as adviser to the Gomeroi applicant. He attended such meetings on the following dates:

- 11-12 May 2017;
- 11-14 July 2017;
- 30-31 August 2017; and
- 15 December 2019.

[336] He may not have attended a meeting on 20 October 2018, although he was mentioned at the meeting. At a meeting held on 14 December 2020, he was not listed as attending, but he apparently spoke of "our proposal", "our position from the beginning" and used other similar language. Similarly, the mediation synopsis dated 31 March 2021, at page 6, makes it clear that the Gomeroi applicant was acting upon Mr Meaton's advice, and that he also attended the mediation. I should add that, particularly at the meetings held

on 15 December 2019 and 14 December 2020, he seems to have adopted a partisan position.

[337] Some of Santos's contentions relate to both Mr Ho and Mr Meaton. Hence I should, at this stage, say something about those contentions. They appear at paras 156-171 of the contentions. I have previously dealt with the issue of "reasonableness" and "market value", demonstrating that care is necessary in using such terms. See, in particular, pt 3.4 of Mr Ho's report.

[338] Mr Meaton and Mr Ho's evidence is relevant only to the extent that it may go to the issue of good faith. In this regard, Santos asserts that neither Mr Meaton nor Mr Ho has addressed offers made by Santos as a package. Rather, both have focussed on the production levy or royalty payments, by reference to allegedly comparable projects and associated agreements, but without regard to other aspects of similar "packages". Hence both have focussed upon parts of the comparable packages and agreements, and then sought to explain why the other aspects should be discounted. I shall deal with that matter in more detail when I consider Mr Ho's evidence. The reasons given by Mr Meaton for discounting other aspects of the Santos package are unconvincing.

[339] Referring to the decision in *Drake Coal Pty Ltd v Smallwood*[41] at [195]-[197], Santos submits that the Tribunal cannot determine the question of good faith, having regard to whether the offer is "reasonable" or constitutes "market value". This submission may overstate the case. In *Brownley v Western Australia*[42] at [34]-[37], Lee J concluded that in assessing the overall conduct of a party, the Tribunal may take into account the reasonableness of offers made. However Nicholson J in *Strickland v Minister for Lands*,[43] and Carr J in *Walley v Western Australia*,[44] both considered that, generally, the Tribunal should not, "assess the reasonableness of each offer". As to the question of "market value", for reasons outlined above, I doubt whether such a concept is helpful in the present case.

[340] Although there may be exceptions, I doubt very much whether offers made in the course of negotiation can necessarily be described as unreasonable, let alone used for the

[41] (2012) 257 FLR 276.
[42] (1999) 95 FCR 152.
[43] (1998) 85 FCR 303.
[44] (1999) 87 FCR 565.

purpose of inferring absence of good faith. After all, the negotiation process inevitably involves identification by one party of the strengths and weaknesses of the other. Even the requirement in s 31(1) for good faith negotiation cannot exclude that aspect of negotiation. It is also inappropriate to isolate one aspect of the negotiation from other aspects, in considering whether negotiations are being, or have been conducted in good faith. When, as in this case, one party is faced with an offer based on largely undisclosed evidence, negotiations may be more difficult, particularly when, as here, that party has its own extensive experience in the area.

[341] I accept Santos's contention at para 163, that any comparison should be of the respective packages offered, rather than arbitrarily chosen parts of each package. Santos submits that Mr Meaton and Mr Ho fall into the "statistical fallacy" of attempting to compare percentage figures for "royalties" from a "sample size" of other agreements which they assert (but do not establish) are comparable to the Narrabri Gas Project. As I have said, Mr Meaton's report offers no justification for his assertion of comparability. Nor does he explain how he has identified and assessed "benchmarks". Mr Meaton uses terms such as "project circumstances" and "determining factors", but does not explain them. The absence of evidence concerning such matters cannot be ignored. As I shall demonstrate, Mr Ho's evidence suffers from similar deficiencies.

[342] Mr Kreicbergs' evidence has an impact upon the evidence of both Mr Meaton and Mr Ho. He provides particulars of five projects involving Santos, in none of which any royalty was paid. All were in Queensland and established between 2013 and 2021. All involved other substantial benefits. As Santos points out, if these five projects were taken into account in Mr Meaton's table 2, the absence of royalty payments in those five projects would significantly undermine any inferences to be drawn considering the "range" of royalties "paid" in the extended number of projects. There is no reason to conclude that the Queensland situation, as demonstrated, is any less comparable, for present purposes, to the Narrabri Gas Project, than are the projects in Northern Australia, the Pilbara, or "Other Australia". I shall further address such matters in connection with Mr Ho's evidence. See, in particular, Mr Kreicbergs' affidavit at paras 87-93.

[343] Other aspects of Mr Kreicbergs' evidence are also relevant for present purposes. First, Mr Kreicbergs asserts that Santos's ultimate offer, as a package, was the highest ever made by it for an onshore gas project in Australia. That proposition has not been

challenged. There is no basis for doubting it. As I have said, Mr Meaton's comparisons are undermined by the absence of evidence of comparability, and his failure to compare packages as a whole, together with the other matters to which I have referred. Santos's experience cannot be simply discounted. It is a major operator in the industry. Further, no attempt has been made by the Gomeroi applicant to refute the explanations offered by Mr Kreicbergs in para 91 of his affidavit, other than to assert, at para 4 of its closing submissions, that Mr Kreicbergs is, "not relevantly qualified, experienced or independent". It may be accepted that he is not independent. Witnesses frequently are not. It does not necessarily follow that their evidence should be rejected. As to his qualifications and experience, the question is whether he is providing evidence which is within his knowledge. At para 89 he indicates that he is so doing. As to his "view" that he had identified all agreements matching particular criteria, his use of the word "view" simply describes the process of identifying the terms of each agreement. He is not asserting an expert opinion. Similar comments apply to paras 90-93. To the extent that Mr Kreicbergs asserts facts, such evidence is admissible. Indeed, the Gomeroi applicant's Counsel, in cross-examination of the witness, commencing at ts 162, seeks similar evidence from him.

[344] To the extent that Mr Kreicbergs was cross-examined as to why Santos did not obtain an expert report (at ts 164), it seems that his position, and that of Santos, was that such a step was unnecessary. Certainly, the expert evidence provided by the Gomeroi applicant in this case has not helped very much, primarily because its basis has not been established.

[345] At para 5 of the submissions, apparently concerning Mr Kreicbergs' cross-examination, the Gomeroi applicant asserts that Santos knew that its offer was under value, and failed to expose its methodology for testing in this inquiry, knowing that it, "would not stand such scrutiny." The proposition seems to be based on some variation of the decision in *Jones v Dunkel*,[45] asserting that the Tribunal might infer that such evidence was not led because it would not have been helpful. The submission is misconceived. It assumes that there was an obligation upon Santos to make an offer which fell within a particular range. There is no basis for that proposition. The parties were negotiating, not valuing. There was no obligation to make a "reasonable" offer. The obligation was to negotiate

[45] (1959) 101 CLR 298.

in good faith and, of course, it was the overall package which was the relevant consideration. I do not accept the proposition that Santos "knew" that its offer was "under value". To the extent that the Gomeroi applicant asserts that such knowledge is based upon Mr Meaton's evidence, I reject the contention. To the extent that the Gomeroi applicant relies upon Mr Ho's evidence in order to establish such knowledge, I shall presently demonstrate my reasons for rejecting his evidence.

[346] At paras 11-20 of the Gomeroi applicant's closing submissions, it addresses the combined effect of Mr Kreicbergs' evidence and that of Mr Ho and Mr Meaton, as that evidence relates to the production levy valuation method and associated matters. The Gomeroi applicant submits that it was "unreasonable" for Santos to "approach" the production levy "on the same basis as non-native title landholders". This contention seems to relate to oral evidence given by Mr Kreicbergs. At ts 118, ll 29-34, he accepted that the production levy was determined by reference to the New South Wales landholders' policy, established in 2012. Mr Kreicbergs did not develop that policy, but was obliged to follow it. The Gomeroi applicant complains that the policy does not take into account the "non-economic loss exceeding market value", as recognized in *Northern Territory v Griffiths.*[46]

[347] At [84] in *Northern Territory v Griffiths,*[47] the majority held that in assessing just compensation for the infringement of native title rights and interests in land, there will be a component for the "objective or economic effects of the infringement … (being, in effect the sum which a willing but not anxious purchaser would have been prepared to pay to a willing but not anxious vendor to obtain the latter's consent to the infringement or, to put it another way, what the Claim Group could fairly and justly have demanded for their assent to the infringement), and a component for non-economic or cultural loss (being a fair and just assessment, in monetary terms, of the sense of loss of connection to country suffered by the Claim Group by reason of the infringement)."

[348] The decision in *Northern Territory v Griffiths* was handed down on 13 March 2019. At ts 119, ll 3-35, Mr Krecibergs accepted that the decision established that traditional owners would be entitled to compensation for "non-economic loss", in addition to any loss of use of the land in question and the associated consequences of Santos's activities.

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[46] (2019) 269 CLR 1.
[47] (2019) 269 CLR 1.

Mr Kreicbergs accepted that Santos's compensation policy did not have any provision for such additional amount. However neither the Gomeroi applicant nor Santos paid much regard, if any, to the impact of the proposed grants on native title rights and interests, let alone to any additional value representing non-economic or cultural loss. The issue seems to have been raised for the first time in Mr Kreicbergs' cross-examination. In those circumstances, I see no basis for concluding that Santos's failure to deal with the issue should lead me to conclude that it failed to negotiate in good faith. Quite apart from anything else, the negotiations were more about maximizing or minimizing the production levy or royalty payments, than about valuing either impact on native title rights and interests, or non-economic loss. In those circumstances, the decision in *Northern Territory v Griffiths*[48] has no relevance to the current consideration as to good faith.

[349] The Gomeroi applicant also seeks to revisit the question of authorized representatives at negotiations. Mr Kreicbergs accepts that he had no authority to depart from the policy referred to above. It seems probable that others at Santos could have exercised such authority but chose not to do so. That such negotiations were conducted through Mr Kreicbergs or other representatives is beside the point. Clearly, Santos was not willing to depart from its position concerning the production levy. There is no apparent reason for Santos to have done otherwise.

[350] Both Santos and the Gomeroi applicant were committed to particular points of view, in Santos's case, by reference to extensive experience, and in the Gomeroi applicant's case, on the basis of the advice received from Mr Meaton. I have already indicated my views concerning Mr Meaton's advice. Mr Ho's views were not known until October 2021. There is no basis for concluding that either party should have conceded any point arising out of Mr Meaton's advice. There is no substance in paras 11-13 of the Gomeroi applicant's closing submissions. Similarly, paras 14-20, to the extent that they rely on Mr Meaton's report, are without substance. To the extent that those paras depend on Mr Ho's evidence, their significance stands or falls on the basis of my assessment of his evidence, to which matter I now turn.

[48] (2019) 269 CLR 1.

[351] I conclude that Santos met with Mr Meaton on numerous occasions, and that his advice to the Gomeroi applicant was discussed. Santos was not obliged to accept that advice, despite the Gomeroi applicant's assertion. From Santos's point of view, there was good reason for rejecting it. Santos did so. It does not follow that it was negotiating other than in good faith.

[352] Finally, I am inclined to the view that the parties were not negotiating about compensation. The absence of any apparent attempt to quantify any such claim is significant. Rather it seems to me that they were simply seeking to divide up the proceeds of the project, although it may be that an agreed sum, however calculated, may have been paid and accepted in discharge of any compensation entitlement. The parties were at liberty to negotiate on that basis. However it is difficult to see how such open-ended negotiation could be used to discredit the position adopted by Santos. Although lip service has been paid to compensation, there is no objective evidence that the negotiations were conducted on that basis.

b. Offers Below Market Value (Mr Ho)

[353] Mr Ho is a chartered accountant. He holds a bachelor's degree in commerce from the University of Melbourne and is a partner and director of SLM Corporate, where he heads the valuations and transaction services area of the practice. He has provided expert reports for the purposes of litigation in a range of compensation matters, including the quantification of damages, and the valuation of assets. He appears to have been engaged in many different mining and native title matters. He is referred to by NTSCORP in his instructions as the "Economist", although I do not understand him to claim that qualification. The matter is of no consequence.

[354] Again, Mr Ho's evidence goes only to good faith. The Gomeroi applicant asserts, at para 144 of its original contentions, that Mr Ho's report analyses relevant agreements to establish a "market price" for the rights sought by Santos to "perform acts on the Project Area." It submits that transactions at market price maximize the economic gain to both the buyer and the seller. I am not sure that I understand that proposition. It does not matter for present purposes. The New Shorter Oxford Dictionary defines "market price" as the, "current price which a commodity or service fetches in the market". I shall consider the significance of the term in the course of discussing Mr Ho's report.

[355] The Gomeroi applicant submits that the production levy offered by Santos is the first oil and gas agreement, seen by Mr Ho, which applies a financial compensation provision benefit, based upon the statutory royalty payable to (in this case) the State. The Gomeroi applicant asserts that Mr Ho's report concludes that the production levy offered by Santos, "will result in significantly lower production royalties payable compared with other agreements we examined", and that there is no feature of the Narrabri Gas Project which justifies such "divergence". Mr Ho considers that:

> The value of the Proposed Terms is so far below the market price for agreements that in my opinion, it cannot be considered economically reasonable to expect the Gomeroi Applicant to voluntarily accept such an offer.

[356] The expression "Proposed Terms" is used in the Gomeroi applicant's instructions to Mr Ho. It includes all terms offered by Santos, as identified in appendix 7 to Mr Ho's report. The term includes both financial and non-financial terms (attached to this determination). In paras 147-149 of the Gomeroi applicant's contentions, concerning Mr Ho's report, there are a number of concepts which do not fit readily into the application of s 31(1). The first is the term "economically reasonable", used by Mr Ho in his report, in conjunction with the expression "market price for agreements". The term "economically reasonable" presumably relates to a judgement by the Gomeroi applicant as to whether it should accept an offer. The term seems to imply an element of objectivity in such a decision-making process, having regard to relevant circumstances. However relevant circumstances may include matters such as any pressing need for funds, concerns about whether Santos will hold out for a Tribunal determination and the possible outcome of such proceedings. Such considerations may be highly relevant to the decision-making process, but Mr Ho seems not to have considered that possibility. The term "market price for agreement" is also difficult to understand. There may be a market for agreements. Futures markets would be an example of a market in which contracts are traded. However there is no market of that kind in the present case. As far as I can see, no agreements are traded, so that there can be no market and no market price. Mr Ho, at para 7.12 of his report speaks not of a market for agreements, but of rights to perform acts on an area. Such transactions do not take place in a market for agreements. In some cases, such a right might be offered for sale to the highest bidder, but that is not the present case, where conferment of the particular right can only be upon the party selected by the State.

[357] Paragraph 149 of the contentions is difficult to understand. The suggestion seems to be that Mr Ho's view as to appropriate royalty rates and Santos's offer of the production levy differ to such an extent that, "considered in isolation", it would not be "objectively considered" to be consistent with Santos having negotiated in good faith. Two comments should be made concerning this proposition. First, it depends upon the acceptance of Mr Ho's evidence. Secondly, one possibly objective view of a part of Santos's offer would not necessarily be sufficient to demonstrate actual absence of good faith.

[358] Mr Ho's report includes appendix 7 to which I have referred. It contains the terms of an offer (the **Proposed Terms**) made by Santos on 29 March 2021. That offer was substantially increased prior to the collapse of negotiations on or about 24 March 2022, when the native title claim group instructed the Gomeroi applicant not to accept Santos's offer or enter into a s 31 deed. The offer contains "milestone payments" and a "production levy", as well as "non-financial" terms. Appendix 8 to Mr Ho's report contains 12 questions identified for Mr Ho's consideration. Appendix 8 is also attached to this determination. I should make some preliminary comments concerning those questions and, in some cases, Mr Ho's treatment of his instructions.

[359] In the NTSCORP brief to Mr Ho, the Project Area is defined by reference to a map at appendix 5. The map is headed "Map of the area covered by the PPLAs". It purports to show, in red, the PPLAs 13-16. It is incorrect in that it has not excised the area affected by PPL 3.

[360] Questions 1 and 2, seek to identify other projects in Australia which are comparable to the Narrabri Gas Project, and any associated agreements with native title holders or claimants, which agreements may be "comparable" to Santos's Proposed Terms.

[361] Question 3 enquires whether any such agreements contain "financial benefit provisions" relating to benefits calculated by reference to statutory royalty payments (as opposed to production).

[362] As question 3 was answered "no", it was not necessary that Mr Ho address question 4.

[363] Question 5 enquires as to how the production levy, contemplated in the Proposed Terms, differs from the financial benefits provisions in agreements associated with the allegedly comparable agreements.

[364] Questions 6 and 7 invite a comparison of the financial benefits provisions contained in the agreements identified in question 3. As Mr Ho answered question 3 "no", it is difficult to see how he could respond to questions 6 and 7. However he appears to have treated the questions as requesting a comparison of financial benefits provisions in the agreements identified in question 2. On that basis, questions 6 and 7 are answered at paras 10.1-10.14 of the report.

[365] Question 8 invites a comparison of the Proposed Terms (as a whole) with "the comparative range of payments" disclosed in answer to question 7. The Proposed Terms included both financial and non-financial terms. NTSCORP invited Mr Ho to compare those Proposed Terms with the financial benefits provisions of the allegedly comparable agreements, referred to in questions 6 and 7. Thus the question did not invite comparison of "like with like". However Mr Ho did not perform the task as requested. Instead he compared the wellhead royalty rates associated with the comparable agreements with the production levy pursuant to the Proposed Terms. I should add that, as with Mr Meaton, Mr Ho did not seek to demonstrate the comparability of the comparable projects or their associated agreements. I shall return to this matter.

[366] Question 9 asked whether the Proposed Terms were outside of the range disclosed by Mr Ho in answering question 6, and whether any features of the Narrabri Gas Project justified such divergence. Again, despite the terms of the question, Mr Ho compared only the production levy and the wellhead royalties. One might reasonably have expected Mr Ho to have taken this opportunity to compare the overall benefits of the Proposed Terms with the overall benefits of the comparable agreements, but he did not do so, apparently remaining true to the assertions which appear in paras 7.2 and 7.3 of his report. In these paragraphs Mr Ho indicates that where he refers to an agreement "as contemplated by s 31(1)", he is, "speaking to the Production Levy component of the Proposed Terms, and not all the terms of an agreement in its entirety."

[367] Question 10 enquires as to whether, aside from the production levy, the Proposed Terms confer any "financial compensation" on the Gomeroi applicant. The term "financial

compensation" had not previously been used in the questions. There were, however, references to a "financial benefit provision". The Gomeroi applicant did not invite any comparison of non-financial benefits (as that term is used in the Proposed Terms) with the comparable agreements. In answer, Mr Ho adopted and explained a distinction between "payment of costs" and "payments available for equal distribution amongst Gomeroi applicant group members". See paras 13.2 and 13.5. I shall return to this matter.

[368] In Question 11, Mr Ho was asked to identify the value of such "other financial terms" (presumably the financial terms identified in appendix 7 other than the production levy). He assesses the value at [redacted], being the sum of the first two financial terms, but excluding the other financial terms (apart from the production levy) and the non-financial terms.

[369] In Question 12, Mr Ho was asked whether such "other financial terms" contribute to the value of the Proposed Terms so as to justify the "divergence" between the production levy and his assessment of the market price. I note the reference to "market price" in the question. Mr Ho said that they did not, on the basis that the sum of [redacted] "was not a substantial amount in the context of the proposed project".

Isolation of Financial Benefits

[370] As previously observed, Mr Ho, in his report has, to some extent, qualified the terms used by NTSCORP in its instructions. Of particular importance are paras 7.2 and 7.3 of his report. They state:

> [7.2] For the purposes of this Report, any references to an agreement as contemplated by Section 31(1) of the Native Title Act 1993 (Cth), is only speaking to the Production Levy component of the Proposed Terms, and not all the terms of an agreement in its entirety.
>
> [7.3] It is within the context of the Production Levy component in the Proposed Terms that I have applied these economic principles.

[371] Mr Ho seems to be saying that any agreement, as contemplated by s 31(1) of the Native Title Act will be, for his purposes, concerned only with the production levy component of the Proposed Terms set out in appendix 7, thus disregarding all other terms. His subsequent discussion of the matter must be read with that proposition in mind.

[372] In appendix 7 there is a clear distinction between "financial terms" and "non-financial terms". However some of the latter terms clearly, if not expressly, impose significant obligations upon Santos. Those obligations may not be expressed in financial terms, but there can be no doubt that they will involve significant cost to Santos, and perceived benefit to the Gomeroi people. See, for example, the first and second points under the heading "Cultural Awareness", the obligations under the heading "Environment", the benefits to be provided under the heading "Business", and the obligations to be incurred under headings "Liaison Committee" and "Option to Purchase Lands and Water Assets". All of those undertakings may involve some expense to Santos. Presumably, they have been included in accordance with the wishes of the Gomeroi applicant. It is for this reason that I have stressed the importance of considering the Proposed Terms as a package. It seems that Mr Ho distinguishes between financial and non-financial terms, and between the production levy and other financial terms. His reasons for so doing are unclear.

Fair Value Within a Free Market

[373] In para 7.4 of his report, Mr Ho describes the production levy as, "an agreement made through good faith negotiations as contemplated by Section 31(1) of the Native Title Act … [having] the objective of achieving an agreement that represents fair value within a free market, in economic terms, and so the economic principles I draw upon reflect this objective". This proposition assumes that the objective of s 31(1) is to reach an agreement which represents "fair value" within a "free market." This proposition overlooks two aspects of s 31(1). First, s 31(1) says nothing about "fair value". It rather seeks agreement as to the proposed grants. Any agreement will contain the terms which Santos will offer, and the Gomeroi applicant will accept in order to reach agreement as to the proposed grants. Some terms may relate to monetary payments, but others may not. Mr Ho focusses on the production levy to the exclusion of non-financial terms, and some of the financial terms, as being irrelevant. The Gomeroi applicant has chosen, in effect, to demonstrate absence of good faith on Santos's part, by seeking to establish that one aspect of Santos's offer is significantly less than certain payments allegedly made by other gas producers to native title parties, in connection with gas projects in other parts of the country. It seeks to do so with little evidence as to the comparability of such projects and associated agreements, with the Narrabri Gas Project and the Proposed Terms as a whole.

[374] In approaching the valuation exercise, Mr Ho suggests that there is a "market" for the "right" to perform acts on an area of land. As I have previously indicated, in the present case, that "right" will be conferred by the proposed grants. Santos needs the Gomeroi applicant's agreement to the proposed grants, not merely to permit access to the Santos project area.

[375] The second aspect of s 31(1), which is overlooked, is the reference to a "free market". I have already discussed this concept. The concept of a free market seems to be inconsistent with the obligation to negotiate in good faith, and the default referral of the matter to the Tribunal for determination. Further, it is not open to Santos, or the Gomeroi applicant simply to agree that Santos may enter the relevant area and perform actions there. That right can be acquired only by reaching agreement as to the proposed grants, or by way of the Tribunal's decision as to such grants. It should also be kept in mind that both Santos and the State must comply with the law, in Santos's case, in order to secure its investment. The State must be seen to comply with the law. Further it will have ongoing financial interest in the Narrabri Gas Project.

[376] In para 7.5, Mr Ho asserts that the production levy component of the Proposed Terms will be "an agreement reached" on the same basis as any other transaction, "at a given price that is satisfactory to both the buyer and the seller". Again, I note that any agreement negotiated pursuant to s 31(1) may not be limited in terms to the production levy. In fact, as this case demonstrates, other terms may be of considerable importance to the native title parties. In particular, as previously discussed, the Gomeroi applicant is greatly concerned with the protection of law and custom, and cultural heritage, or compensation for impact upon such matters, where damage is unavoidable.

[377] In summary, s 31(1) addresses a process, not an outcome. It may implicitly reflect a hope or expectation as to such outcome, but the section addresses the "quality" of the negotiation, with the desired outcome being agreement to the proposed grants. There is no justification for the view, inherent in Mr Ho's report, that "financial compensation" is the only relevant subject for negotiation. Subdivision P, including s 31, is not only about protecting native title rights and interests. It also reflects the fact that the State has determined that, subject to its own legislation, and that of the Commonwealth, the proposed grants should be made, for the benefit of the State and its citizens. The purpose of the negotiation prescribed by s 31(1) is to reach agreement, as between the Gomeroi

applicant, the State and Santos. There is no requirement that the agreed outcome represent "fair value" within a "fair market, in economic terms". It may be that the s 31(1) procedure simply cannot be accommodated within Mr Ho's paradigm.

[378] In any contract, it is the exchange of promises, as a whole, which constitutes the agreement. In this case Mr Ho seems to break up the rights and obligations which might comprise a successful negotiation outcome, pursuant to s 31(1). The right to enter land and perform actions thereon is to be separated from other aspects of any agreement as to the proposed grants.

Two "Economic Elements"

[379] In para 7.6, Mr Ho asserts that a fair value within a free market gives rise to "two distinct economic elements." In subpara 7.6.1, he seems to describe the first "element" as being:

- a voluntary transaction;
- in which the laws of supply and demand provide the sole basis for economic transactions; and
- the participants' decision to participate is totally voluntary, without coercion or conditions.

[380] Subparagraph 7.6.2 describes the second "element" as occurring:

- where a transaction fully represents the potential price or value assigned to an asset, taking into account its utility, supply and demand, and the amount of competition for it; and
- where the transaction represents the potential price or value assigned to an asset, referring to its sale price agreed upon by a willing buyer and seller, assuming that both parties are knowledgeable and enter into the transaction freely.

[381] At para 7.7, Mr Ho asserts that "[t]hese two points taken together, would satisfy the economic principle of fair value within a free market." First, I again observe that s 31(1) requires negotiation in good faith. It does not require that such negotiations produce "a fair value within a free market". As to para 7.6.1, the transaction is not really voluntary, given the fact that the Gomeroi applicant is seeking to protect its claimed native title, and Santos is seeking to obtain an interest after years of investigation and investment.

The State seeks to exploit its natural resources and has chosen Santos to perform that function. The law of supply and demand has no real operation, given that Santos and the Gomeroi applicant are required, by statute, to negotiate, and where any failure to agree will result in mandatory resolution by the Tribunal.

[382] In fact paras 7.6 and 7.7 have a circuitous effect. First, in para 7.6 Mr Ho asserts that a fair value within a free market gives rise to the two "elements". In para 7.7 he asserts that the two "points", taken together, will ensure that any agreement will satisfy the "economic principle of fair value within a free market."

Buyers and Sellers

[383] Paragraphs 7.8-7.11 are even more difficult to apply to the present case, setting aside Mr Ho's fragmented approach to the Proposed Terms and the less than voluntary nature of the negotiations. If para 7.8 is taken literally, the highest price at which Santos is willing to buy, in Mr Ho's terms, is the proposed production levy as offered by Santos. The lowest price, at which the Gomeroi applicant is willing to "sell", is the value identified by Mr Meaton or Mr Ho. It seems clear that there is no overlap. Hence the parties are engaged in the current proceedings. The Gomeroi applicant's response to this problem is to assert that Santos's offer is simply too low. Santos asserts that the Gomeroi applicant's demands are too high. Such assertions are easier to make than to prove. Further, the matter under consideration is not the "value" of anything. It is the question of good faith.

Markets

[384] At para 7.12, Mr Ho asserts that "[t]ransactions, be they for products, services or, in this instance, rights to perform acts on an area, occur in many instances to form a market that involve [sic] multiple buyers and sellers, each of whom will have their own, individually determined, maximum price they are willing to pay (for buyers) or minimum price that they are willing to accept (for sellers)." Clearly, Mr Ho, in speaking of a market, contemplates multiple transactions involving multiple buyers and sellers of goods, services or rights. These paragraphs seem to have little or no relevance in a "one off" situation when one eligible "buyer" and one eligible "seller" are negotiating to bring about a particular outcome which will benefit both of them, and one or more third parties, in this case, the State. The subject matter of the transaction, however it is

described, seems to be unique. The question of uniqueness could only be tested for present purposes if we knew more about the comparable projects and the associated agreements. Such information might well demonstrate that there is no relevant similarity between the subject matter in those cases and that in the present case, particularly having regard to geographical and temporal considerations.

[385] It is difficult to apply Mr Ho's observations to the facts of this case. As I have said, the subject matter of the proposed transaction is unique. The State, the owner of the gas reserve, has chosen to permit Santos to exploit it. It seems unlikely that the State could, at least in the short to medium term, readily identify another developer, or would want to do so. It is the State which will make the proposed grants. Santos's obligation to negotiate comes from the Native Title Act and State legislation, which legislation transfers any State obligations associated with the proposed grants, to Santos. See s 24MD(4)(b)(i) of the Native Title Act; s 112A of the Petroleum (Onshore) Act. Once again, I am drawn to the characterization of s 31(1) as a statutory process, not negotiation in a market.

Comparability

[386] In paras 8.3-8.13 the question of comparability is discussed. I should say something about those paragraphs. In Table A, Mr Ho sets out his 15 "comparable agreements", identifying them by reference to State or Territory, date of agreement, project type (unconventional or conventional) and the relevant legislation. As to the balance of ch 8, Mr Ho asserts, at para 8.9, that the "underlying projects" have "broad resemblance" to the Narrabri Gas Project, "so as to be comparable from an economic perspective". However, there is no evidence to support this opinion. The term, "broad resemblance" is inevitably subjective. For that reason, if a court or tribunal is to act on the basis of comparability, it must generally be demonstrated, not simply asserted. More importantly, other parties must have opportunities to test such assertions. At para 8.10 it is said that it, "stands to reason" that the production payment payable to traditional owners, based on the financial performance of these projects, "can be similarly compared". I do not understand the term, "it stands to reason" when used in expert evidence. Mr Ho seems to be saying that the asserted "broad resemblance" of each "comparable" project to the Narrabri Gas Project is, a sufficient basis for inferring that Santos should pay to the Gomeroi applicant an amount, fixed by reference to views

formed by Mr Meaton or Mr Ho, based upon knowledge of other transactions of which we know little or nothing.

[387] Paragraphs 8.11-8.13, appear to be the ultimate basis for Mr Ho's opinions. It is, nonetheless, difficult to follow his logic. I accept that markets are formed from multiple transactions between buyers and sellers. However the goods, services or rights being traded in the market must be the same, or similar, or substitutable. There may also be temporal and geographical aspects which distinguish the relevant goods, services or rights for the purpose of identifying the market.

[388] In transactions of the present kind, the rights to be traded will be identified by reference to the allegedly comparable projects and associated agreements. Apart from geographical and temporal differences, relevant terms may differ from project to project, as might the quality of the relevant gas reserve, the difficulties associated with extracting it, distance to market and/or existing pipelines, terms of the State or Territory leases, environmental and cultural considerations, and many other characteristics. The absence of such information concerning the comparable projects prevents identification of the subject matter being traded, and therefore the existence of a market. In my view, the subject of any market, in this case, depends upon characteristics of the projects, together with the relevant legislation and the terms of the agreements entered into in connection with the comparable projects.

[389] For those reasons, I do not accept that "it stands to reason", that within this "sample of transactions" there is a "market price" that represents "fair value", which provides the appropriate "reference point as to the fair value free market production payment in an agreement". I have previously challenged the relevance or appropriateness of expressions such as "fair value" and "free market". The expression "fair value free market production payment in an agreement" is quite opaque. Paragraphs 8.12 and 8.13, together seem to assume that the appropriateness of a particular offer should be determined by reference to the comparable projects and associated agreements.

[390] For these reasons, particularly the absence of evidence concerning comparability with other projects and agreements, I cannot conclude that the "fair value free market reference point" can be used to assess whether any offer in the present case is fair or

that it should be accepted. Nor can I conclude that such a reference point has any relevance to the question as to whether Santos has negotiated in good faith.

[391] As to ch 9, the only points which seem to be made are:

- that the production levy payable to the Gomeroi applicant by Santos will be calculated by reference to the rate at which Santos pays royalties to the State, whilst royalties payable to native title holders or claimants in connection with the comparable projects and associated agreements are calculated by reference to the value of wellhead production; and
- the production levy will vary if the royalty payable to the State by Santos varies whilst royalties calculated by reference to wellhead volume would not fluctuate in that way.

[392] Of course, in both cases, payments to native title holders or claimants may vary with wellhead production values, directly or indirectly.

[393] In ch 10, Mr Ho addresses questions 6 and 7. Those questions seek comparison of the "financial benefits" derived from each of the 15 allegedly comparable agreements. It should be noted that the only "financial benefit provisions" identified in connection with the comparable projects and associated agreements (in the questions or in the answers) are the production levy proposed in the Proposed Terms and royalty provisions identified by Mr Ho. There is no reference to other financial benefits in connection with the comparable projects or associated agreements. There appears to be some confusion about Question 3 and 4, and Mr Ho's answers. However he seems to have treated Questions 6 and 7 as requiring a comparison of royalty provisions in the comparable projects and associated agreements, with the production levy provided for in the Proposed Terms. He concludes that the production levy in the Proposed Terms is equivalent to "half of one hundred bps (0.5%) of the wellhead value royalty rate".

[394] Chapter 11 deals with Question 8. That question asks whether the Proposed Terms fall within or outside of the comparable range of payments disclosed in answer to question 7. As previously observed, the expression "Proposed Terms" includes all of the terms identified in appendix 7. Question 8 seems to require a comparison of all of those terms (financial and non-financial), with the range of financial payments, payable under the comparable agreements, apparently limited to wellhead royalty payments. See paras

11.2-11.18. As I have previously observed, Mr Ho places no value upon the non-financial terms in the Proposed Terms and dismisses some of the financial terms, the benefits of which, he asserts, are incapable of distribution to native title claim group members. I shall return to the relevance of that question.

[395] At ch 12, Mr Ho deals with Question 9. It asks whether Mr Ho considers that any features of the Narrabri Gas Project justify the "divergence" between the Proposed Terms and the financial benefits payable pursuant to the comparable projects and associated agreements. Again, Mr Ho, at para 12.3, seems to address the divergence between the production levy in the Proposed Terms and the "comparative range of agreements". Again, one might reasonably have expected the question to invite comparison of the Proposed Terms, as a whole, with the overall terms of each of the 15 agreements. No such exercise has been undertaken. Mr Ho has made no attempt to value the Proposed Terms as a package.

[396] Mr Ho identifies three factors which might justify such "divergence", namely:

- differences between agreements based on the Native Title Act and those on the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**);
- possible variations in the legislated royalties payable to the relevant State or Territory, resulting in changes in the production levy; and
- potential variations in economic outcomes, depending upon whether the product is to be supplied to the domestic or export market.

[397] Missing from the list is the possibility that the Gomeroi applicant (or Santos) might consider that other benefits included in the Proposed Terms, financial or otherwise, might explain such "divergence", particularly if there were other comparable terms in the comparable projects or associated agreements.

[398] No attempt has been made to identify any relevant differences in the terms of the Native Title Act as opposed to the Land Rights Act. However Mr Ho indicates that if only comparable agreements under the Native Title Act are considered, there is "no change to the bottom of the range of royalty rates." Mr Ho seems to say that fluctuation in production rates may be reflected in increases or decreases in production payments. He observes that in the Proposed Terms, fluctuation in the statutory royalty rate might also cause changes in the production levy, upwards or downwards. Mr Ho asserts that, "such

variations are impossible to anticipate at the start of the agreement". He suggests that, "unless it is certain that the statutory rate will rise over the project's operating lifetime", this possibility would not justify the production levy, "leading to lower production payments when compared to the other agreements". As to any difference in benefits, depending upon whether gas is sold in the domestic or export market, Mr Ho says that there is no evidence of sustainable windfall gains in such supply.

[399] At paras 12.7-12.11, Mr Ho seeks to justify his views as expressed above, by reference to various calculations based upon the established differences between amounts payable by way of wellhead royalties and amounts payable pursuant to the production levy. The calculations add nothing to Mr Ho's views. Paragraphs 12.12-12.18 also add nothing for present purposes.

[400] In ch 13, Mr Ho considers whether any of the Proposed Terms (other than that concerning the production levy) confers financial compensation on the Gomeroi applicant (Question 10). Mr Ho identifies two of the Proposed Terms (other than that concerning the production levy) as involving financial compensation. They are the two milestone payments, one to be made on signing the agreement, and the other, on the proposed grants being made. However Mr Ho considers that payments, "for expenses for the implementation of an agreement, such as the 'Payment of costs' and to 'support implementation responsibilities of the Gomeroi'", should not be considered as financial compensation. He also considers that payments related to business development, education, training and employment, and cultural awareness, "would generally be considered non-financial benefits, insofar as they are not financial payments that can be distributed evenly to the Gomeroi Applicants." In effect, apart from the production levy, Mr Ho treats as "financial compensation" amounts, "which can be distributed as cash directly to individuals within the Gomeroi applicant group". Paragraphs 13.2 and 13.3 suggest that Mr Ho considers that the milestone payments may be so distributed to "individuals" directly. He offers no basis for his view concerning such distribution, or his assertion that such payments were, "distributable". Perhaps his reasoning is based on the assumption that matters earmarked for particular purposes cannot be distributed, and that amounts, not so earmarked, may be distributed. Such assumptions would not necessarily be valid. It is not immediately clear to me that any such condition could be enforced against the recipient of any payment, particularly the Gomeroi applicant.

[401] Mr Ho seems to assume that payments to the Gomeroi applicant made to reimburse outgoings, cannot confer financial benefits on the Gomeroi applicant or native title claim group member. It seems probable that any such outgoing will be incurred only because the Gomeroi applicant can see a benefit in it, for the Gomeroi applicant or for the native title claim group, having regard to the contemplated agreement as a whole, and perhaps knowing that such outgoing will be met by Santos. I see no justification for Mr Ho's assumption that there is necessarily no benefit to the Gomeroi applicant in incurring outgoings for which Santos will reimburse it. As previously observed, it is for the parties to determine whether a particular payment is favourable or not. It is not for a third party to determine that question.

[402] In any event, the question of distribution may well not arise. The determination application is made on behalf of the native title claim group. Any benefit derived from s 31(1) negotiation will pass to the native title claim group. There is no basis for assuming that any amount will be distributed amongst group members. It is a possibility, but by no means a certainty. It is difficult to see any merit in the distinction.

[403] As I have previously observed, non-financial terms may not confer "financial compensation" on the Gomeroi applicant. However it is probable that the performance by Santos of its obligations under those terms will involve financial consequences. The Gomeroi applicant may well enjoy the benefit of Santos's discharge of such obligations. Such contemplated benefits can be identified from the Proposed Terms. I can see no justification for excluding such benefits from any assessment of the overall value to the Gomeroi applicant of the Proposed Terms, or the overall cost to Santos. Although Question 10 enquires only as to financial compensation, such limitation cannot be allowed to conceal the true extent of the Proposed Terms. Non-financial terms which seem likely to involve financial support from Santos include cultural heritage support, staff training, cultural awareness, and various other matters identified in the Proposed Terms.

Other Matters

[404] A number of other matters require consideration. At para 13.11, Mr Ho asserts that the, "underlying principle for investment in business, development, education and training for local Aboriginal people" is to "help build a regional supply of workforce and services

that would support the capability requirements of the project". In other words, Mr Ho asserts that such payments are for Santos's benefit, rather than for that of the Gomeroi people. There may well be some benefit for Santos in such payments, but it can hardly be said that there will be no benefit to the Gomeroi people as a group, or individually. I reject the proposition that such payments may be simply ignored in assessing the overall value of the Proposed Terms.

[405] In para 13.12, Mr Ho asserts that the payments for cultural awareness are, "a critical part of any corporation's social license [sic] to operate, irrespective of any legal obligation to the rights holders", under the Native Title Act. It is further asserted that cultural awareness workshops are designed to ensure that the project does not lead to the degradation of Aboriginal culture. The payment in question is quite small. Nonetheless, it is a little too easy for Mr Ho to use a label such as "social licence" to distract attention from the fact that payments are to be made, with at least some benefit to the Gomeroi people. Indeed there may well be benefits to both sides, paid for by Santos. As I have previously observed, cultural concerns appear to be of considerable importance to the Gomeroi applicant. For that reason alone, I do not accept that proposed conditions concerning cultural heritage are necessarily of less significance to the Gomeroi applicant than are financial terms.

[406] As to ch 14, I have effectively dealt with Question 11 in connection with my consideration of Question 10. In ch 15, Mr Ho deals with Question 12. This question asserts a "divergence" between the production levy and Mr Ho's assessment of "market price". It asks whether the, "Other Financial Terms materially contribute to the value of the Proposed Offer so as to justify", such divergence. I assume that the term "Proposed Offer" is synonymous with the term "Proposed Terms". I have already discussed the meaning of the term "Other Financial Terms" and the difficulties associated with it. For reasons which I have given, I do not accept at face value, the assertion that the so-called non-financial terms yield no benefit to the Gomeroi applicant or the native title claim group. Mr Ho concludes that financial terms in the Proposed Terms, other than those relating to the production levy, do not represent a "significant amount" in the context of the Narrabri Gas Project. In this regard, he is considering only the two milestone payments, [redacted]. I do not accept either his dismissal of the other financial benefits or the non-financial benefits as being of no value for present purposes.

[407] In considering Mr Ho's evidence, a matter of considerable importance is his reliance on the comparable projects and associated agreements, which reliance is based upon assertions of comparability about which there is no evidence other than Mr Ho's assertions. For that reason alone, I reject Mr Ho's evidence to the extent that it is said to demonstrate that Santos has not negotiated in good faith, which view is based upon the difference between Santos's offer and Mr Ho's view as to such offer. I also do not accept that the Proposed Terms (other than the production levy) are of little or no value.

[408] Mr Ho's misunderstanding of s 31(1) is also relevant to my conclusion, particularly, his reliance on terms such as "fair market value", "free market", "willing" buyers and sellers, and other similar terms which do not appear in that section. This misconception seems to have led him to make incorrect assumptions about the negotiation process. Further, he has discounted or ignored evidence concerning the Proposed Terms on grounds which I find to be unconvincing. In particular, I reject the proposition in para 16.6 that the value of the Proposed Terms is, "so far below the market price for agreements" that it cannot be considered economically reasonable to expect the Gomeroi applicant "to voluntarily accept such an offer".

[409] As I observed in connection with Mr Meaton's evidence, Mr Ho appears to have made little, or no attempt to identify the impact upon native title rights and interests for which compensation may be payable. Rather, Mr Ho's evidence seems to have been designed to establish inconsistency between the amounts payable pursuant to the comparable projects and associated agreements, and the value to the Gomeroi applicant of the Proposed Terms, and to do so without providing information as to such comparability. He also rejects evidence as to the totality of benefits to be derived by traditional owners pursuant to Santos's proposed terms, without any convincing explanation for so doing. I can see no basis upon which Mr Ho can use such limited information to establish the reasonableness or otherwise of Santos's Proposed Terms, particularly the production levy. More importantly, I do not accept that such evidence demonstrates that Santos failed to negotiate in good faith.

[410] Questions may well arise as to the timeframe over which questions of good faith should be addressed. Santos's production levy offer has been fixed since it was first offered in 2017. To establish absence of good faith, one would have to infer that Santos knew, or ought to have known, that such offer was significantly below the benefits conferred by

the comparable projects and associated agreements then, and perhaps subsequently. Quite apart from my rejection of Mr Ho's evidence and (to some extent) Mr Meaton's, it is clear that in Santos's own dealings, it was not always paying a production levy or similar payments. That fact, by itself, suggests that emphasis placed by the Gomeroi applicant upon the amount of the production levy is unjustified. It seems that native title holders or claimants are willing to deal with Santos in connection with future acts, without necessarily receiving payment by way of production levy.

[411] Further, there is no evidence from which it could be inferred that Santos was aware of the information concerning the comparable projects and associated agreements, upon which Mr Ho's evidence is based. In those circumstances, I cannot infer that Santos failed to negotiate in good faith.

[412] There are a number of other matters concerning Mr Ho's evidence, with which I should deal. Chapters 17 and 18 are problematic. Mr Ho asserts that he has identified, in his report, all of the matters which he considers to be relevant to his consideration of the questions posed, that he has made all inquiries which he considers desirable and appropriate, and that no matters of significance which he regards as relevant have, to his knowledge, been withheld from the Tribunal. These statements seem to be inconsistent with the qualified assertions made as to the completeness of the material upon which he relies, as described in para 8.3 of the report. I have already identified the demonstrated inadequacy of the information disclosed by Mr Ho as the basis for his report. The absence of such evidence makes it impossible for other parties effectively to cross-examine him concerning such matters, or for the Tribunal to assess the reliability of his opinions.

[413] A further difficulty arises out of Mr Ho's conclusions in para 15.3, where he states:

> According to Santo's [sic] EIS Appendix U2, the Project would result in Project royalties to the State of NSW at an estimated $821 million in nominal terms. Assuming this calculation represents the statutory payment to the State of NSW, then five percent of statutory payment [sic] (being the Production Levy in the Proposed Terms) multiplied by the Native Title Area, would nominally return $41.05 million over the life of the Project.

[414] However in pt 4.1.2 of appendix U2 to Santos's Environmental Impact Statement, the same document to which Mr Ho refers, it is stated that:

> The New South Wales Government will receive additional royalties (estimated to be *$1.2 billion in nominal terms*) and taxes from the project.
>
> (Emphasis added).

[415] At p 30 of the same document, Table 10 headed, "Cumulative projected change in real government tax revenues, relative to the Reference Case" shows that "Project royalties" are projected to be $821 million in "real" terms.

[416] It seems that "real" terms reflect adjustment for inflation (and other impacts) over the lifetime of the Narrabri Gas Project. The reference to amounts in "nominal terms" is to terms which have not been so adjusted. Mr Ho has erroneously referred to the amount of $821 million as being in "nominal terms" when, in fact it, was in "real terms". The figure of $1.2 billion ought to have been used to calculate the production levy in nominal terms. Alternatively the figure of $821 million in real terms could have been used to calculate the production levy in real terms. That error may not have actual consequences for present purposes, but it is concerning.

[417] Secondly, in para 15.3 Mr Ho refers to the term "Native Title Area". He seems to assume that the "Native Title Area" is to be used in calculating the amount payable to the Gomeroi applicant. Mr Ho refers to a footnote at para 15.3 of the report which, in turn, refers to an email dated 20 January 2021. That email recognizes that, "the majority of the activity will occur on land subject to native title which directly benefits the Gomeroi People". The email goes on to demonstrate that the Gomeroi applicant would receive a proportion of the production levy calculated by reference to the part of the area utilized by Santos, over which area, native title continues to exist. However Mr Ho nevertheless assumed that the "Native Title area is 100% of the Project area." If that were so, all of the area being utilized by Santos would be treated as being "Native Title Area", notwithstanding Ashurst's calculation to the effect that native title may still exist over 45.6% of the Santos project area.

[418] The assumption that Mr Ho has made in this footnote does not correspond to the information contained in the abovementioned email. Nor does it reflect Mr MacLeod's correspondence with Santos, regarding his understanding of the "Native Title Area". Mr Ho's report provides the following definition of "Native Title Area":

> Native Title Area = the percentage of the area of the Tenements where native title continues to exist and is impacted by Santos' operations compared to the total area of the PPLAs impacted by Santos' operations.

[419] Notwithstanding the references to impact, Mr Ho does not appear to have taken such areas into account when providing his expert opinion to the Gomeroi applicant in para 15.3, or elsewhere in his report. It is surprising that such an omission was not identified earlier. I do not intend to speculate as to the likely consequences of these inconsistencies and omissions. I have drawn attention to these matters only to emphasize the difficulties faced by the Tribunal in assessing Mr Ho's evidence.

[420] Mr Ho was cross-examined at some length. He accepted that in valuing an asset, one seeks to identify a comparable asset with respect to which there is some evidence of value. He said that his "overarching principle" was to provide a "reference point" from which a range could be identified, within which range a "market price" might fall. He did not accept that the reliability of an expert's assessment of market value is dependent "almost entirely" upon the reliability of the choice of samples. He said that an expert would use his/her knowledge and experience in deciding which transactions are "applicable" and which are not. He seemed to suggest that an experienced valuer could "discern" from his/her knowledge and experience, which transactions should be included, and adjust the figures in order to find the right price point. As a general proposition that may be correct, but very often, disputed valuations arise out of disagreements between valuers as to the relevance or otherwise of particular, allegedly "comparable" transactions. A valuer cannot simply include or exclude evidence intuitively, without offering sound justification for so doing.

[421] Of the 10 projects in Table C of his report (cases to which the Native Title Act applies), we know that each is an oil or gas project in a particular State, in a particular year, and we know the percentage of royalty paid. Mr Ho says that, "from an economic perspective", each project has a "broad resemblance" to the Narrabri Gas Project. As I have said, the expression "broad resemblance" may have a range of meanings. The only identified similarities seem to be those that are set out above. Mr Ho was then asked about the expression, "from an economic perspective". He said that, broadly speaking, the comparable projects were, "subject to the same economic conditions", as is the Narrabri Gas Project, namely, "producing or exploring for oil and gas, conventional and non-conventional, within the jurisdiction of Australia … most of them on the east coast, although there are some on the west coast as well … [a]nd they are selling into similar markets for what their end products are producing."

[422] To say that most projects are on the east coast, but some are on the west coast, hardly describes similarities. As far as I can see, the expression, "from an economic perspective" is unexplained. At ts 235, ll 1-40, Counsel pursued the question of comparability, with no helpful result. Mr Ho simply dismisses as "minutiae" considerations such as size of the various projects, the number of wells, the volume of gas produced and the projected returns. Given the almost total lack of evidence concerning comparability, one might have expected that even "minutiae" would be potentially helpful.

[423] At ts 235, ll 26-35, Counsel summarizes Mr Ho's evidence as being that, "gas projects on the east coast bear a broad resemblance, from an economic perspective, to the [Santos] project", by reason of such location. Mr Ho said that location was not the only "condition", but that it was relevant, "by virtue of what they are trying to produce", and selling into particular markets. The "size and scale of the project" was "in line", presumably with the allegedly comparable projects. He added that "they're not in perfect symmetry, obviously, but they are broadly in line to be considered relevant, based on my understanding of the terms of the projects." Mr Ho accepted that some projects might be better comparators than others. In my view, this evidence emphasizes the unfortunate absence of evidence concerning comparability.

[424] I then drew Mr Ho's attention to the difficulty facing me in determining whether other projects were comparable, given the absence of evidence other than his unparticularized assertions. Mr Ho said, at ts 236, ll 24-27, that he had access to most of the relevant agreements and that he had "worked on most of them". Counsel put to him that "this sample" was not a "market sample", but rather a sample of agreements upon which Mr Ho had worked. Mr Ho considered that the sample was "sufficiently large" for it to be "relevant", and that, "nobody has worked on every single agreement in Australia". He referred to the difficulty caused by the fact that, "nobody wishes to disclose the terms of their agreements". Mr Ho accepted that there were agreements of which he had no knowledge. However he said that there is, "no large sample of outliers out there that nobody knows about." Any such outliers would be part of the, "conversation as you are negotiating these agreements". One might have expected Mr Ho to have treated Santos as being that of an "outlier", given the fact that its offer in this case is the largest made by it in Australia onshore, and given Mr Kreicbergs' evidence (discussed below)

concerning projects where no wellhead royalty or production levy was paid. Further, Santos is obviously a major Australian gas producer.

[425] At ts 237, ll 5-21, Counsel asked Mr Ho if he was aware of agreements concerning gas projects which contained no production levy component, but required "upfront" or "lifecycle" payments by way of fixed annual payments or, "lump sum payment upfront". Mr Ho was aware that there were "historical agreements" made prior to the Global Financial Crisis, that is "pre-2008". No such agreements were included in his sample, "because they are not broadly seen in the marketplace as the appropriate types of agreements in the modern context".

[426] At ts 238, l 22, Counsel took Mr Ho to exhibit HK-14 to Mr Kreicbergs affidavit. At para 89 of his affidavit, Mr Kreicbergs states, concerning exhibit HK-14:

> 89. Based on my approximately 9-10 years' experience negotiating compensation agreements with other native title groups, I have prepared a table which summarises the benefits in agreements facilitating gas production projects between Santos and other native title groups. In my view, the agreements set out in the table are the only agreements relevant to the offers made to the Gomeroi Applicant and which set the benchmark against which those offers should be considered. This is because:
>
> (a) the agreements in the table relate to other unconventional gas projects which are inherently riskier than conventional gas projects undertaken by Santos elsewhere in Australia; and
>
> (b) the native title landscape in the region where the agreements in the table were made is similar to north-eastern New South Wales where the Project is located.

[427] Exhibit HK-14 identifies agreements relating to five projects in Queensland, entered into between 2013 and 2021, pursuant to which agreements no royalty payments or production levies were to be paid, and in which "other financial benefits" were paid, including $150,000 in a 2016 agreement, $725,000 in a 2021 agreement, $1.3 million in a 2014 agreement, $1.5 million in another 2014 agreement, and $1.65 million in a 2013 agreement. None of those agreements appears in Mr Ho's list of comparable transactions. Further, these agreements were made after the Global Financial Crisis. This evidence contradicts Mr Ho's attempt to explain agreements of this kind as being "inappropriate" in the "modern context", apparently meaning after 2008. At ts 238, ll 36-40, Mr Ho was invited to agree that if these Santos agreements were taken into account, with Mr Ho's figures concerning the comparable projects and associated agreements, such inclusion would significantly change the results. He said that he would have to understand the context to which these projects relate, the nature of the tenements,

and the background, "… behind them as to why these agreements are the way that they are". Of course Santos, the State and the Tribunal are faced with the same problem in connection with Mr Ho's allegedly comparable projects and agreements.

[428] At ts 239, ll 17-36, Mr Ho seems to assert that the figures in exhibit HK-14 cannot be directly compared to the percentages of wellhead production value identified in his tables. No doubt, that is correct. Wellhead royalty percentages cannot be compared with dollar amounts. However that does not change the fact that the inclusion of agreements which did not provide for wellhead royalty payments or production levies, would significantly change the calculations done by Mr Ho and included in his report. In any event, the point is simply that neither wellhead royalty payments nor production levies are universal features of agreements entered into in recent years.

[429] It was put to Mr Ho, at ts 240, ll 25-32, that he understood that the Gomeroi applicant was being offered financial compensation for the impact of the Narrabri Gas Project on native title. He understood that he was pricing the, "value of native title rights and interests that are affected by the project".

[430] At ts 240, ll 34-43, the following passage appears:

> COUNSEL: But you have no idea whether your sample is comparable at all, because you haven't compared the impact of these relevant projects on native title rights and interests?
>
> MR HO: I – I think that's a – I think that's a bit of a cross purpose question there. The – the nature of these agreements are they're all done in order to compensate for native title interests that are impacted. The specifics of the impact are obviously different in each case, but the – the way in which the impact – the financial aspects of the compensation is determined is not – is not decided by the mining company as part of the – the – the – the compensation offer insofar as how it impacts that. It's decided by other economic methods. That's pretty universal across all agreements that I've participated in.

