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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	27/06/2023 11:29:43 PM AEST
Date Accepted for Filing:	27/06/2023 11:29:50 PM AEST
File Number:	QUD13/2023
File Title:	GOMEROI PEOPLE v SANTOS NSW PTY LTD AND SANTOS NSW (NARRABRI GAS) PTY LTD (FORMERLY KNOWN AS ENERGYAUSTRALIA NARRABRI GAS PTY LTD) AND ORS
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA

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Federal Court of Australia
District Registry: Queensland
Division: General

No. QUD13/2023

Gomeroi People (NC2011/006)

Applicant

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

Respondents

On appeal from the NATIONAL NATIVE TITLE TRIBUNAL

Applicant's outline of submissions

Introduction

1. This is an appeal as of right brought pursuant to s.169(1) of the *Native Title Act 1993* (Cth) (the **Act**), on a question of law. The Court's jurisdiction is conferred in s.169(5) and its power upon determination is to "make such order as it thinks appropriate by reason of its decision" (s.196(6)), which includes affirming or setting aside the decision of the Tribunal (s.169(7)).
2. An appeal pursuant to s.169(1) is limited to a question of law.[1] As such, the Applicant is conscious of the requirement that "the appellate body should not usurp the fact-finding function of the [Tribunal]".[2] The orders that a court in an appeal such as this can make are those "necessary to reflect [the] court's view on the alleged or found error of law".[3] If error is found, the Applicant seeks remittal of the decision to the Tribunal.

[1] *Parker v State of Western Australia* (2008) 167 FCR 340 at [11]-[12] (Moore, Branson and Tamberlin JJ); *TNT Skypak International (Aust) Pty Ltd v Commissioner of Taxation* (1988) 82 ALR 175 at 178 (Gummow J).
[2] *Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 430 (Gibbs CJ, Wilson and Dawson JJ).
[3] *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209 at 220 (Sheppard J); *Commissioner for Superannuation v Miller* (1985) 8 FCR 153 at 165-166 (Pincus J).

Question 1: Did the Tribunal apply the wrong test for good faith or, alternatively, incorrectly apply the test correctly identified?

3. The Tribunal must determine the question of good faith as a preliminary issue.[4] Where it is found by the Tribunal that negotiations were not conducted in good faith, a future act determination application must be dismissed.[5] The party alleging want of good faith must satisfy the Tribunal on logical and probative material[6] of that fact.[7]
4. The Tribunal is not prevented from inquiring into the reasonableness of an offer made by a proponent for the purposes of assessing good faith and nor is the nature of its inquiries limited when considering offers. The correct approach to an inquiry of this nature is stated by Lee J in *Brownley v Western Australia*:[8]

> *… In the context of conduct as a whole, failure to advance reasonable proposals may be shown to be part of a pattern from which an inference may be drawn that a government has not engaged in a genuine attempt to negotiate. Later in the reasons [of the Tribunal below], dealing specifically with "substantive offers" made by the State, the Tribunal, (applying an understanding of the law it formed from reading the reasons of this Court in Strickland), stated that it was "not permitted to consider the reasonableness of offers unless they were so unreasonable or contemptuous of the process that [the State was] not acting honestly or genuinely with a view to achieving agreement". As stated by Carr J in Walley (supra) (at 17), it is not correct to say that the Tribunal is "not permitted" to consider the reasonableness of offers made by government. If consideration of all conduct relevant to determination of the question whether the State negotiated in good faith was restricted by such a misapprehension, an error of law may be shown to have occurred in the making of the decision sought to be reviewed.*

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[4] *Walley v Western Australia* (1999) 87 FCR 565 at [15] (Carr J) (***Walley 1999***).
[5] Section 36(2) of the Act; *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141 at [11], [21] (Spender, Sundberg and McKerracher JJ).
[6] *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 493 (Brennan J).
[7] *Walley 1999* at [11]; *Charles v Sheffield Resources Limited* (2017) 257 FCR 29 (***Sheffield Resources***) at [109] (White J).
[8] (1999) 95 FCR 152 (***Brownley***) at [34] - [35] approving (Carr J) in *Walley (1999)* at [15], contra *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 321 per Nicholson J.