[431] In other words, Mr Ho's understanding is that the comparable projects and associated agreements identify amounts to be paid as compensation for adverse impact upon native title rights and interests, although those amounts seem not to have been fixed by reference to the extent of such impact, but by other "economic methods". It is surprising that the calculation of compensation for adverse impact on native title rights and interests should be, in no sense, measured by reference to the extent or nature of such impact. Whilst negotiating parties may negotiate concerning the matters identified in s 33 (which negotiations seem to have taken place in this case) or any other matter, it does

not follow that a valuer, faced with the task of valuing the impact of a project upon native title rights and interests, should simply seek to estimate the amount which might be extracted by way of production levy or royalty payment, calculated without regard to such impact. Both Mr Ho and Mr Meaton seem to have engaged in an exercise which, in fact, had no regard to the extent of any such impact. Clearly, the parties were negotiating about an amount to be paid, based upon wellhead production levels, either directly or indirectly, and with no real connection to any impact upon native title rights and interests. Once such negotiation is divorced from any assessment of compensation, there appears to be no real basis for using amounts paid to native title parties in connection with comparable projects and associated agreement, as a basis for identifying any amount to be paid to the Gomeroi applicant. It follows that in the absence of any such connection, no absence of good faith, on Santos's part, has been demonstrated.

[432] At ts 240, ll 46 to ts 241, l 14, Mr Ho said:

> Well, I mean, broadly speaking, the arguments that are usually put forward by not just one party but both parties in these – these negotiations are that – they're based on the economic context of the – of the – of the activity that takes place on the area, you know, either the – the mining company or the – the oil and gas company or, you know, anybody that's using the area would – would describe what they're trying to do, and they will make an offer, a financial compensation offer in the context of what they're trying to do. You know, if they can't afford a royalty, or they can't afford a certain number, they can't – they can't make that offer, they can't make – they can't pay it, and they would, you know, vehemently defend or try to defend their offer, on the basis – on that basis. Conversely, you know, the difference between certain activities that it takes place on the area in question lends itself to different metrics in which the – the financial compensation offer is put forward. You know, infrastructure projects are different to certain types of mining projects, are different to general use projects, and so on and so forth. So there – there – the context of what is actually occurring is usual – and the economic activity is usually the main driver for the compensation amounts.

[433] At ts 241, ll 16-26, the following exchange occurs:

> PRESIDENT: So are we not talking about a transaction between a willing but not overly eager purchaser and a willing but not overly eager vendor? The words "purchaser" and "vendor" being used loosely. We're not talking about a context like that, which seems to me to be the classic valuation exercise; is that what you're saying?
>
> MR HO: Yes, well, what I'm saying is that, you know, to – to point the compensation and point it directly at the – at the native title impact, in terms of the cultural aspects and things like that, is – I think, is a misapplication of what that – of how the financial aspects of the compensation agreements are derived. It's - - -
>
> PRESIDENT: I see.
>
> MR HO: - - - that's now how they're derived. No agreement is derived that way.

[434] At ts 241, ll 28-42, the following exchange occurs:

> COUNSEL: So, Mr Ho, are you saying that in determining how much compensation a mining or gas company should pay in exchange for affecting a person's native title rights, it's completely irrelevant to consider how those native title rights are affected by the project?
>
> MR HO: Well, it's not completely irrelevant, but in terms of the – the – the pricing of the – of the agreements, it is an economic assessment. Broadly speaking, it's almost – it's always an economic assessment.
>
> PRESIDENT: What does that mean? What does "an economic assessment" mean, in that context? What do you mean by that?
>
> MR HO: Well, it's – it's a – it's an extension of the economic activity that occurs on the area that is being – that the – or, let's you know, in the case of an ILUA, it's a – whatever the ILUA is for, the user – the user that wants to use the area for that economic activity is the basis of which you – you know, the financial agreement – the financial aspects of the conversation is derived.

[435] At ts 242, ll 5-38, the following exchange occurs:

> COUNSEL: To the extent that any of that can be considered an effect on native title, yes. I'm just – I'm not talking about specific examples; I'm just talking about significance. If you have – and my principle – my proposition is this: small impact on native title, set level of compensation for that. If the impact on native title is higher, bigger, more significant, then the amount of compensation that the group might expect and demand and be entitled to is also higher?
>
> MR HO: I'm afraid that that – that principle that you're trying to allude to is not a – is not a linear relationship, nor is it an elastic relationship.
>
> COUNSEL: Is there a relationship at all?
>
> MR HO: There may be some relationship, but it's different in terms of – it really – that depends on the native title – the traditional owners of the area. I mean, you've also got to bring into context of that, if you're talking about the impacts and what – and – and in that context, you know, the – the ability to actually say no to an agreement is pivotal to the context of a free transaction. I mean, if the one party has no ability to say no, that's not really – that's not really a free transaction, and that colours the context of the agreements that are made in that instance. So – yes, so, I mean, in terms of the elasticity of whether a small impact of a large impact, what may seem to you and I like a small impact may, in fact, be a great impact to the traditional owners.

[436] This passage suggests that Mr Ho considers that the Gomeroi applicant has a right of veto, and that he does not recognize the Tribunal's determinative function. However, later evidence suggests that Mr Ho considers that there is such a right under the Land Rights Act, but not under the Native Title Act.

[437] At ts 244, l 32, to ts 245, l 16, the following passage appears:

> PRESIDENT: Could I just ask you one question. The evidence in the case so far seems to suggest that Santos is what might be described as a major player in the industry. Does that imply – or does it – is it – does it follow from that that it may, in fact – its conduct in the market may well have a lot – it may well have a significant influence upon what the price – what the going price is, in the sense that we're using that language?

> MR HO: For the – for the agreements?
>
> PRESIDENT: Yes. On agreements.
>
> MR HO: Okay. Yes. Look, I mean, that – to be honest, the – the agreements negotiated under native title are so far out – dominated by the position of the – of the proponents that it almost always is in their favour. As I said, you know, if you look at the difference between the outcomes in the NTA table versus the – the ALRA table, the delta is significant.
>
> PRESIDENT: But wouldn't that – sorry. Go on.
>
> MR HO: And – and most of that comes down to the fact that the – the – the traditional owners in the – in the – in the Aboriginal land rights agreements have the right to say no.
>
> PRESIDENT: Well, wouldn't that mean, though, that the table of comparables that you've prepared would be misleading if it didn't include some reflection of Santos' activity in the market?
>
> MR HO: As I said, I don't know the context of those agreements that were put – put forward before, earlier, so in order to properly incorporate them, I would have to understand the context of those agreements. But I would also suggest that, you know, anyone doing agreements today would be – unless there are very special circumstances to – as to why there would be no royalty – that it would be astonishing and astounding to me that any agreement would take place without a royalty arrangement, you know, that is in line with a – you know, what is being negotiated across the board in – in modern agreements. I – I'm in the process of negotiating four agreements at the moment in gas, and they are nothing like the numbers we're talking about.

[438] Once again, Mr Ho seems to recognize the importance of understanding the circumstances of a particular transaction. Nonetheless, Santos, the State and the Tribunal have been deprived of such information concerning the comparable projects and the associated agreements. Mr Ho seems still to assert that agreements which do not involve royalty payments are out of date, despite the fact that Santos has used them quite recently.

[439] Mr Meaton and Mr Ho seem to assert that negotiations pursuant to s 31(1) will generally involve compensation, said to be for impairment of native title rights and interests. However assessment of the appropriate amount will not necessarily, if at all, involve consideration of the extent of such impairment. In those circumstances, the approach taken in *Northern Territory v Griffiths*[49] is more or less irrelevant. Rather, it seems that frequently, although not always, the amount of such "compensation" will be calculated by reference to production directly (as in the case of royalty payments), or by reference to royalties payable to the State (in the case of a production levy). The fact remains that there is no clear basis for asserting that different projects, in different parts of the country, without more, offer a basis for assessing the amount to be paid in connection

[49] (2019) 269 CLR 1.

with any proposed project such as the Narrabri Gas Project. Further, there appears to be no justification for an approach to such assessment which includes consideration of some, but not all cash payments, and no consideration of non-cash payments. Such conditions will frequently have been included at the request of the native title party, commonly involving protection of cultural heritage and being funded by, in this case, Santos.

[440] Santos deals with Mr Meaton and Mr Ho's evidence at paras 165-171 of its contentions, and paras 12-16 of its closing submissions. Santos submits that it is, "neither reasonable nor logical", to take one aspect of a package, and then try to compare that part of the package with other packages. It then submits that neither Mr Ho nor Mr Meaton has established that any of the other projects referred to are comparable to the Narrabri Gas Project, or that the associated agreements are comparable to the Proposed Terms. Neither is there any statistical evidence to support such alleged comparability.

[441] Santos submits that neither Mr Meaton nor Mr Ho explains the agreements previously made by Santos, in which there were no wellhead royalty or production levy provisions. The only explanation offered by Mr Ho seems to be that such a practice is outdated. As I have said, that position is difficult to maintain, given that Mr Ho's comparable agreements were dated between 2003 and 2021, whilst the Santos agreements were dated between 2013 and 2021. Mr Ho suggests that practices changed in about 2008, with the Global Financial Crisis, and that agreements not including production levies or royalty payments are no longer used. That a major operator such as Santos should have, relatively recently, entered into agreements, without such provisions, demonstrates that the practice is not outdated.

[442] At paras 4-6 of its contentions in reply, the Gomeroi applicant seeks to undermine Mr Kreicbergs' evidence, particularly paras 87-93 of his affidavit. First, the Gomeroi applicant repeats its claim that Mr Kreicbergs was not qualified to give such evidence. As previously observed, that evidence concerned matters within his own knowledge. No question of expert qualification arose as his evidence was not opinion evidence. It is true that he used the expression "in my view" in para 89. However he was merely explaining the basis of his selection of particular projects to be included in the table. It was open to the Gomeroi applicant to cross-examine if it wished to do so. The affidavit was available

to the Gomeroi applicant well in advance of the hearing. There is no substance in para 4 of the contentions.

[443] At para 5, the Gomeroi applicant invited the Tribunal to infer that Santos knew that its offer was undervalued and deliberately did not disclose its "approach". I decline to draw the suggested inference. For reasons which appear both above and below, I infer that Santos considered its offer to be appropriate and reasonable. To the extent that, in para 7, the Gomeroi applicant addresses Mr Ho's evidence, I have dealt with it above.

[444] At para 11, the Gomeroi applicant asserts that approaching the production levy "on the same basis as non-native title land holders was unreasonable." I have previously dealt with Santos's desire to stand by its prior public statements. The Gomeroi applicant suggests that such approach did not reflect the non-economic loss referred to in *Northern Territory v Griffiths*.[50] This submission is less than convincing, given that no attempt has been made by any party to identify the possible impact of the proposed grants on native title rights and interests, let alone to assess non-economic loss.

[445] At paras 14-20, the Gomeroi applicant advances quite unrealistic propositions. It criticizes Santos's approach to negotiations, in particular asserting that it relied on its own internal advice rather than obtaining an external report. This submission seems to overlook the fact that Santos was, itself, very experienced in such negotiations. Santos was as entitled to act upon its own experience as it was to seek external expert advice. I have previously concluded that Santos was not obliged to accept Mr Meaton's evidence at face value. As I have also observed, Mr Meaton's report was, fairly clearly, advice as to negotiation rather than expert valuation evidence. Further, as time went on, in the course of negotiations, he seems to have become patently partisan. Similar comments apply to Mr Ho, although his report is, at least superficially, more in the form of evidence than advice as to negotiation.

[446] Paragraph 15 is difficult to understand. The Gomeroi applicant seems to assert that Santos ought to have funded another expert for the Gomeroi applicant because Mr Meaton, in his report, opined that the production levy was 50% below the bottom of the range payable for similar projects. It seems almost as if the Gomeroi applicant expected Santos effectively to undermine its confidence in Mr Meaton's report. It also seems to

[50] (2019) 269 CLR 1.

be suggested that Santos should have told the Gomeroi applicant that it did not intend to obtain external advice for its own purposes. These assertions seek to impose an obligation going well beyond that of negotiating in good faith.

[447] At para 20, the Gomeroi applicant submits that notwithstanding the limitation on the Tribunal's power pursuant to s 38(2), Santos should have agreed to pay a production levy in the event that the Tribunal determined that the proposed grants be made. There is no explanation as to why such commitment should have been voluntarily undertaken. The Gomeroi applicant asserts that Santos's "failure" to do so evidences an absence of good faith. The contention is without merit. At paras 21-24 the Gomeroi applicant deals with the alleged failure by Santos to provide information to it. I deal with this matter below. At paras 25-41, the Gomeroi applicant deals with the Aboriginal Cultural Heritage Management Plan, apparently asserting that the approach taken by Santos and the State call into question their good faith. This proposition seems to be based upon a misunderstanding concerning the "Additional Research Program". This matter is dealt with in my consideration of s 39.

[448] There are four primary reasons for rejecting Mr Ho's evidence. First, Mr Ho has not demonstrated the basis of his assertion as to the comparability of the comparable projects and associated agreements with the Narrabri Gas Project and the Proposed Terms. As a result, neither Santos, nor the State, nor the Tribunal can assess such alleged comparability, and therefore the relevance and correctness of Mr Ho's opinions. Second, there is no demonstrated justification for comparing the production levy (separately from the overall offer made in the Proposed Terms) and with incomplete knowledge of the comparable projects and associated agreements. Third, estimates and assumptions which form the basis of conclusions reached in ch 15 of the report are incorrect, as demonstrated above. Fourth, in his discussion of economic principles, Mr Ho stresses the importance of voluntary negotiation. See paras 7.5-7.8, 7.10-7.11 and 7.13 of his report. In his cross-examination, at ts 242, ll 29-38, he describes the right to veto as being "pivotal" in the context of a "free transaction". However, at ts 243, ll 40-44, he asserts that whilst the Land Rights Act allows a veto, the Native Title Act does not. Whether his view as to the Land Rights Act is correct does not matter. The point is that the Native Title Act, "allows no such veto". As a result, Mr Ho's discussion of economic principles in ch 7 of his report seems to be irrelevant for present purposes, given that he there discusses:

- "an agreement reached on the same basis as any transaction, at a given price, that is satisfactory for both the buyer and the seller";
- fair value within a free market;
- that "a transaction is a voluntary exchange, and the laws of supply and demand provide the sole basis for economic transactions when the participant's decision to participate is totally voluntary, without coercion or conditions"; and
- "an asset's sale price agreed upon by a willing buyer and seller, assuming both parties are knowledgeable and enter the transaction freely".

[449] Clearly, these asserted concepts have no relevance to s 31(1) negotiations, given the requirement to negotiate in good faith, the absence of a right of veto and the role of the Tribunal.

[450] There is also a broader question as to the relevance of the valuation evidence to the question of Santos's good faith. The Gomeroi applicant's contention is that Mr Ho's evidence and, to a lesser extent, that of Mr Meaton, in some way justify an inference that Santos deliberately made an offer which it knew was so "under value" as to demonstrate absence of good faith. In effect, the Gomeroi applicant asserts that the views attested to by Mr Meaton and by Mr Ho were reflective of the relevant state of knowledge (presumably that of Santos or, perhaps, the public) at all relevant times. There is no evidence to that effect. Even without Mr Kreicbergs' evidence of Santos's other transactions, I would have concluded that the Gomeroi applicant's valuation evidence lacked probative value. However, Mr Kreicbergs' evidence puts the matter beyond doubt. See his affidavit at paras 87-93 and exhibit HK-14. I do not understand his evidence to be challenged. It constitutes a coherent explanation of other transactions in which Santos has been involved. In my view, in light of such evidence, there is no basis upon which it can be asserted that Santos ought to have known about, and acted upon opinions such as those allegedly held by Mr Meaton and Mr Ho.

c. Fixed Position on Compensation

[451] The Gomeroi applicant asserts that Santos is a large corporation, with an extensive history in dealing with Aboriginal communities in relation to resource extraction projects. It asserts that as at May 2020, Santos had about 80 executed agreements relating to cultural heritage, native title and consent, and was working with other

traditional owners and land councils. On that basis, the Gomeroi applicant asserts that Santos had the resources and experience to:

- know or ascertain a reasonable offer of compensation;
- engage meaningfully regarding the production levy; and
- make a reasonable offer of compensation.

[452] I have previously warned of the dangers associated with the paraphrasing of statutory requirements. The net effect of the above proposition would be to substitute for the obligation to negotiate in good faith, some ill-defined obligation to identify a "reasonable offer", based upon Santos's assumed knowledge at some relevant time, such knowledge being that possessed by Mr Ho and, perhaps, Mr Meaton, presumably at the time. However there is no evidence which demonstrates that Santos was, or ought to have been aware of such views or of similar views (if any) held by others. As to the requirement that Santos "engage meaningfully" as regards the production levy, this seems to mean little more than that Santos did not increase its offer. Such position is not, by itself, evidence of a failure to negotiate in good faith. Nor is there necessarily an obligation to make a "reasonable offer". The Gomeroi applicant's assertions reflect a misunderstanding of the negotiation process. If an offer had to be "reasonable", the parties to negotiation would not be able to identify a realistic starting point for negotiations. Further, "reasonableness" generally bespeaks an objective standard against which particular conduct may be assessed. Section 31(1) does not require conduct which is objectively reasonable. It requires only negotiation in good faith.

[453] In *Drake Coal Pty Ltd v Smallwood*[51] at [195]-[201], Member Sosso noted that it is not for the Tribunal to assess the reasonableness of offers, citing the decisions of the Federal Court in *Strickland v Minister for Lands*[52] and *Walley v Western Australia*.[53] In *Strickland v Minister for Lands*, Nicholson J said that consideration of the reasonableness of an offer "requires … a further and unnecessary level of complexity and application to the interpretation of the words of s 31(1)(b)", a view which I respectfully adopt. In *Walley v Western Australia*,[54] Carr J added, "one slight

[51] (2012) 257 FLR 276.
[52] (1998) 85 FCR 303.
[53] (1999) 87 FCR 565.
[54] (1999) 87 FCR 565.

reservation", to the reasons in *Strickland v Minister for Lands*,[55] saying that on some occasions, depending upon the circumstances of the matter, the reasonableness of an offer may be relevant to the question of good faith. However Carr J also observed at [15] that there may be a difference between making reasonable offers and being reasonable in negotiating in good faith. A focus upon reasonableness is likely, unduly to complicate the application of s 31(1)(b).

[454] In this case, Santos's experience indicates that, contrary to the Gomeroi applicant's contention, agreements do not always involve wellhead royalty payments or production levies. Santos has, relatively recently, entered into such agreements. Further, it is not disputed that Santos's offer to the Gomeroi applicant is the most valuable that Santos has offered in connection with any onshore project in Australia. These considerations must be seen in light of Santos's earlier public statement concerning payments to all landholders, and its understandable desire to stand by that statement. These considerations militate against the Gomeroi applicant's assertion of unreasonableness, quite apart from the concerns about Mr Meaton and Mr Ho's evidence, which concerns lead me to discount the suggestion that Santos's offers were unreasonable.

[455] At paras 166 of its original contentions, the Gomeroi applicant dealt only with the production levy, without regard to the other Proposed Terms. In that context, it asserted that, "[at] no point during the negotiations did Santos provide any kind of detailed response to the Gomeroi's offer of compensation." The Gomeroi applicant then qualified that statement by referring to Santos's pre-existing policy for compensating landholders, from which policy it would not depart. It then complained that Santos made no attempt to provide financial or economic arguments as to why the Gomeroi applicant's offer of a production levy was unreasonable. It seems that the Gomeroi applicant has explained Santos's position. It did not wish to depart from its earlier public position. Santos did not offer financial or economic arguments. Its reason for not varying its offer as it concerned the production levy was that identified by the Gomeroi applicant, namely its earlier public statement.

[456] The Gomeroi applicant refers to the "negotiations", without identifying the occasion or occasions at which it made any offer or offers to Santos. It may be referring to counter-

[55] (1998) 85 FCR 303.

offers made in 2017, on Mr Meaton's advice. The history of the matter does not support the Gomeroi applicant's complaint. At the meeting on 23 March 2017, the parties agreed not to discuss the compensation package offered by Santos until the Gomeroi applicant had received appropriate advice, relating to the first offer made by Santos and dated 21 March 2017. At a meeting held on 11-12 May 2017, an offer by the Gomeroi applicant was contemplated, but not made. Such offer was again contemplated at a meeting held on 11-14 July 2017. The Gomeroi applicant made a counter-offer on 18 July. It included a "royalty" proposal which exceeded that previously offered by Santos. However, at a meeting held on 30-31 August 2017, the Gomeroi applicant indicated that it wished to amend its counter-offer. Santos indicated that it would review the counter-offer and respond before the next meeting. On 5 September, NTSCORP (not then acting for the Gomeroi applicant) sought to stop negotiations from proceeding, alleging that continued negotiation could not be characterized as "good faith" negotiations. It anticipated instructions to challenge the validity of any agreement reached between Santos and the Gomeroi applicant. The amended counter-offer was made on 3 October 2017. On 6 October, Santos acknowledged NTSCORP's letter. Thereafter, there was a large amount of correspondence, which correspondence has been redacted. Santos made a further offer on 9 October 2018. The Gomeroi applicant seems to have responded on 12 September 2019, varying its proposal concerning the "production levy".

[457] On 17 October 2019, Santos responded, indicating that the proposal concerning the production levy was "[o]utside of offer" and sought "clarity". The matter was further discussed at a meeting held on 15 December 2019. At that meeting, Mr Kreicbergs explained that Santos had "publicly disclosed" the 5% figure to landholders. Mr MacLeod suggested that he was "hearing" a policy from which Santos would not depart. Mr Kreicbergs said that it was more a matter of consistency, presumably referring to Santos's dealings with all landholders. Mr MacLeod asserted that native title holders should be treated differently, a position which Santos seems not to have accepted. At this point, Santos asserted that its then current offer was, "its highest onshore agreement." There was also discussion concerning compensation to be fixed by reference to the location of wellheads. This matter is discussed in connection with s 39.

[458] I have previously discussed a letter from Mr MacLeod to Mr Kreicbergs concerning the production levy, which letter was dated 16 January 2020. Santos responded on 22 January 2020. By that time, it must have been obvious to the Gomeroi applicant that

Santos was unlikely to move from its position on the production levy, given its reluctance to depart from its previous public statement. It is not surprising that there was at least one matter upon which the parties could not agree. It does not follow that such disagreement demonstrated absence of good faith on either side. The history of the matter suggests that the Gomeroi applicant's assertions that Santos did not reply to its "offer" are unfounded.

[459] Concerning the matters identified in para 167 of the contentions, on my view of the evidence, there is no basis for the assertion that Santos's offer was unfair or unrealistic, or that Santos knew as much. Nor was Santos obliged to accept Mr Meaton's views, or, at a later stage, those of Mr Ho. Santos sought to avoid the difficulty by improving other aspects of its offer. It did not adopt a rigid, non-negotiable position, and its offer was not necessarily unfair. Rather it refused to increase the production levy for a reason which it provided. As to the Gomeroi applicant's willingness to compromise in relation to compensation, it may well be said in reply that it was not willing to compromise on that same question. Neither assertion, in isolation, offers any real assistance for present purposes.

d. Failure to Provide Important Information

[460] The Gomeroi applicant's contentions address the following matters at paras 169 - 172:

- requests for information concerning consents and areas of land disturbance;
- funding for expert advice; and
- the request that the Santos CEO or other senior manager attend negotiation meetings.

[461] I have already dealt with the requests for information concerning consents to be given by the Gomeroi applicant and concerning land disturbance. In each case, Santos asserts that it responded appropriately to the Gomeroi applicant's requests. The Gomeroi applicant does not accept the adequacy of such responses. However there is no evidence which would enable me to resolve the differences between the parties. The question has not been addressed in cross-examination. I have also previously dealt with the request that the Santos CEO or other senior manager attend negotiation sessions. I see no basis for revisiting any of these matters. I see nothing unreasonable about Santos's conduct,

let alone any suggestion of failure to negotiate in good faith. I again observe that there is no evidence upon which to assert that Santos was in a stronger negotiating position than was the Gomeroi applicant. Such an assertion cannot simply be assumed. It is clear that NTSCORP was fully engaged in this matter, save for the period from the end of January 2015 until December 2017 when Sam Hegney Solicitors was the solicitor acting for the Gomeroi applicant (2013-2017). The Gomeroi applicant (2013-2017) seems to have been content with its services.

[462] The request to provide further funding for expert advice was, in effect, refused because of the amounts which had already been advanced, and the Gomeroi applicant's refusal to explain why it required further funding. There is no general obligation upon a grantee party to provide such funding, particularly on such an open-ended basis. See *Magnesium Resources Pty Ltd v Cox*[56] at [65].

e. Use of the Future Act Determination Application Process

[463] I have already dealt with aspects of this matter. However I shall add some further comments. Following the reconstitution of the Gomeroi applicant on 7 December 2017 by order of Rangiah J, and subsequent communications with Santos, the latter indicated, on 9 October 2018, that the length of time during which negotiations had been running was significant and sufficient to justify Santos in seeking an arbitral determination. It reserved its right to do so. In a letter dated 3 December 2018, NTSCORP asserted that the Gomeroi applicant (2017-2022) was not to be held responsible for the consequences of the way in which the negotiations had been conducted by the Gomeroi applicant (2013-2017). In my view, negotiations proceeded reasonably well in the period between the end of January 2015 and 7 December 2017. However the Gomeroi applicant (2013-2017) was constituted, it was acting on behalf of the native title claim group. Neither the Gomeroi applicant (2017-2022), nor the native title claim group can simply abrogate responsibility for the way in which the matter had been previously conducted. However the matter is not of great significance for present purposes.

[464] On 17 December 2020, following a meeting on 14 December 2020, Mr Kreicbergs wrote to NTSCORP asserting that, "as discussed at that meeting", unless all relevant

[56] (2010) 259 FLR 181.

documents were signed by 31 January 2021, it would apply for a Tribunal determination. In an accompanying "without prejudice" letter, Santos indicated that at a meeting held on 15 December 2019, and in subsequent correspondence, "in principle" agreement had been reached regarding 14 out of 15 items, subject to agreed wording. There was a subsequent dispute as to the actual words used at the meeting on 14 December 2020, a matter about which I can make no meaningful findings, given that there has been no cross-examination concerning the matter. In any event, the parties continued to negotiate until 5 May 2021, when the current s 35 application was made. Whether or not the time limit imposed by Santos on 18 December 2020 was appropriate depended upon the status of negotiations, and the likely extent of the anticipated drafting exercise. I have previously described the matters identified in para 174 of the Gomeroi applicant's contentions. Some of them may have been relevant in examining Santos's conduct. However negotiations continued for a further four months. In any event, a s 35 application does not, of itself, demonstrate absence of good faith. See *Strickland v Minister for Lands*[57] at 322. As at 5 May 2021, Santos was at liberty to make a s 35 application. That it made such an application did not demonstrate absence of good faith, particularly having regard to the delay in making the application from mid-December 2020 until May 2021, quite apart from the delay prior to December 2020.

The Five Propositions: Outcome

[465] It is unfortunate that the parties have been unable to agree as to the production levy. It may be that the unsatisfactory nature of the evidence as to valuations given by Mr Meaton and Mr Ho, has contributed to the ongoing disagreement. There was no proper basis for using such evidence in order to assert absence of good faith on Santos's part in the negotiation process. The confusion between the exercises undertaken by Mr Meaton and Mr Ho, and the repeated references to compensation for impact upon native title, including cultural loss, caused much of the problem. The balance of the problem may be attributable to the attempts to rely on amounts paid on other, unrelated projects and associated contracts, which were not shown to be comparable to the Narrabri Gas Project, including the Proposed Terms. The use, in Mr Meaton's instructions and in Mr Ho's report, of economic terminology seems to have confused, rather than clarified, the

[57] (1998) 85 FCR 303.

Gomeroi applicant's approach. As to Mr Meaton's advice, there is no justification for asserting that Santos should have acted upon his views, which views were apparently discussed at some length on numerous occasions. Santos's own experience in this area was dismissed by the Gomeroi applicant, without any justification.

[466] The Gomeroi applicant's assertion is that absence of good faith was demonstrated by Santos's allegedly adopting a "fixed position" on compensation. Once the weaknesses in the evidence of Mr Meaton and Mr Ho are recognized, there is virtually no justification for such assertions. However the error in the Gomeroi applicant's contentions are fundamental for another reason. There is no justification for the assertion that Santos necessarily demonstrated absence of good faith by maintaining its position, concerning the production levy, just as the Gomeroi applicant did not demonstrate absence of good faith by insisting that Santos offer a larger sum.

[467] It may be that the position was further complicated by the perceived need to assert that the debate was about compensation when it was really about sharing the profits. In particular, the focus on the production levy, to the exclusion of other aspects of Santos's offers may have forestalled consideration of alternative approaches to negotiation. I need say nothing more about the other propositions. None of them demonstrates an absence of good faith on Santos's part.

2.5. Subsequent Submissions: Racial Discrimination

[468] On the third day of the hearing, the Gomeroi applicant sought to, "supplement or amend", in order to, "plead an act of discrimination as a basis for making out the failure to act in good faith". The allegation is said to arise out of a document about which Mr Kreicbergs had previously been cross-examined. The document is headed "Agreed Principles of Land Access" and is dated 28 March 2014. It is signed by representatives of Santos, AGL Energy Pty Ltd, Country Women's Association, Dairy Connect, NSW Farmers' Association, Cotton Australia Pty Ltd and NSW Irrigation Council. However, some of the signatories appear to have signed on 10 September 2015. Mr Dunn referred to this document in his affidavit at para 189, where he said:

> In NSW, land access is undertaken in accordance with the Agreed Principles of Land Access (NSW Government 2014b), to which Santos is a signatory, along with AGL, NSW Farmers Association, Cotton Australia, Dairy Connect, the Country Women's Association of NSW and the NSW Irrigators Council (TD-17).

[469] I shall refer to the document as the **Agreed Principles document**. It provides as follows:

> **Introduction**
>
> These principles have been agreed between landholders and gas companies based on values of respect, integrity and trust.
>
> They have been facilitated between representatives of agricultural landholders and gas companies.
>
> **Application**
>
> The principles in this document relate to coal seam gas projects in New South Wales and specifically cover access to private agricultural landholder's property (**Landholders**) for coal seam gas drilling operations for exploration and production purposes (**Operations**).
>
> **Principles**
>
> All parties to this document have agreed the following principles:
>
> 1. Any Landholder must be allowed to freely express their views on the type of Operations that should or should not take place on their land without criticism, pressure, harassment or intimidation. A Landholder is at liberty to say "yes" or "no" to the conduct of Operations on their land;
> 2. Gas companies confirm that they will respect the Landholder's wishes and not enter onto a Landholder's property to conduct Operations where that Landholder has clearly expressed the view that Operations on their property would be unwelcome; and
> 3. The Parties will uphold the Landholder's decision to allow access for Operations and do not support attempts by third party groups to interfere with any agreed Operations. The Parties condemn bullying, harassment and intimidation by third party groups and individuals in relation to the agreed operations.

[470] Paragraphs 1 and 2 relate to the "rights" of landholders to express views as to whether operations should be conducted on their land, and to their respective rights to refuse access for the purposes of such operations. Paragraph 3 upholds the rights of landholders who choose to allow such access, and condemns any conduct designed to dissuade them from so agreeing, or to punish them for so doing.

[471] Counsel also referred to a map of the project area (entitled the "Narrabri Gas Project – Conceptual Layout Indicative Sketch Plan") which map bears a note to the effect that, "[i]n accordance with the Agreed Principles of Land Access, no drilling activities would be undertaken on private land without the voluntary consent of the landholder". Santos apparently distributed the map.

[472] It was put to Mr Kreicbergs in cross-examination that the Agreed Principles document conferred upon, "property holders in the project area who are non-native title holders", a "right of veto". Counsel suggested that such "offer" applied to freehold and leasehold land, but not to native title land. Mr Kreicbergs was unaware of any provision which

conferred a right of "veto" on such landholders. He agreed, however, that no such "right" had been offered to the Gomeroi applicant.

[473] Mr Kreicbergs did not accept that the arrangement identified in the Agreed Principles document, and appearing on the map, constituted a right of veto. He said that, "for initial stage scouting, you need to undertake certain requirements, and then have an agreement in place". This appears to be a reference to the access provisions of the Petroleum (Onshore) Act (pts 4A, 4B and 5) which provisions limit the rights of a production leaseholder to carry out exploration and extraction activities on the relevant land.

[474] In its written contentions concerning this matter, the Gomeroi applicant asserts that Santos had "guaranteed" private agricultural landholders the, "liberty to say no", to operations on their land, and that such "liberty" has not been accorded to the Gomeroi applicant in connection with "native title land". The Gomeroi applicant asserts that the failure to grant it such "liberty" constitutes racial discrimination, contrary to s 9(1) of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**). Section 9(1) provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

[475] The "act" identified by the Gomeroi applicant for the purposes of s 9(1) is said to be "Santos's failure to accord the same interests to the [Gomeroi applicant] as are or were afforded to Landholders", identified above. Such act is said to be "racially discriminatory", in that:

- the act was based upon the "Gomeroi party's race"; and
- the act had the effect of impairing the Gomeroi applicant's enjoyment of its interest in the relevant land under the Native Title Act.

[476] For present purposes, I assume that the Gomeroi applicant may be described as having a "race". Alternatively, I shall treat the reference to the Gomeroi applicant as being a reference to its members, or to the members of the native title claim group. It is difficult to understand how failure to comply with the Racial Discrimination Act can affect the operation of subdiv P, particularly s 31(1). The only suggestion made by the Gomeroi

applicant seems to be that a breach of s 9(1) of the Racial Discrimination Act, "would mean that the Tribunal would necessarily find that Santos has failed to act in good faith." Alternatively, it submits that the breach is "discriminatory treatment", which treatment is said to have been, "grossly unreasonable and therefore would weigh overwhelmingly in favour of a finding that Santos has failed to act in good faith."

[477] The Gomeroi applicant does not seek to explain the interaction between the Native Title Act and the Racial Discrimination Act. Section 7 of the Native Title Act provides:

> **Racial Discrimination Act**
>
> (1) This Act is intended to be read and construed subject to provisions of the *Racial Discrimination Act 1975*.
>
> (2) Subsection (1) means only that:
>
> (a) the provisions of the *Racial Discrimination Act 1975* apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and
>
> (b) to construe this Act, and thereby determine its operation, ambiguous terms should be construed consistently with the *Racial Discrimination Act 1975* if that construction would remove the ambiguity.
>
> (3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.

[478] In *Western Australia v Commonwealth*,[58] the High Court considered the operation of an earlier, but similar version of s 7. In that case, the State of Western Australia submitted that a provision of the Native Title Act, which provision discriminated in favour of Aboriginal and Torres Strait Islander peoples, was effectively inoperative because s 7 had the effect of applying the anti-discrimination provisions of the Racial Discrimination Act to the Native Title Act. The majority of the High Court rejected that proposition, saying at 483-484 that:

> The argument encounters considerable obstacles. In the first place, it is not easy to detect any inconsistency between the *Native Title Act* and the *Racial Discrimination Act*. The *Native Title Act* provides the mechanism for regulating the competing rights and obligations of those who are concerned to exercise, resist, extinguish or impair the rights and interests of the holders of native title. In regulating those competing rights and obligations, the *Native Title Act* adopts the legal rights and interests of persons holding other forms of title as the benchmarks for the treatment of the holders of native title. But if there were any discrepancy in the operation of the two Acts, the *Native Title Act* can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Discrimination. And further, even if the *Native Title Act* contains provisions inconsistent with the *Racial*

[58] (1995) 183 CLR 373.

> *Discrimination Act*, both Acts emanate from the same legislature and must be construed so as to avoid absurdity and to give to each of the provisions a scope for operation. The general provisions of the *Racial Discrimination Act* must yield to the specific provisions of the *Native Title Act* in order to allow those provisions a scope for operation. But it is only to that extent that, having regard to s 7(1), the *Native Title Act* could be construed as affecting the operation of the *Racial Discrimination Act*.
>
> Section 7(1) provides no basis for interpreting the *Native Title Act* as subject to the *Racial Discrimination Act*. The *Native Title Act* prescribes specific rules governing the adjustment of rights and obligations over land subject to native title and s 7(1) cannot be construed as intending to nullify those provisions. It may be that s 7(2) is otiose but that provision is properly to be seen as inserted out of an abundance of caution. It follows that the inconsistency between the WA Act and the *Racial Discrimination Act* either survived the enactment of the *Native Title Act* or, if the *Native Title Act* affected the relevant provisions of the *Racial Discrimination Act*, from the time when that occurred, an inconsistency arose between the WA Act and s 11 of the *Native Title Act*.

[479] Clearly subdiv P, particularly s 31, are, "specific rules governing the adjustment of rights and obligations over land subject to native title". It follows that s 9(1) of the Racial Discrimination Act does not nullify such provisions.

[480] Quite apart from that decision, were Santos to make a similar offer to the Gomeroi people, it would be inconsistent with the proposed grants, which grants would presumably be made by the State in the expectation that it would derive royalties from Santos's activity on the relevant land. A right of veto, granted by Santos to the Gomeroi applicant, would jeopardise the State's expectation as to royalties. However the Gomeroi applicant does not take the matter quite so far. It rather asserts that Santos's alleged conduct demonstrates absence of good faith. It asserts that Santos's conduct is either contrary to s 9(1), or is discriminatory treatment of the Gomeroi applicant, and, irrespective of the Racial Discrimination Act, such treatment is relevant to the question of good faith. For reasons which appear below, I do not accept either proposition.

[481] Although the alleged discriminatory act is described in the Gomeroi applicant's contentions, there is no indication as to when such act occurred: at the time at which Santos reached agreement with the various landholders, or at some later stage. The question of Santos's intentions in 2014 or 2015 is not known. However the Gomeroi applicant relies on "effect" rather than "purpose". Hence the question is when, if ever, the Gomeroi people suffered or, perhaps, will suffer such effect, namely the inability to deny Santos access to, and use of the Santos project area. Whilst, in the later stages, of the negotiations, the Gomeroi applicant asserted a desire that the proposed grants not be made, it did not seek a discretionary right to deny access. Until those later stages, the Gomeroi applicant had demonstrated a desire to negotiate terms upon which the

proposed grants might be made, not that it should be able to veto access permitted by such grants. On this analysis, there was no point at which the Gomeroi applicant was denied the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom. The parties were negotiating on the implied basis that there would be no such veto. In those circumstances, there can be no submission that Santos's conduct, in some way, relates to the question of good faith. To put it another way, Santos's conduct cannot demonstrate absence of good faith, given the nature of the negotiations in respect of which good faith was required, such negotiations having, for some years, been limited to identifying a basis on which the proposed grants might be made.

[482] In the course of preparing this determination, I have become aware of the history of the Agreed Principles Document. It appears to have been executed in 2014-2015. It was discussed in ch 17 of the Environmental Impact Statement ("Property and Land Use") at para 17.3.2. See exhibit TD-16. A copy of the Agreed Principles document is at exhibit TD-17. The Environmental Impact Statement was exhibited on 27 February 2017-22 May 2017. The Gomeroi applicant (2017-2022) received a copy of the Environmental Impact Statement on a USB stick on 27 May 2018. Hence the Gomeroi applicant had access to ch 17 of the Environmental Impact Statement from, at the latest, 29 May 2018. The document was also exhibited to Mr Dunn's affidavit at exhibit TD-16. That affidavit was filed on 9 December 2021. It is surprising that no point arising under s 9(1) of the Racial Discrimination Act was raised until 13 April 2022. The application to amend was made on 14 April 2022. Had I been aware of the history of the document, I would have required the Gomeroi applicant to explain such delay before considering its application to raise the matter.

[483] In any event, for the following reasons, Santos's agreement to the Agreed Principles document, in the context of the s 31 negotiations, does not fall within the ambit of s 9(1) of the Racial Discrimination Act in that it:

- concerns principles agreed to by parties other than Santos, including AGL, which parties are not, for present purposes, "negotiating parties" as defined in s 30A of the Native Title Act;

- concerns access to private agricultural land (not native title land or other types of land interests) for the purpose of coal seam gas drilling operations, exploration and production by Santos and AGL anywhere in New South Wales; and
- concerns principles agreed to by the representatives of "agricultural land holders", being a class defined by the nature of activities undertaken on land, not excluding the Gomeroi applicant or any other person on the basis of race.

[484] The Agreed Principles document seems to extend the protection of private agricultural land beyond that afforded by the Petroleum (Onshore) Act. Such right of access is conferred upon the holder of a production lease by s 41(1) of that Act, but limited by s 41(3). The latter provision requires that such holder carry out activities only in accordance with an access arrangement. Such an arrangement is to be agreed pursuant to pt 4A or pt 4B of the Petroleum (Onshore) Act, or as the result of mediation or arbitration pursuant to those provisions. Further protection is offered, in connection with cultivated land, by s 71 in pt 5 of the Petroleum (Onshore) Act. It seems likely that the Agreed Principles document was designed to protect an agricultural landholder from the risk of having to participate in negotiation, mediation or arbitration concerning access. In effect, Santos undertook not to exercise such rights as it may have had under the State legislation.

[485] Section 9(1) of the Racial Discrimination Act is not engaged by Santos's conduct in that:

- the offer applies only to access to private land used for agriculture;
- the offer applies to access to such land anywhere in the whole of New South Wales;
- the offer excludes all other types of land holders; and
- ownership of private land used for agriculture is not determined by race, and therefore the Agreed Principles document does not distinguish, exclude, restrict or prefer any group over another.

[486] The Gomeroi applicant does not contend, nor has it produced evidence to demonstrate:

- that it holds or uses native title land within the project area for agriculture; nor

- that there would be any impairment to the enjoyment of its native title rights and interests as a result of its not being party to the Agreed Principles document.

[487] In any event, it cannot be said that a document produced for the purposes of state-wide negotiations with representatives of agricultural landholders and AGL, is in any way connected with, or relevant to, negotiations between Santos and the Gomeroi applicant regarding the effect of the proposed grants on registered native title rights and interests pursuant to s 31(1)(b) and s 31(2) of the Native Title Act. For this reason, too, the Gomeroi applicant's contention has no merit.

2.6. Subsequent Submissions: Good Faith

[488] After the parties had delivered their respective original contentions, on or before 15 December 2021, further submissions were made as follows:

- the Gomeroi applicant's contentions in reply: 22 December 2021;
- Santos's submissions on "without prejudice" material: 14 February 2022;
- the Gomeroi applicant's submissions on "without prejudice" material: 12 February 2022;
- the Gomeroi applicant's submissions on the "Fifth Negotiation Period": 4 April 2022;
- the Gomeroi applicant's supplementary contentions on racial discrimination: 14 April 2022;
- the Gomeroi applicant's closing submissions: 21 April 2022;
- Santos's closing submissions: 21 April 2022;
- the State's closing submissions: 21 April 2022;
- Santos's submissions in response to the Gomeroi applicant's further allegation: 28 April 2022; and
- the State's submissions in response to the Gomeroi applicant's fourth allegation: 2 May 2022.

I have already referred to some of these documents. To the extent that I have not dealt with matters raised in those documents, I shall try to summarize and deal with them below. Some of this summary may be repetitive.

[489] The Gomeroi applicant asserts that Santos wrongly contended that the Gomeroi applicant must prove that Santos acted in bad faith. It also asserts that Santos erroneously proceeded on the basis that "bad faith" was akin to "commercial concepts of bad faith". See the Gomeroi applicant's contentions in reply at para 5. As to the first matter, it is true that in para 139, Santos appears to assert that the Gomeroi applicant must prove "bad faith". However Santos's contentions generally do not demonstrate such an error. See, for example, paras 133-137. In any event, I proceed on the basis that the Gomeroi applicant must establish absence of good faith. As to the second matter, Santos asserts, at footnote 121 to para 142 in its original contentions, that it is proceeding upon the basis that the Gomeroi applicant is not seeking to establish "serious or deliberate dishonesty" as alleged by the Gomeroi applicant at para 91 of its original contentions. The Gomeroi applicant there refers to, "conduct that was not consistent with accepted standards of commercial conduct". It seems that the Gomeroi applicant initially asserted that Santos's conduct was not consistent with accepted standards of commercial conduct. However Santos did not accept that the Gomeroi applicant was proceeding on that basis, and said so, leaving the Gomeroi applicant to assert that Santos was wrongly asserting that the Gomeroi was asserting conduct contrary to accepted standards of commercial conduct. Such complex exchanges are typical of the parties' conduct of this matter, which exchanges account for the substantial difficulties I have experienced in trying to resolve the matter.

[490] For the purposes of s 31(1), a party will negotiate in good faith if it does so, "with a view to obtaining the agreement of each of the native title parties". There may be circumstances where conduct, which has that purpose, is nonetheless unacceptable for one reason or another. In paras 132 and 133, Santos asserts that it has "regularly and consistently" emphasized its preference for resolution by agreement, despite the complexity and detail of the negotiation. Santos points to the length and nature of its involvement as demonstrating good faith. At paras 134 and 135, Santos asserts that the proposition that it has had no genuine intention of reaching agreement is inherently "unbelievable".

[491] It seems that the Gomeroi applicant and Santos take different approaches to the good faith requirement. Santos looks to apparent intention, having regard to overall conduct. The Gomeroi applicant tends to identify discrete actions or omissions, each of which, it suggests, indicates absence of good faith. The Gomeroi applicant's approach offers no

explanation for Santos's clear commitment to negotiation over more than seven years. There is much in Santos's assertion, at para 139 of its contentions, that the Gomeroi applicant has been, "overly pedantic or mechanistic", and that its complaints comprise a, "list of grievances cherry picked from the lengthy course of the negotiations to attempt to overcome its burden of establishing bad faith". The reference to bad faith (as opposed to absence of good faith) is, as I have said, erroneous.

[492] At para 6 of its contentions in reply, the Gomeroi applicant asserts that Santos wrongly contends that the decision in *FMG Pilbara Pty Ltd v Cox*[59] at [20] "imposes upon a party, asserting absence of good faith, an onus of establishing the subjective 'intention' informing the impugned conduct, before a finding of absence of good faith may be made". As I understand the decision in *FMG Pilbara Pty Ltd v Cox* at [20], it is to the effect that:

> It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations. See, for example, *Brownley v Western Australia (No 1)* (1999) 95 FCR 152 at [24]-[25] per Lee J; *Strickland* 85 FCR at 319-320 and *Western Australia v Thomas* [1998] NNTTA 8 at [7]-[18].

[493] The Gomeroi applicant also submits that, "[o]n an objective assessment, the mere fact that negotiations continued over a long period is not evidence capable of founding an inference in relation to a particular subjective intention … whether as a matter of 'common sense' … or otherwise." It is curious that the Gomeroi applicant should adopt this position, given its perceived reliance on myriad incidents occurring over that same lengthy period. Its complaint, in effect, relies upon those incidents. Santos responds by pointing to the absence of any explanation for its continued involvement in negotiations with the Gomeroi applicant, other than that it wished to agree as contemplated by s 31(1). Santos could, at any time after the expiry of six months from the notification day (28 May 2014), have applied for a s 38 determination. Instead, it continued to negotiate and, to some extent, to fund the Gomeroi applicant in connection with the negotiation and otherwise.

[494] The Gomeroi applicant also submits that self-serving statements as to the subjective thought processes, states of mind, and intentions of individuals on behalf of a

[59] (2009) 175 FCR 141.

corporation are not reliable evidence of intentions and must be tested against an objective assessment of the parties' conduct. Statements and actions must both be considered. Self-serving statements (on behalf of oneself or one's employer) are often treated with caution. However there is no presumption that an arguably self-serving statement should be disbelieved, particularly if it provides a reasonable explanation of conduct or if it is otherwise consistent with conduct.

[495] As to para 8 of its contentions in reply, the Gomeroi applicant asserts that the obligation to negotiate in good faith arises prior to the notification day. I have demonstrated that the duty to negotiate in good faith arises only upon that day. However I have considered matters occurring prior to that day, particularly the correspondence, as providing a setting, against which actions after the notification day may be assessed. In the end those matters have been of little assistance.

[496] At para 9 of its contentions in reply, the Gomeroi applicant takes issue with Santos's suggestion that the Tribunal must make a "global" assessment of its conduct. Nonetheless, it asserts that a party's conduct must be considered as a whole, that no authority is cited for the "global" proposition, and that the meaning of the expression is not clear. In *Western Australia v Taylor*[60] at 224, Member Sumner said, in the context of the legislation as it then was, "[t]o determine whether the Government party has negotiated in good faith it is necessary to look at the conduct of the party as a whole". There can be no doubt about the correctness of that proposition as applied to the Native Title Act in its present form. It is difficult to understand the difference, apparently suggested by the Gomeroi applicant, between "making a global assessment" of conduct and considering "such conduct as a whole".

[497] In the present case, the explanation may lie in the Gomeroi applicant's assertion that, "a party's conduct must be considered as a whole in the sense that minor or one-off failures in good conduct would not, of themselves, demonstrate a lack of good faith." In my view, such an approach cannot be described as considering overall conduct "as a whole". That "minor or one-off failures" do not, themselves, demonstrate lack of good faith, can hardly be consistent with the proposition that a party's conduct must be considered as a whole, presumably including such "minor or one-off failures" and other "failures", not

[60] (1996) 134 FLR 211.

being "minor or one-off failures". In any event, the Gomeroi applicant submits that Santos's conduct was not "one-off". It asserts that it was, "persistent over many years, was unilateral and contrary to the express wishes of the Gomeroi, and was inconsistent with Santos's actual knowledge at relevant times." The Gomeroi applicant does not particularize those allegations. The meaning of the word "unilateral" in this context is unclear. It may mean that Santos's conduct was not responsive to the Gomeroi applicant's wishes. If that is the intended meaning, it is not a valid criticism. Santos cannot properly be chastised for persistence, or for the fact that it may not always have responded to the Gomeroi applicant's wishes. The assertion that Santos's conduct was "inconsistent with its actual knowledge at relevant times", is unparticularized and therefore of no present utility.

[498] At para 10, the Gomeroi applicant seems to assert failure to negotiate in good faith, concerning heritage protection and environmental requirements. The Gomeroi applicant asserts that Santos and the State, "appear to contend that satisfaction of heritage protection and environmental requirements imposed by other legislation, and permit conditions issued pursuant to that legislation, relieves [sic] them of their duty to negotiate in good faith in relation to native title rights and interests in particular as they arise under s 39."

[499] The Gomeroi applicant's assertion may, in part, relate to the Additional Research Program, mentioned in this determination on numerous occasions. However the complaint seems to go further and is difficult to understand. It relies primarily upon a letter dated 8 October 2014 from Ms Hariharan (NTSCORP) addressed "To whom it may concern" at Santos. It was apparently written at the request of Santos and is described by Ms Hariharan as "these preliminary comments". Prior to the letter, there had been Registered Aboriginal Party meetings, although Ms Hariharan considered that they were really information sessions. No point would be served by setting out in detail the contents of the letter. It clearly reflects Ms Hariharan's (and perhaps the Gomeroi applicant's) views as to the cultural management and associated matters. It was written some months prior to the withdrawal of NTSCORP's instructions in January 2015. Given the very general nature of the content of the letter, and that the letter was written at an early stage in this matter, it is difficult to see any basis for criticism of Santos's conduct concerning it. The Gomeroi applicant also refers to two letters identified by Mr MacLeod in his affidavit, dated 7 November 2018, and 18 May 2019. It also refers to

para 222A of his affidavit. The letter dated 7 November 2018 is a letter from Santos (Mr Gilroy) to NTSCORP (Mr Russo). I discuss this letter elsewhere in this determination. It may be that the exchange arose out of an earlier letter from Santos to NTSCORP, dated 23 October 2018. It refers to a meeting held on 20 October. Attached to the letter of 7 November 2018, there is a schedule of actions to be taken by the parties. It is difficult to understand the point being made by the Gomeroi applicant concerning that correspondence.

[500] The document dated 18 May 2019 contains notes of a meeting held at Tamworth on that day. I have previously discussed this document. Again, it is difficult to understand the point being made by the Gomeroi applicant. Finally, the Gomeroi applicant refers, in para 10 of its contentions, to para 222A of Mr MacLeod's affidavit. In it, Mr MacLeod asserts that at "negotiation meetings" which he had attended:

- protection of the cultural heritage values of the Pilliga forest "was a significant concern";
- Santos indicated that it would be willing to consider cultural heritage clauses; and
- such clauses "must be consistent" with the cultural heritage management plan which formed part of the Environmental Impact Statement.

[501] The Gomeroi applicant then points out that the considerations mentioned in s 39 are "part of the subject-matter of negotiations under the right to negotiate". It then asserts that when such heritage and environmental concerns were raised with Santos, it had not responded to those matters. However that assertion is immediately contradicted by the assertion that it either "rejected them outright" or asserted that those matters were already dealt with in the Aboriginal Cultural Heritage Management Plan. The Gomeroi applicant then seems to refer to the Additional Research Program, identified above. The Aboriginal Cultural Heritage Management Plan contemplated its preparation. The Gomeroi applicant complains that the description of the proposed Additional Research Program was considered "in a cursory, vague and unenforceable way", which did not respond to "Gomeroi concerns". It is then said that Santos had refused to engage directly "with Gomeroi" on those matters. It further complained that decisions concerning those matters were to be made (by the native title claimants) "in the company of and subject to the views of non-native title holders", which "must diminish and affect the exercise

of that native title right." The Gomeroi applicant then refers to a statement by the State that its heritage protection regime protects objects and places of significance and does not protect or acknowledge "many of the important aspects of Aboriginal culture, tradition or beliefs". It is not clear to me that Santos has ever asserted that it will have no involvement with the protection of heritage matters upon the basis that the State, alone, will deal with those matters. The flexibility in location of infrastructure, the Additional Research Program, and the s 31(1) negotiation process offer various ways of raising and dealing with concerns. It may be that the Gomeroi applicant's real concern is that it will not be solely responsible for the protection of cultural heritage, other Aboriginal groups being involved, as appears at the end of para 10 of the contentions. It seems that it is a condition of the Development Consent that there be an Aboriginal Cultural Heritage Advisory Group, members of which include both native title claimants and representatives of other Aboriginal bodies.

[502] Overall, para 10 offers nothing more than unparticularized assertions. The degree of generalization makes any further response impossible.

[503] Paragraph 11 is also difficult to understand. On its face, s 39(2) simply requires that the Tribunal take into account the effect of the proposed grants on existing non-native title rights and interests, and other existing uses by persons other than the Gomeroi applicant. I see no merit in the Gomeroi applicant's suggestion concerning possible double-compensation.

[504] At paras 12-16, the Gomeroi applicant seems to accept that the Tribunal will not consider the reasonableness or fairness of a compensation offer, save where such offer may be considered a "sham" or "unrealistic". The Gomeroi applicant then asserts that Mr Ho's evidence establishes that Santos's offer was of that kind. I have dealt with Mr Ho's evidence. I do not consider that any basis has been shown for treating Santos's offer as being a sham, unrealistic or unreasonable.

[505] At para 17, the Gomeroi applicant refers to paras 163-171 of Santos's contentions, and asserts that Mr Kreicbergs cannot be accepted as an "expert" witness, capable of reliably informing the Tribunal, upon the basis that he lacks independence, qualification and experience to do so. I have, to some extent, already dealt with this matter. The contention is misconceived. In general, the distinction between expert and non-expert witnesses is

that expert witnesses may offer opinions, based on their training, expertise and experience. The distinction between expert and non-expert evidence is not always clear. Mr Kreicbergs' evidence seems to address factual matters of which he has knowledge. His evidence as to factual matters, if accepted, may undermine opinions expressed by expert witnesses. It is admissible for that purpose, and may well be relevant for other purposes. A witness is not disqualified from giving evidence by any asserted lack of independence.

[506] As to para 18 of the Gomeroi applicant's contentions in reply, it asserts that Santos's conduct must be considered, "in the context of a national regime for redressing historical injustice", and that the requirement for good faith negotiations was intended to accommodate "inequality of bargaining power". The balance of the paragraph makes unfounded allegations of unethical and contemptuous conduct, and criticizes Santos for continuing to deal with the Gomeroi applicant (2013-2017), a criticism which is also unjustified.

[507] Some of the matters addressed in paras 19-23 of the Gomeroi applicant's reply also require consideration. They relate to paras 142-150 of Santos's contentions, particularly to para 150, dealing with an offer to pay for the Gomeroi applicant's legal representation. Paragraph 19 of the Gomeroi applicant's contentions in reply is misleading. It concerns para 150 of Santos's contentions. In that paragraph, Santos primarily deals with the criticism of its offer to pay for legal representation by a lawyer of the Gomeroi applicant's choice. I have previously pointed out that any limitation upon the Gomeroi applicant's choice of legal representation had nothing to do with Santos and, as pointed out in its contentions, such an offer is "standard". The Gomeroi applicant certainly seemed willing to seek funding from Santos for various purposes. It accepts that Santos paid meeting and travel expenses for members of the Gomeroi applicant and for NTSCORP's facilitators to attend those meetings. However, the Gomeroi applicant asserts that NTSCORP has never invoiced Santos for its legal fees, and that Santos has not paid for NTSCORP's legal representation of the Gomeroi applicant in the negotiations. Certainly, Santos has paid for some of NTSCORP's services, as conceded in para 19. Further, the Gomeroi applicant does not exclude the possibility that a bill will be rendered in the future, which bill would presumably be paid by Santos in accordance with earlier arrangements. Presumably, Santos paid for services provided by Sam Hegney Solicitors. There is nothing in this point.

[508] Paragraphs 20-22 of the Gomeroi applicant's contentions in reply are largely argumentative. To the extent that it alleges misconduct against Santos, there is no explanation of the proposition that it contributed to the creation of a "wedge" within the Gomeroi applicant, and perhaps within the native title claim group. There is no evidence of any such wedge. The Gomeroi applicant seems to imply that the existence of such "wedge" may be inferred from the resolution in July 2016 to reconstitute the Gomeroi applicant and the prior withdrawal of NTSCORP's retainer. I am unable to draw that inference. There is no evidence as to the reason for the replacement of NTSCORP as the Gomeroi applicant's solicitor, the circumstances leading to the subsequent change in the composition of the Gomeroi applicant and NTSCORP's reinstatement as its solicitor. I infer that in offering to pay the Gomeroi applicant's legal expenses, Santos was trying to facilitate the decision-making process.

[509] Paragraph 23 is difficult to understand. The Gomeroi applicant seeks to challenge Santos's assertion that it would prefer to resolve the matter by agreement, rather than by determination in the Tribunal. It asserts that Santos has not approached the Gomeroi applicant since lodging the application on 5 May 2021. However it is clear that negotiation continued in the early part of 2021, prior to such lodgement. Thereafter, between 16 June 2021 and 2 July 2021, it was expected that an authorization meeting would be called. Notice was given and then revoked. There was further correspondence between the parties on 2 and 12 July 2021, in which the Gomeroi applicant requested that Santos withdraw its s 35 application. Santos declined to do so. On 30-31 August 2021, the judicial review proceedings in the Land and Environment Court were heard. On 5 October 2021, the Gomeroi applicant resolved that the proposed grants should not proceed, other than in accordance with "an agreement of the Gomeroi people" authorized at an in-person meeting of that group, such agreement being made with the full, free, prior and informed consent of the group.

[510] On 7 October 2021, NTSCORP wrote to Santos, asserting that the native title claim group considered that the future acts the subject of these proceedings should not be done, and seeking Santos's agreement to certain conditions in the event that the Tribunal should determine otherwise. Some of the conditions had been previously proposed by Santos or the Gomeroi applicant, but other conditions were also proposed. There is no indication as to how such conditions might be adopted following any such determination. It may be that the Gomeroi applicant had in mind an ancillary agreement.

[511] The proposal made by Mr MacLeod on 7 October 2021 could hardly be described as an attempt to reach agreement. In any event, the proposed terms went well beyond anything to which Santos had previously agreed. It also seems that the State had not been advised of the Gomeroi applicant's proposal.

[512] On 22 October 2021, Ms Lawrence of Ashurst telephoned Mr MacLeod, asking that he contact her in relation to the letter dated 7 October 2021. He did so and, presumably, the matter was discussed. The outcome appears in Ashurst's letter of 20 December 2021. Santos indicated that any determination should be unconditional. However Santos indicated its intention to fulfil certain identified "commitments". It also confirmed that its offer of 29 March 2021 remained open.

[513] In light of this history, it is difficult to understand the Gomeroi applicant's assertion in para 23 of its contentions in reply. In particular, it is clear that the letter dated 20 December 2021 was the culmination of discussions which were initiated by the letter of 7 October, continued on 22 October, with the outcome being confirmed in the letter of 20 December 2021. Assuming that the negotiations focussed, at least in part, on the document forwarded with the letter of 7 October, one would hardly expect Santos simply to have accepted or dismissed the proposals without careful consideration.

[514] The suggestion in the last section of para 23, of "unfairness" to the Gomeroi applicant, is difficult to understand. Santos's current offer had been open to acceptance since 29 March 2021.

[515] The Gomeroi applicant made further submissions, entitled "Native Title Party's outline of submissions on evidence arising from cross examination". At paras 1-3, the Gomeroi applicant asserts that I should conclude that the production levy proposed by Santos was "under market value", and that Santos was not negotiating in good faith from 21 March 2017, when it made its first offer. That offer included the production levy. I have already dealt with the Gomeroi applicant's assertions in relation to the production levy. I have also dismissed the assertion that Santos failed to consult with Mr Meaton, or that it should have acted on his report. I have elsewhere dealt with the conceptual difficulties associated with the use of terms such as "market value" in the present context. I have dealt with Mr Ho's evidence. As to para 4, I have given my reasons for accepting Mr Kreicbergs' evidence at paras 89-93 of his affidavit.

[516] As to para 5 of the submissions, the obligation to negotiate in good faith does not necessarily require that any offer be within a particular range. Nor does such obligation necessarily require that a party justify any offer, or explain the basis for its calculations. The reference to the decision in *Jones v Dunkel*[61] in paras 5 and 6, is misconceived. As to the matters addressed in paras 7-10, I have dealt with them in considering and rejecting Mr Ho's evidence.

[517] At paras 11-12, the Gomeroi applicant contends that Santos has approached the production levy, "on the same basis as a non-native title landholder", and that such an approach was unreasonable. As I have previously observed, the indiscriminate use of the word "unreasonable", in connection with the negotiation process, may lead to error. As this case demonstrates, the concept of unreasonableness depends upon one's point of view. A proposal may be reasonable from Santos's point of view, but unattractive to the Gomeroi applicant. Negotiation must be in good faith, with a view to reaching agreement. Unreasonableness will only be relevant to the extent that it demonstrates absence of good faith. Unreasonableness, by itself, may not do so.

[518] In any event, there is no requirement that every offer be "reasonable" from the point of view of either party. The specific criticism raised in para 12 is that Santos has not taken account of the cultural loss factor identified by the High Court in *Northern Territory v Griffiths*[62] at [84]. However there is no suggestion that the Gomeroi applicant ever raised this point in the course of negotiations. The judgment in *Northern Territory v Griffiths* was handed down on 13 March 2019. There is no suggestion that at the meeting on 18 May 2019, or thereafter, this matter was raised. It is understandable that it was not raised, given that virtually no attention was, at any stage, given to the calculation of compensation by reference to the likely impact of the proposed grants upon native title rights and interests, including non-economic loss. I have previously discussed this matter. Given the Gomeroi applicant's own disregard, or lack of knowledge concerning the decision in *Northern Territory v Griffiths*, it can hardly be said that Santos should have increased its offer on the basis of that decision, without any suggestion to that effect by the Gomeroi applicant. However one looks at it, any such "failure" does not demonstrate absence of good faith. Further, Santos sought to enhance the value of its

[61] (1959) 101 CLR 298.
[62] (2019) 269 CLR 1.

offer by offering other substantial payments which offers were not extended to non-native title landholders.

[519] Paragraph 13 concerns the authority of Santos's representation at negotiations. I have dealt with this matter.

[520] As to paras 14-20, I have already dismissed the assertion that Santos ought to have accepted, and acted upon, Mr Meaton's view. I see no basis for concluding that Santos acted other than in good faith by relying upon its own internal advice. Nor was Mr Kreicbergs obliged to tell the Gomeroi applicant that Santos would not be seeking external advice. It seems that the Gomeroi applicant considers that, with the benefit of hindsight, it is now entitled to second-guess the nature of the advice which Santos ought to have obtained. In any event, my views concerning Mr Meaton's evidence deprive the Gomeroi applicant's submissions of any merit. There was no obligation upon Santos to advise the Gomeroi applicant as to the risks associated with the adoption of Mr Meaton's advice.

[521] As to para 19, it may be unfortunate that the Gomeroi applicant acted upon the advice of Mr Meaton and Mr Ho, but Santos is not responsible for its having done so. I reject the proposition that the native title claim group is now entitled to assert that it was in a, "near-impossible position", to accept an offer where, "all of the independent expert advice has said [such offer] is grossly under-value". It chose to act upon Mr Meaton's advice and Mr Ho's opinions. I have previously explained that I do not accept Mr Meaton as an independent expert. As I see it, he was retained to advise as to negotiations, and did so. I have given my reasons for rejecting Mr Ho's evidence. In those circumstances there is no merit in the contentions advanced in para 19.

[522] As to para 20, the Gomeroi applicant seeks to avoid the consequences of its own conduct. Even after the s 35 application was made, the parties were at liberty to negotiate. If they did so, they were obliged to negotiate in good faith. In these circumstances, a refusal to undertake a substantial financial commitment in the event of a determination that the proposed grants be made, can hardly constitute negotiation, let alone absence of good faith. Further, the reference to payment of "a production levy", suggests that the Gomeroi applicant might seek to continue negotiation as to the amount of such levy. Such an arrangement seems not to be contemplated by the Native Title

Act. In any event, Santos's case is that a production levy is not an essential element of any agreement negotiated pursuant to s 31(1), as its own cases demonstrate.

[523] At paras 21-24, the Gomeroi applicant again addresses the alleged failure by Santos to provide information to the Gomeroi applicant. Initially, the Gomeroi applicant seems to focus on the number of meetings between Santos and the Gomeroi applicant (2013-2017), and between Santos and the Gomeroi applicant (2017-2022). It asserts that Santos met with the latter Gomeroi applicant four times between 15 December 2019 and 14 December 2020.

[524] The Gomeroi applicant asserts that between February 2017, and 31 August 2017, following the filing of the s 66B application, Santos met with the Gomeroi applicant (2013-2017) on 12 occasions. It seems to imply unreasonable conduct by Santos in meeting more frequently with the Gomeroi applicant (2013 - 2017) than with the Gomeroi applicant (2017 – 2022). This comparison appears to have little to do with the provision of information. In any event, the evidence suggests that between early 2018 and the date of the s 35 application (5 May 2021), the following meetings were held with the Gomeroi applicant (2017-2022):

- 20 May 2018;
- 15 August 2018;
- 20 October 2018;
- 10 December 2018;
- 18 May 2019;
- 15 December 2019;
- 14 December 2020;
- 8 March 2021; and
- 18 and 19 March 2021.

[525] Further, as the Gomeroi applicant (2017-2022) has asserted, during 2020 and 2021, it was particularly difficult to arrange meetings, due to the COVID-19 pandemic. Of course, not all communications were exchanged at meetings. The evidence demonstrates that between February 2018 and the filing of the s 35 application, the following letters, emails and telephone calls were exchanged:

- a letter from NTSCORP to Ashurst dated 12 February 2018;
- a letter from Ashurst to NTSCORP dated 23 February 2018, enclosing the then-latest offer made to the Gomeroi applicant (2013-2017);
- a letter from Ashurst to NTSCORP dated 6 August 2018, providing materials which had been provided to the Gomeroi applicant (2013-2017);
- a letter from Ashurst to NTSCORP dated 9 October 2018, providing an offer;
- an email from Santos to NTSCORP dated 7 November 2018, regarding the 20 October 2018 meeting;
- an email from NTSCORP to Santos dated 3 December 2018, being a preliminary response to Santos's offer of 9 October 2018;
- a letter from NTSCORP to Santos dated 20 May 2019, regarding the 18 May 2019 meeting;
- a telephone call between Mr MacLeod and Joshua Gilroy (of Santos) on 19 June 2019;
- a letter from Santos to NTSCORP dated 2 August 2019, responding to NTSCORP's letter of 20 May 2019;
- a letter from NTSCORP to Santos dated 12 September 2019, providing a counter-offer;
- a letter from Santos to NTSCORP dated 17 October 2019, providing a further offer;
- a letter from NTSCORP to Santos dated 16 January 2020, regarding the 15 December 2019 meeting;
- a letter from Santos to NTSCORP dated 22 January 2020, regarding the 15 December 2019 meeting;
- an email from NTSCORP to Santos dated 25 February 2020, attaching a draft Ancillary Agreement;
- a letter from NTSCORP to Santos dated 16 April 2020, requesting details of approvals necessary for the carrying out of proposed activities;
- a letter from NTSCORP to Santos dated 1 June 2020, regarding the draft Ancillary Agreement;
- a letter from NTSCORP to Santos dated 1 June 2020, in relation to NTSCORP's letter of 16 April 2020;

- a letter from Santos to NTSCORP dated 18 December 2020, regarding arbitration;
- a "without prejudice" letter from Santos to NTSCORP dated 18 December 2020;
- a letter from NTSCORP to Santos dated 21 December 2020, regarding the 14 December 2020 meeting;
- a letter from Santos to NTSCORP dated 8 January 2021, regarding the commencement of proceedings in this Tribunal;
- a telephone call between Mr MacLeod and Mr Kreicbergs on 8 January 2021;
- a letter from NTSCORP to Santos dated 11 January 2021, regarding statements allegedly made at the 14 December 2020 meeting;
- a letter from Santos to NTSCORP dated 12 January 2021, regarding the land to be impacted by the proposed grants;
- a letter from NTSCORP to Santos dated 19 January 2021, regarding the land to be impacted by the proposed grants;
- a letter from Santos to NTSCORP dated 20 January 2021, regarding the land to be impacted by the proposed grants;
- a letter from NTSCORP to Santos dated 29 January 2021, advising of a mediation request made to this Tribunal;
- a letter from NTSCORP to Santos dated 5 February 2021, regarding a schedule of land disturbance;
- a letter from Santos to NTSCORP dated 11 February 2021, regarding a schedule of land disturbance;
- a letter from NTSCORP to Santos dated 11 February 2021, regarding Santos's letter in relation to land disturbance;
- a letter from NTSCORP to Santos dated 15 March 2021, requesting information in advance of the mediation with this Tribunal;
- a letter from Santos to NTSCORP dated 29 March 2021, providing an offer;
- a letter from NTSCORP to Santos dated 6 April 2021, proposing to appoint an independent arbitrator; and
- a letter from Santos to NTSCORP dated 12 April 2021, declining the appointment of an independent arbitrator.

[526] I see no merit in this aspect of the Gomeroi applicant's contentions.

[527] At para 23, the Gomeroi applicant seems to complain of the failure to provide only one document described as an "Indicative Wellhead Sketch Plan". The document was provided to the Gomeroi applicant (2017-2022) on 14 December 2020, although it had been discussed at one of the meetings at Narrabri in 2018, 2019 or perhaps 2020. It can hardly be said that 14 December 2020 was "immediately before" Santos's s 25 application, made on 5 May 2021.

[528] As to the supply of information to the Gomeroi applicant (2017-2022), the evidence does not suggest that it was actively seeking further documentation from Santos. On 23 February 2018, Ashurst provided a copy of Santos's most recent offer, pointing out that it had been "superseded" by counter-offers. This document was provided in response to a request from NTSCORP dated 12 February 2018. There is no suggestion of any further requests prior to 6 August 2018, when Santos provided further information. There seems to be no basis for criticizing Santos or Ashurst in this regard.

[529] At para 24, it is said that a "negotiation roadmap" was developed at the first meeting of the reconstituted Gomeroi applicant on 18 May 2018 at Tamworth. Mr Kreicbergs did not consider it to be "binding". The term "roadmap" suggests anticipation as to how a matter may proceed, or how the parties desire that it should proceed. Mr Kreicbergs' view is probably valid. Had NTSCORP and/or Gomeroi applicant wanted further documentation they could have asked for it. Much of it appears to have been publicly available. Alternatively, it could have been raised at any time by NTSCORP with Ashurst. It was apparently not raised.

[530] In para 24, the Gomeroi applicant again complains concerning the provision of material in August 2018. It also complains about Santos's refusal to provide further funds to obtain advice concerning the proposed Narrabri Gas Project. It is said that Santos was then commissioning its own new reports which were not to be provided to the Gomeroi applicant. This evidence is said to be found at ts 159, ll 1-19, and ts 160, ll 7-11. It may be that the second reference should be to ts 162, ll 7-11. However the evidence does not seem to justify the implied proposition that Santos was obliged to provide funding for further reports, or to allow access to reports obtained by Santos for its own use.

[531] At paras 25-27, the Gomeroi applicant asserts that the Aboriginal Cultural Heritage Management Plan will not protect native title rights, and that the Pilliga is culturally

important. It is said that the conduct of both Santos and the State has been called into question. The matter is discussed at various places in this determination relating, at least in part, to the Additional Research Project. I need not say any more about that topic.

[532] In the course of the hearing, I decided that I would not allow the Gomeroi applicant to raise any question as to good faith against the State, arising out of this matter. No allegation of absence of good faith had previously been made against the State. I considered that it would be unfair to raise the issue at such a late stage. In any event, these matters will be dealt with in the Additional Research Program. I have elsewhere dealt with the matters raised in para 28. That paragraph is largely argumentative.

[533] At para 29 the Gomeroi applicant challenges Dr Godwin's evidence that in the course of his consultation with Gomeroi people in connection with the preparation of the Aboriginal Cultural Heritage Assessment Report, it had not been said that the whole of the Pilliga was of particular cultural heritage significance, referring to paras 50, 52, 58 and 68 of Dr Godwin's affidavit. That is not an entirely accurate description of Dr Godwin's statements. At para 50, he said that he did not recall any general statement to the effect that the entire project area was of particular significance. At para 52, he said that he did not recall any specific mention of the particular significance of the Pilliga by the Gomeroi, referring to a meeting held on 7-8 March 2017. He also said that the significance of the area was discussed only in broad terms in relation to the significance of country to the Gomeroi. At para 58 he said that during the course of consultation nobody ever said that the whole of the Pilliga was of particular cultural heritage significance to the Gomeroi people. At para 68, Dr Godwin said that "the particular cultural heritage significance of the Pilliga as a whole [was] never stated."

[534] The Gomeroi applicant asserts that at two places in the Aboriginal Cultural Heritage Assessment Report, the whole of the Pilliga was described as being an area of particular cultural heritage significance. This is not strictly correct. In the report, at p 62, many qualities are attributed to the Pilliga, including that it is vital to the continuing transmission of cultural knowledge and understanding as part of a living tradition. Whilst the list of characteristics strongly suggests that it is an area of considerable importance, use of the word "particular" generally involves a comparative assessment of importance.

[535] At p 194 of the Aboriginal Cultural Heritage Assessment Report, it appears that NTSCORP had, in a letter, indicated that the Pilliga area is of "high cultural value" to the Gomeroi people. However there is no specific assertion that it is a place of particular cultural heritage significance. Use of the word "particular" in ss 39 and 237 of the Native Title act has been discussed in the cases. However I am presently only addressing the Gomeroi applicant's assertion that Dr Godwin erred in saying that he had not been told that the Pilliga was an area of particular cultural heritage significance. That NTSCORP wrote of its high cultural value does not demonstrate any inaccuracy in Dr Godwin's assertion. Further, it is a statement by NTSCORP, not by a Gomeroi person. Clearly, the Pilliga is important to the Gomeroi people. The evidence before the Tribunal reveals few, if any, areas or sites of particular significance within the Narrabri Gas Project area and the Santos project area.

[536] Paragraph 30 is problematic. At ts 92, ll 30-34, the proposition put to Dr Godwin was that information concerning the Pilliga forest, if substantiated, might lead to a recommendation that the area be avoided altogether. Mr Godwin agreed with that very broad, and almost meaningless proposition but, at ts 92, ll 36-40, he makes it clear that his position is that the avoidance principle will make it possible to avoid places of cultural significance.

[537] At paras 31-41, the Gomeroi applicant raises questions concerning the information available to Dr Godwin. This reference again relates to the Additional Research Program, which report, it is said, will remedy the absence of certain information. The Additional Research Program is discussed in more detail elsewhere in this determination.

2.7. Some Additional Matters

[538] At paras 78-106, the Gomeroi applicant responds to certain matters which, it considers, I raised in the course of the hearing. The first issue is whether I should adopt the decision of the Independent Planning Commission. Pursuant to s 139 of the Native Title Act, I am holding an inquiry into an application "covered by s 75". Pursuant to s 146, I may, in the course of such an inquiry, receive into evidence, and adopt any report, findings, decision, determination, or judgment of any court, person or body, mentioned in s

146(a). The Independent Planning Commission's Statement of Reasons has been put into evidence before me. I proceed accordingly.

[539] Professor Steffen provided further information from the Sixth Assessment Report of the Intergovernmental Panel on Climate Change and the report of the International Energy Agency. However there has been no clear explanation as to how such information modifies or undermines the Independent Planning Commission's Statement of Reasons. Neither does such information affect the Commonwealth Minister's decision pursuant to the Environmental Protection Act.

[540] Paragraphs 83-85 are difficult to understand. I accept that these proceedings are administrative in nature. I do not understand there to be any contrary submission. I accept that s 40 of the Native Title Act places limits upon the raising of issues previously determined. That provision has no present application, as far as I can see. I also accept that, in some circumstances the relevant Minister may overrule a Tribunal determination. No such question has yet arisen. At para 86, it is suggested that paras 83–85 lead to the conclusion that the Tribunal's process, "should be exercised in the usual way: unfettered by the decision of others made under other powers, and on the basis of the evidence before it at the time that the decision is made." There can be no doubt that the Tribunal's decision must be based on the evidence before it. However that does not necessarily exclude consideration of conclusions reached by other specialist decision-makers. Section 40 may bind parties on issues previously agreed or determined as between them. However s 40 is not relevant for present purposes. As to s 146, the parties have conducted these proceedings upon the basis that numerous reports and decisions are in evidence. The Gomeroi applicant cannot now seek to exclude matters, given that they have been addressed at some length in evidence and in submissions.

[541] In paras 87 and 88 the Gomeroi applicant seems to suggest that I should prefer Professor Steffen's views to the conclusions of the Independent Planning Commission. In the course of Professor Steffen's cross-examination, at ts 200, ll 7–43, he expressed views which initially assumed that the Narrabri Gas Project would involve hydraulic fracking. He concluded that such a process might result in gas leakage. When told that there would be no fracking, he nonetheless asserted that there would still be some risk of gas leakage. At ts 201, ll 7–9, Professor Steffen's attention was drawn to para 4.2 of his report where he discounts a common argument concerning relatively small amounts of leakage. He

agreed that the Independent Planning Commission had not relied upon any such argument. At ts 202, ll 7–43 of his cross-examination Professor Steffen seems to disagree with the Independent Planning Commission's view that a relevant consideration is that there will be expected emissions advantages in using coal seam gas as compared to coal. He dismisses the Independent Planning Commission's views concerning that matter as being inconsistent with the science which is "absolutely clear". I cannot simply disregard the Independent Planning Commission's report, based as it is upon expert advice, in favour of Professor Steffen's broad assertions. At ts 203, ll - 41, Professor Steffen states his views that Australia could only meet the goals of the Paris Climate Agreement if it bans all new fossil fuel developments. That view may, or may not be correct, but the question is not primarily for scientists. It is for our political leaders to decide the extent to which we should seek to contribute to such goals. Similar comments apply to Professor Steffen's evidence in re-examination.

[542] It is not practicable for this Tribunal to second-guess specialist bodies such as the Independent Planning Commission, save to the extent that there may be specific impact upon native title rights and interests. There may be circumstances in which such a decision should be considered in light of new information or changing scientific views. However, for a non-scientific Tribunal, to take such a step is necessarily the exception rather than the rule. I am not persuaded that the state of the evidence is such that I should depart from the decision of the Independent Planning Commission. That Commission, and this Tribunal, have functions which require the balancing of interests. There are, and will continue to be, differences of opinion about this project, however the matter may be decided. In my view, and for the reasons discussed elsewhere in this determination, the balancing exercise carried out by the Independent Planning Commission is more likely to assist the Tribunal in performing its function than is Professor Steffen's narrower views, although they are no doubt well informed.

[543] Paragraphs 89-102 of the Gomeroi applicant's closing submissions deal with the relationships between Santos, the Gomeroi applicant and NTSCORP in the period prior to the notification day (28 May 2014). Such events preceded the commencement of the obligation to negotiate in good faith. For the reasons which I have given, such evidence can only be relevant to the extent that it throws light on negotiations after the notification day. The evidence seems not to have that effect. However I shall briefly revisit the issue.

[544] The evidence demonstrates that meetings between Santos and the Gomeroi applicant (2013-2017) occurred between those parties, apparently without reference to NTSCORP. NTSCORP and Santos were also communicating from time to time. I infer that NTSCORP was communicating with the Gomeroi applicant (2013-2017). I also infer that, if the Gomeroi applicant had been unhappy about communicating directly with Santos, it could easily have asked NTSCORP to intervene. Elsewhere I have summarized the evidence concerning the Gomeroi applicant's view about Santos's conduct in this period. I need not say more concerning that matter.

[545] As to the balance of paras 90-92, of the Gomeroi applicant's closing submissions, it seems to be suggested that the "Gomeroi" (presumably the native title claim group) was concerned about matters of authorization, the limits of authority and the representative nature of the Gomeroi applicant. The Gomeroi applicant seems to rely on various resolutions as evidence of the native title claim group's dissatisfaction, at various times, with the Gomeroi applicant. However such resolutions say little or nothing about matters leading to such resolution. I reject the proposition that Santos was party to any (unidentified) misconduct by the Gomeroi applicant (2013-2017). There is simply no evidence to that effect. Indeed, in the period between 28 May 2014 and 7 December 2017, some progress seems to have been made in the negotiations. As to para 92, Mr Kreicbergs' evidence seems to be consistent with the approach taken by Santos. Further, the allegation of a power imbalance does not necessarily lead to an inference that such imbalance was exploited. Paragraph 92 is entirely speculative.

[546] As to paras 93 and 94, there is no doubt that NTSCORP complained about Santos having direct access to the Gomeroi applicant. However the Gomeroi applicant appears to have been satisfied with that arrangement. I have previously dealt with the matter identified in para 95. As to para 96, it is not clear to me that the correspondence demonstrates that the Gomeroi applicant (2013-2017) was acting beyond its authority in its dealings with Santos. As to para 97, it may suit the Gomeroi applicant now to assert that Sandlewood was not validly appointed. However, if there were to be any such challenge, it should have been made at the time, and not at this late stage. Of course, NTSCORP had been anxious to be a "one stop shop". No relevant inference can be drawn from the matters alleged in para 98.

[547] As to para 99, the point is that Santos was to contract with Sandlewood, apparently in accordance with the native title claim group's resolution. Santos had made it clear that it would not engage lawyers to perform the function which Sandlewood was to perform. I have previously pointed out that, notwithstanding NTSCORP's assertion that at a later stage, it had been authorized to provide the relevant services, such authority seems to have related only to its functions as a solicitor. Paragraphs 100, 101 and 102 are entirely speculative.

[548] As to para 103, my observation was that I found the "negotiation periods" to be misleading insofar as they are used by the Gomeroi applicant. They have caused difficulties in the preparation of these reasons. As to para 104, my remark related to earlier exchanges at a directions hearing, concerning Mr MacLeod's evidence, which evidence consisted largely of exhibited documents, accompanied by, in some cases, comments. Further, Mr MacLeod had commenced his employment in May 2019, five years after the notification day. He had little or no direct knowledge of earlier events. My preliminary reading of Mr MacLeod's affidavit including the exhibits, and the Gomeroi applicant's contentions, delivered in advance of the hearing, led to the view which I expressed. I have addressed all of Mr MacLeod's evidence in some detail.

2.8. Conclusions as to Good Faith

[549] Because of the fragmented, discursive, and extensive nature of the evidence, and the way in which the case has been conducted, I have, to some extent, had to deal with it in a piecemeal way, leading to a degree of repetition. However the evidence, as a whole, does not substantiate the allegation of absence of good faith made against Santos.

[550] From an early stage in the negotiations, NTSCORP seems to have been "interested" in the possibility that Santos might not negotiate in good faith. An early issue was NTSCORP's concern about direct communications between Santos and the Gomeroi applicant (2013-2017). There appears to have been little or no concern expressed by the Gomeroi applicant. Had it wished to do so, it could easily have avoided such contact. NTSCORP could certainly have stopped it, had it been instructed to do so. There was, and is no reason to believe that Santos had any ulterior motive in this respect, or that it exploited the opportunity in any way.

[551] In the months after the notification day, NTSCORP (and presumably, the Gomeroi applicant) accepted Santos's offer of the sum of $100,000 for various purposes. However any satisfaction with the provision of such benefit did not last long, apparently because the Gomeroi applicant had, in effect, already committed some of those funds to particular purposes. There seems to have been less remaining than had been expected. Not long thereafter, Ms Hariharan had her inexplicable exchange with Mr Thorneycroft and Mr Bok.

[552] It may be that these events led to the withdrawal of NTSCORP's instructions, but there is no evidence to that effect. As to the period between 30 January 2015 and 7 December 2017, the Gomeroi applicant must now accept the Federal Court's decision that NTSCORP's removal, as solicitor for the Gomeroi applicant (2013-2017), was valid. It must also accept that the reconstitution of the claim group did not take effect until 7 December 2017. Further, it is clear that the Gomeroi applicant (2013-2017) and Santos were obliged to continue to negotiate in good faith. They did so. The Gomeroi applicant seems to assert that the alleged failure by Santos to engage with Mr Meaton occurred after 7 December 2017, although there seems to have been engagement prior to that date. In any event, my views concerning that complaint dispose of it for all purposes.

[553] The Gomeroi applicant's contentions covering the period from 7 December 2017 until May 2021 (when Santos made its s 35 application) focus on the five propositions to which I have referred. In my view, those propositions do not establish any absence of good faith in Santos's conduct of negotiations.

[554] As to the period between May 2021 and the native title claim group meeting on 24 March 2022, the Gomeroi applicant's complaints focus on three acts of alleged "unreasonableness" on Santos's part. First, it is said that it was unreasonable for Santos to lodge its s 35 application when it "knew" that the Gomeroi applicant (2017-2022) could not enter into an agreement without the approval of the native title claim group, and because of the risk posed by the COVID-19 pandemic at any meeting. As I have demonstrated, the cases support the proposition that such an application can be made at any time after the expiry of the six-month period prescribed in s 36, and that no prior notice need be given. Further, such an application commences a process which does not necessarily proceed to immediate resolution. Depending upon the attitudes of the parties, the Tribunal may well have acceded to any request to defer any determination

until after a claim group meeting, provided that there was no undue delay. In any event, the difficulties experienced by the Gomeroi applicant in obtaining decisions from the native title claim group were not wholly attributable to the COVID-19 pandemic. The native title claim group's insistence, that any proposed agreement be referred to it for authorization, contributed to the problem. There are more flexible ways of regulating the authority of a negotiator, particularly in a matter which has gone on for so long. If the Gomeroi applicant's authority had been more flexible, even the COVID-19 difficulty could have been dealt with, no doubt with the assistance of NTSCORP. In any event, the point is that it was not Santos's conduct which raised these difficulties. It demonstrated its willingness to find a way around the problem, by offering to ask the Tribunal to defer its determination.

[555] Second, it is said that Santos acted unreasonably in failing to agree to conditions proposed by the Gomeroi applicant on 14 February 2022, and in asserting that it did not understand the need for the proposed conditions. There has been no detailed explanation of these matters. However they seem to relate to the Additional Research Program which has been discussed at various points in this determination. As I have said, Dr Godwin had been unable to obtain information concerning cultural heritage matters and had recommended that there be an Additional Research Program, designed to remedy the shortcoming. Initially, the program was to be conducted in the first 12 months of the commencement of the second phase of the Narrabri Gas Project. However, in the course of these proceedings, Santos agreed to conduct the program prior to the commencement of Phase 2. In any event, there is no basis for asserting that Santos's conduct concerning this matter demonstrated a failure to negotiate in good faith.

[556] The third alleged failure to act "reasonably" is that Santos did not agree to a counter-offer made on 4 March 2022, such counter-offer being to the same effect as the conditions offered on 14 February 2022. The Gomeroi applicant has not explained how such failure to agree demonstrates absence of good faith, particularly at such a late stage in the determination proceedings.

[557] I should add that from the time of Santos's first offer, in March 2017, the Gomeroi applicant's responses, including counter-offers, appear to have been affected by the advice received from Mr Meaton and possibly, Mr Ho. My view concerning such matters is that Santos cannot be held responsible for the fact that the Gomeroi applicant

chose to rely on their views. It was in no way "unreasonable" for Santos to take the position which it did.

[558] The Gomeroi applicant asserts that the only way in which it "may be certain" that native title rights and interests will be adequately protected would be by the Tribunal's dismissing the application, or making a determination subject to the proposed conditions. Again, no attempt has been made to explain or justify the proposed conditions or such an approach. Some of the conditions would seem to be financially onerous to Santos. The Gomeroi applicant seems to overestimate the extent to which s 31(1) is designed to address the protection of native title rights and interests, as opposed to facilitating agreement to the future acts in question.

[559] As to the reference to the evidence of Ms Tighe, Mr Booby and Mr Wilson, Santos has not refused to acknowledge such evidence. Such evidence, and that of Mr Kumarage, fail to focus on the very small part of the Pilliga which will be affected by the proposed grants. Such considerations have no real relationship to the question of good faith.

[560] There is no evidence upon which I could find that Santos failed to negotiate in good faith between May 2021 and March 2022, or thereafter. Whether or not the events between the claim group meeting in March 2022 and April-May 2022 constituted negotiation for the purposes of s 31(1) may be a difficult question. It seems probable that the native title claim group's decision to reject Santos's offer was the final step in the negotiations, save possibly for the Tribunal mediation after the determination hearing. However there is no basis for finding absence of good faith in that mediation.

[561] There is no basis for finding that at any time since the notification day, or before that day, Santos failed to negotiate in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants.

III SECTION 39

[562] In considering the good faith case, the question to be considered is whether I am satisfied that Santos had failed to negotiate in good faith, with a view to obtaining the Gomeroi applicant's agreement to the proposed grants. The question pursuant to s 39 is whether, I consider the proposed grants should be made, or should not be made, or should be made subject to conditions. Whilst the good faith question was a matter of fact, the

answer being either "yes" or "no", the s 39 question is of a somewhat difficult kind. It is a matter of judgement. I must assess the factors listed in s 39, and then decide the preferable outcome, having regard to those factors.

3.1. Section 39(1)(a)

3.1.1. Summary of the Evidence of the Parties

a. The State

Affidavits of Ms Fegan

[563] Ms Fegan, a solicitor, has the day-to-day carriage of this matter for the State. She has annexed to the affidavit of 23 February 2022, a bundle of documents. They are referred to as Exhibit CF-1 and include:

- a "parcel list" including all cadastral parcels of land, Crown reservations and Aboriginal Land Claims within, or overlapped by the Petroleum Production Lease Applications 13-16, reserve profiles and gazettals for State and National forest declarations; and
- an Aboriginal Heritage Information Management System "Extensive Search Report", site cards and maps.

[564] Ms Fegan has annexed to her affidavit dated 15 December 2021, a bundle of documents referred to as Exhibit CF-2. Exhibit CF-2 includes:

- a map of the Gomeroi People Claim Area;
- s 29 notices for Petroleum Production Lease Applications 13-16, from 2014;
- documents concerning policies and procedures, including an email from M Walsh to S Williamson regarding the Environmental Protection Authority's approach, the NSW Government's Future of Gas Statement, and the Memorandum of Understanding on the Regulation of Gas Activities in NSW;
- documents concerning current interests and management plans, including the Travelling Stock Reserves Statewide Plan of Management, the Forestry Corporation Forest Management Plan for the Western Division, the Yarrie Lake

Flora & Fauna Trust website "About Us" page, and the Brigalow Park Nature Reserve Plan of Management; and

- The decision in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*.[63]

Affidavit of Ms Godwin

[565] Ms Godwin is employed as a senior analyst at the Mining Exploration and Geosciences group of the Department of Regional NSW. She states that the Title Administration System records that 16 petroleum production lease applications have been made in New South Wales over an undefined period of time. Six of these applications remain current, four of which are Petroleum Production Lease Applications 13-16, being the applications under consideration in these proceedings. The last petroleum production lease in the State was granted on 29 May 2008. There has been a "freeze" on the processing of petroleum exploration titles in New South Wales since around 2015, when the former Office of Coal Seam Gas was disbanded. No grants have been made since 2014.

[566] In para 9 of her affidavit, Ms Godwin identifies the procedure for granting a petroleum production lease. It seems that even after an agreement or determination pursuant to subdiv P of the Native Title Act, there are other steps to be taken before a grant is made by the relevant Minister or other decision-maker.

[567] Exhibited to Ms Godwin's affidavit is a document marked "Annexure TG-1". It is an example of a petroleum production lease. Also exhibited to Ms Godwin's affidavit is a document marked "Exhibit TG-2". It is not referred to in her affidavit, but is mentioned in Ms Fegan's affidavit. The Exhibit comprises a bundle of electronic documents including:

- land tenure descriptions for parcels of land falling within Petroleum Production Lease Applications 13-16;
- other mining and tenure information relevant to the surrounding mining and geothermal tenure;

[63] [2021] NSWLEC 110.

- Petroleum Production Lease Applications 13-16 lease application documents; and
- maps of Petroleum Production Lease Applications 13-16.

b. Santos

Affidavit of Mr Dunn

[568] Mr Dunn is the Development Manager NSW/NT, Santos Onshore Development. He holds degrees in Engineering and Business Management. He held the position of Project Manager Narrabri for around 2 years and 7 months, until late 2021. He is a chartered professional engineer, with over 15 years of experience in the oil and gas industry in Australia and overseas.

[569] Mr Dunn annexes a copy of the "Field Development Protocol" to his affidavit. The Protocol was prepared for Development Consent approval. It outlines measures to protect the environment and cultural heritage. It includes detailed procedures which must be followed before any ground disturbing activities for infrastructure may occur, commencing with a desktop review and involving field scouting activities (micro-siting), design of a field development plan which deals with constraints, including known cultural heritage sites, through to implementation of the plan. Such implementation includes a pre-clearance cultural heritage survey and subsequent monitoring and reporting of compliance.

[570] Mr Dunn asserts that flexibility in the siting of the infrastructure can be employed in order to avoid identified sensitive environmental and cultural heritage areas. He notes that after an assessment process, lasting more than six years, the Independent Planning Commission concluded that the Narrabri Gas Project was in the public interest, and that any negative impacts could, with strict conditions, be managed.

[571] At pt 1.2 of his affidavit, Mr Dunn sets out the circumstances leading to the s 35 application. At pt 1.3, he described the Narrabri Gas Project area in some detail. Much of that information has been addressed above.

[572] The Narrabri Gas Project area covers a total area of 95,000ha. However its "footprint" may only affect about 1000ha, within that total area. About 988.8ha may be native

vegetation. He states that most of the "proposed development" is located within an area known as the "Pilliga", the balance of the area (around 34%) being currently used for agricultural and pastoral activities. The collective term "Pilliga" describes an agglomeration of forested area, occupying more than 500,000ha within north-western New South Wales, around Coonabarabran, Baradine and Narrabri. Mr Dunn does not specify which parts of the "Pilliga forest area" include the Narrabri Gas Project area. He states that only 0.2% of the "Pilliga forest area" will be disturbed by that Gas Project. He states that access to 99.8% of the "Pilliga" will be unaffected by the Narrabri Gas Project.

[573] In 2005 the State completed comprehensive strategic land use planning for the Pilliga and the surrounding region, involving extensive consultation with a wide range of stakeholders. Such planning was addressed in the Brigalow Act. Almost half of the Pilliga (over 240,000ha) is reserved for biodiversity and cultural heritage conservation. These areas are permanently protected under the National Parks and Wildlife Act. The Brigalow Act categorises State forest areas (such as those falling within the Narrabri Gas Project area) as Zone 4, within which zone, activities such as forestry, recreation and mineral extraction are permitted, subject to appropriate merit assessment.

[574] Mr Dunn relies upon information contained in exhibit TD-2 as demonstrating that around 240,000ha of the Pilliga is permanently protected under the Brigalow Act, as either:

- Zone 1 – Conservation and Recreation areas (National Park);
- Zone 2 – Conservation and Aboriginal cultural areas (Aboriginal Areas); or
- Zone 3 – Conservation, recreation or mineral extraction (State Conservation Areas); and
- Zone 4 – Forestry, recreation and mineral extraction (State Forests).

[575] The evidence does not disclose the extent to which Zone 2 is protected. Indeed, the claim that almost "half of the Pilliga" is "permanently protected" is difficult to reconcile with the fact that Zone 3 permits "mineral extraction". Mr Dunn demonstrates that the Narrabri Gas Project area includes parts of the Pilliga East, Bibblewindi and Jacks Creek State Forests, and that each of these forest areas was logged historically, and includes an extensive network of forestry roads and tracks. He further says that the Brigalow

Park Nature Reserve and the Brigalow State Conservation Areas have been excluded from the Narrabri Gas Project area. It should be noted that each falls within the outer boundary of the areas comprising the four Petroleum Production Lease Applications. Each lies to the south of PPL3.

[576] Mr Dunn provides an overview of Santos's current activities within the larger Petroleum Exploration Lease 238, including the drilling of three pilot wells. He also provides information regarding historical drilling activities undertaken by Eastern Star Gas between 2003 and 2007.

[577] In pt 1.4 of his affidavit, Mr Dunn explains the regulatory scheme and conditions applicable to the Narrabri Gas Project. The Narrabri Gas Project is a "State significant development" under the Environmental Planning and Assessment Act, and related policies. See "State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007" and "State Environmental Planning Policy (State and Regional Development) 2011". On 30 September 2020, the Independent Planning Commission approved the Narrabri Gas Project, subject to a comprehensive set of conditions, regulating its operation. Any breach of such conditions could lead to investigation, prosecution, or other penalty or compliance measures.

[578] Mr Dunn identifies a number of primary and secondary approvals. See paras 50-63. He also lists a number of the Development Consent conditions at paras 64-67. The Development Consent conditions are publicly available.[64] At para 68 of his affidavit, Mr Dunn identifies the extent of Santos's compliance, as at the date of the affidavit.

[579] The Narrabri Gas Project was referred to the Commonwealth Minister for the Environment on 28 October 2014 and, following assessment, on 24 November 2020, was approved under the Environmental Protection Act.

[580] Part 2 of Mr Dunn's affidavit deals with the process by which coal seam gas infrastructure is to be located and constructed. It provides technical and operational detail concerning the Narrabri Gas Project. It involves a number of stages and processes, some of which occur concurrently, as detailed below:

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[64] See NSW Government (2020) <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-6456%2120200929T234612.186%20GMT>.

- The location of coal seam gas wells
    - This is a matter of some importance in that Santos proposes to avoid interfering with cultural heritage in its various forms, and will seek to do so by taking a flexible approach to the location of such sites.
    - Exploration and appraisal activities have been completed in respect of some of the Narrabri Gas Project area. All new well and infrastructure sites will depend upon the location of gas reserves. However there will be input from Santos's Field Development Protocol and consultation with land holders.
- Infrastructure location
    - Although the location of coal seam gas wells depends on the location of gas reserves, a degree of flexibility is available, which flexibility may lead to the avoidance of identified land use constraints, such as known Aboriginal cultural heritage and other ecologically sensitive sites.
    - Other avoidance and mitigation measures have been adopted in the Narrabri Gas Project design, in order to minimize potential impacts on terrestrial flora and fauna. Measures include maximizing the use of previously disturbed areas, constructing multiple wells on a well pad, deploying an ecological scouting framework, implementation of pest, plant and animal control protocols and co-locating linear infrastructure.
    - Pursuant to the Development Consent conditions, the Field Development Protocol takes into account a range of constraints, including avoidance of all known Aboriginal cultural heritage sites, watercourse and buffer width, and identified sites such as Yarrie Lake (200m buffer) and the exclusion of non-linear infrastructure from riparian corridors.
    - The process for determining the location of infrastructure is broadly described below:

        Desktop review

        - Desktop assessment identifies details including geologic features, gas resources, ecological data, known Aboriginal cultural heritage and other heritage sites, existing and historical infrastructure, access tracks and roads, water resources, riparian corridors, and "sensitive receptors" which could potentially be impacted by noise or air emissions.

Micro-siting

- Micro-siting is the process of locating precisely each piece of infrastructure in order to minimize risk of impact to sensitive ecological and cultural features.
- Micro-siting involves field scouting of ecological features and pre-clearance surveys for known and unknown Aboriginal cultural heritage within the proposed area of development. Infrastructure may be relocated where field scouting or surveys identify such values.
- As set out in the Aboriginal Cultural Heritage Management Plan, pre-clearance surveys are conducted by approved cultural heritage officers nominated by the Aboriginal Cultural Heritage Working Group. That group is comprised of nine persons, being one chair, four persons nominated by the Gomeroi applicant (or native title claim group) and four persons nominated by the local Aboriginal land councils.
- Pre-clearance surveys include walking over and inspecting proposed work areas, considering any Aboriginal cultural heritage in the work area, test excavations in areas associated with water features, identifying, documenting and reporting any finds, and recommending management measures consistent with the Aboriginal Cultural Heritage Management Plan.
- If during operations or construction, a “new find” (a previously unknown Aboriginal object or place) is discovered, activities in the area will stop and various measures will be taken to secure and prevent impact or harm, including immediate contact with the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group. Measures may include re-siting the infrastructure.

“Known sites”

- Aboriginal Cultural Heritage Management Plan sch 3 provides that the following site types must be completely avoided: burials, stone arrangements and earthen circles, carved trees, rock shelters, rock art, grinding grooves, quarries, mounds, scarred

trees, hearths and ovens, places of traditional and anthropological significance, identified in the cultural heritage audit review or in a cultural heritage compliance plan; and recent historic and contact sites. Aboriginal Cultural Heritage Management Plan sch 4 provides that the following site types will, where practicable, be avoided. However, if it is not practicable to re-site the infrastructure, Santos will adopt a range of management measures identified in the table. The site types in sch 4 include: stone artefact concentrations, shell middens, sub-surface cultural material, and isolated stone artefacts.

Field Development Plan

- Pursuant to Development Consent condition B4, prior to construction of any gas field infrastructure, Santos will prepare a Field Development Plan which must be consistent with the Field Development Protocol and prepared in consultation with a number of stakeholders, agencies and groups, including the Aboriginal Cultural Heritage Advisory Group. The Field Development Plan must include detailed plans of existing and proposed gas field infrastructure, analysis of compliance with locational criteria, results of surveys undertaken as a part of in-field micro-siting, and other relevant information and plans for managing public safety and property. The Planning Secretary must approve the Field Development Plan before Phase 1, or any subsequent phase of development may begin.

Monitoring and review

- Pursuant to Development Consent Condition D8, an Annual Review of environmental performance will be submitted (every March) to the Department to evaluate and report on compliance with the Development Consent conditions. Conditions D9 and D10 provide for regular environmental audits to ensure compliance with all applicable regulations and conditions.

[581] Mr Dunn states that based on the framework described above, “Santos will avoid impacts so the Aboriginal cultural heritage sites are preserved and will largely remain

as they were prior to the commencement of the project". He states that the findings of the Department and the Independent Planning Commission support this view. He quotes from the Independent Planning Commission Statement of Reasons in his affidavit at paras 100(a) and 100(b), such quotations reflecting satisfaction with the Aboriginal Cultural Heritage Management Plan and related measures.

[582] In pt 2.3 of his affidavit, Mr Dunn provides details regarding the construction and rehabilitation of well pads. The size of each well pad is dictated by operational and safety considerations associated with operating coal seam gas sites. The minimum pad size to accommodate a rig is 1ha per well site.

[583] In pt 2.4 of his affidavit, Mr Dunn addresses the question of roads and access tracks. Existing routes and access tracks will be used where possible. Existing routes to the field, Bibblewindi and Leewood are the Newell Highway, X-Line Road and Old Mill Road. Various other forestry roads will provide access to locations within the field. Access to the Pilliga will not generally be affected. However it may be necessary to install fencing around well pads, equipment and infrastructure, for operational and safety reasons.

[584] In pt 2.5 of his affidavit, Mr Dunn deals with drainage and hydrology in the Narrabri Gas Project area. The Environmental Impact Statement assesses the hydrology and geomorphology impacts, in and around the Narrabri Gas Project area, as negligible. The Department and Water Expert Panel raised uncertainty concerning the geology and hydrogeology of the Narrabri Gas Project area, presumably due to lack of available information concerning deep strata, aquifer connectivity and faulting. Each of the Department, Water Expert Panel and Independent Planning Commission concluded that faulting in the rock structures under the Narrabri Gas Project area was unlikely to pose a major risk to, or have major impact on groundwater flow. Such uncertainties have been addressed through the implementation of a number of conditions, including conditions B30, B38, B39(e) and B41(d)(iv). These conditions include compensatory measures for landowners, the establishment of a Water Technical Advisory Group and a detailed water management plan for approval by the Planning Secretary.

[585] In pt 2.6 of his affidavit, Mr Dunn outlines the rehabilitation and site restoration measures that Santos will deploy in the Narrabri Gas Project area. He refers to Santos's

prior record of rehabilitation and relinquishment of well sites, including some in the Bibblewindi State Forest. Santos has also undertaken rehabilitation of produced water impacted sites, in consultation with regulatory agencies and experts. Mr Dunn refers to conditions B81 and B83 in the Development Consent conditions, which conditions identify rehabilitation objectives against which Santos's performance may be assessed and corrected, if required. He also details procedures regarding progressive rehabilitation of sites and conditions of relinquishment.

[586] In pt 2.7 of his affidavit, Mr Dunn states that Santos will comply with the NSW Code of Practice – Well Integrity. The code establishes a best practice framework for the design, construction and maintenance of gas wells in order to ensure the safe and environmentally sound production of gas. He further details technical processes concerning drilling and protection of aquifers and other reservoirs. He refers to ch 6 of the Environmental Impact Statement but does not provide page or paragraph references. Mr Dunn states that the Independent Planning Commission accepted the Water Expert Panel conclusions that the risk of inter-aquifer contamination from drilling is minimal, if correct procedures are followed. It has imposed conditions requiring compliance with the NSW Code of Practice – Well Integrity.

[587] In pt 2.8 of his affidavit, Mr Dunn asserts that the plugging and abandonment procedures for the gas wells will be completed in accordance with the NSW Code of Practice – Well Integrity. Mr Dunn sets out a procedure which includes sealing the well with cement, removing all infrastructure from the site and maintaining records related to reporting requirements.

[588] Part 2.9 deals with air quality and dust generation. Development Consent conditions B23 (regarding the "Air Quality and Greenhouse Gas Management Plan") and B41(d)(vii) (regarding the "Dust Suppression Protocol") deal with these matters. Condition B23 refers to a number of measures intended to monitor greenhouse gasses and to the Greenhouse Gas Emissions Advisory Group (to be established in accordance with the requirements of the Field Development Plan).

[589] Part 2.10 deals with noise impacts. Whilst noise may be a problem for persons living in the vicinity of the Narrabri Gas Project areas, it has not emerged as a significant problem for the Gomeroi applicant.

[590] In pt 2.11 of his affidavit, Mr Dunn refers to methods of managing water used and produced in drilling, known as "Produced Water". He outlines some of the procedures to be adopted by Santos in order to reduce risks to aquifers and groundwater bores as a result of drilling activities, including a "Produced Water Management Plan". The Independent Planning Commission considered that the conditions set out in the Development Consent conditions are acceptable. Mr Dunn discusses estimated volumes of water to be recovered under the Narrabri Gas Project, and the treatment and storage of such water.

[591] In pt 3.1 of his affidavit, Mr Dunn provides information concerning land access, rehabilitation and workplace engagement. He asserts that the Narrabri Gas Project can co-exist with other land uses, having regard to existing roads, tracks and infrastructure, and the flexibility in the location of infrastructure. The Field Development Protocol enables flexibility in the location of well pads, gas and water gathering lines, and access tracks. Constraints are set out at paras 165-168.

[592] In pt 3.2 of Mr Dunn's affidavit, Santos provides estimates of the quantities of native vegetation to be cleared for the Narrabri Gas Project. The Department report:

> … acknowledges that the total offset liability has been calculated based on a very conservative estimate that 989 ha of vegetation would be cleared. As outlined above, the realistic maximum clearing is likely to be between 247 and 626 ha or between 27% and 67% of the upper disturbance limit for all vegetation.

[593] Development Consent conditions B81 and B82 concern rehabilitation requirements and objectives. Development Consent condition B83 requires that Santos prepare a "Rehabilitation Management Plan" and lists the requirements of such plan.

[594] In pt 3.3 of his affidavit, Mr Dunn sets out Santos's proposed workplace engagement and management strategies, concerning the promotion of health, safety and wellbeing of the Narrabri Gas Project workforce, and their integration into the Narrabri community. The key measures will include a code of conduct applying to all workers during the construction and operation of the project, recruiting employees from the local area, supporting local community organizations, providing training and education opportunities for local Narrabri people and provision of scholarships, training and apprenticeship programs. Mr Dunn notes that two trainees commenced in January 2021. A further employee, who identifies as Gomeroi, has been engaged.

[595] At pt 4 of his affidavit, Mr Dunn asserts that the Narrabri Gas Project will make a significant positive contribution to the economy of New South Wales and regional communities through, for example, the creation of employment, increased investment, economic activity, royalties and tax revenue to the New South Wales Government. Mr Dunn refers to three documents which are exhibited to his affidavit: the "Department of Planning, Industry and Environment's Final Report" (the **Department Report**) on the Narrabri Gas Project, dated June 2020; Chapter 27 of the Narrabri Gas Project's Environmental Impact Statement, titled "Economics"; and a report prepared by ACIL Allen Consulting, dated 6 August 2020, titled "Narrabri Gas Project – Update of the Economics".

[596] At pt 5 of his affidavit, Mr Dunn outlines some of the factors to which Santos points in connection with the public interest. These factors include the following:

- potential to meet up to half of New South Wales's natural gas demand, powering more than 1 million homes and 33,000 businesses;
- securing future domestic supply:
    - within the regulatory framework outlined in the "NSW Gas Plan" and "NSW Future of Gas Statement" (see TD-18 and TD-19);
    - in an uncertain supply environment as described by the Australian Competition and Consumer Commission's inquiry (see TD-20); and
    - in anticipation of "… supply shortfalls in the southern states …" as stated in the Department's Report (see TD-2).
- identification as a "Strategic Energy Project" in the NSW Gas Plan (see TD-18);
- on a lifecycle basis, the production of 50% less carbon emissions compared to coal-fired production (see CSIRO research, TD-2);
- direct and indirect greenhouse gas emissions, including emissions from the downstream burning of gas, being less than 1% of Australia's total emissions;
- providing firming power for the transition towards renewable energy sources;
- the forecast creation of 1300 jobs during the construction phase, and approximately 200 direct and indirect jobs during the operational phase;
- economic inputs to the regional and New South Wales economy, including potential for a future industrial hub;

- development of programs involving local Aboriginal communities in relation to cultural heritage management, cultural awareness, environmental management, employment, training, and business development; and
- the Independent Planning Commission conclusion that "the project is in the public interest and that any negative impacts can be effectively managed with strict conditions".