5. Falling into precisely this kind of error,[9] the Tribunal found that to impugn a Grantee Party's good faith on the basis that an offer was under-value: "one would have to infer that Santos knew, or ought to have known, that such offer was *significantly* below… *then*, and *perhaps* subsequently"[10] (emphasis added). In the event, the Tribunal only considered Santos's knowledge at the time that it first made its offer.[11]
6. The Applicant submits that the Tribunal mis-stated its task[12] in two ways. First, because good faith would be assessed "in the context of the negotiations as a whole",[13] as stated in *Brownley*, and not only at the time that an offer was first made. Secondly, because the Tribunal's findings are contrary to conventional authorities to the effect that "faith" may be established objectively by considering the knowledge of the person whose faith is impugned.
7. The conventional authorities relevant to assessing "faith" and honesty were referred to by Nicholson J in *Strickland v Minister for Lands for Western Australia*.[14] His Honour considered the test for good faith comprised two elements, quoting Kirby J in *Cannane v J Cannane Pty Ltd (In liq)*:[15]

   > *The first is a broad or subjective view which requires inquiry into the actual state of mind of the person concerned, irrespective of the causes which produce it. The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence.*

   In relation to the objective element, his Honour referred to *International Alpaca Management Ltd v Ensor*[16] where the Federal Court of Australia Full Court considered that a party "closing [their] eyes to the obvious" could not claim not to have knowledge of a matter, and the existence "in a civil context [of] an objective standard by which a person is judged to have acted dishonestly or not".[17] The Court quoted Lord Nicholls in *Royal Brunei* at 389:

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[9] As did Sosso DP in *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/Grace Smallwood & Ors (Birri People)/Queensland* [2012] NNTTA 9, at [197], [201]).
[10] Determination [410].
[11] Determination [450].
[12] *Craig v South Australia* (1995) 184 CLR 163 at 179-80.
[13] *Western Australia v Taylor* (2996) 1134 FLR 211(***Njamal***) at 218 – 224, 237.
[14] (1998) 85 FCR 303 (***Strickland***) at 319-20.
[15] (1998) 192 CLR 557 at 191-192.
[16] (1995) 133 ALR 561 (***Alpaca Management***).
[17] *Alpaca Management* at 596 (Davies, Beaumont and Carr JJ), citing *Royal Brunei Airlines Sdn Bhd v Tan* (PC) [1995] 2 AC 378 at 389 (***Royal Brunei***).

…these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual

…

Nor does an honest person …deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.[18]

The Court observed that the principles there stated "are capable of general application in civil matters where "good faith" or "honesty" is in issue".[19] The objective approach to good faith has been endorsed by the Federal Court[20] and applied by the Tribunal.[21]

8. In *Alpaca Management* and *Royal Brunei*, the question of dishonesty was established not subjectively but objectively by considering the knowledge of the negotiating party. The Courts in those instances inferred a lack of good faith on the basis of hearsay information of which they were in receipt.[22] In *Alpaca Management*, another party had written a letter stating that another contract existed. That was found by the Court to constitute actual knowledge even though they were not in possession of material in the nature of admissible evidence of the matters, because the party failed to make inquiries into the matter of which it had thereby been put on notice.
9. However, in contrast with these authorities, the Tribunal required not only knowledge at a particular time, but knowledge in the nature of "the information concerning the comparable projects and associated agreements, upon which Mr Ho's evidence is based".[23] It was because Santos was not in possession of such information that the Tribunal found that it "could not infer that Santos failed to negotiate in good faith".[24]

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[18] Lord Nicholls in Royal Brunei at 389 quoted in Alpaca Management at 597.
[19] *Alpaca Management* at 597.
[20] *Sheffield Resources* at [94]-[96] (White J).
[21] *Western Australia v Dimer* (2000) 163 FLR 426; *Rusa Resources v IS* [2015] NNTTA 15 (McNamara M); *Norwest Sand & Gravel v Ngarluma Aboriginal Corporation* [2020] NNTTA 68.
[22] *Alpaca Management* at 567-8 (Davies J), citing the principle that "if by an objective test clear notice was given, liability cannot be avoided by proof merely of the absence of actual knowledge".
[23] Determination [411] and [459].
[24] Determination [411].