[597] At pt 6.1 Mr Dunn identifies the environmental benefits of the Narrabri Gas Project, including the following non-exhaustive considerations:

- in the transition away from coal-fired electricity generation, gas will remain an importance source of direct power and firming power to support renewable energy sources;
- CSIRO research indicates that on a lifecycle basis, natural gas produces up to 50% less greenhouse gas emissions than coal, and can therefore reduce such emissions, if replacing coal (as accepted by the Independent Planning Commission);
- the NSW Energy Package Memorandum of Understanding (endorsed by the Commonwealth) at pt 2.3 of sch C, identifies the Narrabri Gas Project as a "priority project" in the context of the memorandum's objectives of "increasing gas supply and reducing emissions"; and
- as a domestic supply project, all Scope 3 emissions will be reported, mitigated and managed in accordance with Australian best practice standards, guidelines and policies.

[598] At pt 6.2 of his affidavit, Mr Dunn lists and explains the various standards, guidelines and legislation referred to in the Environmental Impact Statement Greenhouse Gas Assessment (TD-25), including the Commonwealth's "National Greenhouse and Energy Reporting (Measurement) Determination 2008", and the "National Greenhouse Accounts Factors". He describes the various types of emissions and the manner in which they are categorized, quantified and assessed. He states that emissions for the Narrabri Gas Project have been overestimated, rather than underestimated. The Environmental Impact Statement Greenhouse Gas Assessment states that in a typical year, the annual direct emissions from the Narrabri Gas Project would be less than 0.2% of Australia's current annual greenhouse gas emissions.

[599] In its Statement of Reasons, the Independent Planning Commission states that it considered a range of public submissions, including concerns regarding underestimating fugitive and greenhouse gas emissions from the Narrabri Gas Project, and its overall contribution to climate change. Mr Dunn relies upon statements made by the Independent Planning Commission in response to public concerns and refers to the conditions imposed by the Independent Planning Commission to address climate change issues, including increased risk of bushfire, and the need to limit greenhouse gas emissions. In para 225(c) of his affidavit, Mr Dunn identifies the Independent Planning Commission's conclusion that the Narrabri Gas Project is in the public interest, as it aligns with the NSW Gas Plan and NSW Energy Package Memorandum of Understanding. The NSW Land and Environment Court upheld the Independent Planning Commission's decision and reasoning.

[600] At pt 6.3 of his affidavit, Mr Dunn paraphrases Development Consent conditions B16, B19-B21, B23, B25 and D8-D9, each of which includes provisions intended to address greenhouse gas emissions and related climate change issues.

[601] At pt 6.4 of his affidavit, Mr Dunn asserts that in mitigation of climate impacts, Santos's standard practice is to consider, and if appropriate, to implement energy-efficient and greenhouse gas management measures in relation to its activities, where it is practicable and economical to do so. It lists a number of operational and reporting examples.

[602] At pt 7 of his affidavit, Mr Dunn responds to a number of issues raised by the Gomeroi applicant in its contentions, including the following:

- Exhibit JWM-4, p 1418, "An artist's impression of the Pilliga following construction of the wells" is inaccurate in that it depicts 25 well pads per 1km^2 area, rather than the maximum of four permitted under Development Consent condition B1. Mr Dunn expects that significantly greater separation distances between wells will be adopted.
- Waste generated by the Narrabri Gas Project will be reused and recycled wherever possible, in accordance with the Waste Management Plan required by Development Consent condition B70.
- Santos always intended natural gas from the Narrabri Gas Project be made available to domestic markets.

[603] At pt 8 of his affidavit, Mr Dunn outlines information which he provided to the Gomeroi applicant regarding the production levy. He also "engaged at length" with Mr Meaton (who was advising the Gomeroi applicant). In particular he made it clear that the 5% production levy would apply to land where native title has not been extinguished and there was disturbance. He also told the Gomeroi applicant that the offer was of greater magnitude than any other project on the east coast, and that a 10% production levy would not be viable from Santos's point of view. The meetings in question were conducted on 15 December 2019 and 14 December 2020.

Cross-examination of Mr Dunn

[604] At ts 28, l 40 – ts 29, l 27, Mr Dunn explains his belief that the proposed grants will produce gas for the domestic market only. See also ts 43, l 10 and ts 71, l 42 – ts 73, l 38. Clearly, gas produced from the Narrabri Gas Project will be supplied to the domestic market.

[605] At ts 47, l 5, Mr Dunn agrees that the Narrabri Gas Project will emit greenhouse gas emissions, but does not agree that it will exacerbate climate change, given that Santos would be offsetting emissions through other sources. See ts 48, ll 5-7.

[606] At ts 50, ll 35-38, Mr Dunn agrees that there are no conditions requiring that Santos offset emissions.

[607] At ts 53, l 35, Mr Dunn agrees that the Gomeroi people believe that the aquifers in the Pilliga are connected, and that such information would not have been taken into account in the Environmental Impact Statement, apparently because the decision was based on best available sources, "considerations that we can touch, essentially, or analyse".

[608] At ts 59, l 40, Mr Dunn agrees that climate change is making natural disasters more frequent and more extreme.

[609] At ts 64, l 20, Mr Dunn states that the area of disturbance by the Narrabri Gas Project will be, at most, 998ha.

[610] At ts 66, l 40 – ts 67, l 4, Mr Dunn states that in the early life of the Narrabri Gas Project, most of the drilling will be "in the forest", but as it proceeds, the distribution would be "proportionate".

Affidavit of Mr Kreicbergs

[611] Mr Kreicbergs is the Manager Cultural Heritage, Aboriginal Engagement and Land with Santos. He is responsible for the day to day cultural heritage and native title aspects of the Narrabri Gas Project. He has undertaken undergraduate study in archaeology and palaeoanthropology at the University of New England, and holds a Diploma of General Studies (Anthropology) from the University of Southern Queensland. Mr Kreicbergs' affidavit sets out, amongst other matters, the means by which Santos will avoid or minimize any effects that the Narrabri Gas Project may have on identified Aboriginal cultural heritage within the Narrabri Gas Project area, and any other tangible or intangible Aboriginal cultural heritage which may be identified during the course of the Narrabri Gas Project.

[612] Part 3 of Mr Kreicbergs' affidavit sets out, in some detail, matters which, when combined, appear to respond to some of the concerns raised by the Gomeroi applicant regarding the impacts upon their cultural heritage and enjoyment of their native title rights and interests in the Narrabri Gas Project area.

[613] In pt 3.1 of his affidavit, Mr Kreicbergs asserts that Santos is the largest domestic gas supplier in Australia. It has been working in the area for 65 years and, in the Narrabri region, for ten years. Although Mr Kreicbergs refers to an overarching policy based on "avoidance" with respect to Aboriginal cultural heritage, no such policy is annexed to his affidavit. He states that Santos prefers that traditional owners manage their own cultural heritage as the best way to minimize impacts upon them. Although there is no policy to support this stated "aim", Mr Kreicbergs outlines seven points which he claims demonstrate Santos's resolve to achieve that aim. The points include:

- complete avoidance of the most important cultural heritage sites or locations, and "maximum avoidance" of other cultural heritage sites;
- respecting native title rights and interests by, for example, ongoing consultation and investigation to augment cultural knowledge;
- Santos's indigenous employment, training and education opportunities, with regular notification of employment opportunities;
- meeting regularly with the Gomeroi applicant;
- extended negotiation pursuant to the Native Title Act;

- meeting with, and consulting with other Registered Aboriginal Parties and Local Aboriginal Land Councils in preparation for the Environmental Impact Statement process; and
- establishing a Gas Community Benefit fund for all members of the local community.

[614] Matters arising under s 39 of the Native Title Act are dealt with in pts 3 and 4 of the affidavit. In pt 3.2 of his affidavit, Mr Kumarage sets out the grounds upon which the Independent Planning Commission approved the development application, and then identifies the various conditions. In substance, the conditions include provisions preventing any disturbance to identified Aboriginal cultural heritage other than in accordance with an approved Field Development Plan, formulated in consultation with the Aboriginal Cultural Heritage Advisory Committee. In the event that any new Aboriginal cultural heritage is identified, the Committee is to be consulted. Santos was also required to develop an approved Aboriginal Cultural Heritage Management Plan, which plan conformed to statutory requirements and various standards, including consultation with traditional owners and Registered Aboriginal Parties.

[615] In pt 3.3 of Mr Kreicbergs' affidavit, he states that in addition to the Development Consent conditions, Santos has committed to the implementation of an Additional Research Program to identify Aboriginal cultural values in relation to the Narrabri Gas Project area. This commitment is contained in para 5.7 of the approved Aboriginal Cultural Heritage Management Plan. The matter is referred to in various parts of this determination.

[616] Parts 3.4 and 3.5 detail the extent of consultation and research undertaken by Santos and Central Queensland Cultural Heritage Management in order to identify Aboriginal cultural heritage for the Narrabri Gas Project, and measures for the continued protection and management of such heritage. Dr Godwin's team at Central Queensland Cultural Heritage Management held 10 meetings, as part of its preparation of the Aboriginal Cultural Heritage Assessment Report. Santos issued notices seeking engagement from the community and held meetings with the Aboriginal Cultural Heritage Advisory Group, the Gomeroi applicant, Registered Aboriginal Parties and Local Aboriginal Land Councils. Representations made by the Aboriginal Cultural Heritage Advisory Group

and various Registered Aboriginal Parties were considered and included in the draft Aboriginal Cultural Heritage Management Plan.

[617] In pt 3.5, Mr Kreicbergs advises that the Aboriginal Cultural Heritage Advisory Group met on three occasions during 2021, and that the committee included Ms Natasha Talbott, Mr Donald Craigie, and Ms Maria (Polly) Cutmore, representing the "Native Title Party".

[618] In pt 3.6, Mr Kreicbergs deals with the impact of the Narrabri Gas Project on Aboriginal cultural heritage and native title rights and interests. In substance, Mr Kreicbergs says that project construction and infrastructure will probably affect less than 1% of the total Narrabri Gas Project area, and that of that area, native title is likely to have been extinguished over approximately 53%. Hence any impairment to native title rights and interests will be minimal. Mr Kreicbergs further relies upon the provisions of the Aboriginal Cultural Heritage Management Plan, including the "avoidance principle", buffers, pre-clearance survey processes (conducted by Gomeroi-appointed Cultural Heritage Officers) and the "New Find Measures", being measures directed towards the protection of Aboriginal cultural heritage and related native title rights and interests. In paras 162-163 of his affidavit, Mr Kreicbergs states that to the best of his knowledge, the majority of persons comprising the Gomeroi applicant do not regularly access, and do not have any direct cultural connection to the Narrabri Gas Project area. He considers that the Narrabri Gas Project is unlikely to restrict the Gomeroi people's existing use of the area. On 20 October 2018, Santos hosted a site visit to the Narrabri Gas Project area. Mr Kreicbergs recalls that for many members of the Gomeroi applicant, it was their first visit to the Pilliga or the Narrabri Gas Project area.

[619] In pt 3.7, Mr Kreicbergs outlines his understanding of further statutory protections (additional to the Development Consent conditions) for Aboriginal cultural heritage under the National Parks and Wildlife Act, including offence provisions, the Aboriginal Heritage Information Management System database and associated reporting and consultation processes. Mr Kreicbergs considers that although the Narrabri Gas Project did not require an Aboriginal Heritage Impact Permit under the National Parks and Wildlife Act, the substance of the permit process has been captured by the Secretary's Environment Assessment Requirements. Mr Kreicbergs also notes that Aboriginal

places and objects may be listed under the Heritage Act and protected by conservation agreements under the National Parks and Wildlife Act.

[620] In pt 4 of Mr Kreicbergs' affidavit, he states that Santos intends to ensure that the Gomeroi people receive significant benefits from the Narrabri Gas Project, regardless of the outcome of negotiation, and for so long as the Gomeroi native title claim is on foot, or if the claim is resolved favourably to the Gomeroi people. Support to be provided by Santos would include matters such as the establishment of a corporate entity, cultural heritage, cultural awareness, environment, business development, training and employment, and facilitation of a liaison committee. Such support was the subject of correspondence between Ashurst and NTSCORP. The final position seems generally to be in accordance with Mr Kreicbergs' evidence. See letters dated 20 December 2021, 14 February 2022 and 17 March 2022.

[621] Mr Kreicbergs notes that his staff members regularly monitor the Aboriginal Heritage Information Management System database. Although he was aware of individual and community sentiment against the Narrabri Gas Project, he was surprised to learn that the Gomeroi applicant did not want it to proceed. He did not recall a "collective view" from the "Native Title Party" to that effect during any of his meetings with them. Nor did he recall any concern on the part of the Gomeroi applicant regarding "climate change". He recalled some negative views expressed by individual claim group members and some community members. Mr Kreicbergs is not aware of any Aboriginal communities within the Narrabri Gas Project area. To his knowledge, the persons comprising the Gomeroi applicant are not from the Narrabri community.

Cross-examination of Mr Kreicbergs

[622] At ts 114, l 12 – ts 115, l 12, Mr Kreicbergs agreed that the Additional Research Program (recommended by Dr Godwin) had not commenced, and that approval of the Aboriginal Cultural Heritage Management Plan was not a precondition to commencement. Mr Kreicbergs accepted that Dr Godwin identified a need for additional research based upon the Southern Brigalow Report, which report stated that there were spiritual and cultural values associated with the Pilliga forest. The Gomeroi applicant did not include the Southern Brigalow Report in its materials. The issue concerning the Additional Research Program is discussed in various parts of this determination. In the Aboriginal

Cultural Heritage Assessment Report, and subsequent Aboriginal Cultural Heritage Management Plan, provision was made for such additional research after the commencement of Phase 2 of the project, involving construction. In the course of proceedings, Santos has agreed that any determination be conditional upon the Additional Research Program being completed prior to the commencement of Phase 2. At various stages in these proceedings, the Gomeroi applicant sought to criticize Santos for not carrying out the program at some previous stage in the long history of this matter. However no logical basis for such criticism has been advanced.

[623] At ts 115, l 22 – ts 116, l 20, Mr Kreicbergs rejected the proposition that the Gomeroi applicant was unable to make an informed decision about the Narrabri Gas Project in the absence of the completed Additional Research Program. He stated that the Gomeroi applicant had opportunities from around 2014 to respond through the Environmental Impact Statement consultation process. He also stated that the Additional Research Program must be performed by the "right people". The members of the working group could not be identified until the Aboriginal Cultural Heritage Management Plan had been approved. Mr Kreicbergs accepted that Santos cannot say where the drilling for the wells in the Pilliga forest will occur. Only indicative maps have been provided. It is clear, however, that all drilling will be within the Narrabri Gas Project area.

[624] At ts 117, ll 8 – 16, Mr Kreicbergs indicated that prior to any activity on the ground, the Gomeroi will, under the Aboriginal Cultural Heritage Management Plan, assess the location and, if sensitive, tangible or intangible values are identified, such locations will be excluded.

[625] At ts 118, ll 15-21, Mr Kreicbergs agreed that if the Additional Research Program demonstrates that the whole of the Pilliga forest (that is, including the Narrabri Gas Project area) is imbued with spiritual beings, and objection is made to any drilling of wells in the Forest, Santos will not drill there. At ts 136, l 41 – ts 137, l 12, Mr Kreicbergs accepts that if Santos is denied access to the Pilliga as a whole (that is, including the Narrabri Gas Project area), there would be no project. However the relevant question, for present purposes, concerns only the Narrabri Gas Project area, a very small part of the Pilliga. The relevant question is whether that area is "imbued with spiritual beings and meaning and power". There is little or no evidence concerning that matter.

[626] At ts 135, ll 8-10, Mr Kreicbergs agreed that native title rights and interests may include the right to maintain and protect sites and places of significance, which sites and places may not be "picked up" by the State cultural heritage regime. Mr Kreicbergs agrees that the New South Wales cultural heritage laws with regard to Registered Aboriginal Parties, do not align with Santos's policy regarding cultural heritage protection in Queensland. Obviously, in the Narrabri Gas Project, Santos will have to comply with New South Wales legislation.

[627] At ts 136, ll 27-39, Mr Kreicbergs agreed that where there is evidence disclosing that places are of particular significance, Santos will avoid those areas. However he also accepted that where damage cannot be avoided, minimization of destruction might be attempted. He also said that in the initial phase of operations, about 66% of activity will be on native title land, the balance being freehold.

[628] At ts 139 - 140, Mr Kreicbergs agreed that within the Pilliga forest, there are parcels of freehold and leasehold land where Santos intends to drill. I do not understand his evidence to detract from the proposition that all drilling will take place within the Narrabri Gas Project area. Areas to the north of the Narrabri Gas Project area are predominately used for cattle grazing, cropping, and cotton irrigation. See ts 141, ll 4-6. Mr Kreicbergs concludes that if some of the State forest areas are determined to be of high cultural value, such areas would be factored into the project planning under the Aboriginal Cultural Heritage Management Plan. If areas cannot be accessed, they become exclusion zones which will be avoided for the lifecycle of the Narrabri Gas Project. If the advisory group, under the Aboriginal Cultural Heritage Management Plan, concludes that there are areas of high significance which should be avoided, Santos will accept that decision and not engage in minimization. See ts 141, l 45 – ts 142, l 3.

[629] At ts 167, Mr Kreicbergs agrees that clearance work has been undertaken on the basis of the Ashurst native title audit, which audit identifies areas where native title is likely to have been extinguished. Mr Kreicbergs agrees that Ashurst has reported that native title rights and interests may exist over approximately 46% of the Santos project area, and that 80% of initial cultural heritage clearance work will be done in that area. Cultural heritage clearances will be performed over all land tenures.

[630] At ts 167, ll 26-31, Counsel asked how Santos proposed to "acknowledge" the native title rights and interests which "may be extant in the area", given that Santos opposes "important conditions proposed by the Gomeroi relating to cultural heritage". The question was potentially argumentative. However Mr Kreicbergs indicated that the working group, composed of Gomeroi people, would inform each phase of the operation. Further, three members of the Gomeroi applicant would be members of the advisory group. At ts 168, ll 2-5, Mr Kreicbergs stated that the Gomeroi applicant will be "directly informing", the Cultural Heritage Management Advisory Working Group, "on the ground". As noted above, the Cultural Heritage Advisory Group met on three occasions in 2021.

[631] At ts 169, ll 2-28, Mr Kreicbergs agreed that the Aboriginal Cultural Heritage Management Plan does not mention native title rights and interests, nor does it contain any information relating to cultural heritage and values. The absence of such information apparently reflects State legislation. Mr Kreicbergs asserted that Santos is committed to remedying this deficiency, if that it be. The cross-examination at ts 170, ll 4-23 seems to be rhetorical rather than forensic. Mr Kreicbergs accepted that clearances to be conducted under the Aboriginal Cultural Heritage Management Plan may be predominantly in the lower (southern) two-thirds of the Narrabri Gas Project area. He agreed that 80% of the proposed 450 wells will be located in the southern section of the Narrabri Gas Project area, which area is presently largely undeveloped. Mr Kreicbergs agrees that the existence of roads and pipelines may fragment "presently un-fragmented forest" (ts 171, ll 5-6). He also agreed that the Narrabri Gas Project will restrict the ability of people to move through the forest in the way in which they currently do. However he pointed out that other areas, not presently accessible, may become accessible. Mr Kreicbergs stated that throughout the lifecycle of the Narrabri Gas Project, the process of cultural heritage clearances will give the Gomeroi people access to, and the ability to assess cultural values of the Pilliga.

[632] At least part of the thrust of this cross-examination appears at ts 169, ll 20 – ts 170, l 2. Counsel seems to be asserting that the negotiation process pursuant to s 31(1) may be the, "only opportunity for native title to be expressly considered and dealt with with any certainty in relation to this project". Mr Kreicbergs seems not to have accepted that proposition, saying that Santos would prefer to continue working with the Gomeroi applicant "to progress economic outcomes, procurement". Counsel for the Gomeroi

applicant sought to dismiss any such activity, apparently on the basis that Santos would be under no obligation to participate. Nonetheless, Santos has frequently expressed the intention to work co-operatively with the Gomeroi applicant.

[633] A second point being made by the Gomeroi applicant seems to have concerned possible limitation of access as the result of the construction of roads and pipelines, particularly by "fragmentation". However the cross-examination at ts 171 seems not to distinguish between the Narrabri Gas Project area and the wider Pilliga area.

[634] At ts 178, ll 15-36, Mr Kreicbergs agreed that it is a condition of the Independent Planning Commission's approval of the project that Santos avoid all direct and indirect impacts on Aboriginal cultural heritage items.

Affidavit of Dr Godwin

[635] Dr Luke Godwin is the Director of Central Queensland Cultural Heritage Management (the **CQ Management**). That organization was engaged by Santos to prepare an Aboriginal Cultural Heritage Assessment Report (**the Report**) concerning the Narrabri Gas Project. Dr Godwin is an archaeologist with over 41 years of experience. Of that time, he has spent 40 years in Aboriginal cultural heritage management in Australia.

[636] Dr Godwin's report was prepared in accordance with the "Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW", issued by the Office of Environment and Heritage, and the "Secretary's Environmental Assessment Requirements". It was completed in November 2016. In addition to the preparation of the Report, CQ Management was engaged by Santos to provide general advice regarding Aboriginal cultural heritage, review a draft Aboriginal Cultural Heritage Management Plan, to undertake fieldwork, including verifying sites, to attend meetings with Registered Aboriginal Parties and the Gomeroi applicant, and to create a Geographic Information System. In around 2017, CQ Management ceased to be involved in the Narrabri Gas Project.

[637] Whilst retained by Santos, CQ Management undertook consultations with over 500 people, entities and agencies, who were Registered Aboriginal Parties, who/which responded to advertisements and correspondence regarding the Narrabri Gas Project. Dr

Godwin said that Gomeroi people registered as Registered Aboriginal Parties for the Narrabri Gas Project.

[638] Sections 3.1 and 3.2 of the Report define the nature and extent of Dr Godwin's consultations. Such consultations include providing project information to all Registered Aboriginal Parties, a series of meetings (which were held in Wee Waa, Narrabri and Gunnedah, in the latter half of 2014) and a field trip on 17 September 2014. Issues and submissions raised by the Registered Aboriginal Parties and responses to the same were collated and are annexed to the Report. A final meeting with Registered Aboriginal Parties was held in November 2014. In addition to meetings, Registered Aboriginal Parties and the Gomeroi applicant had opportunities to advise CQ Management or Santos of matters related to their cultural heritage. Such opportunities were facilitated by Santos during its site inspections. Other opportunities to provide information about cultural heritage were also utilized. Various forms of communication were designed to accommodate individual sensitivities and confidentiality.

[639] In addition to such consultations, CQ Management engaged with the Gomeroi applicant and native title claim group through Environmental Impact Statement fieldwork, and at a meeting held on 7-8 March 2017. Dr Godwin personally attended five consultation meetings with Registered Aboriginal Parties.

[640] The purpose of the Report was to consult with Aboriginal communities, including Registered Aboriginal Parties, Local Aboriginal Land Councils, and the Gomeroi applicant, in order to determine and assess any impact of the Narrabri Gas Project on cultural heritage, and to develop mitigation measures to manage such impact. CQ Management identified key risks as follows:

- "previous development activities have had a profound impact on the cultural heritage sites that once existed throughout the region", so that avoidance of further damage to significant sites is of the utmost importance; and
- there was no single body of information available at the time at which the Report was being prepared, which information definitively identified the location of Aboriginal cultural heritage issues, and how they could best be managed to avoid or minimize impact.

[641] CQ Management conducted a cultural heritage assessment, including desktop studies, compiled a Geographic Information System, consulted with agencies, Registered Aboriginal Parties and the Gomeroi applicant, and completed a data audit and field surveys, in order to validate existing data. The cultural heritage assessment process was intended to capture both tangible (material) and intangible (non-material) heritage.

[642] The Report adopts a broad definition of Aboriginal cultural heritage, including all places of archaeological, traditional, historical or contemporary significance, so as also to include non-material/intangible cultural heritage as well as material/tangible cultural heritage.

[643] A key consideration was to determine the extent to which the "avoidance principle" could be applied to the Narrabri Gas Project so as to avoid impact upon Aboriginal cultural heritage, rather than to mitigate such impact. The "avoidance principle" constitutes "best practice for cultural heritage management", and applies equally to both tangible and intangible cultural heritage.

[644] Dr Godwin considers that, subject to a range of management actions, it is possible to apply the avoidance principle to protect Aboriginal cultural heritage in the Narrabri Gas Project area for many of the operational reasons referred to by Dr Godwin at HK-22, pp 8-9, and because no Aboriginal cultural heritage sites were located in the vicinity of the existing Bibblewindi facility. Only four such sites were identified in the area of the Leewood facility. With the exception of isolated finds, non-complex stone artefact scatters and non-complex shell middens, no mitigation programs will be required because there will be complete avoidance of impacts. Further, where mitigation may be required "standard procedures consistent with best practice will be implemented on a case by case basis" (at p 126).

[645] In addition to the avoidance principle Santos also plans to adopt the precautionary principle, as defined in HK-22, p. 126. Dr Godwin describes the effect of the precautionary principle as taking actions, reasonable and practicable, to minimise harm to a known Aboriginal object, and/or identifying such objects so that they can be managed in accordance with the law, and by implementation of reasonable and practicable management measures.

[646] Further, in addition to the adoption of the avoidance principle and the precautionary principle, Santos will undertake pre-clearance surveys prior to the initiation of ground disturbing activities. Any further identified sites or objects of significance will then be recorded and relevant protection measures taken.

[647] At pt 5.3.8 of his report, Dr Godwin sets out reasons for his recommendation (at pages 129-130) that an Additional Research Program be undertaken. Dr Godwin considers that information regarding places of cultural significance to Registered Aboriginal Parties was not forthcoming, despite the large project area and high participation of the Registered Aboriginal Parties. He considers that additional information is required in order to ensure the effective utilization of the avoidance principle. The CQ Management assessment concluded that there are particular places of cultural value in the Narrabri Gas Project area. The Additional Research Program would identify and record places and values of particular traditional, anthropological, historical and contemporary significance to Aboriginal People. That program was not to be linked to any proposed program of works, but was to be completed within 12 months of commencement of Phase 2. The Gomeroi applicant was particularly critical of the fact that the program has not yet commenced. However the justification for such criticism is unclear. As previously mentioned, the program will now be conducted before the commencement of Phase 2.

[648] In March 2017 Dr Godwin attended a meeting with the Gomeroi applicant, in order to present cultural heritage findings and recommendations for the Aboriginal Cultural Heritage Management Plan. His presentation was not challenged at the meeting. He does not recall any statements to the effect that the entire Narrabri Gas Project area was of, "particular significance and for that reason the Project was opposed". He recalls that the Gomeroi applicant asserted that the Gomeroi people, alone, should be involved in Aboriginal cultural heritage issues. See para 50.

[649] Dr Godwin states that, "I do not recall, at this meeting, any specific mention of the particular significance of the Pilliga by the Gomeroi. The significance of the area was discussed only in broad terms in relation to the significance of country to the Gomeroi". He further states, that, "I do not recall statements by the Gomeroi Applicant that the Project was against their wishes …". See paras 52 - 53.

[650] In appendix 3 to the Report, Dr Godwin refers to correspondence from NTSCORP, which correspondence indicates the Gomeroi applicant's willingness to discuss and evaluate the impact of the development on their culture and heritage.

[651] In pt 4.5 of his report, Dr Godwin states that the preparation of the Report complied with all relevant statutory requirements and guidelines and met best practice standards. He considers that the Report responded directly to issues raised during the consultation and research process. He says that the Gomeroi raised the significance of Yarrie Lake and other unidentified places in the Pilliga, leading to the 200m buffer around the lake. The Additional Research Program was recommended in order to identify places of significance identified by Registered Aboriginal Parties as likely to be associated with spiritual and creative beings, and to avoid creeks likely to be linked to Dreaming tracks.

[652] CQ Management concluded in its report, that the flexibility in the design of the project and "micro-siting" in accordance with the Field Development Protocol, would allow Santos to locate well pads and connecting linear structure, in order to avoid or minimize impact on known Aboriginal cultural sites and values, identified through additional recommended procedures, including the conduct of clearance surveys and the proposed Additional Research Program.

[653] Santos instructed CQ Management that it intended to observe best practice for Aboriginal cultural heritage through implementation of the avoidance principle. Dr Godwin considered that such approach was "a distinct possibility". Dr Godwin considered that Santos demonstrated a commitment to Aboriginal ownership and management of cultural information. He acknowledged that Aboriginal people should hold and manage information about their heritage.

[654] CQ Management reviewed the initial draft Aboriginal Cultural Heritage Management Plan (prepared by Santos), concluding that it was consistent with the Report. CQ Management considered that a 2021 version was also consistent with the CQ Management report. It strengthened protections and provided ongoing consultation with Aboriginal people. Dr Godwin considers that both versions of the Aboriginal Cultural Heritage Management Plan, if followed, offer sufficient protection of tangible and intangible Aboriginal cultural heritage.

[655] At pt 7 of his affidavit, Dr Godwin responds to some of the contentions raised by the Gomeroi applicant in these proceedings. In response to the Gomeroi applicant's contentions regarding the particular significance of the Pilliga, Dr Godwin states that CQ Management had anticipated that there would be elements of non-material Aboriginal cultural heritage. However no detailed information regarding such matters was forthcoming. Nor is there any such material concerning the Pilliga "as a whole". The Gomeroi applicant deals with this question at paras 188-208 of its contentions. It is dealt with elsewhere in this determination.

[656] At para 69 of his affidavit, Dr Godwin outlines his responses to the Gomeroi contentions regarding, "Mechanisms for protection of Aboriginal cultural heritage". He:

(i) states that the Office of Environment and Heritage Consultation Guidelines and Assessment Guidelines are components of a broader suite of regulatory and management measures for the protection of Aboriginal cultural heritage and that in such context, the Guidelines provide robust protection of such heritage;

(ii) asserts that CQ Management's awareness of limited information regarding intangible cultural heritage in the area led to its recommendation that there be an Additional Research Program to identify such heritage and to provide for its protection by listing it as a "site type" for "complete avoidance" in Schedule 3 of the Aboriginal Cultural Heritage Management Plan;

(iii) rejects the Gomeroi contentions regarding "reliance on the AHIMS database" as CQ Management relied upon a "variety of other resources" in addition to the Aboriginal Heritage Information Management System; and

(iv) rejects the Gomeroi applicant's contentions regarding the inadequacy of the avoidance principle in relation to sites of non-material culture and, regarding that matter, relies upon sch 3 to the Aboriginal Cultural Heritage Management Plan and previous statements in his affidavit at paras 35-39.

Cross-examination of Dr Godwin

[657] Dr Godwin agreed:

- at ts 77, ll 30-43, that Aboriginal cultural heritage includes both material and non-material finds, sometimes referred to as "intangible cultural heritage";

- at ts 78, l 8 – ts 79, l 11, that great value is placed upon stories transmitted orally in relation to places and sites, that such information forms part of a "knowledge economy" for people who possess and transmit that information, and that such information is often protected by confidentiality provisions;
- at ts 79, ll 9-32, that such information is ordinarily obtained by anthropologists doing "fieldwork";
- at ts 80, lls 44-45, that there have been many native title determinations in which the native title right to protect and maintain places and sites of significance has been recognized;
- at ts 81, l 21-ts 83, l 10, that the Office of Environment and Heritage Consultation Guidelines provide a process whereby Aboriginal parties can contribute to culturally appropriate information-gathering and research methodology;
- at ts 83-84, that there may have been a different outcome in the quantity and quality of information received from Registered Aboriginal Parties if they had greater control over the preparation of the Report and the consultation process, including whether CQ Management was to be the provider; although Dr Godwin states, at ts 84, ll 6-46, that an opportunity was provided for people to identify the cultural knowledge holders; however CQ Management was not provided with that information;
- at ts 86, that the Report recognized a gap in the information provided to CQ Management, and that mechanisms were required to provide Registered Aboriginal Parties with opportunities to provide information to somebody whom they trusted;
- at ts 86, l 28 – ts 88. l 31, that the Report does not include a mechanism for obtaining ethnographic research (an example being that mythological sites were not included in the Aboriginal Heritage Information Management System), that being one of the reasons for recommending a report (the Additional Research Program); and
- at ts 88, that Schedule 3 of the Report includes information from Registered Aboriginal Parties, regarding specific cultural values in relation to the area.

[658] At ts 90, l 38 – ts 91, l 12, Counsel identified three paragraphs at para 62 of the Report, referring to the Pilliga as follows:

- the Pilliga forests are the location of a high density of sites of cultural significance;
- the Pilliga forests are a landscape invested with spiritual meaning and power; and
- the Pilliga forests are a landscape inhabited by a range of spiritual beings.

[659] At ts 91, ll 9-12, Counsel suggested to Dr Godwin that notwithstanding the inability to perform certain research, he had been able to observe that, "values existed that gave breath to particular values in the forest". Dr Godwin responded by pointing out that such statement was extracted from the Southern Brigalow Belt study. In other words, the observation was not necessarily his own. He was asked about protection of such "values" by minimization. The witness indicated that protection would be by way of avoidance and/or minimization. He accepted that somebody might say that because the whole area is culturally significant, Santos should not enter it, assuming that there was some evidence in support of the contention.

[660] Counsel suggested that it was for the person preparing the Report to identify such matters and advise the "proponents", so as to allow the Aboriginal Cultural Heritage Management Plan "to avoid that impact altogether". Dr Godwin rejected that proposition. At ts 91, he said that the point of the Aboriginal Cultural Heritage project was to review available data concerning the cultural values of the area and come up with strategies to manage those locations. The proposed Additional Research Program was expressly for the purpose of gathering information which was not readily available.

[661] It seems that the Office of Environment and Heritage in New South Wales had, at some stage, asked whether the Additional Research Program would result in a "connection report". That term is regularly used to describe a report concerning connection between a native title applicant for a native title determination, and the land or waters to which the application relates. The Gomeroi applicant sought to exploit this assertion, suggesting that in some way, the State was trying to conceal something. As the matter is said to go only to good faith, I deal with it elsewhere in this determination.

[662] At ts 92,ll 30-34, Dr Godwin agreed that if the information about the Pilliga forest in the Southern Brigalow region report was substantiated, it might lead to a recommendation that the area be avoided altogether. However he said that in his report

he had asserted that the avoidance principle would make it possible to avoid places of cultural significance. Counsel then asked Dr Godwin whether he agreed that Mr Kumarage's report, taking into account, the Southern Brigalow report, "goes some substantial way to 'fleshing out' the existence of a spiritual [sic] and a spiritual landscape invested with stories and spirit beings". The witness's answer is somewhat unclear. He first replied that he would think that Mr Kumarage's report "does that". He then pointed out that Mr Kumarage had cited "three reports that he … or whether they are affidavits or whether they were as he took some notes of people that he went into the field with, who made certain claims about that area". In other words, Dr Godwin was apparently uncertain as to Mr Kumarage's meaning or justification as to such views. Counsel put to him that he had no reason to disbelieve the information relied upon by Mr Kumarage. Dr Godwin said that he did not. At ts 93, ll 7-19, Counsel seems to have sought further agreement, but none was forthcoming. Given the limitation upon Mr Kumarage's research (set out at para 45 of his report), it is difficult to know how to treat this aspect of Dr Godwin's evidence. However Dr Godwin accepts that the Southern Brigalow report suggests that some persons had said that there were, "significant cultural values in the Pilliga forest".

[663] At ts 95, Dr Godwin stated that the Aboriginal Cultural Heritage Management Plan indicates that the Additional Research Program will be carried out within 12 months of the commencement of Phase 2. Dr Godwin agreed that the Additional Research Program should be undertaken as a matter of urgency and importance for the purpose of effectively employing the avoidance principle. Santos has now proposed that the Program will be completed prior to the commencement of Phase 2. In the event that I determine that the proposed grants may be made, there will be a condition to that effect.

[664] At ts 97, Dr Godwin was asked how common it may be for an area as large as 500,000ha to be declared to be so significant that it prevented "work" from proceeding. Dr Godwin said that he had not seen such a large area being so treated.

[665] Dr Godwin's oral evidence has been of assistance in my understanding of the research which underlies the Report. The Report is thorough and well-researched. He readily acknowledged the limitation upon his work. In particular, pts 4.5.2 and 4.5.3 of his report offer a convincing description of the history of Aboriginal and European exploitation of the Pilliga area over many years.

c. The Gomeroi Applicant

Report of Mr Kumarage

[666] Mr Kumarage's report deals with three key topics:

i. the "cosmology" of the Gomeroi people, said to encompass beliefs regarding the origin of the universe, people, country, life, death and the spirit world;
ii. the adequacy and appropriateness of the Aboriginal Cultural Heritage Assessment Report and the Aboriginal Cultural Heritage Management Plan; and
iii. the impacts on native title rights and interests not considered in the Aboriginal Cultural Heritage Assessment Report or the Aboriginal Cultural Heritage Management Plan.

[667] Appendix 9 to Mr Kumarage's report is a document prepared by NTSCORP, setting out the scope of work required of him, having regard to items (i) to (iii) above. See Schedule 5 to this determination.

[668] NTSCORP engaged Mr Kumarage to prepare an expert report for this proceeding. NTSCORP did not however request that Mr Kumarage provide evidence as to past and present enjoyment of native title rights and interests relevant to a consideration under s 39(1)(a)(i). Mr Kumarage was instead asked to comment upon the "adequacy and appropriateness" of the Aboriginal Cultural Heritage Management Plan and the Aboriginal Cultural Heritage Assessment Report to assess impacts upon such enjoyment. The reference in the instructions to "enjoyment" suggests that NTSCORP was limiting the inquiry to s 39(1)(a)(i), as do the references to "native title rights and interests" and "native title". It is difficult to understand how Mr Kumarage could be expected to assess such impacts without first identifying evidence of current and past enjoyment of native title rights and interests in the Santos project area.

[669] Mr Kumarage refers to the Gomeroi as the "Gamilaraay". In his Executive Summary concerning key topic (i) above, Mr Kumarage at paras 5, 6, 7 and 8, said that:

> 5. Gamilaraay Country is not conceived of by the Gamilaraay people just in terms of its natural/environmental values, its economic use or occupational history, although all of these are also important. Gamilaraay people also have

a spiritual relationship to their country which is believed to have existed from time immemorial, i.e., the time of creation.

6. The spiritual relationship of Gamilaraay people to their country is defined by the travels and activities of creative beings such as the God-like figure [redacted], as well as a belief in ghosts and ancestral spirits, and other supernatural creatures such as [redacted] who are denizens of the forest and waterways. Together these represent the Gamilaraay cosmology, or the theory and beliefs of the origins of their country, its features, products, people and languages.
7. The Gamilaraay creative beings are not just associated with specific tangible sites such as hills, rock formations or waterholes. Some mythological sites are not tangible, in that they cannot be recognised except by Gamilaraay people with specific knowledge of the mythology and country. The country between sites, along 'Dreaming tracks', for example, is also culturally important.
8. Ancestral spirits, and the other supernatural characters are believed to have a generalised presence in country in Gamilaraay country. Similarly, waterways are generally associated with the Rainbow Serpents. Therefore, in Gamilaraay cosmology, it is not just particular sites that are significant, but landscapes, whether forests, waterways or flood plains.

[670] Concerning key topic (ii), Mr Kumarage makes a number of criticisms of the Aboriginal Cultural Heritage Assessment Report and the Aboriginal Cultural Heritage Management Plan, which criticisms can be summarized as follows:

(a) impacts caused by well pads and other infrastructure or "fragmentation" of "country" have not been adequately addressed in the Aboriginal Cultural Heritage Assessment Report;
(b) emphasis in the Aboriginal Cultural Heritage Assessment Report on tangible sites does not adequately consider intangible qualities such as mythological tracks, or the cultural integrity of the landscape;
(c) the cultural heritage sensitivity zones modelled in the Aboriginal Cultural Heritage Assessment Report are inadequate because they are based on stream and landform analysis;
(d) proposed infrastructure appears to be located within zones identified in the Aboriginal Cultural Heritage Assessment Report as "High Sensitivity", including near waterways;
(e) the avoidance principle is not adequate to protect the Pilliga forest, water courses, ancestral spirits and other supernatural beings;
(f) buffer zones varying between 20 – 100 meters around sites are inadequate;
(g) tensions between the Gomeroi claimant group and representatives of the Local Aboriginal Land Council, engaged to carry out pre-clearance surveys,

may impact upon the quality of the surveys and recording of relevant information;

(h) the Aboriginal Cultural Heritage Management Plan has not accounted for the cumulative impacts of the 25 year project;

(i) inadequate control of cultural heritage processes by traditional owners, for example determination of buffers, maintaining the Aboriginal Cultural Heritage Site Register, determining disputes between Cultural Heritage coordinator and Santos field officer, decisions regarding the engagement of experts, some inconsistency with Office of Environment and Heritage guidelines, and other matters; and

(j) recording, assessment and protection of cultural data and sites is not independent of Santos.

[671] Mr Kumarage also criticizes the Social Impact Assessment, at appendix T1 to the Environmental Impact Statement, on the basis that it does not address disputes within the Aboriginal community concerning, for example, divisions over the Narrabri Gas Project, or the distribution of benefits flowing from it. In para 181, he suggests that ceremonial and mythological sites and areas are unlikely to be mapped during pre-clearance surveys, due to a lack of trust between Santos and as between the Gomeroi and other knowledge-holders. He suggests that these tensions are a consequence of the Narrabri Gas Project, again, evidence supporting the opinion is not apparent. Mr Kumarage anticipates that the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group lack the capacity to organise and conduct effective pre-clearance surveys.

[672] As regards key topic (iii) described above (concerning impacts), Mr Kumarage believes that the following issues were not given adequate consideration in the Aboriginal Cultural Heritage Assessment Report or the Aboriginal Cultural Heritage Management Plan:

(a) restrictions on the right of access "…to a significant part of the Gomeroi Application Area"… "the exercise of every one of the claimed rights would be affected to some extent";

(b) restrictions caused by safety limitations such as fencing and the impact upon claimed native title rights and interests such as camping, erecting shelters, use and enjoyment, holding meetings, hunting, fishing, gender restricted rituals;

(c) loss of Gomeroi claimants' asserted right to control access to, or use of lands and waters within the claim area by other Aboriginal people in accordance with traditional laws and customs;

(d) any pollution or reduction in water flows caused by the proposed project and impacting upon claimed native title rights to fish, use water resources and maintain places of importance; and

(e) impacts of traffic, noise and dust upon the enjoyment of rights.

[673] In his discussion concerning access, Mr Kumarage fails to refer to non-native title interests and other tenures presently located in the Narrabri Gas Project area, or to the impacts which these matters may have had and continue to have on the Gomeroi people's asserted rights to access and control the relevant area.

[674] During cross-examination, Mr Kumarage accepted that his report does not identify specific native title rights and interests which are, in fact, exercised by the Gomeroi on the Narrabri Gas Project area. It rather addresses claimed rights.

Cross-examination of Mr Kumarage

[675] It is fair to say that Mr Kumarage had only a limited opportunity to gather information for his report. He spoke to members of the Gomeroi claim group by telephone but had no on-site consultation. He was engaged as an anthropologist in connection with the native title claim application filed in 2011. He agreed that his research conducted for the purposes of his current report does not offer a strong basis for forming final opinions. He accepts that his opinions may be described as "preliminary".

[676] Mr Kumarage considers that areas of intangible cultural significance may not include physical sites, but may include Dreaming lines and areas between sites. Intangible cultural heritage can be identified and mapped by people with relevant knowledge. See ts 217, ll 19-22. He also agrees that the definition of Aboriginal cultural heritage in the Aboriginal Cultural Heritage Management Plan is broad enough to cover both tangible and intangible cultural heritage. See ts 217, ll 12-13. Mr Kumarage accepted that the

Plan recommends an Additional Research Program, which Program may address the absence of data regarding matters of intangible cultural heritage or myth. He agreed that theoretically, such additional research could identify areas of intangible heritage or myth. He suggested that if such research had been done at an earlier stage, a "swathe of country" might have been identified as significant. As previously noted, the present intention is that such research will be done prior to the commencement of Phase 2 of the Narrabri Gas Project. Mr Kumarage considers that the proposed additional research will "not work well for larger areas" such as "landscape, or something intangible". See ts 218 to ts 219. However he offered no further explanation as to this matter.

[677] At ts 220-222**,** Mr Kumarage was cross-examined concerning matters associated with para 184 of his report. In paras 184-186, Mr Kumarage addressed the question of control of the Aboriginal Cultural Heritage Management Plan. He considers that such control should be exercised, according to "best practice", by "relevant Aboriginal organizations, representing the traditional owners of the area". He asserted that Santos will have ultimate control over the Aboriginal Cultural Heritage Management Plan. At ts 230, ll 21-22, Mr Kumarage accepted that he does not have experience in connection with such plans. His views in cross-examination, at ts 220, l 14 to ts 222, l 19, should be understood in that context.

[678] Mr Kumarage was cross-examined concerning para 136 of his report. He there dismissed the flexibility with which Santos would accommodate the location of areas of tangible and intangible cultural heritage. See ts 222, l 36-ts 224, l 23. He seemed to be concerned that Santos's flexibility in locating infrastructure, so as to avoid cultural sites, may lead to such infrastructure being located in other areas having intangible cultural heritage significance. The reason for his concern is unclear. If it is possible to identify a site which should be avoided for cultural reasons, it should be possible to ensure that any proposed alternative site does not pose similar problems.

[679] Mr Kumarage asserts at paras 27-30 of his report as follows:

> 27. The Narrabri Gas Project would not affect the ability of the Gomeroi claimants to exercise the claimed native title rights throughout the entire Gomeroi Application Area. However, within the Narrabri Gas Project Area, and to varying degrees in adjacent areas, especially within the Pilliga Forest, the exercise of every one of the claimed rights would be affected to some extent. This is because the ability to exercise any of the claimed native title rights within the Narrabri Gas Project Area are dependent, in the first instance, on the right of access which will be restricted to a significant part of the Gomeroi Application Area.

> 28. In my opinion, all the other asserted native title rights will be affected, to some degree, by the loss of access to a significant proportion of the Gomeroi claimants' country. The ACHAR and the CHMP under-estimate the impact of loss of (or reduction in) access to country, in my opinion.
>
> 29. The claimed native title rights that would be impacted by the proposed Narrabri Gas Project include, for example, the rights to use and enjoy, move about, camp on, erect shelters on, live on, enter or remain on, hold meetings on, hunt, fish or access and use natural resources on the parts of the Gomeroi Application Area that are within the Narrabri Gas Project Area.
>
> 30. The CHMP gives Santos the right to control access to the Narrabri Gas Project Area. This will result in the loss of the Gomeroi claimants' asserted right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.

See also the further concerns identified in paras 31-34 of his report.

[680] Counsel cross-examined Mr Kumarage concerning his repeated assertion that native title rights and interests will be affected by the reduction of available access to a significant proportion of the native title claim area. See, for example, para 28 of his report. At ts 224, ll 34-40, he agreed that the "significant proportion" in question is the "total area of the project compared to the Gomeroi claim area", in his view, the former comprising 8.4% of the latter. At ts 226, ll 15-30, it was pointed out to him that the actual percentage is 0.84%. Nonetheless, he then asserted that 0.84% also constituted a culturally significant proportion. It is difficult to accept that assertion at face value. One would have expected some explanation.

[681] The fundamental flaw in Mr Kumarage's assertions is the absence of any explanation as to how activity within the Narrabri Gas Project area will have such wide-ranging effects over all or any of the balance of the native title claim area, including the much-discussed Pilliga. There is no evidence of such wide-ranging, or any effect on water quality or quantity, or as to the impact of traffic noise and dust within or outside of the Narrabri Gas Project area. Further, Mr Kumarage is here expressing views concerning the Narrabri Gas Project area, not the effect upon the Santos project area.

[682] At ts 225, Mr Kumarage said that his report addresses the claimed native title rights and interests, arguing that exercise of such rights and interests depends on access, which access will be limited. This approach fails to address the focus in s 39(1)(a)(i) upon "enjoyment" of such rights and interests as demonstrated by the cases cited elsewhere in this determination. The failure by the Gomeroi applicant, and Mr Kumarage, to appreciate this distinction is of considerable significance in this case. There is little or

no evidence as to the extent to which the Gomeroi people have enjoyed such rights and interests in the past, or are now enjoying them.

[683] All of this evidence is speculative. The value of such evidence is further undermined by Mr Kumarage's assertion that the Narrabri Gas Project area occupied 8.4% of the Gomeroi native title claim area when, in fact, the correct percentage was 0.84%. His assertion that the latter percentage was "significant" for present purposes, without explanation is somewhat concerning. I must also keep in mind the difficulties which Mr Kumarage apparently experienced in researching for and preparing his report.

[684] At ts 225, ll 1-7, and ll 33-47, Mr Kumarage seemed to overstate the visible impact of the wells, suggesting, or at least implying that wells will be visible, throughout the Narrabri Gas Project area. Apart from anything else, that proposition overlooks the fact that the program will be staged over 25 years. Again, Mr Kumarage's evidence is unconvincing.

[685] At ts 226, l 43 – 227, ll 27 Mr Kumarage agrees that in his report the term "the Pilliga" is used to refer to a forested area which is larger than the Narrabri Gas Project area. He agreed that the term "Pilliga" includes a number of State forests, national parks and other reserves, and that he does not, in his report or his evidence, "go into detail" about the specific parts of the Pilliga to which his stories and ethnographical detail relate. He qualified such extent only by asserting that he had mentioned Bohena Creek "and a couple of sites".

[686] Finally, Mr Kumarage suggests that any pollution of water sources may impair the cultural heritage values identified in his report. However he does not claim expert knowledge concerning that possibility, or offer any reasonable basis for his assertion.

Re-examination of Mr Kumarage

[687] At ts 228, ll 29-30, Mr Kumarage agreed that he does not know the area occupied by the Pilliga forest in pre-colonial times. At ts 229, ll 6-16, he said that he believes that although it is possible to move a well pad, "here and there to avoid an artefact scatter", he doubts whether it is possible to use the same method if a large part of the project area is found to be traditionally significant. As with other aspects of his evidence, Mr Kumarage seemed to assume a "worst case" scenario, with no apparent justification for

doing so. He assumed that, "a lot of" artefacts are likely to be affected by the proposed siting of infrastructure. Whilst that situation may arise, it seems likely that such an area would be identified at an earlier stage, perhaps in the course of the Additional Research Program. His suggestion that, "it seems to me a bit back-to-front", echoes the earlier suggestion in other parts of the evidence that Santos provide locations for its wells before further information has been obtained as to cultural sites, tangible or intangible. Common sense dictates that information as to cultural sites should be, as far as is practicable, located before the well pads are sited.

[688] At ts 230, Mr Kumarage notes that he has not had previous experience with Aboriginal cultural heritage management plans. It is difficult to assess the significance of such lack of experience.

[689] Three further points should be made concerning Mr Kumarage's evidence and the three dominant topics identified above. First, much of Mr Kumarage's evidence concerning cosmology is not directly relevant to this matter. The more useful evidence comes from the claim group deponents. His evidence assists in understanding their evidence. For this reason I have not set out that part of Mr Kumarage's evidence in detail. As to the second topic, the purpose of the Aboriginal Cultural Heritage Assessment report and that of the Aboriginal Cultural Heritage Management Plan must be kept in mind. The Report is dated November 2016. It reports on Aboriginal cultural heritage values, impacts and management. It identifies "potential environmental issues associated with construction and operation of the [Narrabri Gas Project]". It also addresses the Secretary's environmental assessment requirements for the Project. It was to be used to support the Environmental Impact Statement. It is difficult to see any point in NTSCORP's request that Mr Kumarage comment on its adequacy and appropriateness for assessing the impact of the Project on native title rights and interests in the Narrabri Gas Project area. Nor is there any point in enquiring as to "kinds of categories" of impact on native title rights not considered in the Report.

[690] Mr Kumarage was instructed in early October 2021. By that time the Report was of merely historical interest. It had apparently satisfied the Secretary. As to the Plan, it was prepared for inclusion in the Development Consent. It was approved in March 2022.

[691] It cannot seriously be suggested that this Tribunal should reconsider those documents, in particular, the Plan, simply because Mr Kumarage considers that it should have dealt with matters in other ways and/or addressed other matters. Neither document is directly relevant to my present task, although they may have some indirect relevance.

[692] As to the third topic, the key to understanding s 39(1)(a) is the word "effect". In order to demonstrate an effect, one must show that, if the proposed grants are made, relevant circumstances will, after the grant, differ from those before the grant. For example, guidance as to the likely enjoyment of rights and interests after any grant can most usefully be acquired through an understanding of the enjoyment of such rights and interest prior to any grant. NTSCORP's failure to request such information from Mr Kumarage led to his addressing the list of registered native title rights and interests, rather than the enjoyment of such rights and interests in the Santos project area.

[693] The evidence of the claim group deponents has been summarised as part of the Summary of the Gomeroi applicant's contentions below.

3.1.2. Summary of the Parties' Contentions

a. The Gomeroi Applicant

[694] Concerning s 39, in its points of claim, the Gomeroi applicant identifies the following propositions:

(a) at para 11, Gomeroi tradition imposes an obligation to "care for country", including preserving and preventing damage or destruction to particular landscape features, elements, flora and fauna;

(b) at para 12, the Pilliga forest, as a whole, is a place of "particular spiritual significance", to the Gomeroi people and there are, "special sites of particular significance to the Gomeroi within the Pilliga forest and at Yarrie Lake";

(c) at para 13, the Gomeroi people exercise all of the registered native title rights and interests within the Pilliga forest;

(d) at paras 14-18, the proposed grants will have, or will likely have, the following effects:

i) clearing of significant amounts of vegetation and fragmentation of remaining vegetation;

ii) reducing or preventing access to country within the footprint of the proposed grants;

iii) significant and permanent ecological impacts including possible leaks, spills and contamination of groundwater with, for example, radioactive uranium, methane and other pollutants;

iv) continued disruption of the development of Gomeroi social, economic and cultural structures; and

v) significant damage to the environment, economy and mental and physical wellbeing of human beings in Narrabri, New South Wales and Australia, through greenhouse gas emissions and contribution to climate change.

[695] It must be kept in mind that the Gomeroi applicant is dealing with the Pilliga as a whole, not the Narrabri Gas Project area or the Santos project area.

[696] At para 19, the Gomeroi applicant declares its opposition to the proposed grants. However, it also states that if the proposed grants are approved by the Tribunal, the grants should only be made, "in accordance with an agreement authorized by the native title claim group." The basis for such a requirement is unclear.

The Gomeroi Applicant's Revised Contentions

[697] The Gomeroi applicant's submissions do not reflect the structure of s 39(1). I have, however, adopted its headings. This has led to some difficulty in matching the Gomeroi applicant's contentions to those of the State and Santos. For that reason, I have considered the Gomeroi applicant's primary contentions and the contentions in reply before adding the other parties' contentions. I shall treat the contentions of the other parties in the same way.

Effects of the Proposed Project

[698] At paras 183 - 187 of the Gomeroi applicant's contentions, it asserts that the Tribunal should assume that the native title rights and interests listed on the Register are currently exercised and enjoyed by Gomeroi people within the whole of the claim area, including the Narrabri Gas Project area, and would therefore be affected by the proposed grants. The expression, "would therefore be affected by the proposed grants" is derived from para 184 of the contentions. The reference seems to be to the effect of the proposed grants upon registered native title rights and interests. Such proposition is fundamentally misconceived. Section 39(1)(a)(i) addresses effect upon enjoyment of registered native title rights and interests, not the effect upon registered native title rights and interests.

[699] In *WMC Resources v Evans*,[65] Member Sumner stated at [30] that:

> The Tribunal must assume for the purpose of this inquiry that the native title rights and interests which potentially could be effected are those set out in the Register of Native Title Claims and then consider evidence of what are the likely effects of the act on those registered native title rights and interests. The introduction of the word 'enjoyment' in s 39(1)(a) must also be taken into account and implies that the Tribunal must make an assessment of the effect of the act on present usage and future amenity. The fact that the Tribunal must now look at the enjoyment of the native title rights and interests reinforces the point that evidence needs to be given of how those registered native title rights and interests (whether determined or only claimed) are exercised and enjoyed. A mere statement, contention or assertion that interests claimed will be effected without evidence of their current use and the potential impact on them will not suffice to enable the Tribunal to make findings on this point.

[700] It follows that the Gomeroi applicant, in addition to asserting that the registered native title rights and interests exist and are enjoyed in the relevant area, must also, "produce evidence to support their contentions, especially when the facts are peculiarly within their own knowledge". See *WMC Resources v Evans* at [35]. In this regard, the Gomeroi applicant relies upon the affidavits of Mr Jitendra Kumarage, Ms Suellyn Tighe, Mr Jason Wilson and Mr Stephen Booby as evidence relevant to the criteria in s 39(1) (the claim group deponents).

Significance of the Santos Project Area to the Gomeroi

[701] The Gomeroi applicant submits that although the Pilliga forest has always been significant to them, the significance has intensified due to the clearing of large parts of

[65] (1999) 163 FLR 333.

the Brigalow Belt South bioregion, and because the Pilliga is a "key intact remnant of the bioregion". There is no evidence for the latter assertion.

[702] The Gomeroi applicant contends that although the State has identified a need permanently to conserve and protect natural and culturally significant areas, the Brigalow Act only reserves a small area of the "original Brigalow Belt South bioregion" for conservation management. There is no evidence to support the Gomeroi applicant's implied assertion that a larger portion of such bioregion should have been reserved for such purposes, or that excessively large areas were zoned under s 11 and sch 4 of the Brigalow Act for forestry, recreation and mineral extraction.

[703] The Gomeroi applicant does not accept that native title may presently cover only approximately 45.6% of the Santos project area, as indicated in the Santos "Audit Report". Santos has prepared a map, showing the areas where native title has likely not been extinguished. A large part of that area comprises State forests including: parts of the Bibblewindi State Forest, Jack's Creek State Forest, Pilliga East State Forest and Pilliga State Forest. The Gomeroi applicant asserts that each of these State forests is an area over which native title rights and interests may be exercised, having regard to the operation of s 211 of the Native Title Act and s 104A of the *Native Title (New South Wales) Act 1994* (NSW). Notwithstanding the identification of these State forest areas as particularly relevant for the purposes of s 211 of the Native Title Act, the Gomeroi applicant has not provided particulars of the enjoyment of native title rights and interests within, or in the vicinity of these State forests.

[704] The Gomeroi applicant relies upon particular paragraphs in the affidavits of Mr Kumarage, Ms Tighe and Mr Wilson to support contentions regarding the "Pilliga" as an area which has remained, "relatively physically unchanged since sovereignty", and as, "one of the remaining places where native title rights and interests are still able to be freely exercised". At para 120, Mr Kumarage states that, because of the scarcity of undisturbed tangible and intangible sites, the cultural significance of forests such as the Pilliga is increased. At para 58, Ms Tighe attests that due to the activities of forestry, mining and agriculture, she is no longer able to access some sites in Gomeroi country. However, at paras 58, 75 and 83, Ms Tighe states that the "Pilliga" remains an important place for cultural practice. At para 59 of his affidavit, Mr Wilson states that "The Pilliga forest is one of the largest tracts of Cyprus forest left in our country."

[705] There are at least two difficulties in considering the effect of the proposed grants for the purposes of s 39(1)(a), by reference to the evidence of Ms Tighe and Mr Wilson. Firstly, evidence detailing the nature of the cultural, environmental, and ecological significance of the Cyprus forest, or other particular ecological habitats within the Pilliga, presented by the Gomeroi applicant is limited. Secondly, the term "Pilliga" and "Pilliga forest" may or may not include the Narrabri Gas Project area, the Santos project area, the State forest areas or other features which can be related to the Santos project area. The terms "Pilliga" and "Pilliga forest" could refer to an area of around 5000km^2. The Narrabri Gas Project area comprises around 950km^2, or about one-fifth of the area said to comprise the "Pilliga". The evidence concerning the cultural significance of the Pilliga, such as it is, cannot be readily identified with any relevant locations within the Santos project area.

[706] The Gomeroi applicant submits that further detail cannot be provided specific to the Santos project area because the proposed locations of the well pads have not been disclosed. That may be so. However Santos has indicated that it will locate well pads so as to avoid culturally significant sites. Logic dictates that identification of such sites should precede the location of the well pads. There is no apparent reason for the Gomeroi applicant's not identifying evidence concerning sites located within the 923.9km^2 Santos project area or even the Narrabri Gas Project area. In any event, it seems likely that the Additional Research Program will remove any difficulty.

The Way of Life, Culture and Traditions, Social, Cultural and Economic Structures of the Gomeroi People

[707] The submissions regarding s 39(1)(a)(ii) and (iii) are dealt with together under this heading. The contentions refer to particular paragraphs in Mr Kumarage's report and the claim group deponents' affidavits. Whilst these paragraphs provide evidence of aspects of the criteria in s 39(1)(a) (ii) and (iii), the effects of the proposed grants on these criteria are not detailed here. They appear to be dealt with under part of the contentions, headed, "C.V The effect of the proposed Project on the Gomeroi".

[708] In any event, paras 198 – 206 summarize the evidence of the Gomeroi applicant in support of the central contention that "country", and in this case, "Gomeroi country", is part of an indivisible realm, comprised of the material and metaphysical, existing in an

inter-dependent continuum. The creation stories listed in para 201 from (a) to (j), and the map at p 32 of Mr Kumarage's report, are provided as evidence of Gomeroi cosmology.

[709] Mr Kumarage's evidence, and that of the claim group deponents regarding spiritual and custodianship obligations to care for "country", also refer to Gomeroi cosmology. Taken together the Gomeroi applicant submits that there is an overarching framework within which the Gomeroi way of life, culture, traditions, social, cultural and economic structures should be understood and evaluated for the purposes of s 39(1)(a). This framework appears to comprise the basis of the traditional law and customs of the Gomeroi. See *Milirrpum v Nabalco Pty Ltd*[66] at 167.

[710] At this point, it is convenient that I summarize the evidence of Mr Kumarage and the claim group deponents concerning these matters. The Gomeroi applicant contends that the evidence of the claim group deponents demonstrates the obligation to "care for country" including water, maintaining sites, preserving flora and fauna and undertaking spiritual practices. The evidence explains such practices, including:

- the totem system as a form of resource management, [redacted];
- sharing of food, for example, the meat of a kangaroo; and
- resource efficiency, for example, using the whole kangaroo for a range of uses beyond meat, and disposing of rubbish when camping.

The Gomeroi applicant appears to contend that the obligation to care for country is currently practised by members of the native title claim group through actions such as those described above. However it provides no detail as to specific actions and practices, including locations, frequency, and the number of persons involved. To assert an obligation or right does not necessarily lead to an inference that the obligation is being discharged or the right, enforced. Nor does such assertion relate such right or obligation to a particular area within a larger whole.

[66] (1971) 17 FLR 141.

[711] The Gomeroi applicant contends that water is of great cultural, spiritual and practical significance because of its centrality to creation stories, sites, ceremonies and a healthy ecology. The evidence relied upon to support this contention is summarized briefly below:

- Mr Booby explains:
  - being taught by Elders about the significance of water near sites;
  - language as an expression of the significance of water, for example, [redacted];
  - concentration of water and underground rivers in the Pilliga makes it a special place;
  - [redacted] stories; and
  - importance to them of drinking water from their birth country.
- Mr Kumarage explains:
  - origin of the fish story; and
  - origin of the water sources story.
- Ms Tighe explains:
  - [redacted];
  - [redacted];
  - the consequences for breaking laws, for example, the "upside-down river", X Line Road and Bohena Creek;
  - the story of the "upside-down river, digging for water in the river";
  - women's and birth business near water sources, springs and hot water bores;
  - water quality impacts for ecology and the availability of food and other resources; and
  - swimming in waterholes.

[712] The evidence assists in understanding the Gomeroi people's assertions regarding culture and traditions for the purposes of s 39(1)(a)(ii). However evidence explaining the likely effect of the proposed grants on their way of life, and the development of the social, cultural and economic structures of the Gomeroi people in the Santos project area is limited or not apparent. For example, whilst the ecological effects of the Narrabri Gas Project on social and cultural frameworks are discussed at a high level of generality by

the claim group deponents, any daily or other impacts for the Gomeroi people are not disclosed or explained.

Areas of Particular Traditional Significance

[713] In the Gomeroi applicant's contentions, before para 207, there is a heading "Areas of particular traditional significance". The Gomeroi applicant seems to be referring to s 39(1)(a)(v), which provision refers to "any areas or sites on the land, or waters concerned, of particular significance to the native title parties in accordance with traditions". Insertion of the word "traditional" is not explained or justified. It is essential that the wording of s 39(1) be applied. Variations in terminology may lead to error. The expression "particular significance" is used in s 237 as well as in s 39(1). As a result, the expression has been considered judicially and by the Tribunal.

[714] In *Cheinmora v Striker Resources NL*,[67] Carr J considered the phrase used in s 237. At 34-35, his Honour said:

> I have reached the conclusion that the tribunal's construction of s 237(b) is correct, ie that a relevant site is one which is of special or more than ordinary significance to the native title holders. It is not enough that the site simply be of significance to the native title holders. That would leave the word "particular" with no work to do. It would also involve a notional transposition of that word from being in front of "significance" (as it appears in the subsection) to immediately after it. If parliament intended that there be no qualification on the extent of the significance of the site, it would have left the word "particular" out. The situation is, in my opinion, that a relevant site is one that is of special or more than ordinary significance to the native title holders in accordance with their traditions. There is no reason why there should not be more than one such site in any relevant area. Where there are several sites which the native title party claims are of particular significance, the tribunal will have to make its own factual assessment of that matter.

[715] In *Bisset v Mineral Deposits (Operations) Pty Ltd*,[68] Member Sosso considered the phrase as it appears in s 39(1)(a)(v). Member Sosso adopted the observations by Carr J in *Cheinmora v Striker Resources NL*, which observations are set out above. He then observed at [84]:

> Section 39(1)(a)(v) requires the Tribunal to consider the effect of the future act on areas or sites of particular significance to native title holders. Those areas or sites must be capable of physical identification and must be of more than ordinary significance to native title holders. In my view the focus of this criterion is to ensure that the Tribunal does not place undue emphasis on any area or site which native title holders regard as significant, but to focus only on areas or sites that have more than average significance to claimants. There may be a number of those areas or sites within a

[67] (1996) 142 ALR 21.
[68] (2001) 166 FLR 46.

> particular tenement. However, if a native title party is seeking the Tribunal to carry out its duties pursuant to this criterion it should bring to the inquiry material which demonstrates a knowledge of the areas or sites, the location of the areas or sites and why those areas or sites are of particular significance in accordance with their traditional laws and customs.

[716] This approach to the construction of s 39(1)(a)(v) highlights the shortcomings in para 208 of the Gomeroi applicant's contentions. No attempt has been made to identify areas or sites within the Narrabri Gas Project area or the Santos project area which are said to be of "particular" (not "special") significance. The "special" coal seams referred to in para 208(a) appear to be in the vicinity of Burning Mountain, some 150 kilometres away from the Narrabri Gas Project area.

[717] As to para 208(b) the passages cited, referring to Mr Booby's affidavit, seem to differ from the evidence given by Mr Kumarage and Ms Tighe. Mr Kumarage and Ms Tighe refer to crocodiles and Rainbow Serpents associated with waterholes which are not identified, or are said to be within the Narrabri Gas Project area. Mr Booby seems to speak of spring systems and waterways in the Pilliga. He sees the Pilliga as the place where the waters meet and are absorbed and filtered. Whilst the waterways are said to have been created by mythical beings and are "special", it seems that some may be distinguished from others. It is true that all three witnesses refer to the Garriya. Mr Booby refers to it as a mythical creature. On the other hand Mr Kumarage and Ms Tighe use the term to describe crocodiles. It is difficult to identify, from this evidence, any area or site of particular significance within the Narrabri Gas Project area, let alone the Santos project area.

[718] At para 208(c) the Gomeroi applicant contends that there are locations within the Narrabri Gas Project area, which locations relate to creation of land, landscape and "resources" including plants, animals, and residences of spirits. Neither Mr Booby nor Ms Tighe identifies any such "location" within the Narrabri Gas Project area, notwithstanding the Gomeroi applicant's assertion to the contrary at para 208(c) of the contentions. Similarly, no burial site (referred to in para 208(d)) is said to be located within the Narrabri Gas Project area, although one such site is said to be "in the vicinity of" it.

[719] As to para 208(e) Ms Tighe "understands", that there are birthing places [redacted] in the north-west of the Narrabri Gas Project area. However she does not locate them. Ms Tighe also "understands that some areas around Yarrie Lake are

associated with men's business". See para 208(f). She can say no more concerning such business. Again, no particular area or site has been identified. I also note that Yarrie Lake is very close to the boundary of the PPL3 "enclave", within the boundaries of the Santos project area (PPLA 15).

[720] As to para 208(g) Mr Booby identifies the Pilliga as a place where he does traditional woodwork, including making boomerangs. However he does not identify any area within the Santos project area. See para 35 of his affidavit. At para 43, he expresses concern about chemical spills in the Pilliga, causing damage to plants and animals. He associates the Pilliga with cutting timber and making boomerangs, but says nothing about hunting, gathering, fishing and camping. He refers to the possibility of such spillage in the Narrabri Gas Project area but, again, he does not identify any area or site within that project area where there may be an adverse effect. Nor is there any particular reason for assuming that Santos will not be able to prevent or deal with such problems. Ms Tighe does not identify any area or site within the Narrabri Gas Project area for camping, hunting or collecting food, medicine or other things. It is said that there are such areas or sites, but they are not identified. Mr Wilson also fails to identify any relevant area or site within the Narrabri Gas Project area.

[721] Unfortunately, the Gomeroi applicant refers inconsistently to places such as "Pilliga" or "Pilliga forest", and fails to recognize the distinction between such areas and the Narrabri Gas Project area or Santos project area. As previously observed, the Narrabri Gas Project area may occupy about one-fifth of the Pilliga forest.

[722] Ms Tighe is concerned about the threat posed by the Narrabri Gas Project to Gomeroi country. She says that the Pilliga is, "one important place where we continue to practice [sic] culture, and where you can really see the stories in the landscape." The Gomeroi people teach language and culture in the Pilliga. They do not visit only for cultural purposes, but also for teaching and learning opportunities.

[723] Ms Tighe refers, at para 36 of her affidavit, to the "X Line Road". Part of that road lies within the Santos project area. It seems that one "upside down river" may be located in that vicinity. However there is no evidence of any particular significance attaching to either feature. There is also reference to Bohena Creek, being further to the north of the

Santos project area. It is said to be an "upside down river". Again, there is no evidence that it is of particular significance.

[724] Mr Wilson says that the Pilliga is a place where the Gomeroi people collect food, medicines and other resources. He fears for adverse effects of the Narrabri Gas Project on animals, insects and plants. He sees the forest as a place of gathering and a place to practise native title rights and interests. He then refers more generally to Gomeroi country, rather than the Pilliga. He says that the Pilliga forest is one of the largest tracts of Cyprus forest left in "our country". The Gomeroi see it as their "lungs".

[725] At para 207 of its revised contentions, the Gomeroi applicant contends that the Pilliga is of "particular significance" to the Gomeroi people, both spiritually and practically. That assertion is not supported by any specific evidence. The Gomeroi applicant contends that the Gomeroi people regularly access the Pilliga and the Narrabri Gas Project area to "undertake a variety of activities". The evidence relied upon does not seem to relate specifically to the Narrabri Gas Project area, or the Santos project area. The evidence relied upon in respect of such activities "in the Pilliga" is summarized as:

- harvesting timbers to make tools for hunting, weapons, musical instruments and digging ochre for decorating;
- teaching language and culture, and visiting at specific times of the year; and
- harvesting quandongs in the spring on the western side of the Pilliga.

[726] Although the evidence relied upon by the Gomeroi applicant, listed in the paragraphs above, does not characterize these "activities" as "the enjoyment of native title rights and interests", it appears that the claim group deponents are describing actions consistent with the registered native title rights and interests to:

> (k) … gather and use the natural resources of the application area (including food, medicinal plants, timber, tubers, charcoal, wax, stone, ochre and resin as well as materials for fabricating tools, hunting, implements, making artwork and musical instruments)
>
> …
>
> (q) … transmit traditional knowledge to members of the native title claim group…

[727] Thus in paras 207-208, the Gomeroi applicant seeks to establish that because there are so many (apparently unidentified) sites of special significance within the Pilliga, the whole of the "Pilliga" is a place of particular significance for the purposes of s 39(1)(a)(v). It is difficult to see how an unidentified area or site can be of particular significance. If such locations were known, one might expect that they would have been identified. As to the area or sites which are identified, I have elsewhere pointed out that the relevant coal seams were some considerable distance from the Narrabri Gas Project area. I have elsewhere described the evidence concerning Yarrie Lake.

[728] There are difficulties in seeking to infer particular significance from so many unidentified sites or areas. Carr J, in *Cheinmora v Striker Resources NL*,[69] cited above, held that areas or sites of "particular significance" must be capable of physical identification, and be of more than ordinary significance to the native title holders. See *Bisset v Mineral Deposits (Operations) Pty Ltd*[70] also cited above. The evidence of the claim group deponents and Mr Kumarage regarding sites, stories and features of significance refer generally to the "Pilliga" or "Pilliga forest", an area approximately five times the size of the Narrabri Gas Project area. Evidence as to events occurring in the Pilliga or the Pilliga forest say little or nothing about the effect of the proposed grants upon areas or sites within the Santos project area. Nor does it assist to identify such areas or sites as being of particular significance.

The Effect of the Proposed Project on the Gomeroi

[729] The above heading, (adopted by the Gomeroi applicant), does not accurately describe the operation of s 39(1). That provision identifies discrete issues which the Tribunal must take into account in making its determination. The Gomeroi applicant's choice of heading should not be understood as broadening the operation of s 39(1). Whilst it may be accepted that the proposed grants create the possibility of an effect as identified in s 39(1), the extent of any such effect is difficult to assess. It is not sufficient simply to assert that particular native title rights and interests will, or may be adversely affected by the proposed grants.

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[69] (1996) 142 ALR 21.
[70] (2001) 166 FLR 46.

[730] The Gomeroi applicant contends that the claim group deponents' affidavits provide evidence of particular native title rights and interests which will be, or may be, affected by the proposed grants. The interests are listed from (a)-(i) at para 210 of the Gomeroi applicant's contentions, with cross references to particular paragraphs from the claim group deponents' affidavits. The Gomeroi applicant relies upon these affidavits as first-hand accounts of the enjoyment of native title rights and interests in the area described as the "Pilliga", "Western Pilliga", "Narrabri", "Coonabarabran" and "Yarrie Lake". The affidavits also refer to the exercise of native title rights and interests by other Gomeroi people. It seems to be suggested that, "any restriction on access will affect the Gomeroi in the exercise of such rights and interests." The assertion that the rights and interests "will be, or may be affected" is an assertion of opinion, not a statement of fact. The claim group deponents' evidence may, or may not support such opinion.

[731] Paragraph 210 seems to address the effect of restrictions on access upon the exercise of native title rights and interests in the Narrabri Gas Project area. The Gomeroi applicant seems not to be addressing any effects on native title rights and interests outside of the Narrabri Gas Project area, which issue seems to be addressed at para 211. The effect must be that of the proposed grants, not the Narrabri Gas Project. Identification of a possible future effect may not tell the whole story. The degree of likelihood must also be considered. As the cases demonstrate, one must look to the distinction between the circumstances if the proposed grants are not made, and the circumstances if they are made. That exercise will generally involve a consideration of the extent and nature of current and previous effect.

[732] In my view the effect upon s 39(1)(a) must be the effect of (in this case) the proposed grants, which effect may be upon the enjoyment of matters identified in s39(1)(a)(i). It is possible that a future act may have an effect outside of the area to which the future act applies. That would be a matter requiring appropriate evidence. In fact, the Gomeroi applicant has asserted the effect of the proposed grants outside of the Narrabri Gas Project area. However, there is little or no evidence to that effect. The only possible exception appears at para 59 in Mr Wilson's affidavit where he describes the Pilliga as the Gomeroi's "lungs". He also expresses concern that the spirits and the dreaming stories may be interrupted by the Narrabri Gas Project, but he makes no clear assertion that such an outcome is likely. Otherwise there seems to be little or no evidence concerning effects of the proposed grants outside of the Narrabri Gas Project area.

[733] At para 211, the Gomeroi applicant contends that:

> It may be inferred that the ability of the Gomeroi with traditional connections to the proposed Project Area and surrounding country, including more broadly the Pilliga Forest and Narrabri area, to exercise their native title rights and interests will be particularly affected.

This contention has no clear meaning. It is merely speculation, expressed in the broadest of terms.

[734] At para 212, the Gomeroi applicant identifies six, "native title rights and interests which may be affected and the source of those effects", cross-referenced to the affidavits of Ms Tighe and Mr Booby. However the evidence does not seem to support the contentions. The reference to Mr Booby's affidavit at para 34 is to a dispute between a Gomeroi leader and a man from another tribe, and the taking of a piece of timber from the Pilliga. The concern is really about Mr Booby's capacity to tell an associated story should the waterways be poisoned. There is no apparent reference to the Narrabri Gas Project area. The reference to Ms Tighe's evidence at para 82 relates to ability to access rivers for fishing and similar activities. The concern seems to relate to reduced volumes and muddying of the water. It is said that those factors have already contributed to a decline in fish stocks and numbers of other aquatic creatures. There is no suggestion that such effects were produced by Santos's conduct. Perhaps it is implied that the current conditions will be exacerbated by the Narrabri Gas Project. However no such explanation is offered. Again, there is no express reference to the Santos project area or the Narrabri Gas Project area. Similar observations apply to the right to gather, mentioned in para 212(c) of the contentions.

[735] Concerning caring for country (at para 323(d)), Mr Booby seems to be concerned about losing "control" of country and therefore being unable to protect it. He says that because of the way in which non-Aboriginal people use country, the Gomeroi people are deprived of their responsibilities and ability to care for such country. However Mr Booby does not seem to be talking about the Narrabri Gas Project area or the Santos project area. Even within those areas, restrictions upon Aboriginal activity would, at any one time, be limited. These comments also apply to Ms Tighe's evidence at paras 20-21.

[736] The Gomeroi applicant submits (para 212(e)) that the Gomeroi people have an obligation to neighbouring nations to care for river systems and country. Ms Tighe

asserts as much at para 39 of her evidence. Whilst failure to discharge that obligation may add to the Gomeroi people's concern, it does not affect the likelihood of adverse impact upon land or waters.

[737] Finally, at para 212(f), it is suggested that the Narrabri Gas Project may affect the right to practise and maintain religion, including song lines and ceremonies, referring to various paragraphs in Mr Booby's evidence. His concerns seem to relate to use of country (para 22) but, to a much greater extent, to the risk of water pollution (paras 37, 39-41 and 43). There is no doubt that Mr Booby has such concerns. However it is generally accepted that the protection of waterways will be an important aspect of the Narrabri Gas Project. The matter has been addressed in other reports, which reports have led to approval of the project. Mr Booby's concerns may be reasonable from his point of view. However one must take into account the evidence as a whole.

[738] In particular, the Independent Planning Commission Statement of Reasons dated 30 September 2020 deals with water in Chapter 7, including part 7.1 (Groundwater – Water security) and part 7.2 (Contamination – Surface and Groundwater). The key conclusions are at para 123 and 152. There is no viable basis for preferring the generalized concerns of Mr Booby or Ms Tighe, over these reasoned conclusions, based on the evidence.

[739] To the extent that para 212(f) relates to religious matters there is no evidence of any risk to such matters, within the Narrabri Gas Project area, or otherwise, as an effect of the proposed grants.

[740] At paras 213-218, the Gomeroi applicant contends that access to "country" for the purpose of exercising native title rights and interests will be impeded, and substantially affected by the anticipated number and likely location of proposed wells, infrastructure and fencing. The Gomeroi applicant primarily relies upon the report of Mr Kumarage to support this contention. His opinions regarding fencing, and other impediments to access, are not attributed to sources. The Gomeroi applicant refers to ch 6 of the Environmental Impact Statement, which chapter refers to the fencing of well pads and fencing associated with worker accommodation. Mr Kumarage does not refer to this information in his report.

[741] The vagueness of Mr Kumarage's evidence largely undermines the relevance of his evidence on this score. See para 197. He seems to assert that fencing of selected parts

of the Narrabri Gas Project area, from time to time, will have a similar effect to fencing off the whole of that area. There is no logical justification for such a view. Further there is little support for his assertion that it would not be possible, freely to engage in the list of activities identified in para 195, on the Narrabri Gas Project area. Only part of that area will be subject to utilization at any one time. Further, there has been no evidence that any of the rights asserted in para 195, were exercised near or within the Narrabri Gas Project area. As to both paras 194 and 195, the assertions of a right or interest will not satisfy s 39(1)(a)(i). It is the impact upon the enjoyment of such rights and interests which must be considered. The land disturbed within the Narrabri Gas Project area will affect approximately 1000ha, much less than one-fifth of the Pilliga forest. There is no logical explanation for the assertion, in para 197, that any fencing on the Narrabri Gas Project area will affect all native title rights and interests within that area, or affect, in any way, the wider Pilliga forest.

[742] Overall, Mr Kumarage's evidence concerning fencing is speculative. He has apparently little or no knowledge of the likely extent of any fencing. There is certainly insufficient evidence to permit the inference that it, "…would not be possible to freely use and enjoy, move about, camp on, erect shelters on, live on, enter or remain on, hold meetings on, hunt, fish or access and use natural resources on parts of the Gomeroi Application Area that are within the Narrabri Gas Project Area." Nor is it possible to infer that, "all the other associated rights will be affected, to some degree, by the loss of access to a significant proportion of the Gomeroi claimants' country." Such assertions are easy to make but more difficult to demonstrate. Mr Kumarage's evidence does not support these contentions. Further, under cross-examination he admitted that he had over-stated the proportion of the Gomeroi claim area affected by the Narrabri Gas Project by a factor of ten (ts 226 l 26). Paragraphs 198 and 199 of his report are entirely speculative.

[743] As to para 200 of his report it is difficult to accept that the issue of access was not addressed in the course of s 31(1) negotiations. If it was not discussed, it can only have been because it was not identified by the Gomeroi applicant as an issue for negotiation. Again, it must be kept in mind that Santos's activity will affect a very small part of the Pilliga or of the native title claim area. As to the question of water, addressed by Mr Kumarage in paras 201-202 of his report, I have already dealt with those matters. Again, the questions raised are speculative. Similar comments apply to paras 203-205 of his report.

[744] In effect, the Gomeroi applicant contends that the mere presence of the Narrabri Gas Project will substantially affect the enjoyment of native title rights and interests, and stories connected to the Pilliga. The contention relies upon the evidence of the claim group deponents who attest that Gomeroi stories are connected to the Pilliga, and claim that spiritual harm, "despair and hopelessness" will result from the Narrabri Gas Project. It is said that this would be due to the lack of control or ability to discharge obligations of custodianship to "country", including flora and fauna listed as threatened. However the contentions do not address the current lack of control exercised by the Gomeroi people over existing Santos infrastructure, private lands, State forest, and other areas in the Narrabri Gas Project area or the Pilliga. Similarly, the extent to which current lack of control has affected the exercise or enjoyment of Gomeroi native title rights and interests in the relevant area is not discussed.

[745] At para 219 of its contentions, the Gomeroi applicant contends that the Narrabri Gas Project will, as a result of habitat loss, affect spirit beings, the spirits of ancestors and other phenomena which occupy the Pilliga. The Gomeroi applicant relies upon Mr Kumarage's report to support this contention. However, a number of the references to the report do not appear to be relevant. The Gomeroi applicant also refers to the evidence of the claim group deponents. Whilst there may be concerns about the matters raised in para 219, such concerns seem to relate to the Pilliga as a whole. The contention provides references to the evidence of the claim group deponents but does little to explain how activities in the Narrabri Gas Project area will affect the Pilliga as a whole.

[746] At para 220, the Gomeroi applicant contends that the Narrabri Gas Project will have permanent effects on the cultural values of the landscape through disturbance to the coal seams, which hold spiritual significance, and because 425 well caps will remain in situ after the Narrabri Gas Project has been completed. As to cultural significance, Mr Booby refers to creation of the coal and mineral deposits in the vicinity of Burning Mountain and Murrurundi, places located about 150km from the Narrabri Gas Project area. The effect which the Narrabri Gas Project will have on those features is unclear. As to the well caps, the evidence does not establish the effect which these will have upon the native title rights and interests, other than at a very general level. The Development Consent conditions applicable to the Narrabri Gas Project require rehabilitation measures, including a requirement that such wells be buried and revegetated. See Independent Planning Commission Development Consent conditions B81 – B83.

[747] As to para 221, I have dealt with that matter above.

[748] At para 222, the Gomeroi applicant asserts that the Narrabri Gas Project may cause disputes within the Aboriginal community. The reference to such "disputes" may involve the Gomeroi community or some wider community. The reference in para 192 of Mr Kumarage's report suggests the latter. He considers that the dispute resolution process identified in the Social Impact Assessment is "seriously inadequate", apparently for the reason that, "there is little focus … on the Aboriginal community". It is said that such Assessment does not, among other things, address possible divisions which may arise as a result of competition for cultural heritage work associated with the Narrabri Gas Project. Mr Kumarage seems to think that there is a role for Santos in identifying possible forms of intra-indigenous disputes, and the likely parties to such disputes. I am inclined to think that such engagement might be inappropriate.

[749] At this point, I should say something about cultural issues. In paras 223-249 the Gomeroi applicant primarily discusses the merits of State and Federal legislation concerning the protection of cultural heritage. At para 223 the Gomeroi applicant asserts:

> … due to the inadequacies of other statutory schemes relating to the identification and protection of Indigenous heritage, the future act provisions of the Native Title Act provide an important opportunity for the identification and protection of Indigenous cultural heritage as an incident of the recognition and protection of native title rights and interests under the Act.

[750] To support this contention, the Gomeroi applicant asserts that in the New South Wales Aboriginal cultural heritage legislative scheme, there is an overreliance by the State on reactive and punitive responses, instead of proactive measures, taken to protect and prevent harm to Aboriginal cultural heritage. Additionally, the Gomeroi applicant claims that the present regime does little to protect intangible Aboriginal cultural heritage values.

[751] At para 232, the Gomeroi applicant contends that although a requirement of the development approval process is the preparation of an Aboriginal Cultural Heritage Assessment Report and Aboriginal Cultural Heritage Management Plan, these measures are not sufficiently robust so as to enforce protection of Aboriginal culture and heritage.

[752] The Gomeroi applicant's revised contentions are matters of opinion rather than evidence. They identify views as to statutory construction, which exercise has not been undertaken, and opinions as to likely practical operation.

[753] At para 236, the Gomeroi applicant asserts that the Aboriginal Cultural Heritage Assessment Report does not include a number of sites which have already been identified within the Narrabri Gas Project area, referring to para 208. Examination of each reference in para 208 demonstrates only one specific site, identified as being in the Santos project area or the Narrabri Gas Project area. It is to Yarrie Lake (in Ms Tighe's affidavit at paras 55-56). Yarrie Lake is included at p 275 of the Aboriginal Cultural Heritage Assessment Report. It is reported that there are 90 known Aboriginal cultural heritage sites in the Narrabri Gas Project area. The reference to burial sites at para 208(d), said to be identified in Mr Kumarage's report at paras 115 and 117, shows only one burial site in the "vicinity" of the Narrabri Gas Project area.

[754] The Gomeroi applicant contends, at paras 237-240, that neither the Aboriginal Heritage Information Management System database nor the "avoidance principle" is sufficient to protect Aboriginal cultural heritage sites. This is purportedly because many sites are not recorded in such database and, in any event, there is no protection of intangible sites or landscapes which are culturally significant. The Gomeroi applicant relies upon para 167 of Mr Kumarage's report, where he states that "[n]umerous well sites are also proposed near creeks, immediately adjacent to the very narrow riparian corridors that are excluded from the development." The Gomeroi applicant further contends that the absence of information on the database is due to cultural protocols and cross-cultural misunderstanding, as well as protection from public knowledge and possible vandalism.

[755] The assertions by Mr Wilson and Ms Tighe, referred to in the contentions at paras 239, seem not to distinguish between the Narrabri Gas Project area (or Santos project area) and the Pilliga, either in assessing activity which may cause adverse consequences, or in identifying the location of any such consequences. As to Mr Kumarage's report at para 167, there appears to be a difference of opinion between him and the authors of the Aboriginal Cultural Heritage Assessment Report. Mr Kumarage asserts that, "from a traditional owner's perspective [well sites] would be occupying a significant proportion of the habitat of the ancestral spirits, [redacted], and other supernatural beings and interfering with the tracks and activities of mythological

beings …". Such a broad assertion is easy to make, but rather more difficult to demonstrate. One might have expected some evidence as to the likely extent of the areas associated with such beings or tracks, so that their general locations could be identified prior to any complaint that such sites cannot be avoided.

[756] At para 240 of the contentions, the Gomeroi applicant seems to elevate a possible "worst case scenario" to a probability. Of course there may be unrecorded sites. However despite Mr Kumarage's doubts, it appears that the parties, at various times, reached substantial agreement in respect of cultural heritage management provisions and protections. Similar comments apply to para 241. As to para 242, Mr Kumarage seems to have seen a hypothetical well layout (at para 167 of the report). As observed above, final layout will depend upon information to be provided by the Gomeroi applicant. The Gomeroi applicant and Mr Kumarage seem to be unwilling to accept that Santos is offering flexibility in the location of well heads to enable avoidance of damage to areas or sites of cultural significance. Further, any difficulties in locating intangible sites may be resolved, given cooperation by the Gomeroi applicant.

[757] At paras 241-248, the Gomeroi applicant also contends that:

- the proposed fencing and buffer zones in the Aboriginal Cultural Heritage Management Plan will be inadequate to protect sites, may lead to vandalism by the public, and will exclude Gomeroi people from accessing their cultural heritage;
- the Conceptual Layout Indicative Sketch Plan does not confirm the final location of infrastructure, without which the Gomeroi applicant cannot assess how the proposed project will affect specific sites;
- proposed project infrastructure will impede access to land in proximity to the proposed infrastructure; and
- pre-clearance surveys do not provide adequate control to Gomeroi people to make decisions with respect to their cultural heritage, and the reporting of new finds to the Office of Environment and Heritage.

[758] As previously observed, it seems more appropriate that infrastructure be located having regard to identified sites, rather than that the infrastructure be located and then relocated

to accommodate such sites. Otherwise, these assertions are matters of opinion, unsupported by the evidence.

[759] It seems that paras 223-249 address criteria in ss 39(1)(a)(i),(ii),(iv) and (v). The Gomeroi applicant's principal submission seems to be that the shortcomings in cultural heritage protections under the New South Wales regime, including the Aboriginal Cultural Heritage Assessment Report and the Aboriginal Cultural Heritage Management Plan, can only be addressed through the right to negotiate provisions of the Native Title Act. However it is not for the Tribunal to make generalized observations concerning the merits of State legislation. Nor is it necessarily part of the Tribunal's function to seek to remedy any perceived shortcomings. Concerning the Tribunal's function, in *North Ganalanja Aboriginal Corporation v Queensland*[71] at 616, the majority of the High Court made the following observations concerning subdiv B (now subdiv P):

> Sub-division B of Div 3 of Pt 2 of the Act denies the Governments of the Commonwealth, States and Territories power (s 28) to confer, inter alia, mining rights (s 26(2)) in respect of land that is the subject of an accepted claim to native title unless notice of an intention to do so is first given to the registered native title claimant (s 29(2)(b)) and a procedure is followed through which ordinarily (ss 26(3), (4), 32) requires the Government to negotiate with the claimants and the miner. The negotiation is assisted, if desired, by mediation by the NNTT or other arbitral body (s 31). The procedure may terminate either in an agreement (s 37) or in a determination by the NNTT or other arbitral body that the Government may or may not confer the mining rights in question (or some other interest to which Sub-div B applies) or may do so subject to specified conditions (s 38). Time limits for applying for and for making of determinations of this kind are prescribed (ss 35, 36). Thus, once an application for determination is accepted, the Act maintains the status quo as between the registered native title claimant on the one hand and the Government and those having proprietary interests or seeking rights to mine on the other, unless the parties negotiate and agree on the resolution of their respective claims or a competent authority makes a binding decision.

[760] The Tribunal's role is neither to identify, nor rectify, systemic deficiencies in State or Territory legislation. Its role is to apply the relevant provisions of the Native Title Act upon its proper construction. Where the parties have been unable to reach a compromise, and therefore require a determination under s 38, a native title party's opportunity to achieve a customized solution to its perceived problems, becomes less likely.

[761] I should add that, at paras 239-240, the Gomeroi applicant seeks to discount the efficiency of the "avoidance principle" as a means of protecting the "broader significance of landscape, the way in which the proposed Narrabri Gas Project as a

[71] (1996) 185 CLR 595.

whole will affect the geography of the region and, in turn the native title rights and interests of the Gomeroi". It may well be that the avoidance principle cannot be as readily applied to a "landscape" as it is applied to particular sites or areas within a particular "landscape". However I see no reason for concluding that the avoidance and minimization procedures, even in modified forms, may not be applicable to wider areas or landscapes.

[762] Paragraph 243 of the contentions must be understood in context. The factual matters identified in para 244 seem to be accepted. However the "approach" is said to be "flawed", in that it fails to take account of effects on the exercise of native title rights and interests on land in proximity to infrastructure. Presumably, this concern is limited to activities within the Narrabri Gas Project area. The references to the evidence of Mr Wilson and Ms Tighe do not assist in understanding this proposition. Initially, Mr Wilson (at para 55) seems to be referring to gatherings in the Pilliga, rather than in the Narrabri Gas Project area. However he then raises (but does not address) the question as to whether the Gomeroi would want to access the Narrabri Gas Project area whilst mining continues. It may well be that the Gomeroi people will choose to meet outside of the Narrabri Gas Project areas. However there is no suggestion that Narrabri Gas Project area is a preferred meeting area, as compared to the much wider area of the Pilliga forest. Indeed, there is no evidence of any identifiable meeting area within the Narrabri Gas Project area. There is only the bald assertion by the Gomeroi applicant that there can be "no doubt" that the wells will "affect the cultural integrity" of the landscapes. In the absence of further information concerning such effect, it is impossible to compare their concerns with other considerations. The assessment required by s 39 depends upon reliable and relevant information by way of evidence, not mere assertions.

[763] At para 78 of Ms Tighe's evidence, she asserts negative impacts upon Gomeroi country and people, but does not identify or describe any such impacts. In particular, Ms Tighe asserts unspecified impact upon the landscape. However no landscape is identified with precision. Nor is any possible damage identified. Paragraph 246 takes the matter no further.

[764] At para 247, the Gomeroi applicant asserts that there are "issues" relating to Santos's control over, and management of cultural heritage processes, referring to Mr Kumarage's report at paras 183-188. This assertion seems to be based upon his view

that the process of cultural heritage management should be controlled by Aboriginal people, particularly, in this case, those with traditional connection to the Pilliga forest and Narrabri areas. He says that such people may be, "amongst those represented by" the Gomeroi applicant. Some might also be members of the Narrabri or Pilliga Aboriginal Land Councils. He seems to suggest that not all members of the Aboriginal Land Councils are traditional owners. Mr Kumarage suggests that issues of control and management, "require sensitivities that Santos has not demonstrated it possesses". I see no basis for Mr Kumarage's criticism of Santos in this regard.

[765] At para 248, the Gomeroi applicant contends that Aboriginal objects located in the Narrabri Gas Project area should not be relocated and dealt with pursuant to State legislation, and that such an approach, "fails to account for the harm caused to Gomeroi people and their culture associated with the dislocation of Aboriginal cultural heritage from place". This concern is reflected in Ms Tighe's affidavit at para 76. She refers to a particular incident involving one object, a grinding groove stone. She suggests that to move such an object is to separate it from its proper location. It is somewhat difficult to give preference to Ms Tighe's views over the statutory protection apparently prescribed by the State. The State, of course, has its own obligations in this regard. Any such discovery may be dealt with by avoidance methods, or it may be that the Cultural Heritage Management Committees (including members of the Gomeroi people) will make a decision to manage protection by other means. The contention seems completely to discount the processes provided for in the Aboriginal Cultural Heritage Management Plan and the flexibility available to Santos in the location of its infrastructure.

[766] I have already dealt with para 249.

Views of the Native Title Party

[767] Concerning this matter, at para 252, the Gomeroi applicant contends that the Narrabri Gas Project should not proceed as it will cause significant and irreparable damage to the Pilliga forest, an area of particular cultural significance and practical importance to Gomeroi religious, cultural and social practice. I have assumed that the reference to the "Narrabri Gas Project" is intended to refer to the proposed grants. There is really no evidence of significant or irreparable damage to the Pilliga forest. There is evidence concerning utilization of the Narrabri Gas Project area, including the Santos project

area. However such utilization will not impinge upon the Pilliga as a whole, subject only to the possible extent of spiritual and cultural matters. There is evidence of places and stories concerning locations within the Pilliga. As to such matters, appropriate arrangements have been made, in particular the Additional Research Program and the flexibility which Santos has in connection with its drilling program, provided that the Gomeroi people advise as to spiritual or cultural sites within the Santos project area or, for that matter, the Narrabri Gas Project area. There is no real evidence which justifies concerns that activity within those areas will have any adverse spiritual or cultural effect outside of those areas.

[768] Alternatively, it is submitted at para 253 that if the project is to proceed, it should do so only in accordance with the Gomeroi applicant's agreement, made with the full, free prior and informed consent of the native title claim group. That formula is used extensively in the Gomeroi applicant's contentions. However it does not, in any way, detract from the requirements of subdiv P. In any event, para 252 adds little to other aspects of the Gomeroi applicants contentions. As to para 253, the Tribunal must exercise its jurisdiction in accordance with the Native Title Act.

Public interest

[769] The Gomeroi applicant contends that the Tribunal should make a determination that the act must not be done, for the reason that it is, "against the public interest". At para 267 of its contentions, the Gomeroi applicant states:

> If the Project proceeds, a substantial quantity of greenhouse gas … emissions will be emitted. It follows that the grant of the PPLs will not only not assist with meeting the temperature targets in the Paris Accord, but will contribute to higher temperatures than the target and the more extreme impacts of climate change.

[770] At para 268, the Gomeroi applicant submits that there is a public interest in:

> (a) seeking to mitigate and prevent the worst likely effects of global warming, which has consequences at global, national and local levels, and
>
> (b) the preservation and continuity of the culture and society that underpins the Gomeroi People's tradition law [sic] and custom.

[771] The only matters of public interest, referred to by the Gomeroi applicant, concern climate change, and the preservation and continuity of the Gomeroi people's culture and society. These matters will be dealt with elsewhere in this determination.

The Gomeroi Applicant's Contentions in Reply

[772] At paras 24-25 of its contentions in reply, the Gomeroi applicant effectively asserts that there is no authority for Santos's contention that the Tribunal will make a favourable (to Santos) determination if Santos demonstrates that the effects of the proposed grants are "limited, manageable and acceptable". Although Santos uses language to that effect, I do not understand it to submit that if such effect is demonstrated, the Tribunal will necessarily make such a determination. As I have previously observed, the parties should take care not to adopt language which differs from that of the Native Title Act, in order to support a wider or narrower view of the statutory provision in question. Elsewhere in these reasons, I have urged the approach identified in *WMC Resources v Evans* to which, in this context, the Gomeroi applicant refers.

[773] At para 25, the Gomeroi applicant submits that Santos has not provided any "direct" evidence as to how the Narrabri Gas Project will affect the Gomeroi people's native title rights and interests. The Gomeroi applicant suggests that Santos ought to have led evidence as to that matter. Clearly, much of the evidence addresses it.

[774] It is difficult to understand the lengthy and convoluted contentions contained in para 26. Initially, the Gomeroi applicant refers to the State's contention that it has failed properly to lead relevant evidence concerning its application of s 39(1)(a)(ii), in that there is no definitive statement as to whether interests are enjoyed in specific locations or will be affected in particular ways. Of course, the question is not so much as to the absence of such assertions, as it is a matter of evidence. The Gomeroi applicant also notes that both Santos and the State assert that it has not established that the Pilliga is "of particular significance" for the purposes of s 39(1)(a)(v). The Gomeroi applicant seems to dismiss any shortcomings in its own evidence, suggesting that any such shortcomings are attributable to the lack of evidence provided by Santos concerning the likely location of infrastructure, including well heads.

[775] As I have previously observed, logic dictates that the formulation of a more detailed plan for the location of project infrastructure be preceded by the Gomeroi applicant's indicating locations of cultural significance within the Narrabri Gas Project area. The Additional Research Program will provide the opportunity for recording any further locations or matters of cultural significance which have not yet been identified in the

Aboriginal Cultural Heritage Management Plan. It is (pursuant to a proposed condition of this determination) to be completed before the commencement of Phase 2 of the Narrabri Gas Project. In the end, the adequacy or otherwise of the evidence led by the parties is a matter for the Tribunal.

[776] The Gomeroi applicant then refers to evidence as to, "how some Gomeroi people exercise and enjoy some of their native title rights in the Pilliga Forest, together with evidence as to the fact that the Pilliga Forest is relatively easy to access." However such evidence does not relate specifically to the Narrabri Gas Project area or the Santos project area. Such generalized evidence is of little assistance when particular areas are the subject of the relevant inquiry. It is said that such evidence comes from Ms Tighe and Mr Booby who have "cultural authority" to speak for the Pilliga forest, including the right to "cultural continuity". That term includes the right to preserve the cultural significance of the landscape, and the amenity of use required to perpetuate traditional methods of transmitting cultural knowledge. Curiously, the Gomeroi applicant does not refer to relevant evidence concerning these assertions. It refers to claimed rights identified in registration proceedings, rather than to evidence establishing the exercise of such rights. There is also an unparticularized reference to Mr Kumarage's evidence. The Gomeroi applicant then asserts that Santos's own evidence demonstrates that the proposed grants will have "significant" effects on the land, landscape, vegetation and dependent animals, and consequently, the amenity of the Narrabri Gas Project area or the Santos project area for the purpose of exercising native title rights. This assertion tends to misrepresent Santos's position. See paras 37-71 of Santos's Contentions.

[777] A major problem with the Gomeroi applicant's evidence is that it frequently fails to distinguish between the Pilliga or Pilliga forest on the one hand, and the Narrabri Gas Project area or the Santos project area on the other. The "Pilliga" or "Pilliga forest" is a vast area, of which the area is a clearly defined part. It comprises about one-fifth of the Pilliga. Given that the Gomeroi applicant has flagged the significance of the relevant State forest areas to its native title claim, the lack of evidence specific to the Santos project area or the Narrabri Gas Project area is difficult to understand. Further, in view of the length of time during which the parties have been negotiating, and the amount of information provided prior to, and during the conduct of this matter, it is difficult to accept that any inadequacy in the Gomeroi applicant's contentions are attributable to a lack of information provided by Santos or the State. The balance of para 26 is largely

speculative and generalized. It is merely opinion, unsupported by references to evidence. The same comments apply to para 27.

[778] Paragraph 28 is largely argumentative. It asserts the inadequacy of the New South Wales cultural heritage regime. The paragraph seems to criticize Dr Godwin's evidence, by reference to Mr Kumarage's evidence. As best I can tell, the contention addresses paras 57 and 58 of Dr Godwin's affidavit and para 136 of Mr Kumarage's report. Dr Godwin describes the design flexibility which will allow Santos to locate well-pads and "connecting linear infrastructure", so as to avoid or minimize impacts to known Aboriginal cultural heritage sites and values. He points out that this process will be facilitated by additional procedures recommended in the Aboriginal Cultural Heritage Assessment Report, including clearance surveys, and the Additional Research Program, to which I have previously referred. Dr Godwin says that his experience, as an archaeologist, leads him to conclude that these steps will minimize the risk of interference with Aboriginal cultural heritage values. Mr Kumarage concedes that it is "positive" that Santos is to adopt that approach. However he says that, "it remains the case that the infrastructure may be moved onto areas of intangible cultural heritage significance". Mr Kumarage seems to assume that Santos might avoid interference at one location, at the expense of transferring such interference to another area. Such conduct seems to be a "worst case scenario". It seems not to recognize the likelihood that Dr Godwin's Additional Research Program will provide adequate information and opportunity to allow the Gomeroi people to consult with Santos so as to avoid relocation from one site, in order to protect cultural considerations, to another area, where similar considerations may arise.

[779] The Gomeroi applicant then complains that neither Dr Godwin nor Santos has explained or addressed the requirements for adequate identification and protection of intellectual and physical property, or for storage and control of artefacts and information. Mr Kumarage says that these are, "uniquely matters that can and should be, and are intended by the legislature, to be addressed in the context of the right to negotiate". The issue of protecting cultural heritage has taken up much time prior to, and during the hearing. It is unhelpful for the Gomeroi applicant, at this late stage, to raise such practical issues. They will best be addressed as the Narrabri Gas Project proceeds. Whilst such matters could properly have been raised in negotiations, Santos has dealt with them in its offer, which is appendix 7 to Mr Ho's affidavit (attached to this determination). It was

proposed that such matters be dealt with in conjunction with the Gomeroi people, particularly using the proposed Liaison Committee, the Nominated Body and Santos.

[780] At para 30(a), the Gomeroi applicant contends that new findings of the Intergovernmental Panel on Climate Change are relevant to the deliberations of the Tribunal, particularly as they were not considered by the Independent Planning Commission, the Minister, or the Land and Environment Court in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*.[72] The Gomeroi applicant appears to contend that such new findings should be considered by the Tribunal pursuant to s 39(1)(e). I have previously referred to Professor Steffen's report, in which he considers the Intergovernmental Panel on Climate Change Sixth Assessment Report. However the "important new information" has not been clearly identified. I have previously explained that it would not generally be appropriate to depart from an earlier decision by a relevant tribunal, simply because another body has taken a different view. There may be cases in which it is appropriate to revisit such a decision, but it is a step which this Tribunal would take, only after careful consideration of the ways in which a different decision might be reached.

[781] At para 30(b), the Gomeroi applicant contends that the Tribunal, in exercising its power under s 38 of the Native Title Act, may not be fettered or constrained by decisions relating to other matters, referring to the Tribunal's decision in *Bligh Coal Limited v Malone*.[73] In that case, at [69], the Tribunal took into account submissions by the State of Queensland concerning the public interest. The Tribunal considered that the State was, "an appropriate arbiter of the public interest". The Gomeroi applicant seeks to deter the Tribunal from taking that approach in this case. However, as discussed elsewhere in this determination, s 146 of the Native Title Act permits the Tribunal to take into account reports, findings, decisions, determinations or judgments of courts, persons or bodies where such matters are the subject of evidence. That provision may not be displaced by the Gomeroi applicant's bare assertion that the Tribunal, in exercising its power, may not be "fettered" or "constrained". Section 146 does not fetter or constrain the Tribunal. Rather, it permits the Tribunal to take relevant matters into account.

[72] [2021] NSWLEC 110.
[73] [2021] NNTTA 19.

No Agreement with Proposed Conditions

[782] Paragraphs 31-34 do not seem to take the matter any further. In para 31, the Gomeroi applicant disputes Santos's assertion that the parties had reached in principle agreement. The term necessarily implies that no binding agreement had been reached. It may mean that most, but not all terms have been agreed, and that it is expected that there will be agreement. The term may also be used to describe a situation in which agreement has been reached, subject to the preparation of an appropriate contract. For present purposes, the question is of little consequence.

[783] In paras 32 and 33, the Gomeroi applicant asserts that it would prefer that the proposed grants not be made but that, in any event, the proposed grants should not be "approved without [its] agreement". It asserts that protection of its native title rights and interests will only be possible by way of "such an agreement". This seems to mean that even if the Tribunal determines that the proposed grants should be made, the Gomeroi people's agreement should still be sought and obtained. In its contentions in reply, at para 33, the Gomeroi applicant asserts that because of COVID-19 restrictions, the native title claim group had not, as at 22 December 2021, considered Santos's then current offer. At para 34, it refers to conditions proposed by the Gomeroi applicant and Santos's response. These matters are of no current significance. They may go to good faith, but such relevance has not been clearly demonstrated. I have conceptual difficulties seeking to understand how the Tribunal can abdicate its responsibility for deciding the matter as suggested by the Gomeroi applicant. Any determination by the Tribunal that the proposed grants may be made will reflect the Tribunal's consideration of the various matters prescribed in s 39. Section 38 strongly suggests that the Tribunal must adopt one or other of the alternatives there identified. That section should not be taken as an invitation to make further submissions as to conditions. There may be circumstances in which the Tribunal offers parties an opportunity to address proposed conditions. However there will be a point at which the Tribunal's function is fully discharged, and its jurisdiction spent. In any event, the evidence does not lead to the conclusion that the Gomeroi applicant's native title rights and interests can only be protected by such a procedure. A great deal of time and effort was spent in obtaining the State's decision to notify its intention to make the proposed grants. Even more time and money has been spent in bringing these proceedings to an outcome. There can be no justification for any further extension of the process.

The Gomeroi Applicant's Closing Submissions

[784] Initially, it was not clear that there would be an oral hearing, involving cross-examination and oral submissions. In the end, there were cross-examination, further written submissions and brief oral submissions.

[785] At para 42 of its closing submissions, the Gomeroi applicant contends that "the Pilliga, including the proposed Project Area, is culturally important … and will be affected by the proposed Project…" and not protected by State legislation. I have previously discussed the importance of the expression "particular significance" in s 39 (and s 237), as set out in the cases. Use of the term "culturally important" may tend to confuse. I have also dealt with Commonwealth and State legislation.