10. The Applicant submits that the Tribunal's approach was in this regard wrong and that because of this error the Tribunal failed to consider whether Santos's notice through either or both Mr Meaton's[25] or Mr Ho's[26] reports that its assumptions about its offer[27] might be incorrect amounted to Santos "turning a blind eye", a finding capable of supporting an inference that in doing so Santos was not acting in good faith.

Question 2: Is "payment" in Division 3 of Part 2 of the Act synonymous with "compensation" in Division 5 of Part 2 of the Act?

11. Part 2 of the Act is headed "Native Title". Division 3 of Part 2 is headed "Future acts etc and native title". Division 3 is in part concerned with the validity of future acts (acts affecting native title s.24AA(1) and s.227 and s.24AA(2)). Section 24AA(4)(j) relevantly provides that future acts covered by s.24MD (acts that pass the freehold test) will be valid, subject to satisfaction of the right to negotiate.
12. The Preamble to the Act says of the Right to Negotiate:

> *Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.*
>
> *It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.*

[25] Court Book, 4025 – 4106.
[26] Court Book, 0743 – 0763.
[27] As stated in Mr Kreicbergs' evidence at Court Book, 1762 – 1800 at 1780 [86] – 1782 [93].

13. The Right to Negotiate is enshrined in Subdivision P of Division 3 of Part 2 of the Act. Satisfaction of the requirements of Subdivision P is necessary for the validity of a future act to which it applies (s.24AA(5)).

14. Where the Right to Negotiate is a requirement for the doing of a valid future act, *payment* may be made to native title parties.[28] Section 33(1) provides, in respect of such payments, that:

> ***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. …* (emphasis added)

15. The Applicant submits that such payments (**right to negotiate payments**) are made in exchange for the native title party's consent to the doing of the future act.[29] That consent is the "agreement" referred to in s.31(1)(b):

> *(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.*

16. Division 3 is also concerned with compensation for future acts, but only in so far as the classification of the future act under Division 3 will determine what later provisions are engaged. As the Note to s.24AB(2) states:

> *It is important to know under which particular provision a future act is valid because the consequences in terms of compensation and procedural rights may be different.*

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[28] Section 33(1) (chapeau).

[29] The Tribunal appears to agree with this proposition at [309] of the Determination, but the Applicant is unable to reconcile the statement in this paragraph of the Determination with the Tribunal's findings elsewhere, as set out in this Appeal.

17. The Applicant conceded before the Tribunal that the proposed acts the subject of the proceedings are "non-legislative acts that pass the "freehold test" under s.24MB of the act and that Subdivision M applies to them, with the result that they do not permanently extinguish native title. (Which is not to say they do not permanently affect the land…)".[30]
18. Future acts valid pursuant to s.24MD(3)(a) are subject to the "non-extinguishment principle" (s.24MD(3)(a)) and subject to the "similar compensable interest test" set out in s.240 applies to the proposed future act (s.24MD(3)(b)). The effect of s.24MD(3)(b) is that in the event that a compensation application is brought under Division 5 of Part 2 of the Act (s.48, s.61(1) and s.59(2)), a decision maker determining just terms compensation for a s.24MD future act pursuant to s.51 "must … apply any principles or criteria for determining compensation (whether or not on just terms) set out" in the legislation establishing the "similar compensable interest".[31]
19. In determining a compensation application, it may be that a decision maker must consider any right to negotiate payment (s.49) made in respect of an act.[32] There is, otherwise, no statutory interaction between a right to negotiate payment and an award of compensation made under a native title compensation application.
20. The Applicant submits that, properly construed, s.31(2) establishes a statutory minimum for the content of negotiations. Section 31(2) does not create a "carve out" such that negotiations for payment *not* related to compensation for the anticipated effect, impairment or impact of a proposed future act on native title rights and interests are not the subject of the requirement for "good faith" negotiations.[33]
21. The Applicant submits that not only are right to negotiate payments and compensation awards within the meaning of Part 2 of the Act not synonymous, they are conceptually antithetical. Right to negotiate payments, like consent, are agreed prior to and in anticipation of the doing of an act. They are prospective. This