[786] At paras 43-47, the Gomeroi applicant seeks to neutralize certain problems arising in connection with Mr Kumarage's report and his oral evidence. It is suggested that his preparation and research were affected by the expedited nature of the hearing and pandemic restrictions. Given that this matter has been on foot for so long, I find it difficult to accept that any shortcomings in Mr Kumarage's evidence should be simply ignored. I have dealt with his evidence elsewhere in this determination. Clearly, Mr Kumarage disagreed with Dr Godwin's view that shortcomings, which the latter had identified in the draft Aboriginal Cultural Heritage Management Plan, could be remedied by conduct of the Additional Research Program, to which I have referred on numerous occasions, particularly as concerns intangible heritage or myth. Two points should be made concerning Mr Kumarage's position. First, Dr Godwin's reliance upon the Additional Research Program was not an afterthought. He experienced difficulty in obtaining information for inclusion in his Aboriginal Cultural Heritage Assessment Report, and identified the Additional Research Program as a way of dealing with this shortcoming. Secondly, Mr Kumarage seems to have rejected the value of the Additional Research Program upon the basis that it might assist in dealing with "isolated sites" or "definable sites" but would not, "perhaps", work well for larger areas, landscapes or "something intangible". See ts 219, ll 31-47. However at ts 220, ll 3-7, Mr Kumarage seems to accept that the Additional Research Program would work "theoretically". In the circumstances, I conclude that Dr Godwin has had a better opportunity to assess the relevant problem and develop a possible solution than has Mr Kumarage. In those circumstances, I prefer Dr Godwin's evidence and infer that the

Additional Research Program is likely to assist in resolving any relevant gaps in the collection of cultural information.

[787] As to Mr Kreicbergs, his evidence is considered at paras 48-59. It was suggested in cross-examination that he and Santos ought to have conducted the Additional Research Program at some earlier time. However, Dr Godwin had recommended that it be performed in the first 12 months of the commencement of Phase 2 of the Narrabri Gas Project, which phase has not yet commenced. In any event, the research will now be conducted prior to such commencement. It will target places and values of particular traditional, anthropological, historical and contemporary significance to Aboriginal people. At para 1.2 of the Plan, phase 2 is said to involve the construction of wells and related infrastructure. Its purpose and significance are explained by Dr Godwin in his report at [5.3.8].

[788] At para 49, the Gomeroi applicant seems to assert, at ts 117, l 18 – ts 118, l 4, that Mr Kreicbergs indicated that he did not agree that the Additional Research Program was necessary for approval of the Aboriginal Cultural Heritage Management Plan. I do not understand him to have made that assertion. At ts 117, ll 12-16, he seems to identify the Program as appropriate. The balance of para 49 is highly speculative.

[789] At para 50 the Gomeroi applicant seems to assume that Santos has failed to perform the Additional Research Program. I have already dealt with that matter. The paragraph is, to say the least, speculative and difficult to understand. At para 51, the Gomeroi applicant seems to seek to hold Santos and Mr Kreicbergs responsible for a perceived shortcoming in the law of New South Wales. The shortcoming seems to be that persons other than traditional owners might, in New South Wales, be engaged in cultural heritage regimes. Similarly, at para 52, the Gomeroi applicant seeks to make some point concerning the fact that, in New South Wales, the Aboriginal Cultural Heritage Management Plan had to comply with New South Wales law rather than the Native Title Act. It is not clear to me that, as is suggested by the Gomeroi applicant, Mr Kreicbergs agreed with that proposition. There is no suggestion that the Plan is, in some way, inconsistent with the Native Title Act.

[790] The Gomeroi applicant submits, at para 52, that Mr Kreicbergs accepted in cross-examination, that no cultural heritage information which had been identified in the

negotiations or these proceedings has been included in the Aboriginal Cultural Heritage Management Plan. See ts 169, ll 25-28. In fact, Mr Kreicbergs' admission related only to information emerging from these proceedings.

[791] As to para 53, the Gomeroi applicant asserts that Mr Kreicbergs had agreed that Santos was under no specific obligation to protect native title rights and interests, referring to ts 169, l 44. In context it is clear that Mr Kreicbergs considers that Santos continues to be committed to working with the Gomeroi people, and looking for opportunities to progress economic outcomes and "procurement". At ts 169, ll 39-42, it was suggested to him that Santos did that "off your own [bat], so to speak". Mr Kreicbergs agreed with that proposition "to a point". He said that Santos would continue to work with the community, although elements of the community "may not want to participate". It is in that context that it was put to him that there was no discrete obligation on Santos to work with the Gomeroi people. He accepted that proposition, but again stressed that Santos's policy was to work with the Gomeroi community.

[792] It is worth observing, at this stage, that the Gomeroi applicant has spent much time in addressing the Additional Research Program, asserting that it should have been conducted at some earlier stage, or that it was unlikely to be of much value. However the points made have been largely speculative and do not take account of the evidence concerning Dr Godwin's recommendation concerning it. The matter is also dealt with in connection with the good faith consideration.

[793] In para 54 of the closing submissions, the Gomeroi applicant seems to suggest that clearance work pursuant to the Aboriginal Cultural Heritage Management Plan will affect the Gomeroi people's right to "assess and move through the Pilliga". In that paragraph and in Mr Kreicbergs' cross-examination at ts 170, l 36 – ts 171, l 18, the Gomeroi applicant seems not to distinguish between clearance work concerning the Pilliga, and clearance work concerning the Narrabri Gas Project area. Such clearance work will, in fact, be performed in the Narrabri Gas Project area. It is accepted that various forms of infrastructure will be located throughout that area, particularly in the south. The case has been conducted on the basis that all infrastructure will be located within the Narrabri Gas Project area, including the Santos project area. Although there have been suggestions that activity within that area may have consequences for the

wider Pilliga, such assertions have lacked particularity. I have made this point on numerous occasions in the course of this determination.

[794] Paragraphs 55-59 seem to be rhetorical rather than legal. The attempt, in para 57, to assert absence of good faith on the basis of Dr Godwin's recommendation concerning the Additional Research Program, is misconceived. His recommendation was that it be conducted in the first 12 months of Phase 2. In any event, I am presently considering the Gomeroi applicant's contentions concerning s 39, not the question of good faith. Finally, the Gomeroi applicant seeks to establish some sort of relevant inconsistency between the State and Commonwealth legislation, or perhaps an hiatus in the overall legal system. However, the submissions have little to do with s 31(1), or s 39.

[795] The Gomeroi applicant contends that the evidence arising from the cross-examination of Mr Kumarage establishes the following:

(a) Santos unfairly criticizes his report, which (as previously mentioned) was affected by restrictions arising from the COVID-19 pandemic;
(b) Santos unfairly suggests that adverse inferences could be drawn from the fact that the Gomeroi applicant does not yet have a determination of native title;
(c) without evidence to the contrary, the Tribunal should give full weight to Mr Kumarage's report;
(d) his opinion regarding inadequate provision for intangible cultural heritage in the Aboriginal Cultural Heritage Management Plan did not change;
(e) he did not accept that the Additional Research Report would provide a method adequate to protect intangible cultural heritage or large areas such as a landscape;
(f) he asserted that Santos had significant control over the process and management of Aboriginal cultural heritage under the Aboriginal Cultural Heritage Management Plan;
(g) he did not accept that micro-siting was an adequate method for avoiding intangible cultural heritage;
(h) he stated that fencing 400 well pads, spread over the Narrabri Gas Project area will be visible from anywhere (leading, in the Gomeroi applicant's contention, to fragmentation);

(i) he confirmed his opinion that micro-siting would not provide adequate protection to places and sites that cannot be necessarily seen, such as the habitat of supernatural beings living in forested areas;

(j) he stated that the Narrabri Gas Project area, although not a significant proportion of the native title claim area, was, in his view, "culturally significant"; and

(k) pollution or reductions in water flow would impact upon cultural heritage values.

[796] These observations should be considered in the light of my observations concerning Mr Kumarage's evidence in connection with the good faith issue. I have previously indicated that I prefer Dr Godwin's evidence to that of Mr Kumarage. Of the matters listed above, sub paras (a), (b) and (c) are matters of opinion. I have previously identified my concern about Mr Kumarage's evidence. As to subpara (d), it is of no real relevance that he did not change his evidence in the course of the proceedings. As to subpara (e), he expressed doubt about the Additional Research Program but did not explain his reasons for considering that it could not be applied to larger areas. As to subpara (f), Mr Kumarage expressed a view about the control of committee processes concerning cultural heritage. However it seems that the parties had reached agreement as to the proposal. All appointments, with the exception of the Chair and one Santos representative, are to be made by the Gomeroi applicant and the Local Aboriginal Land Council (or Councils).

[797] Subparagraphs (g) and (i) deal with micro-siting, a term which I understand to refer to the process concerning the location of individual well heads. The proposal is that well heads will be sited to accommodate environmental and cultural areas of concern. There may well be places and sites which cannot be seen. However, if there are such places or sites, the Gomeroi people will presumably be able to identify somebody who can speak on behalf of such areas or sites.

[798] Concerning subpara (h), Mr Kumarage does not explain his view as to well head visibility, particularly having regard to the "staggered" nature of the project. As to subpara (j), his use of the expression "culturally significant" is not explained, a matter of concern, having regard to his error as to the percentage of the native title claim area affected by the Narrabri Gas Project area. As to pollution or reduction in water flow (addressed in subpara (k)), he seems not to have considered other, more positive evidence.

[799] In paras 48-59, the Gomeroi applicant advances a number of contentions, many of which are repetitive, and appear to misinterpret, or ignore, the evidence arising from the cross-examination of Mr Kreicbergs. The most pertinent contentions are summarized as follows:

(a) Santos's failure to progress the Additional Research Program demonstrates a lack of good faith in negotiations, notwithstanding Mr Kreicbergs' explanation that the Additional Research Program may now proceed, as the Aboriginal Cultural Heritage Management Plan has been approved;

(b) notwithstanding Mr Kreicbergs' evidence, the failure to complete the Additional Research Program prior to the approval of the Aboriginal Cultural Heritage Management Plan does not meet the requirements of the Office of Environment and Heritage Guidelines, and demonstrates the weakness of the New South Wales Aboriginal cultural heritage protection regime in protecting intangible cultural heritage;

(c) although not accepted by Mr Kreicbergs, Santos's failure to complete the Additional Research Program, to confirm well location, or to provide ethnographic information, meant that the Gomeroi applicant was not sufficiently informed regarding the Narrabri Gas Project and was denied the opportunity to provide "free, prior and informed consent";

(d) Mr Kreicbergs' evidence that Santos would not drill in the Pilliga forest, if recommended in the Additional Research Program, was "implausible", being inconsistent with Santos's conduct to date, and because he could not say whether the project would remain viable if the Additional Research Program identified all of the State forest as an area to be avoided;

(e) that although Mr Kreicbergs understood the misalignment under the New South Wales cultural heritage regime regarding the inclusion of both Registered Aboriginal Parties and native title claimants in the Aboriginal Cultural Heritage Management Plan working group, Santos was satisfied with the arrangement;

(f) that although Mr Kreicbergs agreed that a s 31 agreement and an Aboriginal Cultural Heritage Management Plan are different instruments, the Aboriginal Cultural Heritage Management Plan was developed for the purpose of New South Wales legislation and did not mention native title rights;

(g) Mr Kreicbergs did not accept that the s 31 negotiations were the only opportunity for the parties to reach agreement with respect to native title rights and interests, but conceded that Santos was under no obligation to protect those rights and interests; and

(h) Mr Kreicbergs accepted that Gomeroi people's access and movement through the Pilliga forest would be affected by the project, however he also stated that areas not previously available for access may be made available.

[800] The Gomeroi applicant simply makes observations or assertions concerning Mr Kreicbergs' evidence, implying that they undermine his evidence, without actually explaining how they do so. These observations or assertions are far from convincing. As to subpara (a),(b) and (c) concerning the Additional Research Program, the matter has been dealt with in numerous parts of this determination. No point will be served by revisiting the matter. Subparagraph (d) mis-describes Mr Kreicbergs' evidence in cross-examination. The relevant cross-examination appears at ts 136 – ts 137. Counsel initially referred to Mr Kreicbergs' evidence that Santos would avoid working in areas of particular significance. Presumably for forensic reasons, he then enquired as to how Santos would respond if the whole of the Pilliga had to be avoided. Mr Kreicbergs accepted that if access to the whole Pilliga were denied, the project would not proceed. Clearly, he was responding to an extreme case, put to him by Counsel, which extreme case was unlikely to occur. As to subparas (e)-(g), they concern relevant legislation. Mr Kreicbergs views considering the legislation are of no real relevance. As to subpara (h), it is self-explanatory.

Racial Discrimination

[801] In paras 60 – 65, the Gomeroi applicant refers to submissions that relate only to good faith. These contentions are dealt with elsewhere in the determination.

Public Interest

[802] At paras 66 – 67 the Gomeroi applicant deals with this matter, primarily in connection with climate change. That matter is dealt with elsewhere in this determination. The Gomeroi applicant asserts that the Tribunal should have regard to the following points:

(a) that the Tribunal is not bound by the decisions of the Independent Planning Commission or the Commonwealth Minister under the Environmental Protection Act, and must make a fresh and independent decision having regard to all relevant material before it at the time of making its decision;

(b) that the material which the Tribunal must take into account includes the expert reports provided by the Gomeroi applicant, and fresh documents referred to by Professor Steffen, including the Intergovernmental Panel on Climate Change Sixth Assessment Report;

(c) the Narrabri Gas Project is not in the interests of the public because of the greenhouse gas emissions and climate change;

(d) Mr Dunn's evidence at the hearing, regarding "offsets" and "Santos zero emission targets" reveals that there is no guarantee, by way of conditions or otherwise, that such offsets will be enforced;

(e) Mr Dunn's evidence reveals that gas wells would be in situ forever, and that if leakage occurred, the principal gas leaked would be methane, which is a more potent greenhouse gas than carbon;

(f) because methane leakage was not considered by the Independent Planning Commission, it should instead be considered by the Tribunal;

(g) that a decision under s 38 is an "administrative decision";

(h) that the structure of the Native Title Act and the future act provisions, including ss 40 and 42, suggest that the decision of the Tribunal is analogous to an administrative decision; and

(i) that when exercising its powers, the Tribunal must take s 39 considerations into account.

[803] The Gomeroi applicant suggests that due to changing commercial factors, Santos may ultimately export gas from the Narrabri Gas Project, in which case the public interest in local benefits flowing from a domestic gas market may not materialize. Importantly, the export process would, through liquefaction and transport processes, negate any emissions reductions otherwise secured by replacing coal in the domestic market. However the evidence indicates that the gas will be produced for the local market.

[804] The Gomeroi applicant submits that the public interest can be broader than economic interest. For example, the decision in *Western Australia v Thomas*[74] at 176 involved the destruction of large areas of high heritage value to Aboriginal and non-Aboriginal people. Such destruction was considered to be against the public interest. See also *Western Desert Lands Aboriginal Corporation v Western Australia*[75] at [182]. The question of climate change will be addressed at a later stage in this determination.

b. Santos

Santos's Response to the Gomeroi Applicant's Points of Claim and Contentions

[805] Santos's response reflects the structure of s 39. I propose to adopt that structure. Santos contends that, having regard to the criteria in s 39 of the Native Title Act, it is open to the Tribunal to determine that the proposed grants be made. It relies particularly upon the affidavits of Mr Haydn Kreicbergs, Mr Todd Dunn and Dr Luke Godwin, each dated 9 December 2021.

Section 39(1)(a)(i)

[806] Santos accepts that the relevant native title rights and interests are those listed on the Register. However it rejects the Gomeroi applicant's contention that the Tribunal may assume that such rights and interests are practised throughout the Narrabri Gas Project area. Santos contends that the Gomeroi applicant should have provided evidence of the claimed native title rights and interests, and the exercise thereof. This approach is consistent with the decisions in *Western Australia v Thomas,*[76] *Western Desert Lands Aboriginal Corporation v Western Australia,* and *WMC Resources v Evans,*[77] each referred to above.

[807] Santos contends that the impacts of the proposed grants on native title rights and interests will be "limited, manageable and acceptable". The native title claim area covers 111,317.6km^2. The Narrabri Gas Project area covers approximately 950km^2; that is, about 0.85% of the native title claim area. The Santos project area covers approximately

[74] (1996) 133 FLR 124.
[75] (2009) 232 FLR 169.
[76] (1996) 133 FLR 124.
[77] (1999) 163 FLR 333.

923.9km^2. Santos states that the "footprint" of the Narrabri Gas Project may disturb up to 1,000ha (10km$^{2)}$, of which 988.8ha may comprise native vegetation. Hence the project infrastructure will be constructed upon approximately 1% of the Narrabri Gas Project area, comprising approximately 0.009% of the native title claim area.

[808] At paras 37-44 of its contentions, Santos submits that the Gomeroi people's right to access the Narrabri Gas Project area will not be significantly impaired. Clearing will occur progressively throughout the life of the Narrabri Gas Project. It is thus contended that temporary limitations on access will, at any one time, affect only a small proportion of the Narrabri Gas Project area.

[809] This evidence, of itself, significantly undermines the Gomeroi applicant's opposition to the Narrabri Gas Project, given the very limited evidence which specifically addresses the Santos project area.

[810] At paras 45 and 46, Santos contends that the siting of the Narrabri Gas Project infrastructure has not yet been finalized. It will therefore be possible to avoid or minimize impact upon Aboriginal cultural heritage, and the enjoyment of native title rights and interests in the Narrabri Gas Project area, as they are identified by the Gomeroi applicant.

[811] At paras 45-51, Santos identifies the evidence of Mr Dunn in support of its contention, that the processes developed to inform and determine the location of the Narrabri Gas Project infrastructure, will avoid any identified tangible or intangible Aboriginal cultural heritage. These processes include a desktop review of available cultural heritage information, site verification or "ground truthing" of known sites, avoidance of all sites listed on the Aboriginal Heritage Information Management System register, pre-clearance surveys (conducted under the guidance of the proposed Aboriginal Cultural Heritage Working Group), micro-siting, re-siting (if necessary), and other measures designed to minimize ground disturbance and impacts upon sensitive ecological values.

[812] At paras 52 and 53 Santos submits that the Tribunal should give limited weight to the contentions of the Gomeroi applicant regarding the effects of the Narrabri Gas Project upon native title rights and interests, given that the Gomeroi applicant has not produced expert evidence in support. However it seems to me that Mr Kumarage has given some

expert evidence in that regard although it suffers from the shortcomings to which I have referred.

[813] At paras 54 – 55, in response to the environmental concerns of the Gomeroi applicant, Santos contends that the impacts and risks of the Narrabri Gas Project have been assessed by the Department and the Independent Planning Commission as part of the Environmental Impact Statement process, in accordance with relevant legislation. Santos also asserts that strict conditions have been attached to the Development Consent and that, in any event, the current proceedings are not the appropriate context in which to pursue such concerns. See *Bisset v Mineral Deposits (Operations) Pty Ltd*[78] at [146].

[814] At para 54(e), Santos contends that a consideration of environmental impacts of the Narrabri Gas Project, other than in relation to such impact upon native title rights and interests, is not relevant as such consideration was removed from the Native Title Act by the *Native Title Amendment Act 1998* (Cth) (**1998 Act**). This matter is dealt with elsewhere in this determination.

[815] As observed above, the Gomeroi applicant contends that there are inadequacies in other statutory schemes relating to the identification and protection of Aboriginal cultural heritage. Further, it submits that the Native Title Act provides, "an important opportunity for the identification and protection of indigenous cultural heritage as an incident of the recognition and protection of native title rights and interests". Santos rejects that contention. It asserts the sufficiency of the processes established by State and Commonwealth legislation, together with Santos's "best practice" standards. Santos further contends that the relief sought by the Gomeroi applicant, for the protection of its cultural heritage in these proceedings would, effectively, provide a right of veto and is clearly not contemplated by the Native Title Act. Santos submits that the Gomeroi applicant should seek relief under other legislation, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

[816] Santos contends that State and Commonwealth statutory regimes are strengthened by specific cultural heritage protection conditions attached to the Development Consent for

[78] (2001) 166 FLR 46.

the Narrabri Gas Project. The following conditions are extracted from the Santos contentions at para 65:

> (a) (**Condition B1-B6**) These conditions require that petroleum mining operations in the Project Area must not disturb any identified Aboriginal cultural heritage items, as identified in Appendix 7, disturb any other Aboriginal cultural heritage items identified during development, if assessed in a Field Development Plan to be of high significance, or disturb any other Aboriginal cultural heritage items (and historic heritage items) identified during the development, unless otherwise approved in a Field Development Plan. They also require the development, approval and implementation of a Field Development Protocol and Field Development Plan.
>
> (b) (**Condition B51**) Condition B51 provides that the Applicant must prepare a Biodiversity Management Plan to the satisfaction of the Planning Secretary which describes measures to be implemented in the Project Area to manage potential conflicts with Aboriginal heritage values.
>
> (c) (**Conditions B53-B57**) These conditions require Santos to take steps to consult with the Aboriginal Cultural Heritage Advisory Group and to avoid direct and indirect impacts on Aboriginal items of high significance, and to avoid impacts to heritage items that are not of high significance as far as possible.
>
> (d) (**Condition B58**) Condition B58 requires the Applicant to establish and facilitate the operation of an Aboriginal Cultural Heritage Advisory Group for the development to the satisfaction of the Planning Secretary.
>
> (e) (**Condition B59**) Condition B59 requires that the Applicant must prepare an Aboriginal Cultural Heritage Management Plan for the development to the satisfaction of the Planning Secretary.

[817] Santos contends that the Tribunal's task is not to uphold any objection on the basis that there may be even a remote possibility of interference. It must focus upon the likelihood of interference with the enjoyment of native title rights and interests. Santos asserts that taking into account its previous history, working closely with Indigenous communities to protect their cultural heritage, and its intention to comply with the relevant legislation (according to the evidence of Mr Kreicbergs and Dr Godwin), the Tribunal should be satisfied that the likelihood of interference with such enjoyment is minimal and acceptable.

[818] Santos contends that the required processes under the Environmental Planning and Assessment Act, as addressed in the Aboriginal Cultural Heritage Assessment Report, and developed for implementation through the Aboriginal Cultural Heritage Management Plan, provide for the continued identification and protection of cultural heritage in accordance with "industry best practice" through participation of the Aboriginal community in the design and implementation of work programs, and by providing access to the Narrabri Gas Project area. Santos contends that these programs

will improve the identification, management and recording of cultural sites and values in the Narrabri Gas Project area.

[819] At para 70 Santos refers to the public interest in gas supply. It also points out that the legislative intention of the "right to negotiate" procedure was facilitation of the grant of mining titles, not the addition of a further layer of requirements.

[820] The Gomeroi applicant contends that the Aboriginal Cultural Heritage Assessment Report and the Aboriginal Cultural Heritage Management Plan have failed to take into account the intangible sites and cultural landscapes. Santos rejects that contention on the basis that such documents were prepared in accordance with the "Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in New South Wales" and the "Aboriginal Cultural Heritage Consultation Requirements for Proponents". Both documents require consideration of tangible and intangible cultural heritage.

[821] Santos contends that notwithstanding the registration of over 500 Registered Aboriginal Parties and extensive consultation with Gomeroi people, the Aboriginal Cultural Heritage Assessment Report recognized that intangible cultural heritage appeared to be underreported. The Aboriginal Cultural Heritage Assessment Report therefore recommended an Additional Research Program to continue to promote the identification and protection of intangible cultural heritage. Santos further contends that the protection of identified sites can be enhanced through the use of micro-siting. Those matters are discussed above.

Section 39(1)(a)(ii)

[822] Santos contends that the effect of the proposed grants on the way of life, culture and traditions of the Gomeroi people will be limited, manageable and acceptable. Santos states that it is not aware of any Aboriginal communities, living in the vicinity of the Santos project area. It also contends that the impact of the Narrabri Gas Project on surface and subsurface water has been assessed as minimal and is subject to Development Consent conditions. Santos contends that Chapter 13 of the Environmental Impact Statement, as assessed by the Department and the Independent Planning Commission, indicate "non-existent or negligible" impact upon the hydrology and geomorphology in and around the Narrabri Gas Project area.

[823] Santos relies upon the technical evidence of Mr Dunn and compliance with the "NSW Code of Practice – Well Integrity" in its contention that risks to subsurface aquifers and other reservoirs have been assessed and will be mitigated.

Section 39(1)(a)(iii)

[824] Santos contends that the proposed grants have the potential to impact positively on the development of the social, cultural and economic structures of the Gomeroi people. It should facilitate the return of Gomeroi people to country as a result of the establishment of the Aboriginal Cultural Heritage Advisory Group, the proposed Additional Research Program, micro-siting, training and employment opportunities and other economic and public benefits.

Section 39(1)(a)(iv)

[825] Santos contends that the freedom of the Gomeroi people to access the Santos project area in order to carry out rites, ceremonies or other activities of cultural significance, in accordance with their traditions, will not be significantly affected because of the limited footprint of the Narrabri Gas Project, of which only a portion will, for safety reasons, have restrictions on access.

Section 39(1)(a)(v)

[826] Santos rejects the Gomeroi applicant's characterization of the whole of the Narrabri Gas Project area, or the "Pilliga forests" as being of particular significance pursuant to s 39(1)(a)(v), asserting that the contention is unsupported by evidence. It suggests that the Gomeroi applicant's own contentions blur the distinctions between "ordinary" and "particular" significance, as discussed in *Cheinmora v Striker Resources NL*.[79] At 34, Carr J stated:

> … a relevant site is one which is of special or more than ordinary significance. It is not enough that the site simply be of significance to the native title holders. That would leave the word "particular" with no work to do.

[827] Santos accepts that the Narrabri Gas Project area contains 90 known Aboriginal cultural heritage sites and potentially other sites, both tangible and intangible, which sites may be of significance to the Gomeroi people. However Santos contends that the proposed

[79] (1996) 142 ALR 21.

grants will not impact upon any areas or sites of "particular significance". The Development Consent conditions impose duties which protect Aboriginal cultural heritage. Further, the Field Development Plan provides for the avoidance of impacts upon cultural heritage, unless approved in a Field Development Plan.

Section 39(1)(b)

[828] In its revised contentions, the Gomeroi applicant's position is that the Narrabri Gas Project should not proceed. Any such interest, proposal, opinion or wishes must concern the management, use or control of land affected by the proposed grants, namely the Narrabri Gas Project. Santos asserts that "in principle" agreement with the Gomeroi applicant was reached, subject to agreement on the production levy and authorization by the native title claim group. In support of this contention, Santos relies upon para 115 in the affidavit of Mr Kreicbergs which refers to a file note prepared by Mr MacLeod on 18 December 2020. The Gomeroi applicant denies that "in principle" agreement was reached. The difference of opinion may be little more than semantic.

[829] Santos states that it would prefer to reach agreement in relation to the proposed grants. However it notes that negotiations have been ongoing for a substantial period of time, without a result.

Section 39(1)(c)

[830] Santos contends that the Narrabri Gas Project will make a significant contribution to the economy of New South Wales and, in particular, to local and regional communities. Estimated economic benefits, over a 25 year period, include a Community Benefit Fund of approximately $120 million (over 25 years), agreements with Narrabri Council to the value of $14.5 million, shareholder revenue of $5.4 billion from the sale of gas and $3.1 billion in royalties and tax revenue to the New South Wales Government. Santos anticipates the creation of approximately 1,300 jobs during the construction phase, and around 200 direct and indirect jobs during the operational phase. Further, the Narrabri Gas Project will stimulate local industry through the consumption of goods and services.

[831] Whilst such benefits flow from the Narrabri Gas Project as a whole, as previously discussed, the proposed grants are an essential component of that project.

Section 39(1)(e): Any public interest in the doing of the act

[832] Santos submits that there is a public interest in the making of the proposed grants for reasons associated with the domestic supply of gas, and other economic and social advantages. Santos contends that the public interest arguments against the proposed grants, due to greenhouse gas emissions, have been considered by the Independent Planning Commission in detail.

[833] At paras 104-106 of its contentions, Santos submits that the Independent Planning Commission has already determined the development application for the Narrabri Gas Project. As a part of its decision-making process, the Independent Planning Commission considered the public interest under s 4.15(1) of the Environmental Planning and Assessment Act. It determined, on balance, that the Narrabri Gas Project was compliant with the legislation and in the public interest. Prior to reaching its conclusion, the Independent Planning Commission had regard to a range of submissions and expert reports. It held public hearings over seven days, and heard from 366 speakers.

[834] In *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*,[80] the relevant applicant sought to establish that the decision of the Independent Planning Commission was invalid on four grounds. One ground was that the Commission had failed to consider the environmental impacts of the greenhouse gas emissions and balance such impacts against the benefits. The Land and Environment Court undertook a detailed examination of the reasons underpinning the Commission's conclusion that the anticipated emissions from the Narrabri Gas Project are, subject to conditions, acceptable. The decision did not examine "on the ground" environmental impacts of climate change, such as those described in general terms by Professor Steffen at paras 3.1-3.3 of his report. Rather, it examined the anticipated impact of greenhouse gas emissions from the Narrabri Gas Project within the framework of Commonwealth and New South Wales policy regarding greenhouse gas emissions targets.

[835] At para 109 of its contentions, Santos submits that while the conclusion of the Independent Planning Commission, the Land and Environment Court and the Department are not determinative of the Tribunal's considerations under s 39(1)(e), such

[80] [2021] NSWLEC 110.

matters are relevant. Santos asserts that in *Bligh Coal Limited v Malone*,[81] the Tribunal found that the State's view was relevant to an assessment of the public interest. In *Bligh Coal Limited v Malone*, the Tribunal held at [69]:

> Concerning s 39(1)(c), the State and the joint venturers assert that significant economic and social benefits will flow from such grant. There is no reason to doubt these propositions. Section 39 (1)(e) requires that I take into account any public interest in the proposed grant. Prima facie, the State is an appropriate arbiter of the public interest concerning mining within its borders. Obviously, it supports the proposed grant. I see no basis for rejecting that view.

[836] At paras 110-111 of its primary contentions, Santos asserts that the proposed grants are, notwithstanding greenhouse gas emissions, in the public interest for a number of reasons, including that:

- natural gas produces approximately 50% less greenhouse gas emissions than does coal when used to generate electricity on a lifecycle basis, and New South Wales is currently seeking to transition away from coal as an electricity generation source;
- gas fired electricity generation is able to provide firming power to support and promote the use of renewable energy sources;
- the proposed grants will contribute to emissions reduction efforts;
- the Narrabri Gas Project is consistent with the Commonwealth and State Governments' commitments under the Paris Agreement, NSW Energy Plan and the Energy Memorandum of Understanding;
- the greenhouse gas emissions from the Narrabri Gas Project have been assessed in the Environmental Impact Statement, and by the Department and the Independent Planning Commission;
- the greenhouse gas emissions of the Narrabri Gas Project are strictly conditioned in the Development Consent;
- Santos's "standard practice" is to implement energy efficiency and the greenhouse gas management measures where it is practicable and economical to do so; and
- direct greenhouse gas emissions from the proposed project are anticipated to be relatively low (<0.2% of Australia's greenhouse gas emissions, or <0.002% of global greenhouse gas emissions).

[81] [2021] NNTTA 19.

[837] In substance, Santos contends that the greenhouse gas emissions from the Narrabri Gas Project are acceptable, given its potential to halve the quantity of downstream emissions produced by the current domestic electricity market. Santos contends that such an outcome would be consistent with Commonwealth and New South Wales Government emissions reduction commitments and the conditions imposed on the Narrabri Gas Project in order to control, monitor and minimize greenhouse gas emissions.

[838] Santos contends that energy security is an issue for New South Wales and the Australian eastern States more generally, and relies upon predictions by the Australian Energy Market Operator and the Australian Competition and Consumer Commission inquiry into gas supply in Australia. Santos further argues that the Narrabri Gas Project will contribute to energy security for New South Wales. Santos is committed to providing 100% of the Narrabri Gas Project gas to the domestic market. During Mr Dunn's re-examination, he was referred to Condition A9 of the Independent Planning Commission Development Consent conditions, which condition effectively requires Santos to provide gas to the domestic gas network by way of a pipeline.

[839] Santos relies upon para 199 of Mr Dunn's affidavit as supporting its contention that the Narrabri Gas Project is in the public interest. It is anticipated that it will create approximately 1,300 jobs during the construction phase, and sustain a further 200 direct and indirect jobs during the operational phase. Santos says that there are currently 16 Narrabri-based jobs, including two for Gomeroi people. In this regard, Santos contends that the proposed grants are in the public interest in that the environmental footprint is relatively small when compared to the processes associated with the extraction of coal, involving either open cut or underground mining. Further, domestic coal seam gas-fired electricity will produce 50% less carbon emissions compared to coal-fired production. Santos also submits that the direct and indirect greenhouse gas emissions from the Narrabri Gas Project, including emissions from downstream burning of the gas, will be "minor".

Section 39(1)(f): Any other matter that the arbitral body considers relevant

[840] Santos contends that the Tribunal may have regard to any other matter that it considers relevant, including the rigorous assessment that the Narrabri Gas Project has already undergone pursuant to the process undertaken by the Independent Planning

Commission, and the fact that the Independent Planning Commission decision has been upheld following judicial review. Santos relies upon the decision of *Seven Star Investments Group Pty Ltd v Western Australia*[82] at [67] to support this contention as follows:

> The grantee party disputed both these contentions and I do not propose to make a finding on them. I do not regard them as factors I should take into account in making my determination. In my view the Tribunal is entitled to rely on the Government party (Department of Mines and Petroleum) as the regulatory body to deal with this type of issue. The issues are not of such an exceptional or serious nature to make it necessary to resolve them in order to make a determination.

[841] In *Seven Star Investments v Western Australia*, the Tribunal relied upon the government party's assessment of the size and standing of the grantee party, although it did not consider the matter to be of particular relevance.

[842] Elsewhere in this determination I deal with the effects of the 1998 Act upon the limited extent to which environmental factors, affecting native title rights and interests, should be addressed under s 39(1). Some of those issues will later be addressed in connection with the State's contentions.

Closing Submissions

[843] Santos submits that the Tribunal's task is to limit itself to a consideration of the factors set out in s 39, and not to reassess the Narrabri Gas Project, which project already has Development Consent and Aboriginal Cultural Heritage Management Plan approval, involving a "detailed and interactive six and a half year assessment process". Santos contends that in the absence of evidence to the contrary, the Tribunal can assume that Santos will comply with the law and the conditions of the Development Consent.

Section 39(1)(a)(i)

[844] Mr Kumarage's evidence relates to the enjoyment of native title rights and interests. Santos contends that the Tribunal can give little weight to such evidence for the following reasons:

(a) his report was "preliminary";

[82] (2010) 257 FLR 175.

(b) he does not have expertise in mining operations and has therefore based his views on assumptions regarding the operation of the Narrabri Gas Project;
(c) his report did not involve any visit to the Narrabri Gas Project area;
(d) his relevant research included telephone interviews with five people, none of whom was a member of the Gomeroi applicant;
(e) his report is based upon claimed native title rights and interests, not upon evidence as to the exercise or enjoyment of such rights and interests in the Narrabri Gas Project area;
(f) his report assumes that restricted access to the Narrabri Gas Project area will impact upon the exercise of native title rights and interests, without reference to any factual basis; and
(g) his report overstates the size of the Narrabri Gas Project area by a factor of 10, an error which he concedes, whilst he asserts that it does not undermine his conclusion as to such significance.

[845] Santos contends that, by contrast, its evidence regarding the operation of the Narrabri Gas Project demonstrates that any interference with native title rights and interests will be limited, having regard to considerations including the following:

(a) detailed Development Consent conditions regarding the protection of Aboriginal cultural heritage;
(b) the identification and protection of any further sites or areas of cultural significance in the Additional Research Program;
(c) the ongoing involvement of Gomeroi people in cultural heritage clearances and management, as set out in the approved Aboriginal Cultural Heritage Management Plan; and
(d) the relative size of the actual footprint of the Narrabri Gas Project area as compared to the size of the Gomeroi people's claim area.

[846] Concerning the Additional Research Program, in April 2022, Santos proposed, as an additional condition to any determination, that such program be completed prior to the commencement of Phase 2 of the Narrabri Gas Project, rather than within a year after such commencement.

[847] Santos contends that, contrary to the submissions of the Gomeroi applicant, the Aboriginal Cultural Heritage Management Plan processes provide sufficient protections for tangible and intangible cultural heritage, given that it includes pre-clearance surveys to be undertaken by Cultural Heritage Officers nominated by the Aboriginal Cultural Heritage Advisory Group, and through the application of the avoidance principle. Santos contends that these processes can be applied to relocate proposed infrastructure in order to protect identified tangible and intangible Aboriginal cultural heritage.

[848] Santos contends that its policy of adopting "best practice" Aboriginal cultural heritage protection should be taken into account by the Tribunal. It relies upon the evidence of Mr Kreicbergs, given at the hearing, and Member Shurven in *HL (Name withheld for cultural Reasons) (Warrwa #2) v 142 East Pty Ltd*.[83]

[849] Santos contends that Mr Kumarage concedes that it is possible for the Aboriginal Cultural Heritage Management Plan to apply to both tangible and intangible cultural heritage. Nonetheless, he asserts that the emphasis in the Aboriginal Cultural Heritage Management Plan is on tangible sites. Santos contends that such opinion is not supported by the evidence.

[850] Mr Kumarage suggested at the hearing, that there may be some difficulty in relocating wells if a large portion of the Narrabri Gas Project area is found to be significant for cultural reasons. Santos asserts that the proposition is speculative and contradicted by the evidence given by Mr Dunn. In re-examination, Mr Kumarage was taken to sch 4 of the Aboriginal Cultural Heritage Management Plan, which schedule is headed, "Mitigation Measures to be applied to site types", in connection with "terms of flexibility". See ts 229, ll 18-19. The flexibility in question concerned the relocation of wells to protect tangible and intangible cultural heritage. In sch 4 it is acknowledged that in some cases relocation may not be practicable, and that in such cases, identified management provisions would be adopted. Mr Kumarage enthusiastically adopted this passage as supporting his suggestion that if there were many wells in an area, re-location may not be an option. Santos points out that sch 4 must be read in the context of sch 3 which identifies eleven categories of sites in which Santos will not locate infrastructure. The categories are discussed in some detail in sch 5. In other words, the protection

[83] [2014] NNTTA 49.

offered in connection with such sites is much wider than Mr Kumarage's evidence would suggest. Santos contends that Mr Kumarage's evidence, concerning sch 4 of the Aboriginal Cultural Heritage Management Plan, lacks context, in that it does not consider the contents of sch 3 regarding complete avoidance of known sites, and sites identified in the Additional Research Program.

[851] Overall, Santos contends that when considering the practical effect of the proposed grants on the registered native title rights and interests, the Tribunal should ascribe greater weight to the evidence of Mr Kreicbergs, Mr Dunn and Dr Godwin than to that of Mr Kumarage. Given the limitation upon Mr Kumarage's access to likely sources of information and other comments concerning his evidence, I am inclined to accept Santos's contention.

[852] With particular reference to s 39(1)(a)(v) Santos submits that the Tribunal has not been provided with any evidence that the proposed grants or the Narrabri Gas Project will have an effect on any area of particular significance to the Gomeroi people. Santos submits that during cross-examination, Mr Kumarage conceded "that he has no present evidence that the whole of the Pilliga is of particular significance". Santos submits that the only evidence before the Tribunal, relevant to the significance of the Pilliga, is insufficient to support a finding that there are any areas or sites of particular significance in the Pilliga, the Narrabri Gas Project area, or the actual footprint of the Narrabri Gas Project.

Section 39(1)(b)

[853] Santos points out that the Gomeroi applicant has not always expressed opposition to the Narrabri Gas Project. On occasions, it seems to have been willing to agree to the proposed grants, subject to conditions. Indeed, at one stage the only outstanding matter seems to have been the percentage of any production levy.

Section 39(1)(c)

[854] Santos submits that the Tribunal should accept the evidence of its witnesses regarding the economic and other significance of the Narrabri Gas Project. However, one matter requires particular consideration. The Gomeroi applicant seems to suggest that in assessing the economic benefit of the proposed grants, account should be taken of the

possible cost of damage resulting from climate change. Santos rejects that proposition, submitting that it would not be possible to ascertain the proportion of any damage attributable to climate change.

Section 39(1)(e)

[855] In its closing submissions, Santos submits that:

- whilst it agrees that there is a public interest in mitigating the impact of climate change, and in the preservation and continuity of Gomeroi culture, the evidence before the Tribunal does not demonstrate that the proposed grants will have a negative impact upon the public interest;
- Professor Steffen failed to appreciate that the Narrabri Gas Project will not involve hydraulic fracturing, and did not consider the conditions imposed on the project by the Development Consent;
- Professor Steffen did not address climate change issues considered by the Independent Planning Commission in approving the Narrabri Gas Project, and did not engage with matters identified by the Independent Planning Commission as "Expected emission advantages of coal seam gas"; and
- the findings of the Independent Planning Commission should prevail over the views expressed by Professor Steffen.

[856] At the hearing, Santos submitted that the evidence of Professor Steffen:

- in relation to the Narrabri area was at a level of generality which did not add anything which would undermine the detailed consideration of expert evidence undertaken by the Independent Planning Commission;
- suffered from flawed assumptions, including that the Narrabri Gas Project will involve extraction of gas by means of hydraulic fracturing; and
- did not engage with the reasoning of the Independent Planning Commission, but adopted a simplistic approach, thereby rejecting the consideration of any factors relevant to new projects which emit greenhouse gasses.

[857] At para 90 of its closing submissions, Santos refers to Mr Dunn's evidence, concerning the public benefit, summarizing it as follows:

- gas power generation supports and promotes the use of renewable energy by providing a readily available alternative energy source/firming power to address energy requirements where an intermittent renewable source is not available;
- gas produced by the Narrabri Gas Project will directly support energy stability in New South Wales via the domestic market; and
- Construction of production wells cannot commence until a pipeline, for supply to the domestic market, is approved, thus demonstrating that Santos intends to supply that market.

[858] In summary, Santos asserts that:

- the Tribunal ought not revisit the Independent Planning Commission's decision concerning the public interest; and
- there is, in any event, no evidential basis for doing so, given the inadequacy of Professor Steffen's evidence.

[859] In summary, Santos contends that the Independent Planning Commission's findings should be preferred to Professor Steffen's evidence. For reasons given elsewhere in this determination, and set out above, I adopt Santos's contentions.

c. The State

The State's Contentions Concerning the Gomeroi Applicant's Contentions

[860] The State does not admit that:

- Gomeroi tradition imposes on Gomeroi people an obligation to "care for country";
- the Pilliga forest, as a whole, is a place of particular spiritual significance to the Gomeroi people;
- the Gomeroi people exercise all of their registered native title rights and interests in the Pilliga forest;
- the proposed grants will result in the clearing of a significant area of vegetation and fragment remaining vegetation;

- access to the Santos project area will be reduced;
- the ecological impact of the proposed grants will be significant and permanent, with the potential for further damage due to leaks and spills, possibly involving contamination of groundwater, relying upon the State's regulatory approvals processes, the findings of the Independent Planning Commission and the Development Consent conditions; or
- the proposed grants will contribute to environmental damage through climate change.

[861] The State contends that the Tribunal may make a determination without imposing any conditions, and that the Gomeroi applicant has not advanced any cogent reasons for imposing a condition requiring authorization by the native title claim group (assuming that the Tribunal determines that the proposed grants may be made).

[862] The State further contends as follows:

(a) the Tribunal may refuse to consider such of the Gomeroi applicant's contentions which go beyond the issues set out in its points of claim, the purpose of the points of claim being to define the issues in dispute, so allowing the State and Santos to respond appropriately;

(b) for the purposes of s 39(1)(a)(i) to (v), it is not sufficient for the Gomeroi applicant to rely upon the registered native title rights and interests; it is for the Gomeroi applicant to produce evidence to establish that those asserted rights and interests are exercised, and the extent of such exercise;

(c) the registered native title rights and interests relate to a native title claim area of approximately 111,317.6km^2; the proposed grants will cover an area less than 950km^2 or .85% of that claim area.

(d) the assertions by the Gomeroi applicant at paras 184, 187, 195, 210 and 212 of its contentions regarding the rights and interests which "may" be exercised and "may" be affected by the proposed grants do not assist; the question is whether such rights are, in fact, enjoyed, whether the enjoyment of those rights and interests will be affected by the proposed grants, and the extent of any such

effect; see *Western Desert Lands Aboriginal Corporation v Western Australia*[84] at [64] and *Western Australia v Jidi Jidi Aboriginal Corporation*[85] at [27];

(e) the Gomeroi applicant's contentions regarding restrictions on access to the Santos project area are flawed in that:

(i) restrictions on access to the whole of the Narrabri Gas Project area are not proposed;

(ii) any restrictions on access will affect parts of the Santos project area for only limited periods; and

(iii) the assertion that the exercise of native title rights and interests will be "particularly affected" is not supported by the evidence before the Tribunal;

(f) the Gomeroi applicant's assertions regarding fragmentation of the landscape and impacts upon story sites by the proposed grants are not supported by evidence before the Tribunal, or by other explanation;

(g) the Gomeroi applicant's contentions regarding the inadequacy of the State regulatory regime to protect Aboriginal cultural heritage, and the natural environment, relying upon the Development Consent conditions, addressing heritage and environment, should be rejected; such rejection being highly relevant in assessing whether the proposed grants will affect the enjoyment of native title rights and interests;

(h) the evidence filed by Santos regarding its intentions to abide by regulatory requirements is a matter which the Tribunal is entitled to take into account;

(i) the protection of Aboriginal cultural heritage is supported by various provisions pursuant to the National Parks and Wildlife Act and supporting policies, particularly by:

(i) section 86, an offence provision;

(ii) section 5, the definition of "Aboriginal object" which, Santos says, is sufficiently broad to include intangible aspects of Aboriginal culture and heritage;

(iii) the fact that any Aboriginal or non-Aboriginal person may seek to enforce protections provided under the National Parks and Wildlife Act;

(iv) section 87 defence provisions are "fairly narrow";

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[84] (2009) 232 FLR 169.
[85] (2002) 169 FLR 470.

(v) sections 90 to 90P comprise rigorous requirements for the grant of an Aboriginal Heritage Impact Permit; and

(vi) section 90Q, providing for establishment of an Aboriginal Heritage Information Management System;

(j) should the proposed grants be made, the relevant terms will be consistent with, and require compliance with, the Development Consent conditions; further the lease conditions could include provisions regarding the minimization of harm to the environment, land rehabilitation, operation plans identifying how operators will manage harm, and other regulatory approvals, including those pursuant to the *Protection of the Environment Operations Act 1997* (NSW);

(k) any breach of conditions imposed on a petroleum production lease could result in the cancellation of the lease pursuant to s 22(1)(c) of the Petroleum (Onshore) Act; further, security could be required by the Minister for the performance of a lease condition pursuant to s 10A of the same Act;

(l) the Development Consent conditions contemplate an environmental protection licence being issued by the Environment Protection Authority to regulate aspects of the Narrabri Gas Project, including discharge of water and gasses;

(m) evidence shows that Santos currently holds two Environmental Protection Licences for the Narrabri Gas Project, and that the conditions include legally enforceable obligations, safely to store materials and substances to prevent environmental harm;

(n) the Environmental Protection Licences include requirements relating to groundwater and produced water storage monitoring, and publicly available reporting;

(o) Santos is required to have a pollution incident response management plan, dealing with any pollution incidents which cause, or may cause, harm to the environment, including timely communication, minimization and management risks; and

(p) as the Environmental Planning Authority is the lead regulator for gas, it reviews and comments on mining exploration and geoscience group draft conditions for any petroleum title.

Section 39(1)(a)(i)-(iv) and Section 39(2)

[863] The State contends that having regard to the submissions made by the Gomeroi applicant and Santos concerning s 39(1)(a)(i)-(iv) and s 39(2), the Tribunal may conclude that the effect (if any) of the proposed grants on the criteria outlined in s 39(1)(a)(i)-(iv) is unlikely to be substantial.

Section 39(1)(a)(v)

[864] The State contends that it is not sufficient for the Gomeroi applicant merely to assert that areas are of significance. The State relies on the decision of Member Sosso in *Bissett v Mineral Deposits (Operations) Pty Ltd*[86] at [84]. Nor is it sufficient for the Gomeroi applicant to assert that "some areas may have particular significance due to their connection to an important religious or cultural story, or its role in the ecology of the region". The State submits that taken together, the protections for Aboriginal cultural heritage provided for under the Development Consent conditions and the State regulatory regimes, ongoing consultation, and site investigations, the Tribunal may find that the effect of the proposed grants upon any area or site of particular significance is unlikely to be substantial.

Section 39(1)(b)

[865] The State notes that the agreement of the Gomeroi people is not a precondition to a determination by the Tribunal that the proposed grants be made.

Section 39(1)(c)

[866] The State refers to comments made in *Cameron v Queensland*[87] at [71]-[73] as follows:

> A few observations can be made about the statutory task required of the Tribunal. First, the paragraph focuses on the significance of the *act.* It is not a generalized inquiry about the importance of exploration or mining to the economy (localized or national). It is a specific evaluation about the impact of the future act the subject of the inquiry. Accordingly, the Tribunal is not required under this paragraph to look any further than the evidence of how the proposed future act will impact on the economies and persons specified. Issues about the benefits of the mining industry to the health of the local, Queensland or Australian economy are not relevant to this paragraph. The only focus of this paragraph is the act in question and the only issue which the Tribunal is required to evaluate is the significance of the future act. The symbolic,

[86] (2001) 166 FLR 46.
[87] [2006] NNTTA 3.

> cumulative or ripple impacts of the future act fall outside the purview of this paragraph.
>
> Second, the inquiry is not limited to the economic consequences of the proposed future act – see *Western Australia v Thomas* (1996) 133 FLR 124 at 175. The term "other significance" is potentially broad and can only be sensibly dealt with in terms of the evidence produced at a particular inquiry. I do not read the term "other significance" as being limited to impacts of an economic or wealth related nature. It could be that the doing of the future act could have beneficial impacts for the advancement of medical or related research. For example, the minerals proposed to be extracted could be critical for medical research, or any other field of human endeavour. The "significance" of granting the right to mine must therefore be viewed in an expansive sense and not purely and necessarily from the quantum of money that will be generated from the extraction of the relevant material from the relevant land or waters.
>
> Finally, the Tribunal is required to evaluate the significance of the proposed act to indigenous persons living within close proximity to the proposed tenement. It should be noted that the Act is not worded to limit the inquiry to members of the native title claim group. Rather, the inquiry focuses on the significance of the act to indigenous persons generally. For example, it may be that a proposed mine will generate jobs and related benefits to indigenous Australians who live nearby whether or not they are members of the claim group. The 1998 amendments to this paragraph were designed to ensure that in any proper inquiry the interests of local indigenous persons living and having responsibilities in the general area, were given proper weight.

[867] I accept that passage as being correct. The State relies upon the findings by the Independent Planning Commission that the Narrabri Gas Project will yield economic and social benefits. Likely benefits include employment for workers engaged for the Narrabri Gas Project, indirect employment for suppliers and contractors, royalties and tax revenue for the State, tax revenue for the Australian Government, and the ongoing availability of gas for households and businesses in New South Wales and Australia.

Section 39(1)(e)

[868] The State contends that the proposed grants would be in the public interest. It considers that the concept of "public interest" may include any public interest in greenhouse gas emissions. The State contends that the Tribunal should give significant weight to the conclusions reached by the Independent Planning Commission, having regard to the fact that the issue is primarily a State planning matter, and that it was the subject of extensive detailed expert analysis on the planning documents presented to the Independent Planning Commission. The issue was also closely examined by the Independent Planning Commission and by the Land and Environment Court, the State's planning regime, and by reference to the State's energy plan. The State contends that this rigorous assessment should be preferred to the limited evidence produced in these proceedings by the Gomeroi applicant.

[869] The State further contends that in circumstances where the conclusions of the Independent Planning Commission regarding greenhouse gas emissions and climate change were undisturbed by the Land and Environment Court in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*,[88] the Tribunal need not depart from that conclusion. The reference to the Gomeroi applicant's limited evidence is primarily referring to Professor Steffen's evidence. There is no doubt that Professor Steffen has firm views about climate change, and that such views are widely held in both the relevant scientific community and more broadly. However scientific views do not displace the obligation placed on governments at all levels to take into account many considerations in making decisions, which decisions are often controversial.

[870] In New South Wales, there is a clear decision-making process which regulates the proposed grants. The Tribunal must proceed in accordance with Commonwealth law. However its decision must inevitably reflect the relevant State regime. There would be serious consequences for our federal system were Commonwealth tribunals simply to disregard decisions of State agencies, made within constitutional power. Section 146 of the Native Title Act offers a basis for dealing with this problem.

[871] Nonetheless, the State cannot demand that its role displace that of the Tribunal, where the latter body is performing its statutory function.

Section 39(1)(f)

[872] The State is not aware of any other relevant matter. Parliament seems to have intended that environmental matters affecting native title be dealt with under this heading, a matter to which I shall return.

Section 39(2)(a)

[873] To the extent necessary, the State accepts that significant parts of the Santos project area are subject to third party rights and interests. It considers that such rights and interests may have extinguished more than half of the Santos project area.

[88] [2021] NSWLEC 110.

Section 39(2)(b)

[874] The State asserts that significant portions of such land have been lawfully used, managed and controlled in the past, and are subject to continuing lawful use, management and control.

[875] I accept the evidence relating to s 39(2). It suggests historical interference in the enjoyment of native title rights and interests. However loss of control must be balanced against any evidence of continuing enjoyment by the Gomeroi people of native title rights and interests, and other matters relevant to s 39(1).

Closing Submissions

Previous Decisions Concerning Greenhouse Gas Emissions

[876] The State contends that the Tribunal may take into account, and give significant weight to the previous determinations of other specialist bodies and courts regarding the risks of greenhouse gas emissions. The State relies upon the following information:

(a) the Narrabri Gas Project is a matter for State planning;
(b) the Independent Planning Commission is a body constituted by subject-matter experts;
(c) the Independent Planning Commission gave reasons for its approval and addressed matters specified by the Environmental Protection Authority relating to environmental impacts;
(d) the Independent Planning Commission considered submissions concerning greenhouse gas emissions;
(e) the Independent Planning Commission determined that greenhouse gas emissions aligned with State and Commonwealth government commitments for future energy generation in New South Wales;
(f) the NSW Land and Environment Court in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*[89] did not accept that the Independent Planning Commission had failed properly to consider the environmental impacts

[89] [2021] NSWLEC 110.

of greenhouse gas emissions generated by the Narrabri Gas Project when making its decision;

(g) there is no reason for the Tribunal to adopt a different planning or environment analysis from that adopted by the Land and Environment Court; and

(h) the NSW Land and Environment Court is a specialist court with expertise in determining disputes concerning environmental protection laws.

The Exercise to be Undertaken by the NNTT Pursuant to s 39

[877] Concerning the public interest, the State contends that the Tribunal must assess arguments for and against the proposed grants on the evidence produced, and form a view about how such evidence affects the determination to be made.

Clarification of Matters

[878] The State contends that:

(a) condition B59 of the Development Consent conditions required Santos to prepare an Aboriginal Cultural Heritage Management Plan. The Aboriginal Cultural Heritage Management Plan was approved by the Planning Secretary on 15 March 2022;

(b) the Development Consent conditions require Santos to avoid all direct and indirect impacts on specific Aboriginal cultural heritage items, both known and unknown; the State contends that a breach of these conditions would be a breach of the Environmental Protection Act and could lead to proceedings for remedy or restraint; Santos further concedes that any breach could expose Santos to offence provisions under s 86 of the National Parks and Wildlife Act; and

(c) the Tribunal may take into account the decision of the Independent Planning Commission that:

(i) the Aboriginal Cultural Heritage Advisory Group is an appropriate mechanism, guiding the development of the proposed project; and

(ii) the micro-siting process, avoidance principle and the Aboriginal Cultural Heritage Management Plan will ensure proper regard to items and areas of Aboriginal cultural significance.

3.1.3. Consideration

[879] Concerning s 39(1)(a)(i), the Gomeroi applicant contends that the Tribunal should assume that the enjoyment of registered native title rights and interests is practised throughout the claim area. That proposition is not supported by authority. See *WMC Resources v Evans*[90] at [30], and *Seven Star Investments Group Pty Ltd v Western Australia*[91] at [38]. The Gomeroi applicant must establish that such enjoyment is practised within the Santos project area. Within that area are located the X Line Road, Bohena Creek and mythological tracks identified by Mr Kumarage in a map [redacted]. However the map is said to be "indicative" and there is no evidence as to its source or its accuracy.

[880] The affidavits of the claim group deponents and Mr Kumarage cover many facets of the matters identified in s 39(1)(a). Mr Wilson seems to have been a member of the Gomeroi applicant since 2011, although he claims to have been inactive from January 2015 until, I infer, 7 December 2017. His evidence may be worthy of especial consideration.

[881] With the exception of the X Line Road, Bohena Creek, and Mr Kumarage's report concerning the [redacted] mythological tracks, identifiable locations mentioned in the evidence do not appear to fall within the Santos project area. Whilst there is evidence of the Gomeroi people's culture and traditions, there is only limited evidence concerning the other matters identified in s 39(1)(a). For example, whilst the ecological effects of the Narrabri Gas Project on social and cultural frameworks are discussed generally by the claim group deponents, there is little or no discussion of routine or occasional events concerning the other matters identified in s 39(1)(a). Mr Booby, at paras 38-40, states that:

> The cultural impacts of the Narrabri Gas Project cannot be known … If water is poisoned, that goes against the lore and responsibilities of all Gomeroi People, because that doesn't allow us to protect country and protect the nourishment it gives to all things. The connection between Gomeroi People and [redacted] is broken.

[882] The evidence of the claim group deponents and Mr Kumarage, concerning Gomeroi cosmology, lends force to the contentions that spiritual despair and hopelessness might arise from an inability to fulfil obligations to care for country, particularly the protection

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[90] (1996) 163 FLR 333.
[91] (2010) 257 FLR 175

of sites of significance. These concerns will be addressed further in the context of s 39(1)(b), the Additional Research Program and any conditions attaching to this determination.

[883] The effect of the proposed grants will be to confer rights, and impose obligations concerning the Santos project area, that is the land subject to the proposed grants. Whilst it is theoretically possible that the proposed grants could affect enjoyment of native title rights and interests outside of the Santos project area, there is no evidence to that effect, and such an effect seems unlikely.

[884] Although the claim group deponents and Mr Kumarage give evidence as to the enjoyment of native title rights and interests, such evidence describes, almost entirely, activities within the Pilliga or Pilliga forest, not the Santos project area. Whilst one might accept that such rights and interests are enjoyed throughout the Pilliga, it does not follow that presently, or in the past, such enjoyment occurs or has occurred within the Narrabri Gas Project area or the Santos project area. Given the relatively small area, and the focus of proceedings upon that small area, one would expect evidence of such activity. In summary, it is unlikely that the proposed grants (occurring within the Santos project area) will have any effect upon the enjoyment by the Gomeroi people of their native title rights and interests. In *Bisset v Mineral Deposits (Operations) Pty Ltd*[92] at [51]-[53], Member Sosso treated the lack of locational information as significant.

[885] Similarly, there is little evidence of any likely effect of the proposed grants upon the other matters identified in s 39(1)(a). The Gomeroi applicant contends that proposed grants will impair access, apparently referring to access to the Pilliga as a whole. The thrust of the Gomeroi applicant's contentions concerning s 39(1)(a) seems to rely on such impairment of access. Mr Kumarage placed great emphasis upon possible interference with access. The proposition is difficult to reconcile with the Gomeroi applicant's contentions in reply (at para 26), where it is suggested that the Pilliga forest is relatively easy to access. At para 58 of her affidavit, Ms Tighe says that there has been much destruction from forestry, agriculture and mining, although no particular destruction is identified. Ms Tighe also suggests that some sites are now locked, so that there is no access to them. At para 75, Ms Tighe asserts that the cumulative effects of

[92] (2001) 166 FLR 46.

agriculture and mining may have left the Pilliga as "one of the few remaining areas" where the Gomeroi people can practise their culture. On the other hand, Mr Kumarage reports, at para 104 of his report, that he was told, presumably by Gomeroi people, that the Pilliga "was sorta [sic] 'forbidden'".

[886] Mr Wilson states at paras 55-56 that:

> I know there are issues relating to access. There is also the question of whether Gomeroi people would want to access the Project Area while there is mining occurring is also another question [sic] … Even if the destruction isn't in places we go to all the time just knowing that our mother earth is being cut up by these mines is hurtful.

[887] The evidence concerning access to the Pilliga seems to be somewhat uncertain. In any event, no evidence suggests that access to the Pilliga, outside of the Narrabri Gas Project area, will be adversely affected by the proposed grants.

[888] The Gomeroi applicant relies on the evidence of Mr Kumarage and Ms Tighe, regarding the extent to which the infrastructure and fencing of portions of the Santos project area or the Narrabri Gas Project area will impede access and fragment the landscape within these areas. Mr Kumarage's opinion at page 197, regarding the extent of fencing is not supported by reference to evidence. Santos does not deny that for safety and operational reasons, some parts of the Santos project area will be fenced. In any event, the degree of access needed, in order to carry out activities such as those described by the claim group deponents and Mr Kumarage, is not clear. Whilst there may be some impact within the Narrabri Gas Project area, there will be no impact outside of that area. There is no reason to believe that such limited fencing will significantly interfere with access to that area. Ms Tighe's evidence at, para 58, is difficult to understand. She seems, initially, to refer to Gomeroi country which may or may not be within the Pilliga, let alone the Santos project area. Ms Tighe does not seek to identify the "threat" of "Santos's Project". There is no direct assertion that Santos was responsible for the "locking". The reference, in the last sentence, to the "Pilliga" does not necessarily relate to the Santos project area.

[889] The Gomeroi applicant contends that access to cultural heritage and other sites of cultural significance, not identified in the Aboriginal Cultural Heritage Management Plan, may be impaired by fragmentation of the landscape caused by the proposed grants. In answer, Santos points to the Additional Research Program and the consultation

procedures with the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group as described in the Aboriginal Cultural Heritage Management Plan. The plan demonstrates that there are further opportunities for input from the Gomeroi applicant and the Gomeroi people, regarding previously unidentified cultural heritage. Where the location of cultural heritage is uniquely within the knowledge of the Gomeroi people, the opportunity to participate or share information with the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group provides a direct channel of communication to Santos, regarding the protection of such heritage throughout the life of the Narrabri Gas Project. See *Western Australia v Thomas*[93] at [162].

[890] The Gomeroi applicant's contentions refer to a broad range of potential environmental impacts, which impacts may occur as a consequence of the Narrabri Gas Project. Such contentions invite considerations going beyond the scope of s 39(1). Of course, for present purposes, such impact must be the effect of the proposed grants. Santos contends that the Tribunal should give limited weight to the environmental concerns of the Gomeroi applicant, other than as they relate to matters identified in s 39(1). That approach is consistent with my construction of s 39, as amended by the 1998 Act.

[891] The evidence of the claim group deponents and Mr Kumarage contains material which may be relevant to the environmental effects upon the Gomeroi people's enjoyment of their native title rights and interests, way of life, culture and traditions. Some of these effects are summarized above, and at paras 210-212 of the Gomeroi applicant's revised contentions. I shall return to environmental matters in considering the 1998 Act.

[892] In paras 213-214 of the contentions, the Gomeroi applicant asserts that the scattered infrastructure locations within the Santos project area will permanently affect all claimed native title rights and interests and all landscape values. It seems to assert that fencing of some parts of the area will have effects upon the whole landscape. It is said that the mere presence of the Narrabri Gas Project will substantially affect how native title rights and interests are enjoyed. Mr Kumarage certainly makes such broad assertions, but he does not explain them. It does not follow that the possibility, or even likelihood, of some such changes in the Gomeroi people's perceptions concerning their

[93] (1996) 133 FLR 124.

native title rights and interests will "substantially affect" the enjoyment of such rights and interests. Neither the nature of such changed perceptions nor their extent has been explained.

[893] As to para 214, I accept that there may be stories and associated rights and interests which can only take place in identified areas, and therefore cannot be relocated. Whilst Mr Kumarage, in his map, identifies mythological tracks associated with the Narrabri Gas Project area, there is no suggestion that such tracks will be affected. As previously observed, if the Gomeroi applicant were to identify particular places associated with stories and/or native title rights and interests, Santos might well be able to avoid interference with them. As to the assertion that the Narrabri Gas Project area is one of the last, and one of the largest, remaining areas of forest in the Gomeroi claim area, the references to the evidence of Mr Wilson and Ms Tighe do not support that proposition. Ms Tighe, at para 75, asserts that the "Project" concerns "a huge area of Gomeroi country". The evidence does not support use of the word "huge", to describe the Narrabri Gas Project area. Having regard to the evidence generally, she is probably referring to the whole of the Pilliga area as previously discussed. More importantly, Ms Tighe also asserts that the Pilliga, not the Santos project area, is one of the few remaining areas where the Gomeroi people can "access to practice [sic] culture". There is no evidence that such "practice" occurs in the Narrabri Gas Project area or the Santos project area. The reference to the Narrabri Gas Project as being on a "large scale" is also inconsistent with the relative size of the Narrabri Gas Project, as compared to the extent of the native title claim area. Nor does Mr Wilson, at paras 56 and 59, describe the Narrabri Gas Project area as one of the "last" and one of the "largest" remaining areas of forest in the native title claim area. He is referring to the Pilliga as a whole.

[894] At para 220 of the Gomeroi applicant's revised contentions, it submits that the "Project" will have significant and permanent impacts. In para 221 it is said that there is a risk of contamination of groundwater by pollutants, permanent well caps and disturbance to coal seams. Santos and the State contend that such environmental concerns have been thoroughly assessed by the Department of Planning and Environment and the Independent Planning Commission. As a consequence, the approval by the Independent Planning Commission was granted, subject to strict environmental conditions. Other statutory requirements and penalties apply to environmental breaches. See discussion above regarding Environmental Protection Licences. Such conditions and statutory

restraints are directed towards preventing or minimizing many of the harms anticipated by the Gomeroi people. However, for reasons discussed above, in the absence of evidence as to the extent of the Gomeroi people's activities and practices in the Santos project area, the Tribunal cannot attribute any significant weight to the contention that environmental risks posed by the proposed grants will impact upon the Gomeroi people's enjoyment of its native title rights and interests. It is understandable that the Gomeroi applicant may be concerned about possible harm. It is also understandable that it might not be reassured by the management plans and reports which suggest that such harm is possible, but less than likely. For reasons which appear elsewhere in this determination, the Tribunal cannot, and should not reject conclusions reached by government agencies after careful investigation and examination, including consideration of views expressed in opposition to the Narrabri Gas Project.

[895] I have, to this point, made only passing references to the subject matter of s 39(1)(a)(ii). Such matters are, of course, closely associated with the subject matter of s 39(1)(a)(i). A central contention of the Gomeroi applicant is that the proposed grants will adversely affect the development of the Gomeroi people's social, cultural and economic structures (s 39(1)(a)(iii)). The word "development" seems to inform the proper understanding of that provision. The New Shorter Oxford English Dictionary suggests that the word means, in this context:

> The action or process of developing; evolution, growth, maturation; an instance of this; a gradual unfolding, a fuller working out.

[896] The appeal of this definition is that it recognizes the emergence of social, cultural and economic "structures", which structures give shape and continuity to a society. Mr Kumarage's report asserts that the proposed grants have the potential to cause, "serious and ongoing disputes within the Aboriginal community". See the Gomeroi applicant's contentions at para 222. Mr Kumarage's opinion is that the Social Impact Statement prepared for the Environmental Impact Statement, as part of the development application process, did not adequately assess these risks. However he does not attempt to justify that view. The relevant passage in the Social Impact Statement is at Chapter 7, headed, "Mitigation and management strategies". Under the sub-heading "Stakeholders engagement, complaints and dispute resolution", the document deals with the regular supply of information and prescribes a system for enquiries and complaints. Santos has a complaint management procedure of which all staff members are aware.

[897] Mr Kumarage seems to be concerned with a quite different category of dispute, namely those within Aboriginal communities concerning differing views about the Narrabri Gas Project, and disputes between the Narrabri Local Aboriginal Council and the Gomeroi native title claim group in relation to matters such as the distribution of benefits, management of cultural heritage or the identification of traditional owners and knowledge holders.

[898] The Social Impact Assessment is part of the Environmental Impact Statement, prepared and approved in accordance with State law. As far as the evidence goes, the "Mitigation and management strategies" appear to satisfy the State's requirements. There is no justification for substituting Mr Kumarage's views for those of Santos or the relevant State authority. Further, it would be inappropriate to seek to develop a dispute resolution process "for serious and ongoing disputes". The suggestion of "serious and ongoing disputes within the Aboriginal community" is not supported by the evidence and implies a degree of paternalism. The Gomeroi applicant has previously asserted that Santos, in some unidentified way, has brought about such disputes. There is no evidence to that effect. In any event, the native title claim group has previously utilized its power to change the composition of the Gomeroi applicant. There seems to be no reason to doubt that in the future, disputes, if any, will be resolved in appropriate ways, having regard to traditional laws and custom and to the Native Title Act. There is no merit in Mr Kumarage's unparticularized criticism.

[899] Santos's contentions concerning this consideration refer to the opportunities for the Gomeroi people to be involved in the Narrabri Gas Project through employment and consultation in respect of micro-siting, pre-clearance surveys, the Aboriginal Cultural Heritage Advisory Group, Additional Research Program, and other training and development opportunities. These benefits were not disputed by the Gomeroi applicant.

[900] Section 39(1)(a)(iv) has been, to some extent, discussed. The "land or waters concerned" must be those which may be affected by the proposed grants, in other words, the Santos project area. The evidence suggests that there will be some limitation upon access to sites within such area. However there has been no suggestion that access to land or waters within that area has been exercised, although it seems probable that access has occurred over the years. Such a possibility does not lead to the conclusion that any limitation imposed upon access by the proposed grants is likely to be significant.

Similarly, there is no evidence of sites, ceremonies or other activities of cultural significance having been conducted within the Santos project area. Even so, I cannot discount the possibility that such events have occurred from time to time. Again, it is unlikely that the proposed grants will significantly affect such activities, save to the extent that a location may be, for the moment, unavailable. There is no present suggestion that there are areas or sites used for such purposes. In any event, Santos's intended flexibility will assist in accommodating particular areas or sites, should such areas or sites are so identified by the Gomeroi applicant.

[901] As discussed above, the Gomeroi applicant has presented evidence to support the contention that there are a number of features, resources, sites and areas of "special significance" in the Pilliga or Pilliga forest, each of which forms part of the Gomeroi cosmology. Having regard to the evidence of the claim group deponents, Mr Kumarage and Dr Godwin, it is clear that the Pilliga is a place of considerable importance to the Gomeroi people. However, for the purposes of s 39(1)(a)(v), the effect of the act must be:

- on "any area or site, on the land or waters concerned";
- which land or waters is/are of particular significance to the [Gomeroi people];
- in accordance with their traditions.

[902] Clearly, the reference to the land or waters concerned is to the land or waters affected by the proposed grants. It is unlikely that the land outside the Santos project area would be affected by the proposed grants. However waters outside of that area may possibly be affected as a result of the transfer of contamination from within the Santos project area to water outside of it. However, as the risk of contamination within the Santos project area seems low, the risk of external contamination is also unlikely. However the wording of s 39(1)(a)(v) suggests that the "waters concerned" are only those waters within the area subject to the proposed grants, that is within the Santos project area.

[903] As I have observed, there are numerous Court and Tribunal decisions concerning the expression "area or site of particular significance" in s 237 and s 39(1)(a)(v) of the Native Title Act. As Carr J held in *Cheinmora v Striker Resources NL*,[94] at 35 that, for the purposes of s 237(b), such a site is one which is of special or more than ordinary

[94] (1996) 142 ALR 21.

significance to the native title holders in accordance with their traditions. See also *Bisset v Mineral Deposits (Operations) Pty Ltd*[95] and *Watson (on behalf of Nyikina & Mangala) v Backreef Oil Pty Ltd*.[96] For present purposes, there must be evidence of particular significance to the Gomeroi applicant in accordance with its traditions.

[904] At paras 207 and 208 of its contentions, the Gomeroi applicant seeks to identify areas of particular "traditional" significance in relation to the spiritual and practical exercise of their native title rights and interests. It is said that the Gomeroi people regularly access the Pilliga and the Narrabri Gas Project area "to undertake a variety of activities." Regular access, by itself, may not be sufficient to demonstrate particular significance. Daily resort to an area or site may be attributable to many aspects of life, without justifying the description of such area or site as being of particular significance. It is said that para 208 contains "[s]ome examples" of these sites. However, the "examples" do not generally relate to the Narrabri Gas Project area or the Santos project area. In particular, the coal seams referred to are, or were located about 150km from the Narrabri Gas Project area. I have previously referred to that matter in connection with Mr Booby's evidence at paras 17-19. It seems unlikely that such sites could be affected by the proposed grants. The coal seams are not in the land or waters concerned. The "aquifers and watercourses" are also not identified as being in the "land or waters concerned". As to para 208(c), locations identified in stories, referred to in the evidence of Mr Booby and Ms Tighe, do not seem to relate to the Santos project area. However, at paras 35-36 of Ms Tighe's evidence, there is reference to an upside-down river near the X Line Road, within the Santos project area. Bohena Creek seems also to be within that area. However neither Mr Booby nor Ms Tighe identify that feature as being of particular significance. It seems, however, that it is located in an area in which exploited wells have already been established, and there is a nearby water treatment plant. It may be that Ms Tighe has deliberately not treated the location as being of particular significance. In any event, the Additional Research Program may inform any subsequent decision as to Santos's activity in that area.

[905] The only other evidence of areas or sites said to be associated with the Santos project area are:

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[95] (2001) 166 FLR 46.
[96] [2013] FCA 1432.

- a reference in Mr Kumarage's report at para 115 to one burial site "in the vicinity of the [Narrabri Gas Project area]"; and
- in Ms Tighe's affidavit at paras 55 and 56, she says that she understands that there are birthing places [redacted], and that there may also be men's business associated [redacted].

[906] The expressions "in the vicinity of" and "around" make it difficult to infer that such sites, if they exist, are located within the Santos project area. The Gomeroi applicant's evidence provides no basis for inferring that there are, within the Santos project area, areas or sites of "particular significance" to the Gomeroi applicant in accordance with Gomeroi tradition. In any event, the status of such areas may also be clarified by the Additional Research Program.

[907] At para 208(g) of the contentions, it is said that places where hunting, gathering, fishing, camping and manufacturing of tools occur may be areas or sites of "special significance". However no such areas or sites are said to be located in the Santos project area, as opposed to the Pilliga.

3.2. Section 39(1)(b)

[908] Section 39(1)(b) requires the Tribunal to consider the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters. In relation to such land or waters, there must be registered native title rights and interests of the Gomeroi applicant, which rights and interests will be affected by the proposed grants.

[909] The focus is on the "interests, proposals, opinions or wishes" of the persons appearing as the applicant on the Register of Native Title Claims (that is, the Gomeroi applicant), not those of individual members of it. See *Burragubba v Queensland*[97] at [282]. On appeal in *Burragubba v Queensland*,[98] the Full Court upheld the primary judge's definition of "native title parties", stating at [166]:

[97] (2016) 151 ALD 471.
[98] (2017) 254 FCR 175.

> If s 39(1)(b) of the *Native Title Act* had been intended to take into account the separate views of the members of the native title claim group, then Parliament would have used the defined term "native title claim group".

[910] The interests, proposals, opinions and wishes of the 19 persons appearing on the Register of Native Title Claims, acting collectively as the Gomeroi applicant, are relevant for the purposes of s 39(1)(b). However, Mr MacLeod in his affidavit, dated 4 April 2022, advised that at a claim group meeting held between 22 and 24 March 2022, "the native title claim group passed a resolution instructing the Gomeroi Applicant not to enter into an agreement with Santos in relation to the proposed Project, and to oppose a determination by the National Native Title Tribunal that petroleum production leases may be granted from petroleum production leases [sic] applications 13, 14, 15 and 16."

[911] Neither the right to negotiate, nor s 39(1)(b), nor a resolution of the native title claim group confers on the Gomeroi applicant, a power of veto in relation to the proposed grants. However s 39(1)(b) provides an opportunity for the Gomeroi applicant to have the Tribunal consider its collective interests, proposals, opinions or wishes in relation to the management, use and control of the land or waters concerned. Such interests, proposals, opinions or wishes may be informed by a consideration of views expressed by the native title claim group. Deputy President Sumner in *Western Desert Lands Aboriginal Corporation v Western Australia*[99] at [215] said:

> It is accepted that a native title party under the Act does not have a veto in the sense that they can say "no" to a development proposal and have the Tribunal automatically accept that view no matter what the circumstances. However, they are entitled to say "no" and have the Tribunal give considerable weight to their view about the use of the land in the context of all the circumstances.

[912] Opposition to the proposed grants may be relevant, but it is the reasons for such opposition which will be persuasive in the Tribunal's consideration of the matter. In *Weld Range Metals Ltd v Western Australia*,[100] Deputy President Sumner concluded that the interests, proposals, opinions and wishes of the native title party were to be given greater weight than the economic benefit or public interest. The Deputy President said at [343]:

> The Weld Range area (including the Tenement area) is of such significance to the NTP in accordance with their traditions that mining on it should only be permitted with their agreement. This is not to incorporate a general right of veto over mining

[99] (2009) 232 FLR 169.
[100] (2011) 258 FLR 9.

> projects into the NTA but is a conclusion arrived at in the special circumstances of this case.

[913] In that case, the "special circumstances" included:

> [Wilgie Mia] was a traditional centre of high cultural significance for the mining and trading of ochre with, in its near vicinity, important places for traditional ceremonies including initiation. The archaeological evidence establishes that the general Weld Range area was frequented by Aboriginal people. Not surprisingly, given the importance of the Wilgie Mia, their occupation of the area was widespread and occurred over a significant period of time. The breakaways outside the Weld Range contain caves that were lived in, painted and used as placed to prepare young men for initiation. There are Dreaming stories associated with the Weld Range area which emphasise its importance to the WY people. The continuing belief in the spirit people in and around the Weld Range is testament to the significance of the area in accordance with their traditions.

[914] I understand the Deputy President to have been saying simply that, in balancing the circumstances of that case, he had concluded that the significance of the relevant sites outweighed the economic benefits of the project and public interest. He was not expressing a proposition of general application.

[915] The Gomeroi applicant, at paras 252-253 of its contentions states:

> It is the Gomeroi's position that the proposed Project should not proceed as it will cause significant and irreparable damage to the Pilliga Forest, which is an area of particular cultural significance, and of practical importance to, Gomeroi religious, cultural and social practice.
>
> If the Project does proceed despite the Gomeroi's wishes, it is the Gomeroi's view that the proposed Project may only proceed in accordance with their agreement. Such an agreement may only be made with the full free, prior and informed consent of the Gomeroi People native title claim group.

[916] The Gomeroi applicant seems to contemplate the Tribunal making a determination, subject to subsequent endorsement by the Gomeroi applicant, possibly involving the imposition of conditions. Such a course is not contemplated by the Act. As I have observed, the decision in *Western Desert Lands Aboriginal Corporation v Western Australia*[101] does not lead to the conclusion that the Gomeroi applicant can stop the proposed grants simply by saying "no". The Tribunal must consider all of the evidence, giving appropriate weight to such evidence. Were I to determine that the proposed grants be made, subject to the Gomeroi applicant's approval, I would simply be conferring upon it a right of veto, thus abdicating the Tribunal's statutory function and duty.

[101] (2009) 232 FLR 169.

Questions of full, free, prior and informed consent do not arise in connection with s 39. They add nothing to the requirement that the parties negotiate in good faith.

[917] Mr Wilson's view, expressed at para 42 of his affidavit, is equivocal. He says:

> The Current Applicant is mostly opposed to the Project. We want to prevent development on Gomeroi Country and protect the Pilliga. The Current Applicant wants to make sure that the framework for negotiations is from a Gomeroi perspective taking into account Gomeroi cultural values. If the Project goes ahead, the Current Applicant wishes to ensure the free, prior and informed consent of Gomeroi people is obtained and the [sic] any agreement includes proper compensation. The Current Applicant has taken a more lateral thinking approach to what might be included in the deal looking towards the future, not just at how individuals can benefit. However, it's not just about money but about protection of our Gomeroi values for the future.

[918] I do not understand how the Gomeroi applicant can both oppose a determination that the proposed grants be made, and at the same time assert at para 32 of its contentions in reply:

> Nor is it the Gomeroi's contention that the proposed act not proceed at all (although that is the preference of the Gomeroi). The Gomeroi contend that the proposed act not be approved without their agreement. That is because the protection of their native title rights and interest in the doing of the things permitted by the proposed acts is only possible by way of such an agreement.

[919] The Gomeroi applicant submits that this approach is the only way in which its native title rights and interests can be protected. Although that assertion has been made on various occasions, the Gomeroi applicant has not explained its actual concern. Section 38 contemplates the possibility of a conditional determination. However there is no suggested basis for considering the imposition of conditions after an unconditional determination. Such an approach assumes either that the possibility of conditions has been dealt with by the parties in their contentions, or that the Tribunal may, on its own initiative, decide to impose conditions as part of its determination. The Native Title Act does not seem to contemplate the delivery of a "provisional" determination, followed by further negotiations and/or submissions concerning conditions. Given the apparent inability of the parties to agree to any conditions, despite attempts previously made, I see no point in allowing further negotiations as to conditions. As I have previously indicated, I propose to impose a condition concerning the performance of the Additional Research Program.

[920] In any event, the final expression of the Gomeroi applicant's position in relation to the proposed grants is that expressed at the native title claim group meeting in March 2022 and conveyed to the Gomeroi applicant as a direction.

3.3. Section 39(1)(c)

[921] s 39(1)(c) requires the arbitral body to take into account, "the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and the Aboriginal peoples and Torres Strait Islanders who live in that area".

[922] In *Cameron v Queensland* [102] at [71]-[73], Member Sosso described the Tribunal's approach to s 39(1)(c) as follows:

> A few observations can be made about the statutory task required of the Tribunal. First, the paragraph focuses on the significance of the *act.* It is not a generalized inquiry about the importance of exploration or mining to the economy (localized or national). It is a specific evaluation about the impact of the future act the subject of the inquiry. Accordingly, the Tribunal is not required under this paragraph to look any further than the evidence of how the proposed future act will impact on the economies and persons specified. Issues about the benefits of the mining industry to the health of the local, Queensland or Australian economy are not relevant to this paragraph. The only focus of this paragraph is the act in question and the only issue which the Tribunal is required to evaluate is the significance of the future act. The symbolic, cumulative or ripple impacts of the future act fall outside the purview of this paragraph.
>
> Second, the inquiry is not limited to the economic consequences of the proposed future act – see *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124 at 175. The term "other significance" is potentially broad and can only be sensibly dealt with in terms of the evidence produced at a particular inquiry. I do not read the term "other significance" as being limited to impacts of an economic or wealth related nature. It could be that the doing of the future act could have beneficial impacts for the advancement of medical or related research. For example, the minerals proposed to be extracted could be critical for medical research, or any other field of human endeavour. The "significance" of granting the right to mine must therefore be viewed in an expansive sense and not purely and necessarily from the quantum of money that will be generated from the extraction of the relevant material from the relevant land or waters.
>
> Finally, the Tribunal is required to evaluate the significance of the proposed act to indigenous persons living within close proximity to the proposed tenement. It should be noted that the Act is not worded to limit the inquiry to members of the native title claim group. Rather, the inquiry focuses on the significance of the act to indigenous persons generally. For example, it may be that a proposed mine will generate jobs and related benefits to indigenous Australians who live nearby whether or not they are members of the claim group. The 1998 amendments to this paragraph were designed to ensure that in any proper inquiry the interests of local indigenous persons living and having responsibilities in the general area, were given proper weight.

[102] [2006] NNTTA 3.

[923] Member Sosso's description is consistent with other decisions of this Tribunal concerning s 39(1)(c). See, for example, *Jonathan Downes v Gomeroi People*[103] at [246]; *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another*[104] at [72]-[73]; *Gold Road Resources Ltd v Harvey Murray on behalf of Yilka*[105] at [45]. The economic or other significance of the proposed grants should be demonstrated by evidence produced by the parties. See *Western Australia v Thomas*[106] at 175; *Cameron v Queensland*[107] at [72]. However the Federal Court has acknowledged that "[a]n element of projection and inference is inherent" in making an assessment about a project which has yet to commence. See *Watson (on behalf of Nyikina & Mangala) v Backreef Oil Pty Ltd*[108] at [85].

[924] At para 181(c) of its contentions, the Gomeroi applicant asserts that the proposed future acts should not be done on the basis that they are, "against the public interest and the economic and ecological interests of the Narrabri area, the State of New South Wales, and Australia". Sections 39(1)(c) and 39(1)(e) are cited by the Gomeroi applicant as being relevant to that contention. On its face, it might be argued that the words "other significance" in s 39(1)(c) include consideration of "ecological interests". The word "ecological" is defined as "of, relating to, or involving the interrelationships between living organisms and their environment" or "concerned with environmental issues". See the Oxford English Dictionary (Online).

[925] In its original form, s 39(1)(a)(vi) and s 39(1)(b) of the Native Title Act, as at 1 July 1994, provided consideration of environmental matters. Sections 37-40 of the Native Title Act were substantially amended by the 1998 Act. These amendments are presently relevant. The explanatory memorandum to the Native Title Amendment Bill 1997 (which was enacted as the 1998 Act) provides a clear insight into Parliament's intention. Of particular importance are paras 20.53-20.56, as follows:

> **What criteria must the arbitral body consider in making a determination?**
>
> 20.53 Existing section 39 of the NTA sets out the criteria that must be considered by an arbitral body in making a determination about a future act. The criteria mainly relate to the affect the act would have on native title and the interests of the native title parties and the public interest in doing the act. The Bill re-

[103] [2022] NNTTA 26.
[104] [2018] NNTTA 64.
[105] [2018] NNTTA 52.
[106] (1996) 133 FLR 124.
[107] [2006] NNTTA 3.
[108] [2013] FCA 1432.

enacts section 39 with a number of changes ***[Schedule 1, item 9, section 39]***. The changes that are significant are set out below. These changes were proposed in the 1996 amendments.

Effect of the act on enjoyment of determined or claimed native title

20.54 The Bill removes any implication that the arbitral body is required to make a finding in relation to the existence of native title rights and interests in a right to negotiate determination. The Bill makes it clear that the arbitral body is required to assess the effect of the proposed act on the enjoyment by native title parties of their determined or claimed native title rights and interests rather than any native title that may exist. ***[Subparagraph 39(1)(a)(i)]***

Effect of the act on natural environment no longer a listed consideration

20.55 The re-enacted section 39 does not include the criteria which required the arbitral body to consider environmental matters in relation to the future act. Such assessments are more properly made in State and Territory environmental processes undertaken prior to the grant of a right, such as a mining lease.

20.56 If there are particular environmental concerns which may need to be taken into account because of the particular effect on native title, the arbitral body retains the ability to consider them under paragraph 39(1)(f).

[926] Section 39(1)(a)(vi) in its original form, provided:

Criteria for making determinations

(1) In making its determination, the arbitral body must take into account the following:

(a) the effect of the proposed act on:

…

(vi) the natural environment of the lands or waters concerned;

…

[927] Section 39(1)(b), in its original form, provided that:

Criteria for making determinations

(1) In making its determination, the arbitral body must take into account the following:

…

(b) any assessment of the effect of the proposed act on the natural environment of the land or waters concerned:

(i) made by a court or tribunal; or

(ii) made, or commissioned, by the Crown in any capacity or by a statutory authority;

…

[928] Both provisions were repealed. The effect of the amendments, explained in paras 20.55 and 20.56 of the explanatory memorandum, is that environmental matters are to be left to State and Territory environmental processes. The intention was that if, "environmental concerns … need to be taken into account because of the particular

effect on native title", the Tribunal might deal with them pursuant to s 39(1)(f). It matters little whether the matter is addressed under subs 39(1)(f) or otherwise, save for the fact that admissibility under s 39(1)(f) depends upon the Tribunal's finding as to relevance. There is no such express requirement upon the reception of evidence pursuant to s 39(1)(c) or s 39(1)(e). Pursuant to s 39(1)(f), Only a particular environmental concern, having a "particular effect" on native title, will be a relevant consideration, if the Tribunal so determines. Clearly, the Tribunal is to take account of "State and Territory environmental processes", presumably by reference to s 146 of the Native Title Act. For present purposes, I should accept the processes undertaken by the State and, to the extent that there are particular environmental concerns, having a particular effect upon native title, consider them pursuant to s 39(1)(f).

[929] In fact, the parties have chosen to address environmental questions pursuant to s 39(1)(e). Such an approach is inconsistent with Parliament's intention as appears from the explanatory memorandum to the 1998 Act. The effects of the 1998 Act were considered by Member Sumner in *WMC Resources v Evans*,[109] and by Member Sosso in *Bisset v Mineral Deposits Pty Ltd*.[110] At 341 of *WMC Resources v Evans*, Member Sumner said, concerning the 1998 Act:

> First, the Tribunal is no longer required to take into account the effect of the proposed act on "the natural environment of the land and waters concerned".

[930] However, he then observed that:

> This does not mean that the Tribunal will ignore environmental evidence which is relevant to the other criteria. Environmental protection procedures and assessments may relate to the criteria in s 39(1)(a) and measures to protect the environment may ameliorate the adverse impact of the proposed act on them.

[931] I have some difficulty with this paragraph. It seems to be inconsistent with Parliament's express intention that the Tribunal no longer consider, "environmental matters in relation to the future act", such assessment being "more properly made in State and Territory environmental processes undertaken prior to the grant of a right, such as a mining lease."

[932] Member Sosso said, in *Bisset v Mineral Deposits Pty Ltd*[111] at [146]-[147]:

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[109] (1999) 163 FLR 333.
[110] (2001) 166 FLR 46.
[111] (2001) 166 FLR 46.

> There is a large body of New South Wales judicial dicta on the environmental impact statement process. I have set out the above principles not with the object of making a determination which is outside the jurisdiction of this Tribunal. Rather, this has been done to highlight that whatever the merits of the native title party's case about the adequacy of the environmental impact statement may be, this is not the forum for it to be raised in the way that it has. If the environmental impact statement was defective, on whatever basis, there were (and may still be) avenues open to the native title party to explore.
>
> The arguments raised by the native title party, bar one, fall outside what parliament intended that this administrative tribunal would do. This Tribunal has absolutely no role in second guessing State and Territory courts properly exercising their functions under State and Territory environmental and planning legislation. This is not a Tribunal charged with traversing the highways and byways of New South Wales environmental and planning law. Our only charter in this aspect of our legislative role is to determine if a future act should proceed, and in that regard weigh the various criteria outlined in the Act. At all times our charter is linked to native title: native title claims do not of themselves provide a platform for this Tribunal to trespass into the jurisdiction of other bodies and courts.

[933] I agree with the thrust of that passage.

[934] Returning to s 39(1)(c) and economic or other significance of the proposed grants, the Gomeroi applicant limits its contentions concerning the economic significance of the Narrabri Gas Project to an assertion that it is against the economic interests of the "Narrabri area, the State of New South Wales, and Australia". It seems not to have made any further submissions concerning such significance. Santos addresses the issue at some length. At para 97 of its contentions, dated 9 December 2021, Santos asserts that, "the Project would contribute to the NSW economy, including the regional economies of NSW, via the direct supply chain, in addition to the creation of direct and indirect job opportunities." At paras 98-102, Santos makes further assertions concerning the expected economic impact of the project. Such assertions can be summarised as follows:

> The estimated economic benefit [of the project] for the wider region and New South Wales over a 25 year assessment period includes:
>
> - a real economic output of $14.6 billion;
> - a real income of $8.2 billion;
> - significant funding for local infrastructure and community service projects over the life of the project, including:
>   - community benefit fund, with a value of around $120 million throughout the life of the project; and
>   - voluntary planning agreement and road maintenance agreement with Narrabri Council, with a value of approximately $14.5 million;

It is also said that:

- the project "will generate an estimated $5.4 billion (net present value) in revenue from the sale of gas", which revenue would, "flow through to shareholders through payment of dividends, and to the Narrabri community through payment of royalties to the Gas Community Benefit Fund;
- a government entity will manage the establishment and operation of a local committee to set the direction of the [Gas Community Benefit Fund], and to issue and administer grants;
- the project is expected to contribute around $3.1 billion ($1.2 bilion net present value) in royalties and tax revenue to the NSW Government";
- the project is forecast to lead to the direct creation of 1,300 jobs during the construction phase, to "be sourced from the Narrabri local government area, the wider region, the rest of NSW and, to a lesser extent, interstate"; and
- the project is forecast to create and sustain, "200 direct and indirect jobs", during its operation, "including the 16 current Narrabri based roles."

[935] The Narrabri Gas Project is also expected to generate real income by stimulating local industry through the consumption of goods and services, leading to diversification of industry in the Narribri area. Loss of income from agricultural properties will be offset by compensation agreements with landholders. See Mr Dunn's affidavit, dated 1 March 2022. In pt 4 of his affidavit, he deals with the "economic or other significance of the project". As previously discussed, Mr Dunn relies on three exhibited documents: the Department Report, dated June 2020; Chapter 27 of the Narrabri Gas Project Environmental Impact Statement, entitled "Economics"; and a report prepared by ACIL Allen Consulting, dated 6 August 2020, entitled "Narrabri Gas Project – Update of the Economics". Estimates of the Narrabri Gas Project's "real economic output" and "real income" have varied over time. However such variations are to be expected and have little relevance for present purposes.

[936] At para 48 of its contentions dated 15 December 2021, the State, "agrees that the Project will have economic and associated social benefits, at a local, regional and State level, generally as identified" at paras [97]-[101] of Santos's Contentions. At para 49, the

State, further contends that I should accept the conclusions of the Independent Planning Commission concerning economic benefits. The State emphasizes the following benefits:

> A. Employment for those workers employed to carry out the Project and, indirectly, for suppliers and contractors and their employees and, through the injection of stimulus to the local economy, for employees of business of the region;
>
> B. Additional royalties and tax revenue to the State Government and tax revenue for the Australian Government (from both Santos and from businesses and individuals who derive income from the Project);
>
> C. Ongoing availability of gas for households and business consumption and for electricity generation to meet the needs of businesses and households of New South Wales and Australia.

[937] During Mr Dunn's cross-examination, Counsel for the Gomeroi applicant put to him that the economic benefits of the proposed project should be offset against the cost of natural disasters associated with climate change. See ts 59, l 34- ts 63, l 5. It is convenient to deal with that matter at this stage. Mr Dunn adhered to his view that the Narrabri Gas Project would reduce emissions overall. The Gomeroi applicant's position seems to have been that the benefit of any such reduction in emissions should be offset against damage caused by climate change, in particular as the result of extreme weather events. These contentions seem to blend two discrete matters: the economic benefit of the Narrabri Gas Project and the effect upon greenhouse gas emissions of burning gas rather than coal.

[938] At para 85 of its closing submissions dated 21 April 2022, Santos asserts that, "it is not possible to ascertain what proportion of the damage from the floods would be attributable to the Narrabri Gas Project, nor is there any evidence to that effect before the Tribunal".

[939] Clearly, there will be a discernible economic benefit to the "Narrabri area, the State of New South Wales, and Australia" from the exploitation of the gas reserves in question. There is, nonetheless, a widely held view that climate change may increase the frequency of extreme weather events, with associated damage to public and private property. Notwithstanding the 1998 Act concerning the consideration of environmental matters, it may be appropriate to consider, at this point, whether extreme weather events may offset the benefit of any economic gain. However it is difficult directly to attribute particular weather or other environmental events to gas emissions generated by the Narrabri Gas Project. It is easier to calculate the benefits of the project than to calculate

the extent of damage as the result of its greenhouse gas emissions. This is so simply because the benefit is capable of predictive calculation and is readily seen as directly the product of the Narrabri Gas Project. However the extent of climate change is a worldwide phenomenon, not directly attributable to the extent of greenhouse gas emissions in north-wstern New South Wales. The Tribunal cannot resolve that anomaly. It is a matter for government.

[940] Accepting such concerns at face value, they are not, "particular environmental concerns which may need to be taken into account because of the particular effect on native title". Rather, they are environmental matters, more properly considered in "State and Territory environmental processes undertaken prior to the grant of a right, such as a mining lease", which course has been adopted in this case. There is no "particular effect" on native title, attributable to a general increase in extreme weather events as the result of climate change. Such events and their effects are general, rather than particular in nature. Such matters are better left to the State and its agencies as appears to have been Parliament's intention when it enacted the 1998 Act.

[941] Santos's evidence concerning the "economic or other significance" of the Narrabri Gas Project is extensive and is supported by independent assessment. The Department concluded that the project would, "result in major socio-economic benefits for the locality, region, and the State". It acknowledged that, "the project does have the potential to result in some negative social impacts, particularly at the local level", but the Department was, "satisfied that these residual impacts can be appropriately minimised and managed." The Independent Planning Commission similarly concluded:

> The Commission has considered the evidence provided by [Santos], the Department's AR and the public submissions and finds, on balance, that the Project will provide a significant net economic benefit for the local community, region and the State through increased investment and economic activity, as well as securing existing and future industries through the provision of a local gas supply and increased gas supply to the East Australian market. The Commission also finds that the Project will result in direct benefits to the locality though the [community benefit fund], [voluntary planning agreement] and job creation.

[942] The State's contentions similarly support Santos's assertions concerning the Narrabri Gas Project's "economic or other significance".

[943] In summary, I accept that the Narrabri Gas Project will confer a significant economic benefit on the relevant region, the State and Australia. It is also likely that there will be

a benefit to Aboriginal people in the form of employment opportunities and increased wealth in the Narrabri area. Whilst worldwide climate change may cause extreme weather events affecting Australia, and consequential damage, it does not follow that the probable benefit to be conferred by the proposed grants should necessarily be written off against the significant possibility of such damage.

3.4. Sections 39(1)(e) and (f)

[944] Although the Gomeroi applicant raised the question of climate change in connection with s 39(1)(c), the parties have also addressed such questions under s 39(1)(e). At a late stage in the proceedings the Gomeroi applicant also sought to address the question of the Racial Discrimination Act under this heading. For reasons which appear elsewhere in this determination, I have rejected that argument. As to the issue of climate change, as previously observed, the explanatory memorandum demonstrates that Parliament intended that the 1998 Act exclude environmental or ecological matters from the criteria previously prescribed in s 39(1), subject only to the qualification concerning particular environmental concerns which may cause particular effect on native title. The Gomeroi applicant also contends that the Tribunal should determine that the proposed grants are "against the public interest", given that the greenhouse gas emissions from the project will:

> … not only not assist with meeting the temperature targets in the Paris Accord, but will contribute to higher temperatures than the target and the more extreme impacts of climate change.

[945] Further, the Gomeroi applicant submits that there is a public interest in not making the proposed grants because there is a public interest in:

> (a) seeking to mitigate and prevent the worst likely effects of global warming, which has consequences at global, national and local levels; and
>
> (b) the preservation and continuity of the culture and society that underpins the Gomeroi People's tradition law and custom.

[946] Santos and the State submit that public interest considerations support the Narrabri Gas Project and contend that the proposed grants should be made. Their submissions rely primarily upon the development approval decision and conditions imposed thereon by the Independent Planning Commission, the public interest in the supply of energy to the domestic market and opportunities for social and economic advancement. Santos and

the State also refer to an unsuccessful application to the Land and Environment Court of New South Wales for review of that decision. See *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*.[112] The review application related primarily to issues associated with climate change.

The Gomeroi Applicant's Contentions

[947] The Gomeroi applicant contends that there is a public interest in the proposed grants not proceeding. The contention is underpinned by concerns regarding climate change caused by greenhouse gas emissions from the Narrabri Gas Project, and the possible effect upon native title, as previously discussed. In my view, the effect of the 1998 Act is that environmental matters should be left to State agencies, subject to the exception identified in para 20.56 of the explanatory memorandum. Given the fact that the parties have addressed wider environmental issues connected with climate change, I shall address such matters. However my final decision concerning those matters will take into account Parliament's intention.

[948] At pt 2.9 of its contentions, Santos asserts that whilst the views of independent State or Territory bodies may not be binding on the Tribunal, such views may be treated as indicative of the public interest. The State deals with these matters at paras 51-58 of its contentions, accepting that the concept of public interest is sufficiently broad to "encompass the issue of GHG emissions." However the State contends that the Tribunal should give significant weight to the fact that the issue is, "primarily a State planning matter and is one that was the subject of extensive and detailed expert analysis in the planning documents submitted to the [Independent] Planning Commission and, in turn, detailed and lengthy consideration by that Commission." As appears from the Independent Planning Commission's conclusions, its consideration of the matter focussed on greenhouse gas emissions, as the Commonwealth Parliament anticipated when it adopted the 1998 Act.

[949] The Gomeroi applicant submits that the Narrabri Gas Project will contribute to the more extreme impacts of climate change. Such impact is said to constitute "an existential threat to humanity", undermining the preservation and continuity of the culture and society which underpins the Gomeroi people's traditional law and custom. In its revised

[112] [2021] NSWLEC 110.

contentions of 21 April 2022, the Gomeroi applicant asserts that the term, "any public interest" under s 39(1)(e) should be given a wide interpretation, citing the decision of the High Court in *O'Sullivan v Farrer*[113] at 216, where the majority held:

> Indeed, the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable … [such] reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view": *Water Conservation and Irrigation Commission (N.S.W) v. Browning* (13), per Dixon J.

[950] The passage cited from *Water Conservation and Irrigation Commission (NSW) v Browning*[114] is a little difficult to understand. I understand it to mean that a matter will not be in the public interest if the reasons advanced for its being so classified are, "extraneous to any objects the legislature could have had in view". As I have said, the 1998 Act, when read with the explanatory memorandum, demonstrates that Parliament intended to exclude consideration of environmental matters in any s 39 considerations, save for the exception contained in para 20.56 of the explanatory memorandum.

[951] I accept that the public interest must be in connection with the proposed grants, not mining generally. Clearly, there is a substantial public interest in securing the availability of energy resources for the benefit of people in the region, the State and Australia as a whole. However the public interest is not limited to economic considerations. It may, for example, include the public interest in not destroying areas of high heritage value to the Aboriginal and/or the wider community. At para 258 of its contentions, the Gomeroi applicant submits that in considering the public interest, the Tribunal must take into account the activities which Santos proposes to perform pursuant to the proposed grants, as well as considering the "impact of the grant of the title itself." I accept that proposition.

[952] At para 259, the Gomeroi applicant refers to the evidence of Professor Steffen, concerning natural gas, greenhouse gas emissions, and climate change. According to Professor Steffen, the project will result in the emission of between 109.75 Mt (million tonnes) and 120.55 Mt of carbon dioxide equivalents, representing less than 0.2% of Australia's current annual emissions. At paras 4.1 and 4.2 of his report, Professor Steffen quotes the emissions figures from the Environmental Impact Statement, entitled

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[113] (1989) 168 CLR 210.
[114] (1947) 74 CLR 492.

"Greenhouse gas assessment". Professor Steffen provides other, no doubt important, information.

[953] The Gomeroi applicant submits that the Narrabri Gas Project will contribute to greenhouse gas emissions and to climate change as described by Professor Steffen at paras 1.2-1.5 of his report, and by reference to the Sixth Assessment Report of the United Nations Intergovernmental Panel on Climate Change, published in August 2021.

[954] In response to question 3 in his report, Professor Steffen provides "model-based projections from the IPCC AR6 report and from the CSIRO and BoM report 2020", to assess the likely consequences of global warming for the Narrabri region including the Pilliga forest. This area is said to be included in the Central Slopes cluster. Professor Steffen summarizes the projections as follows:

> In summary, the currently observed trends – more extreme heat, further and more intense droughts, harsher fire danger weather, changes in rainfall patterns and heavier rainfall when it occurs – are all projected to worsen in the Narrabri region over the next few decades at least.

[955] At 3.3 of his report, Professor Steffen states:

> If the Paris goals cannot be met and the current trajectory towards a 3ºC temperature rise continues, the risks to Australians (and the rest of humanity) escalate rapidly: many areas of Australia and other parts of the world would become uninhabitable due to extreme heat and lack of rainfall (the Western Slopes/Pilliga region would become much more harsh in terms of habitability); 1-in-100 year coastal flooding events could happen every year; tropical cyclones and hailstorms will intensify, escalating damage to infrastructure, property and human health; and a cascade of tipping points could change the Earth System so dramatically that it could present an existential threat to humanity (Hoegh-Guldberg et al. 2021; Lenton et al. 2019).

[956] Having regard to Counsel's submissions, and para 268(b) of the Gomeroi applicant's revised contentions, it seems to assert that Professor Steffen's evidence demonstrates that there is not only a broader public interest in "climate change", but also a public interest in "the local effect on native title rights".

[957] The Gomeroi applicant seems simply to adopt Professor Steffen's views and the information upon which he relies. No attempt has been made to explain why such views and any new information should be preferred to the Independent Planning Commission's decision and the information to which it had access, let alone that of the Land and Environment Court. The Gomeroi applicant appears to submit that:

- the Narrabri Gas Project will emit greenhouse gas emissions;

- these emissions will contribute to climate change;
- climate change leads to extreme weather events;
- extreme weather events degrade the natural environment and ecology across the globe, including the Narrabri region; and
- the natural ecology of the Narrabri region is central to the continuity of the Gomeroi people's culture, law and custom.

[958] Thus, taking these considerations as a whole, the Gomeroi applicant submits that climate change will affect, "the preservation and continuity of the culture and society that underpins the Gomeroi People's tradition law and custom", and that these are matters for consideration under s 39(1)(e). If the Gomeroi applicant's contention is accepted, notwithstanding Parliament's intention in making the 1998 Act, s 39(1)(f) may also be engaged.

[959] In its closing submissions, the Gomeroi applicant submits that the Tribunal should have regard to a number of key points as follows:

(a) the Tribunal is not bound by the decisions of the Independent Planning Commission or Commonwealth Minister under the Environmental Protection Act, and must make a fresh and independent decision having regard to all relevant material;
(b) the Tribunal must take into account the expert reports provided by the Gomeroi applicant and the fresh documents referred to by Professor Steffen, including Intergovernmental Panel on Climate Change AR6;
(c) the project is not in the public interest, having regard to the greenhouse gas emissions and climate change;
(d) Mr Dunn's evidence at the hearing, regarding "offsets" and "Santos zero emission targets" revealed that there is no guarantee, by way of conditions or otherwise, that such offsets will be enforced;
(e) Mr Dunn's evidence revealed that gas wells would be in situ in perpetuity, and that if leakage occurred, the principal gas leaked would be methane, a more potent greenhouse gas than carbon dioxide;
(f) because methane leakage has not been considered by the Independent Planning Commission, it should be considered by the Tribunal;
(g) a decision under s 38 of the Native Title Act is an "administrative decision";

(h) the structure of the Native Title Act and the future act provisions, including ss 40 and 42, suggest that the decision of the Tribunal is analogous to an administrative decision; and

(i) when exercising its powers, the Tribunal must take s 39 considerations into account.

[960] A subsidiary Gomeroi assertion suggests that due to changing commercial factors, Santos may ultimately export gas from the Narrabri Gas Project, in which case the public interest in local benefits flowing from a domestic gas market may not materialize. Importantly, the export process would, through liquefaction and transport processes, negate any emissions reductions otherwise secured by replacing coal in the domestic market. However evidence seems clearly to suggest that Santos is committed to supplying gas domestically.

Santos's contentions

[961] Santos submits that there is a public interest in the making of the proposed grants for reasons associated with the domestic supply of gas and other economic and social advantages. It contends that the public interest arguments against the doing of the act, due to the emission of greenhouse gases, have been considered by the Independent Planning Commission in detail. It concluded that the risk was low.

[962] Santos submits that the Independent Planning Commission has already determined the development application for the Narrabri Gas Project. As part of its decision-making process, the Independent Planning Commission considered the public interest under s 4.15(1) of the Environmental Planning and Assessment Act and determined that, on balance, the project complied with the legislation and was in the public interest. Prior to reaching its conclusions the Independent Planning Commission had regard to a range of submissions and expert reports, and held extensive public hearings over 7 days, during which 366 persons spoke.

[963] Santos submits that when considering the public interest under s 39(1)(e) of the Native Title Act, the Tribunal should give considerable weight to the fact that the Narrabri Gas Project was assessed as being in the public interest, subject to certain recommended conditions, including the minimization of greenhouse gas emissions. In *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*, the decision was upheld.

[964] Santos submits that while the conclusions of the Independent Planning Commission, the Court, and the State are not determinative of the issues under s 39(1)(e), they are nonetheless relevant. Santos points out that, in *Bligh Coal Limited v Malone*,[115] I concluded that the view of the State was relevant to an assessment of the public interest. I remain of that view. However, it does not follow that I should ignore submissions concerning other aspects of the public interest, including the effects of climate change.

[965] At paras 110-111 of its contentions, Santos asserts that the proposed grants are in the public interest for reasons associated with the State and Commonwealth government emissions reduction efforts and transition away from coal. Further, Santos contends that the Narrabri Gas Project is in the public interest because the environmental footprint for domestic supply is relatively small when compared to the processes associated with the extraction of coal and greenhouse gas emissions from coal-fired production.

The State's contentions

[966] The State accepts that the concept of "public interest" in s 39(1)(e) may include any public interest in greenhouse gas emissions. It contends that the Tribunal should incline towards conclusions reached by the Independent Planning Commission, it having scrutinized these issues in accordance with extensive and detailed expert analysis, completed in accordance with the State's planning regime and by reference to the State's energy plan. The State contends that this rigorous assessment should be preferred to the limited evidence produced in these proceedings by the Gomeroi applicant.

[967] The State further contends that the Independent Planning Commission's conclusion regarding greenhouse gas emissions and climate change were undisturbed by the Land and Environment Court of New South Wales in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*. There is no apparent reason for the Tribunal to adopt a different position. The matter has been conducted on the basis that the various reports, findings, decisions, determinations and judgments are in evidence before the Tribunal. It follows that these documents may be adopted pursuant to s 146(b) of the Native Title Act.

[115] [2021] NNTTA 19 at 69.

Consideration

[968] In the present case, the Gomeroi applicant asserts that I should, "make a fresh and independent decision", in effect asking that I review evidence underpinning the decision of the Independent Planning Commission, and then adopt the evidence of Professor Steffen. It is difficult to see any justification for the contention that I should simply disregard processes to which the Narrabri Gas Project has been subject, at both State and Federal levels, particularly having regard to Parliament's view as set out in the explanatory memorandum concerning the 1998 Act. It would be a big step to set aside the outcome of such statutory processes in order to adopt the views of an individual scientist, or even the views of international agencies having no particular standing in Australia or in New South Wales.

[969] It is surprising that Professor Steffen should have given his evidence on the assumption that the Narrabri Gas Project would involve hydraulic fracturing, or "fracking". One might reasonably have expected that he would have been appropriately briefed on such matters. It is disturbing that he should dismiss the view of the Independent Planning Commission that there would be "expected emissions advantages" in using coal seam gas rather than coal. He appears to have dismissed the Commission's views concerning the utility of such advantages on the basis of his view that, "the science is absolutely clear", impliedly suggesting that the Commission had chosen to ignore the "absolutely clear" science. The conclusions reached by a statutory body such as the Independent Planning Commission cannot be simply dismissed upon the basis of an assertion by one scientist and sources upon which he or she has chosen to rely. It is unlikely that the Tribunal could perform that function, or was ever intended to do so.

[970] It is fair to say, as Santos does, that Professor Steffen did not address the matters identified in s 39(1)(a) of the Native Title Act, including the more limited considerations relating to environmental matters, subsequent to the 1998 Act, namely particular environmental concerns having particular effect on native title. In effect, he identifies expectations as to future climate change over the Eastern Australian States, to the west of the Great Dividing Range, from the Darling Downs in Queensland to the Central West of New South Wales. I accept, for present purposes, that such prediction is reasonably open in all the circumstances. However I am presently concerned with the effect of the proposed grants on the Santos project area. There is no identified "particular

environmental concern" having "particular effect" on native title, presumably, in this case, the Gomeroi applicant's native title. There is concern about worldwide climate change, predicted to affect a large part of Eastern Australia. There is nothing "particular" about either the environmental concern, or its effect on such native title. Indeed, the Gomeroi applicant has mounted no such argument. These are world-wide concerns, to be resolved by governments.

[971] There seems to be a distinction between the "particular effect on native title" referred to in para 20.56 of the explanatory memorandum and the matters which may be relevantly "affected" pursuant to s 39. However I need not consider that matter. The predicted "on the ground" effects of climate change on the area affected by the Narrabri Gas Project were not considered in detail in the Independent Planning Commission Statement of Reasons, the Environmental Impact Statement or the Department Report. Rather, each body and, ultimately, the consent authority, focussed on the quantity of greenhouse gas emissions from the project within the context of state, national, and international commitments to limit temperature rise, with the intention of mitigating the worst impacts predicted to occur as a result of climate change. Having regard to the evidence before the Tribunal and the findings in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*,[116] there is no reason for the Tribunal to take a different approach.

[972] The Gomeroi applicant submits that attempts to isolate the global impacts of greenhouse gas emissions and climate change upon a particular area would be to take a "piecemeal" approach to a global problem. However the Tribunal is not presently concerned with a "global problem". The Tribunal is necessarily limited to an assessment of the evidence before it, regarding the effect of the proposed grants.

[973] In its submissions made pursuant to s 39(1)(e), Santos contends that the Tribunal may, pursuant to s 39(1)(f), have regard to any other matter that the Tribunal considers relevant, including the rigorous assessment that the project has already undergone pursuant to the Independent Planning Commission process, and the fact that the Independent Planning Commission's decision has withstood judicial review. Santos cites the decision in *Seven Star Investments Group Pty Ltd v Western Australia*[117] at [67]

[116] [2021] NSWLEC 110.
[117] (2008) 257 FLR 175.

in support of that proposition. It is difficult to understand the relevance of that decision for present purposes. It is true that, in connection with assertions that the grantee party lacked relevant mining expertise and sufficient funding to carry out relevant exploration, at para 67, Deputy President Sumner said:

> The grantee party disputed both these contentions and I do not propose to make a finding on them. I do not regard them as factors I should take into account in making my determination. In my view the Tribunal is entitled to rely on the Government party (Department of Mines and Petroleum) as the regulatory body to deal with this type of issue. The issues are not of such an exceptional or serious nature to make it necessary to resolve them in order to make a determination.

[974] It seems to me that s 39(1)(f) provides a sufficient basis for taking into consideration the fact that there has been a rigorous examination of a proposed project by a relevant authority. However s 146 of the Native Title Act also provides a basis for reliance upon reports, findings, decisions, determinations, or judgments of the various courts, persons or bodies identified in s 146(a).

[975] Santos contends that the Tribunal's role is to consider the factors set out in s 39, and not to reassess the Narrabri Gas Project. It does not follow that the Tribunal should simply rely upon views expressed by other tribunals. Nor may they be ignored.

[976] In its written closing submissions, at paras 86 – 89, Santos:

(a) agreed that there is a public interest in the impact of climate change on the preservation and continuity of Gomeroi culture;
(b) contended that Professor Steffen had referred incorrectly to hydraulic fracturing in his report, and had not considered the conditions imposed on the Narrabri Gas Project by the Independent Planning Commission;
(c) contended that no further evidence had been put before the Tribunal, upon which it could reassess the Independent Planning Commission's findings; and
(d) contended that the findings of the Independent Planning Commission should prevail over Professor Steffen's findings.

[977] In particular, Santos submitted that there is virtually no evidence concerning the impact of climate change upon the "preservation and continuity of Gomeroi culture".

[978] In its oral closing submissions at ts 310 l 34 – ts 311 l 26, Santos also contended that the evidence of Professor Steffen:

(a) in relation to the Narrabri area was at a level of generality that did not add anything that could be said to disturb the detailed consideration of expert evidence undertaken by the Independent Planning Commission;

(b) suffered from flawed assumptions, including that the project involves extraction of gas by means of hydraulic fracturing; and

(c) did not engage with the reasoning of the Independent Planning Commission, but rather adopted a simplistic approach, thereby rejecting the consideration of any factors relevant to new projects which emit greenhouse gasses.

[979] The primary purpose of the Department Report was to assist the Independent Planning Commission in evaluating the relevant matters required under the Environmental Planning and Assessment Act and to determine the development application. The Department Report noted the significant public interest in the Narrabri Gas Project. It had attracted the largest number of submissions ever received in connection with a State Significant Project in New South Wales.

[980] The Executive Summary of the Department Report asserts that, after extensive community consultation and investigations, advice from local government, State government and independent experts, the Department concluded that the Narrabri Gas Project is in the public interest because it:

- is critical for energy security in New South Wales;
- will deliver significant economic benefits to the region and the State;
- has been designed to minimize impacts on significant water resources, including the Great Artesian Basin, the biodiversity and heritage values of the Pilliga State forest, and the health and safety of the local community;
- would comply with the relevant requirements in government legislation, policies and guidelines;
- would not result in any significant impacts on people and the environment; and
- any residual impacts can be reduced to acceptable levels by applying total water extraction limits over the life of the project, and requiring Santos to comply with strict standards, rehabilitate the site to a high standard and offset the biodiversity impacts of the project.

[981] The Department Report sets out the evidence regarding greenhouse gas emissions and climate change by reference to the Environmental Impact Statement and CSIRO research. The Department reasoned that the Narrabri Gas Project will provide an opportunity to meet domestic energy needs and, where it displaces coal-fired electricity generation, the coal seam gas power will produce a net reduction of approximately 50% in greenhouse gas emissions. However it is noted that such saving would be lost if the gas were to be exported as liquefied natural gas. The Department recommended a condition of domestic supply only, and other conditions related to minimizing greenhouse gas emissions from the project.

[982] Appendix R to the Environmental Impact Statement, entitled "Greenhouse gas assessment", was prepared by Santos to estimate the greenhouse gas emissions associated with the Narrabri Gas Project. It concluded that the greenhouse gases generated by the project will be reasonable, given the nature of the project. It stated that lower-carbon energy sources such as natural gas can help to meet global energy demand, while reducing relative global greenhouse gas emissions. An example of this effect is the fact that lifecycle emissions for electricity produced by natural gas from the Narrabri Gas Project would be nearly 50% less than emissions for current electricity supplied to the New South Wales grid.

[983] The Greenhouse Gas Assessment references the Planning Framework which includes a requirement that the consent authority (the Independent Planning Commission) consider:

> … an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

[984] Chapter 5 of the Greenhouse Gas Assessment covered "Impact assessment". This part of the assessment examined the greenhouse gas emissions associated with the Narrabri Gas Project, including direct emissions and downstream emissions, but did not analyse "impacts" in terms of the consequences of climate change, such as increased frequency of extreme weather events, natural disasters and the flow-on effects, such as the degradation of ecosystems, and damage to built and natural environments.

[985] I have previously cited the Independent Planning Commission Statement of Reasons above. Paragraph 248 from the Reasons relevantly states:

> The Commission has considered the evidence before it with respect to the potential for serious or irreversible harm, predominantly in association with groundwater contamination, water security, bushfire, greenhouse gas emissions, biodiversity and Aboriginal cultural heritage impacts. Based on the material before it, the Commission is of the view that the risk of the Project causing serious or irreversible environmental damage is low. The low level of the threat is such that the Commission does not consider that a proportionate response – in light of the benefits of the Project - would be refusal of the Project. All threats or risks to the environment that have been raised in the material and submissions before the Commission are capable of being mitigated and monitored by the conditions the Commission intends to impose on the Project.

[986] See also para 438 of the Independent Planning Commission Statement of Reasons as follows:

> The Commission finds that on balance, and when weighed against the relevant climate change policy framework, objects of the EP&A Act, ESD principles and socio-economic benefits, the potential impacts associated with the Project are manageable, and the risks of adverse impacts on the environment are low. The likely benefits of the Project warrant the conclusion that an appropriately conditioned approval is in the public interest.

[987] I accept that greenhouse gas emissions may lead to environmental harm. However, in my view, since the 1998 Act, it has not been appropriate to consider environmental (or ecological) matters, save to the extent that such concerns may have a particular effect on native title. That matter should be considered pursuant to s 39(1)(f) and subject to the Tribunal's view as to relevance. In any event, the matter has been extensively considered by the relevant State agencies and appropriate approvals given. There are conflicting views concerning climate change and knowledge is rapidly expanding. Nonetheless a decision has been made by the relevant authority. The Gomeroi applicant seeks to avoid that decision by referring to Professor Steffen's views. He seeks to dismiss the approvals by referring to additional information including a further report from a United Nations agency. It does not follow that I should simply dismiss the decisions of State agencies. The Tribunal's concern is with any particular effect on native title. It cannot be said, in this case, that there is any particular effect upon native title which must be considered. The problem is world-wide.

[988] A further matter arises under s 39(1)(f). At para 8A(d) of its summary of contentions, the Gomeroi applicant asserts that the proposed grants should not be made because such grants will not be done pursuant to a voluntary regime which would adequately protect the native title rights and interests, and the cultural heritage values of the land. It is asserted that such values are not protected by existing laws. At para 181(d), the proposition is repeated. At para 223, the Gomeroi applicant submits that there are

inadequacies in, "other statutory schemes relating to the identification and protection of Indigenous heritage." It is submitted that the future act provisions of the Native Title Act provide an important opportunity for the identification and protection of Indigenous cultural heritage, "as an incident of the recognition and protection of native title rights and interests under the Act". It is said that such protection has been the subject of negotiation between Santos and the Gomeroi applicant. The Gomeroi applicant then identifies the alleged shortcomings of such legislation.

[989] The Gomeroi applicant criticizes the New South Wales cultural heritage regime, including the development approval process under the Environmental Planning and Assessment Act, the protection of Aboriginal objects and places under the National Parks and Wildlife Act, the "Aboriginal cultural heritage consultations requirements for Proponents",[118] and the "Guide to investigating, assessing and reporting on Aboriginal cultural heritage in NSW".[119] The substance of this contention appears to be that the combined effect of the Development Consent conditions and the Aboriginal Cultural Heritage Management Plan are inadequate to protect intangible cultural heritage, and that procedures and processes established pursuant to the Development Consent conditions do not provide the Gomeroi applicant and native title claim group with sufficient control over such procedures and processes.

[990] The primary concern of the Gomeroi applicant appears to be that in circumstances where the Aboriginal Cultural Heritage Assessment Report did not identify or, in the Gomeroi applicant's view, give sufficient weight to intangible cultural heritage, the Aboriginal Cultural Heritage Management Plan lacks the information necessary to inform processes, including micro-siting and pre-clearance surveys, and therefore a proper application of the avoidance principle. The Gomeroi applicant further submits that because it contends that the whole of the Pilliga is significant, the whole of the project area, or large tracts of it, may need to be avoided. Under cross-examination, Mr Kumarage did not confirm or support the contention that the whole, or even a large part of the Pilliga forest is significant. His report did not recommend that large parts of the

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[118] Department of Environment, Climate Change and Water (2010) <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/aboriginal-cultural-heritage-consultation-requirements-for-proponents-2010-090781.pdf>.

[119] Office of Environment and Heritage; Department of Premier and Cabinet (2011) <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/guide-to-investigating-assessing-reporting-aboriginal-cultural-heritage-nsw-110263.pdf>.

Santos project area be "avoided" for reasons associated with heritage. See ts 219, ll 31-47. The Gomeroi applicant seems to be concerned with presently unidentified, intangible or tangible Aboriginal cultural heritage, as well as protection measures.

[991] Santos contends that the Additional Research Program, and the procedures provided in the Aboriginal Cultural Heritage Management Plan, including regular consultation with both the Aboriginal Cultural Heritage Advisory Group and Aboriginal Cultural Heritage Working Group, are adequate to meet such concerns. In addition, Santos has agreed to the imposition of a condition upon the Tribunal's determination, which condition would require the completion of the Additional Research Program prior to the commencement of Phase 2 of the Narrabri Gas Project.

[992] The Gomeroi applicant also criticizes the Aboriginal Cultural Heritage Management Plan, the New South Wales cultural heritage regime and the involvement of Local Aboriginal Land Councils, Registered Aboriginal Parties and Santos in the Aboriginal Cultural Heritage Advisory Group and Aboriginal Cultural Heritage Working Group. The Gomeroi applicant relies upon the evidence of Mr Kumarage and submits that the composition of the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group allow greater control to Santos, resulting in a lack of control by the Gomeroi native title claim group over their cultural heritage. Santos contends, in reply, that the casting vote on a committee does not equate to "control". Indeed, the Gomeroi applicant seems to assume a level of likely disagreement amongst the committee representatives, for which there is little or no evidentiary support.

[993] For the purposes of s 39(1)(f), it is difficult to understand how the perceived inadequacies of the Development Consent conditions, and the Aboriginal Cultural Heritage Management Plan can be taken into account by the Tribunal. The Gomeroi applicant has not explained the circumstances in which it contends that the Aboriginal Cultural Heritage Management Plan is not a voluntary agreement. It is a matter for the Gomeroi people to determine whether they wish to participate in the relevant processes. It seems that as late as March 2021, substantial agreement had been reached as to such processes.

[994] The Gomeroi applicant submits that there is a lack of cultural heritage information, supplied by it for inclusion in the Aboriginal Cultural Heritage Assessment Report and,

consequently, the Aboriginal Cultural Heritage Management Plan. This "shortcoming" is said to be due to the failure by Santos to provide sufficient information concerning the location of project infrastructure. Further, Mr Kumarage suggests the possibility that large tracts of the Santos project area could include intangible cultural heritage. I have previously explained that Santos's flexibility in siting infrastructure contemplates preliminary verification of heritage sites so that such sites can be avoided. The need for the Additional Research Program identified by Dr Godwin, appears to have arisen out of a perception that Santos should identify its infrastructure locations before the Gomeroi applicant has identified any locations of concern.

3.5. Section 39(2)

[995] The Santos project area includes non-native title interests such as private freehold lands, other extinguishing tenures, and existing Santos infrastructure such as the Leewood property, Bibblewindi water transfer facility and the Westport drillers camp, depicted on maps which have been provided to the Tribunal. Mr Dunn states in his affidavit that approximately 34% of the Santos project area is comprised of agricultural and pastoral land. Hence it seems that the Gomeroi people already enjoy only limited access to the Santos project area. The other areas, where native title may exist, include areas used currently for a range of purposes including forestry and mineral exploration. For example, Santos currently undertakes exploration and appraisal activities under existing approvals and tenements, including the construction and operation of appraisal pilot wells. Santos contends that other current uses of the Santos project area include agriculture, forestry, bee-keeping and recreation. The State has referred to the management of travelling stock routes and forestry plantations as examples of current non-native title uses of parts of the Santos project area.

[996] The State asserts that the lands within the area covered by PPLA15 include an area controlled by the Yarrie Lake Public Hall Land Manager, Yarrie Lake Flora and Fauna Reserve Land Manager. Land within the Brigalow Park State Conservation area is managed and used in accordance with the Brigalow Nature Reserve Plan of Management.

[997] Santos relies upon its "Native Title Audit Report" to contend that 53.78% of the Santos project area is comprised of areas where native title has been extinguished. Freehold

land comprises about 36% of the Santos project area. This evidence is consistent with other evidence which suggests that native title may continue to exist over 45.6% of the Santos project area. Refer to the map at Schedule 2 to this determination. The Gomeroi applicant does not accept Santos's conclusions regarding extinguishment, based upon Ashurst's "audit". However it has made no particular criticism of that audit. The Gomeroi applicant asserts native title rights and interests over State forest areas where native title has not been extinguished. The State contends that as the Forestry Corporation, under the *Forestry Act 2012* (NSW), currently controls and manages lawful activities in the State forest areas, it is unlikely that the proposed grants will substantially increase impairment of the Gomeroi people's access to the Santos project area.

[998] Historical uses of the State forest areas, (for example, for timber harvesting), are similar to current use and are referenced in the evidence of the parties. See affidavit of Suellyn Tighe at [5], [7]; affidavit of Haydn Kreicbergs, exhibit HK-22. At para 46 of his affidavit, Mr Dunn deposes to a history of logging in the State forest areas, evidenced by extensive tracks and roads through those areas.

[999] I accept the evidence relating to s 39(2). It suggests historical interference in the enjoyment of native title rights and interests. However loss of control must be balanced against any evidence of continuing enjoyment by the Gomeroi people of native title rights and interests, and other matters relevant to s 39(1).

3.6. Sections 39(3) and 39(4)

[1000] I note the content of s 39(3). As to s 39(4) I have caused enquiries to be made as to whether there are issues relevant to the determination upon which the negotiation parties agree. There no such issues.

3.7. Conclusions as to Section 39

[1001] In drawing conclusions in this matter, it is not possible that I refer again to all of the evidence. It is too diffuse and too voluminous.

[1002] Section 39(1) of the Native title Act prescribes matters to be taken into account in making a determination for the purposes of s 38(1). None of those matters, taken in isolation, will necessarily lead to a determination that the proposed grants may, or may not be made. Section 39(1)(a) focusses on the effect of the proposed grants. Obviously, identification of such effect involves an element of prediction, possibly informed by past events. However the relevant inquiry is as to the effect of the proposed grants on the matters identified in s 39(1)(a). Thus the Tribunal must inquire as to the extent of past and present usage, in order to determine whether the proposed grants may affect such considerations and, if so, the extent of such effect.

[1003] Section 39(1)(a)(i) refers to "the enjoyment by the native title parties of their registered native title rights and interests". The other sub-paragraphs of s 39(1)(a) do not refer to "enjoyment". However I am inclined to the view that ss 39(1)(a)(ii)-(v) deal with considerations which otherwise depend upon such rights and interests or are closely associated with them. It may be that use of the word "enjoyment" in s 39(1)(a)(i) was intended to demonstrate that the relevant effect was not simply inconsistency between rights conferred by the proposed grants and native title rights and interests.

[1004] Broadly speaking, ss 39(1)(b) to (e) refer to considerations that must be taken into account by the Tribunal as part of the balancing exercise between the competing interests of the parties, Aboriginal and Torres Strait Islanders living in the area and the public. Section 39(1)(f) is potentially very wide in effect, but its operation is narrowed by the Tribunal's discretion to act upon or reject such "other matters" by reference to "relevance".

[1005] The Gomeroi applicant has provided much information concerning use of the Pilliga by the Gomeroi people, particularly the evidence of the claim group deponents and Mr Kumarage. However there is very little evidence concerning the Narrabri Gas Project area or areas close to it. The claim group deponents provide information concerning Bohena Creek, the X Line Road, possible birthing places in the [redacted], the possible association of men's business within that area and a reference to one burial site in the vicinity of the Santos project area. In the Aboriginal Cultural Heritage Management Plan, 90 sites are identified within the Narrabri Gas Project area. Those which are within the Narrabri Gas Project area will be treated in accordance with that Plan.

[1006] The Gomeroi applicant has not sought to demonstrate a significant effect on any of the considerations in s 39(1)(a). I have previously demonstrated the failure by the Gomeroi applicant to identify any association between the matters identified in para 208 of its contentions and the Santos project area. In particular, I stress that the coal seams identified in para 208(a) and 220(a) are located near Burning Mountain and the ranges out near Mururundi, about 150km from the Santos project area. I have dealt with the other sites identified in those paragraphs. None seems clearly to be located within the Santos project area.

[1007] Clearly, the evidence concerning sites in the Pilliga say nothing about the Santos project area. It is a clearly identified area about which the Tribunal might reasonably expect evidence concerning traditional activities, if the Gomeroi people were aware of any such activities.

[1008] The difficulty for the Gomeroi applicant is that there is virtually no evidence of effect upon relevant considerations for the purposes of s 39(1)(a) within the area which will be affected by the proposed grants. Whilst there is evidence relevant to the Pilliga, the lack of evidence concerning activity within the Santos project area makes it difficult to draw inferences as to any relevant effect. As to s 39(1)(a)(v), there are few, if any, sites said to be of particular significance on the land and waters concerned and within the Santos project area.

[1009] There is, as far as I can see, little or no evidence concerning the matters raised in ss 39(1)(a)(ii) and 39(1)(a)(iii).

[1010] Much has been said about access to "land or waters concerned". See s 39(1)(a)(iv). At para 167 of his report, Mr Kumarage states that "from a traditional owner's perspective", the well sites would be occupying a significant proportion of the habitat of ancestral spirits, other supernatural beings and associated tracks and activities. This proposition would carry substantially more weight if there were evidence as to the extent to which the Santos project area presently accommodates, or is said to accommodate such habitats and associated tracks and activities, save for the map at page 29 of Mr Kumarage's report. If there were any history of rites, ceremonies or other cultural activities associated with the Santos project area, one would expect that such matters would have been identified in the Gomeroi applicant's evidence. As to well head sites, it is difficult

to accept Mr Kumarage's bare assertion that "from a traditional owner's perspective", the well heads would be occupying a significant proportion of such areas. Mr Kumarage does not explain his views (attributed to traditional owners) or the basis for such asserted significance, particularly having regard to the staggered nature of the Narrabri Gas Project.

[1011] As to s 39(1)(a)(v), As I have previously stated, most of the sites identified in para 208 of the Gomeroi applicant's contentions are not said to be located within the Santos project area. Even those identified by Ms Tighe as associated with that area are uncertain as to location. The absence of particularity concerning location significantly detracts from such sites being identified as being of particular significance for the purpose of 39(1)(a)(v).

[1012] With respect to s 39(1)(b), I have recorded the Gomeroi applicant's strong wish that the proposed grants not be made, unless they are in terms agreed by the Gomeroi applicant (or the native title claim group). However such a wish must be considered in light of the other factors in s 39(1).

[1013] Pursuant to s 39(1)(c), I have also identified the potential benefit to the region, the State and Australia, if the proposed grants are made. I acknowledge that there may be some increase in gas emissions which, in time, will contribute to adverse impact upon the climate, worldwide. There is no evidence of any particular adverse effect upon the Gomeroi people, their native title rights and interests or the Santos project area.

[1014] Sections 39(1)(c) and 39(1)(e) may be considered together. There can be no doubt that there is a demand for gas from the Narrabri Gas Project. It seems unlikely that either the State or Santos would otherwise have devoted undoubtedly substantial resources to the project. The proposed grants are of economic significance to Australia, the State and the region, as well as Aboriginal people. Whilst there may be some degree of risk associated with the project, there can be little doubt that the State and Santos have made substantial efforts to minimize the risk. One cannot simply dismiss scientific and engineering experience. Nor is it practicable for the Tribunal to second-guess State agencies in the performance of their prescribed functions, even when faced with Professor's Steffen's undoubted expertise, and the information provided by international agencies. In a

democracy experts advise, but governments make final decisions and accept political responsibility for the consequences of such decisions.

[1015] Aspects of the public interest may be in conflict. Whilst the development of gas resources may be in the public interest, possibly adverse consequences may not be in the public interest. In the present case, the risk of escaping gas and contribution to climate change are factors for consideration, as is, particularly, the public interest in the preservation of Aboriginal culture and society.

[1016] The 1998 Act removed the consideration of environmental considerations from the s 39 decision-making process, save when there is a particular effect on native title. There is no apparent matter having such particular effect in this case. Whilst there may be a public interest in the consequences of exploiting gas reserves, there is no doubt that the State, in particular, and the Commonwealth have acted in accordance with State and Commonwealth law.

[1017] As to s 39(1)(f), I have dealt with the contentions concerning the desirability of a voluntary regime protecting cultural heritage values. I have also discussed the significance of climate change which is discussed in connection with ss 39(1)(c), (e) and (f). As to that matter, even if one takes the approach taken by Santos and the State, rather than that which I prefer, having regard to the 1998 Act and the explanatory memorandum, it is difficult to attach much weight to the public interest, beyond that attributed to it in any consideration of s 39(1)(c). Section 39(1)(f) is of no relevance, given that there is no suggestion of particular environmental concerns producing particular effects on native title.

[1018] It is not necessary that I say anything more about ss 39(2), 39(3) or 39(4).

[1019] In assessing the s 39 criteria, significant weight must be given to s 39(1)(a)(i). The failure by the Gomeroi applicant to address the effect upon the enjoyment of its native title rights and interests is of some importance. The matters identified in ss 39(1)(a)(ii) and (iii) are closely associated with such enjoyment. The Gomeroi applicant's failure to distinguish, between the native title claim area and the Pilliga on one hand, and the Narrabri Gas Project area and the Santos project area on the other, is also of considerable importance.

[1020] Concerning s 39(1)(a)(iv) Mr Kumarage places great weight upon access as being essential to the exercise of native title rights and interests and associated matters. However any difficulties in access are restricted to the Narrabri Gas Project area, including the Santos project area. In those locations, there may be some limitations on access, as the result of fencing for purposes of safety and security. However the extent of such fencing will be limited. As to s 39(1)(a)(v), there is very little, if any evidence as to the existence of areas or sites of particular significance.

[1021] Concerning s 39(1)(b), the Gomeroi has, in the end, taken a hard line in its participation in the s 31(1) negotiation process. Its current position is that there should either be a determination that the proposed grants not be made, or a determination on terms of which it approves. Such an approach makes negotiation difficult. However it also demonstrates that whatever the Gomeroi applicant's preference might previously have been, it will no longer agree to the proposed grants.

[1022] As to the economic and other significance of the Narrabri Gas Project, Santos has identified the considerable worth of the project to the Narrabri area, the State and the Commonwealth. The Gomeroi applicant chose to base its opposition primarily upon climate change, and by its reference to unclear assertions concerning the "involuntary" nature of the development consent process. Given the extensive consideration of the climate change issue by the State, it is obvious that any decision reached by the State or its agencies should be respected. There is no reasonable basis upon which the Tribunal could justify any preference for Professor Steffen's evidence and the views of United Nations agencies over the State's decision. Whilst there is, no doubt, a public interest in climate change, the intentions underlying the 1998 amendments are clear.

[1023] As to the Gomeroi applicant's concern with the non-voluntary nature of the development consent process, such concern seems to be focussed upon the operation of the Aboriginal Heritage Management Plan. The State required that such plan be incorporated into the development consent. Pursuant to the Plan, the Gomeroi applicant is represented on the Aboriginal Cultural Heritage Advisory Group and the Aboriginal Cultural Heritage Working Group. It has clear opportunities to express its views. It may be that the Gomeroi applicant's concerns relate to the representation of other Aboriginal groups on those bodies.

[1024] I accept that the Gomeroi applicant has genuine concerns about the recognition and protection of its native title rights and interests, and the associated matters identified in s 39. It is unfortunate that the parties have been unable to agree. I attribute such failure, at least in part, to confusing expert evidence. In any event, the Tribunal must now resolve the matter. There can be little doubt that there is a significant public interest in the responsible exploitation of gas reserves. Substantial resources have been expended by the State and by Santos in ensuring such responsible exploitation. Whilst I understand the Gomeroi applicant's concern, I consider that, having regard to the matters set out above, its concerns are outweighed by the public interest.

IV CONDITIONS

[1025] The considerations prescribed by s 39 of the Native Title Act have been identified as providing an, "indication in broad terms" as to the appropriate subject matter of conditions which the Tribunal might impose upon, in this case, the proposed grants. See *Walley v Western Australia*[120] at [13]; *Evans v Western Australia*[121] at 213; *Minister for Mines (WA) v Evans*[122] at 283. Clearly, s 38(1) offers three options.

[1026] Section 38(2) provides:

> (2) The arbitral body must not determine a condition under paragraph (1)(c) that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
>
> (b) any income derived; or
>
> (c) any things produced;
>
> by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

[1027] The Tribunal is also prohibited from making a determination as to compensation to be paid to a native title party under Div 5 of the Native Title Act. See s 50 of the Native Title Act. The Tribunal may, however, impose a condition that the estimated amount of any future compensation award be paid into trust, or be secured by bank guarantee, until a determination as to compensation is made by the Federal Court. See ss 41(3), 41(5) of the Native Title Act.

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[120] (1999) 87 FCR 565.
[121] (1997) 77 FCR 193.
[122] (1998) 163 FLR 274

[1028] In late 2021 and early 2022 the parties exchanged correspondence concerning conditions which might be imposed on any determination that the proposed grants be made. On 7 October 2021, Mr MacLeod wrote to Mr Baldock (Santos), listing conditions which the Gomeroi applicant would seek to have imposed "[i]n the event that the Tribunal takes the view that the future acts may be done." Mr MacLeod stated that the proposed conditions were, "based on the offer from the Grantee Party and the Native Title Party", but included "other conditions which will be sought by the Native Title Party". The letter was not sent to the State. Thirteen conditions were proposed by the Native Title Party. As the Gomeroi applicant suggested, some of those conditions had not previously been discussed.

[1029] On 20 December 2021, Ashurst replied to Mr MacLeod's letter of 7 October. It stated that "[Santos does not] consider that a determination by the National Native Title Tribunal that the petroleum production leases required for the Narrabri Gas Project may be granted, should be subject to any conditions." Nonetheless, it said that Santos "[intended] to fulfil, in broad terms", the commitments it had made in its offer of 29 March 2021.

[1030] At the directions hearing on 7 February 2022, the Gomeroi applicant was directed, by close of business on 14 February 2022, to "advise the other Parties and the Tribunal in writing as to the specific conditions which it [sought] to have imposed on any condition." Santos and the State were directed to respond to the Gomeroi applicant's proposed conditions by close of business on 21 February 2022. On 14 February, the Gomeroi applicant provided a list of 63 conditions which it sought to have imposed on any determination that the proposed grants be made.

[1031] On 22 February 2022, Santos provided a list of 22 proposed conditions, as well as a "comparison" of its conditions with those proposed by the Gomeroi applicant. It is evident from the comparison that Santos did not accept most of the Gomeroi applicant's proposed conditions. Of those which were agreed, many were subject to apparently minor proposed changes. The predominant reason cited by Santos for disagreeing with the Gomeroi applicant's proposed conditions, was that such conditions were generally, already, provided for in, or had already been performed in accordance with, the Development Consent and/or Aboriginal Cultural Heritage Management Plan. Of particular note are two conditions, relating to a trust and an environmental bond, which

conditions were rejected by Santos on the basis that it "[did] not accept there [was] any basis for the inclusion" of such conditions.

[1032] Condition 52 would have required that Santos "pay $36,000,000 into trust until it is dealt with in accordance with s 52A" of the Native Title Act. No attempt has been made to justify the imposition of any such condition in the absence of agreement. Such trusts have been, only rarely, imposed. The Gomeroi applicant's reference to s 52A suggests that the payment was to be by way of compensation to be determined by the Federal Court. See *Jax Coal Pty Ltd v Smallwood*[123] at [54]. No explanation is offered as to the basis upon which the figure was calculated. In the absence of evidence as to the appropriate amount, or as to any concern that Santos may not be able to pay compensation when and if awarded, I consider that such a condition would be inappropriate.

[1033] Item 53 in the Gomeroi applicant's proposed conditions would have required Santos to provide security for remediation or rehabilitation of the Santos project area. It seems that there is a State requirement for some such security arrangement. However the Gomeroi applicant seek an additional amount equal to 15% of the amount required by the State. No justification has been advanced for such further security. In those circumstances, I decline to make such an order.

[1034] I have previously referred to Santos's willingness to accept a condition that the Additional Research Program, referred to in the evidence, be completed prior to the commencement of Phase 2 of the Narrabri Gas Project, rather than within twelve months after its commencement. I shall impose such a condition.

[1035] On 23 February 2022, the State provided a "short note" addressing the Gomeroi applicant's proposed conditions. Its "principal point" was the inclusion of a condition to the following effect:

> Where there is a conflict between these conditions and the terms of the Development Consent [dated 30 September 2020], such that both cannot be complied with, the requirements of the Development Consent prevail.

This condition was intended to allay the State's concern that "[m]any of the [Gomeroi applicant's] Proposed Conditions touch on or repeat elements of the Development

[123] (2011) 260 FLR 99.

Consent". The State also requested other minor changes. As I propose only to impose a term concerning the Additional Research Program, the above proposed condition will be unnecessary.

[1036] On 21 April 2022, Santos provided a "revised set" of proposed conditions, which included an additional condition, "addressing the timing of the Additional Research Program as well as some other refinements to the [22 February 2022] proposed conditions".

[1037] On 13 October 2022, in response to the Tribunal's inquiry, the parties advised that there is no agreement as to any conditions.

[1038] In the circumstances, no clear case has been made out for the imposition of any conditions, save for that concerning the Additional Research Program referred to in the determination.

[1039] Condition B59 of the Development Consent required that Santos prepare an Aboriginal Cultural Heritage Management Plan. Condition B60 required that Santos implement that plan, once it was approved. Such approval was granted on 15 March 2022. Paragraph 5.7 of the Cultural Heritage Management Plan provides:

> **5.7 Additional Research Program**
>
> To further Santos' commitment to adopt the Precautionary Principle as it relates to the management of impacts on Aboriginal cultural heritage, supplementary research will be undertaken in consultation with the Aboriginal community to confirm existing data sets for places of Aboriginal cultural heritage and, where it proves necessary, augment data.
>
> This will be done by the conduct of an Additional Research Program. The aim will be to collate a body of data on places and values that can be integrated into general Project planning such that the locations where these places and values are identified can be managed by the Avoidance Principle.
>
> A research program targeting places and values of particular traditional, anthropological, historical and contemporary significance to Aboriginal people will be developed and completed within 12 months of commencement of Phase 2.

[1040] It is now proposed that Santos complete the Additional Research Program prior to the commencement of Phase 2 of the Narrabri Gas Project. It may be arguable that the third clause of para 5.7 requires that the program be commenced, as well as completed within

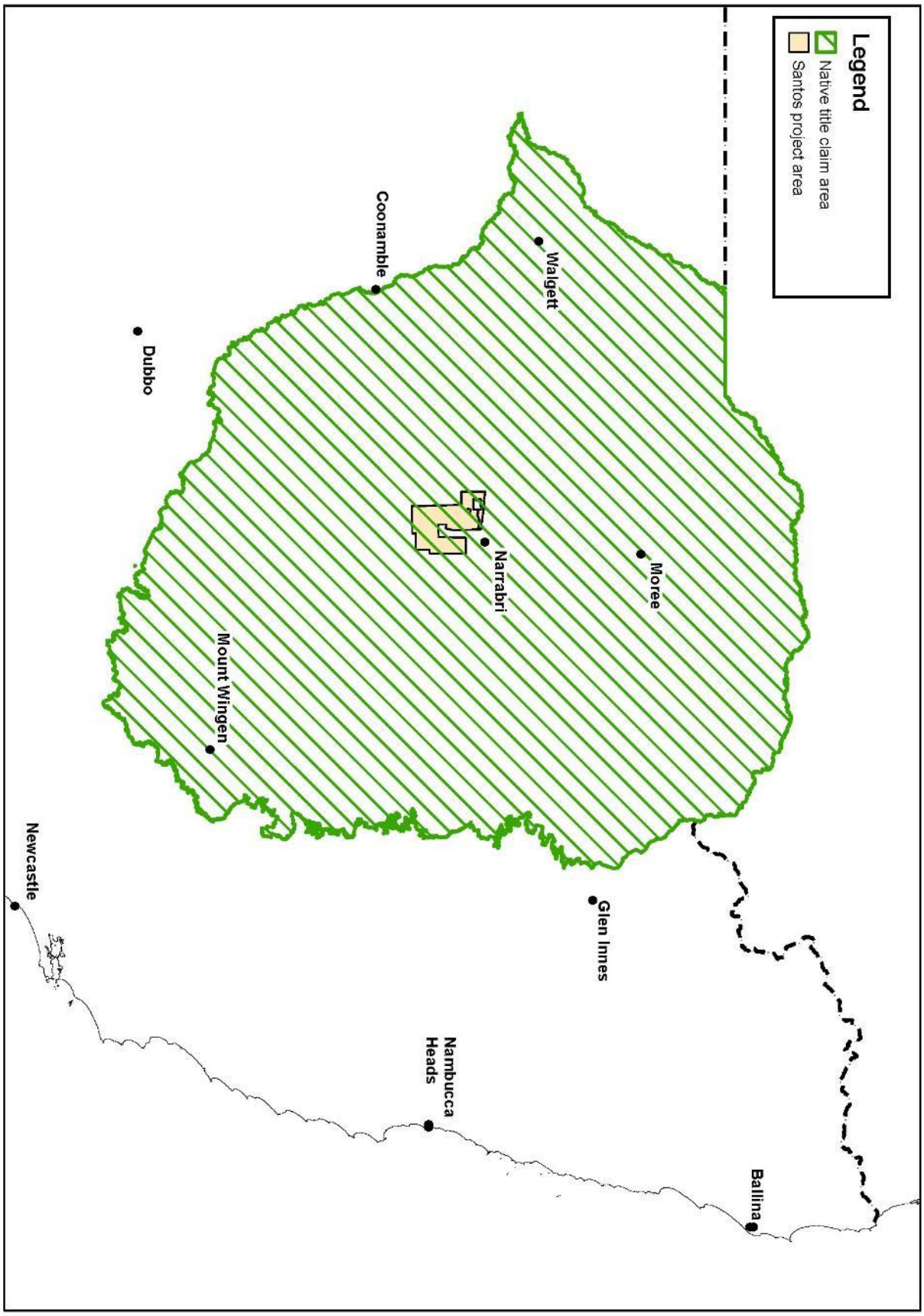
the 12 month period. However the better view is that the program may start at any time, although it must be completed within the stipulated period. Santos is willing to both commence and complete the program prior to the commencement of Phase 2. Such a result would seem to be consistent with the existing requirements, as well as the proposed change to such requirements.

V DETERMINATION

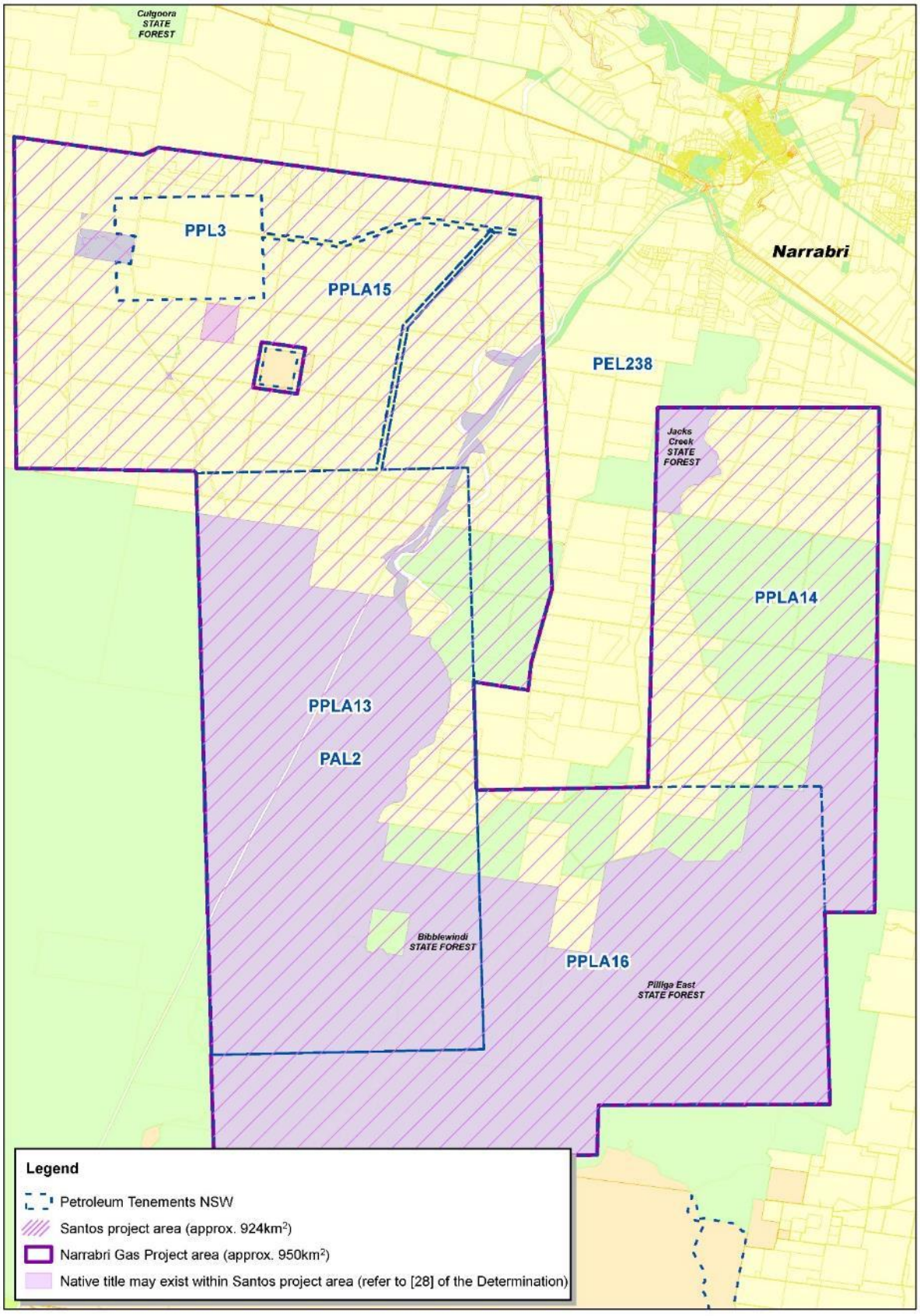
[1041] The National Native Title Tribunal determines that the proposed future acts, pursuant to the *Petroleum (Onshore) Act 1991* (NSW), being the grants of Petroleum Production Lease Application Numbers 13, 14, 15 and 16 may be done, subject, in each case, to a condition, pursuant to s 38(1)(c) of the *Native Title Act 1993* (Cth), such condition being that Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) take all necessary steps to ensure that the Additional Research Program, identified in para 5.7 of the Narrabri Gas Project Aboriginal Cultural Heritage Management Plan dated 21 February 2022, be implemented and completed prior to the commencement of Phase 2 of the Narrabri Gas Project, pursuant to the Development Consent granted by the Independent Planning Commission of New South Wales on 30 September 2020.

The Honourable J A Dowsett AM KC
President
19 December 2022

SCHEDULE 1


Legend
Native title claim area
Santos project area
Coonamble
Walgett
Dubbo
Narrabri
Moree
Mount Wingen
Newcastle
Glen Innes
Nambucca Heads
Ballina

SCHEDULE 2


Culgoora STATE FOREST
PPL3
PPLA15
Narrabri
PEL238
Jacks Creek STATE FOREST
PPLA14
PPLA13
PAL2
Bibblewindi STATE FOREST
PPLA16
Pilliga East STATE FOREST
Legend
Petroleum Tenements NSW
Santos project area (approx. 924km²)
Narrabri Gas Project area (approx. 950km²)
Native title may exist within Santos project area (refer to [28] of the Determination)

SCHEDULE 3

Appendix 7

Proposed Terms from Santos of 29 March 2021

The "Nominated Body" is the entity nominated by the Gomeroi People to undertake and implement the Agreement

Financial terms

Item	Offer by Santos of payments to be made to Nominated Body
On signing of Agreement	[redacted]
Grant of PPLs 13 to 16	[redacted]
Gomeroi economic participation and business capacity development	[redacted]
Payment of costs to establish corporate structure for agreement implementation including legal / financial advice, consultation and contribution towards administration and personnel	[redacted]
To support implementation responsibilities of Gomeroi People under the agreement (including the employment of staff)	[redacted] per year commencing on Final Investment Decision for the Project for life of Agreement, adjusted for CPI
Training and employment – implementation of Santos' Local Industry Community and Indigenous Participation Policy	[redacted] per year commencing on Final Investment Decision for 10 years, adjusted for CPI
Cultural Awareness	[redacted] for the preparation of Cultural Awareness Workshop content and materials
Production Levy	5% of Santos' statutory annual Royalty Payment made to the State multiplied by the Native Title Area Native Title Area = the percentage of the area of the Tenements where native title continues to exist and is impacted by Santos' operations compared to the total area of Tenements impacted by Santos' operations. Royalty payment calculated in accordance with Petroleum (Onshore) Act 1991 (NSW)

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: + 61 2 9310 3188

PO Box 2105 Strawberry Hills NSW 2012 Australia
f: + 61 2 9319 4177

abn: 71 098 971 209
w: www.ntscorp.com.au

	Tenements means Petroleum Production Leases 13, 14, 15 and 16 Paid each year

Non-financial terms

Cultural Heritage

Provision for cultural heritage under the agreement is in addition to the commitments of Santos and the Gomeroi people under the Cultural Heritage Management Plan to be finalised.

The Nominated Body will:

- Establish an initial record of Cultural Heritage values of Pilliga and the ongoing development of the Gomeroi people's culture heritage; and
- assist the Gomeroi people to perform their roles and responsibilities under the Cultural Heritage Management Plan, including the nomination of their representatives for the Aboriginal Cultural Heritage Working Group.

Santos will support the establishment of an initial record of Cultural Heritage values of the Pilliga and the ongoing development of the Gomeroi people's culture heritage as long as there will be no duplication or disruption to the operation of the CHMP.

Santos' position is that the Liaison Committee will be the body responsible for progressing this initiative.

Cultural Awareness

Santos will:

- ensure all Santos staff and contractors who are engaged to work on the Project Area for up to a maximum of 10 days complete a short form audio-visual cultural awareness induction (audio-visual induction), which will be produced by Santos at its own cost with the approval of the Nominated Body as to its content;
- ensure all Santos staff and contractors who are to work on the Project Area for more than 10 days complete a cultural awareness workshop conducted by a person approved by the Gomeroi and engaged by Santos (Cultural Awareness Workshop)

The Nominated Body will:

- produce, or facilitate the production of, the Cultural Awareness Workshop content and materials;
- facilitate the Gomeroi people's participation in, and approval of, a short form audio-visual cultural awareness induction;

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188
PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au

- facilitate Santos' engagement of Gomeroi businesses to deliver the Cultural Awareness Workshop.

Environment

The Agreement will record Santos' and the Gomeroi people's shared goal of minimising the impact of the Project on the environment whilst acknowledging that there will be environmental impacts arising from the Project, including on the earth, water, and airspace.

Santos will:

- acknowledge the Gomeroi people's knowledge of their traditional country includes substantial knowledge about the ecology of the land, waters and night sky;
- consult with the Nominated Body about ecological/environmental surveys to be conducted; ensure the early involvement of Gomeroi people in environmental planning;
- adopt processes and measures directed at returning the land and waters affected by the Project to its natural state;
- involve the Gomeroi people and engage Gomeroi businesses in the rehabilitation of the areas affected by the Project.

Nominated Body

The Nominated Body will:

- be a corporation established for the benefit and advancement of the Gomeroi people;
- receive all Compensation Benefits / payments made under the agreement;
- be responsible for the Gomeroi people's implementation commitments under the Agreement, including in relation to notification, liaison, Project planning, cultural heritage management, cultural awareness, environmental management, employment and training and business development (Implementation Responsibilities).

Business

Santos will:

- give early notice of contracts to the Nominated Body;
- provide guidance to Gomeroi businesses intending to tender for Santos contracts relating to the Project by:

  1. providing them information and assistance in relation to the Santos' tender process and procurement requirements;
  2. providing them information and assistance in relation to the pre-qualification processes; and

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188
PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au

3. assisting them to become pre-qualified to provide goods and services to Santos. give preference to Gomeroi businesses for Project tenders of less than $5M where such tenders are commercially competitive (within 5% of other tender prices) and otherwise of equal merit with the other tenders;

- encourage Project contractors to investigate joint ventures with the Gomeroi businesses;
- provide feedback to the Nominated Body on all Project tender applications; and require contractors for Project tenders over $1,000,000 to indicate how they will benefit Gomeroi people such as through their employment and training.

"Gomeroi business" means:

- for years 1 to 10 of this Agreement, an entity at least 25% owned or controlled by Gomeroi people; and
- after year 10 of this Agreement, an entity at least 50% owned or controlled by Gomeroi people.

The Nominated Body will:

- encourage and assist Gomeroi people with business skills to tender for contracts
- relating to the Project;
- facilitate business assistance provided to Gomeroi businesses by Santos;
- facilitate joint venturing and other arrangements that may assist Gomeroi people develop Gomeroi businesses capable of tendering for Project contracts, maintain a register of business capacity in the Gomeroi community and communicate this to Santos through the Liaison Committee

Liaison Committee

A liaison committee will be established no less than 3 months after FID, comprising up to 3 Santos representatives, and up to 5 Gomeroi representatives (Liaison Committee).

The Liaison Committee will be a forum for the Gomeroi people and Santos to discuss and resolve issues arising in relation to the implementation of the Agreement, including:

- the Implementation Responsibilities;
- Project planning;
- operational and safety issues;
- approvals required for the Project; and
- issues and concerns about the effectiveness of the Agreement to achieve its goals.

The Liaison Committee will meet 3 times a year for the first 4 years following FID. After that, it must meet at least once per year.

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188
PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au

Santos will:

- pay the reasonable costs of meeting of the Liaison Committee, including attendance fees of the Gomeroi committee members; and
- provide a venue for meetings and the secretarial support for the Liaison Committee.

Option to purchase land and water assets

Santos will provide the Nominated Body with the first option to purchase any transferable land and water assets held by Santos which are no longer required for the Project.

Consents

The Gomeroi Applicant (on their own behalf and on behalf of the Gomeroi Claim Group) will:

- agree to execute a Section 31 Deed which provides their consent to the grant of PPLs 13 – 16;
- consent to:
    1. the grant of all PPLs 13 – 16; and
    2. the conduct of all activities
    3. permitted under PPLs 13 – 16.

(nb. the consents do not extend to the proposed export pipeline)

Satisfaction of Compensation entitlement

The Gomeroi Applicant, on behalf of the Gomeroi people, will acknowledge and agree that the benefits provided by Santos under the Agreement are in full and final satisfaction of any Compensation Entitlements of the Gomeroi people in relation to the:

- grant of PPLs 13 – 16; and
- enjoyment exercise, and discharge of obligations under PPLs 13 – 16; and
- effect of PPLs 13 – 16 on any Native Title. The Gomeroi Applicant, on behalf of the Gomeroi people, will release Santos and the State of NSW from all claims to
- Compensation Entitlements in relation to the grant of PPLs 13 –16.

(nb. the compensation release does not extend to the proposed export pipeline)

CPI

The payments covered by the agreement are subject to increases in accordance with the consumer price index for NSW

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188
PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au

SCHEDULE 4

Appendix 8

Scope of Work

The Economist is requested to provide his written opinion in response to the following questions. In providing your opinion, please identify the factual basis for those opinions, the methods adopted to analyse those facts, and any reasoning process engaged in forming those opinions.

In forming his opinion, the Economist is to:

a) Have reference to the materials provided with this brief;

b) Conduct such other inquiries and research as you consider necessary in order to answer the question;

c) Have reference to any other materials you consider relevant;

d) Take into account the Proposed Terms offered by Santos;

Question One

Are there any other projects in Australia, of which you are aware, that are comparable to the Project? If so, can you disclose:

a) how many,

b) in which State or Territory they are located,

c) why they are comparable to the Project and, if appropriate,

d) how they are materially different from the Project.

Question Two

To your knowledge, are any of those developments the subject of agreements with native title holders or claimants? If so, can you disclose:

a) how many,

b) in which State or Territory they are located,

c) why they are comparable to the Project and, if appropriate,

d) how they are materially different from the Project.

Question Three

Do any of the agreements referred to in question (2) contain a financial benefit provision that is calculated by reference to statutory royalty payments required to be made by the project to the relevant State or Territory?

Question Four

If the answer to question (3) is yes, is the statutory provision for royalty payments the same in each jurisdiction?

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188
PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au

Question Five

If the answer to question (4) is no, how does the production levy in the Proposed Terms differ from the financial benefit provisions in other agreements?

Question Six

Is it possible to compare the financial benefit provisions contained in the agreements referred to in question (3)?

Question Seven

If the answer to question (6) is yes, could you provide a comparison of the agreements you have identified in question (3).

Question Eight

Are the Proposed Terms within or outside the comparative range of payments disclosed by your answer to question (7)? How far within or outside that range are the Proposed Terms?

Question Nine

If the Proposed Terms are outside the comparative range of payments disclosed by your answer to question (7), are there, in your opinion, any features of the Project which justify that divergence?

Question Ten

Aside from the Production Levy, do any of the Proposed Terms confer financial compensation on the Native Title Party (**Other Financial Terms**)?

Question Eleven

If the answer to question (10) is Yes, what is the value of the Other Financial Terms?

Question Twelve

If the answer to question (10) is Yes, do the Other Financial Terms materially contribute to the value of the Proposed Offer so as to justify the divergence between the Production Levy and your assessment of the market price?

Level 1, 44-70 Rosehill St Redfern NSW 2016 Australia
t: +61 2 9310 3188

PO Box 2105 Strawberry Hills NSW 2012 Australia
f: +61 2 9310 4177

abn: 71 098 871 209
w: www.ntscorp.com.au

SCHEDULE 5

Appendix 9
Scope of Work: Gomeroi People

1. The Anthropologist is requested to produce a report which provides the Anthropologist's opinions, the factual basis for reaching those opinions, the methods adopted and any reasoning process engaged in forming those opinions, which address the following questions (which are to be used as headings in the document).

2. With reference to the materials in Appendix 8 to this Brief as well as any other material that you consider relevant, we request that you address the following matters:

   (a) What are the main features of:

      (i) Gomeroi cosmology; and

      (ii) Gomeroi beliefs about life, death and the spirit world.

   (b) If appropriate, geographically map matters referred to in (a), using a convenient relief map or satellite image.

   (c) Mark the boundaries of all affected neighbouring registered native title claims on the map referred to in (b).

   (d) In respect of the materials numbered (1) and (2) in Appendix 8, comment on the:

      (i) adequacy; and

      (ii) appropriateness

      of those materials for assessing the impact of the Project on the enjoyment of native title rights and interests in the Project Area.

   (e) Are there kinds, or categories, of impact on native title rights which the materials numbered (1) or (2) in Appendix 8 do not consider?

   (f) If you are unable to answer any of the questions set out above, please state why, including what further information and inquiries the Anthropologist would need to make in order to be able to answer that question or those questions.

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f: +61 2 9310 4177
abn: 71 098 871 209
w: www.ntscorp.com.au