[30] Court Book, 26 – 89, at 37 [24].
[31] In this case, those set out in the *Petroleum (Onshore) Act 1993* (NSW), which does not expressly provide for "just terms" compensation.
[32] In the absence of such payments, however, the Gomeroi will only be able to seek compensation if a native title determination is first made in their favour. In the absence of both of those things, the Gomeroi will obtain neither payment nor compensation.
[33] Determination [273], [277], [279], [329], [347]-[348], [409], [419], [429], [430], [431], [439], [444], [465] and [518].

is what Santos's proposed Production Levy seeks to do [34] By contrast, compensation requires the quantification of actual damage, after the fact.[35] It is retrospective.

22. Nothing said by an expert,[36] and no amount of cross-examination,[37] can change the nature of either right to negotiate payments or compensation, and their different meanings under the Act.

Question 3: Does s.39(1)(e) of the Act exclude "environmental matters" or include the requirements of particularity or practicability?

23. Section 39(1) of the Act provides that the Tribunal *must* take into account "any public interest in the doing of the act" (s.39(1)(e)) and any other relevant matter (s.39(1)(f)). While the Tribunal appears to have found that the evidence of Professor Steffen for the Gomeroi was relevant,[38] and referred to the Applicant's submission[39] and the material provided in support of it,[40] the Tribunal found that:
    a. general "environmental matters" were excluded from consideration as matters of public interest under s.39(1)(e);[41]
    b. "environmental matters" could only be considered if they related to a "*particular* environmental concern having *particular effect* on native title" (emphasis added);[42]
    c. it was not practicable to take into account the public interest to which Professor Steffen's evidence related.[43]
24. The Tribunal appears to have based its findings on the legislative history of s.39. It is true that s.39 was amended in 1998 to remove requirements that the Tribunal

[34] CB [138(a)].
[35] *Northern Territory v Griffiths (Timber Creek)* (2019) 269 CLR 1 at [337].
[36] The Tribunal refers to Mr Meaton's report in relation to "preliminary issues" from [272] and discusses his report from [294] – [352] (especially [304] – [305], [315] – [316] and [329] and again at [445] – [446] and [520] – [521] and [557]). Unlike Mr Meaton, at no point does Mr Ho refer to "compensation" in the sense of "just terms" compensation.
[37] Mr Ho's cross-examination is at T.240/25-T.241/26, to which the Tribunal refers at [278] and [422]-[438].
[38] Determination [869], [954]-[955], [1014].
[39] Determination [944]-[945], [953]; CB [267]-[269].
[40] Determination [952], [954]-[955]. [40]
[41] Determination, [987].
[42] Determination, [970]-[972] and [987].
[43] Determination, [1014].

take into account environmental considerations.[44] In finding that environmental matters must be "particular" in the way stated, the Tribunal referred to the Explanatory Memorandum to the Native Title Amendment Bill (No 2) 1997 (Cth).[45] It may be accepted that extrinsic material (including explanatory memoranda) may be considered in the exercise of interpretation.[46] However such material may not replace the words of the statute.[47] Words not appearing in the text of a statute may only by "read in" when it is clear that an error has occurred in the drafting of the provision.[48]

25. The Applicant submits that no such error has occurred in the drafting of s.39 and that the word "particular", which does not appear in the text s.39, has been elevated from the language of the Explanatory Memorandum to the language of the statute.[49]

26. The Tribunal decided that it was not required to consider Professor Steffen's evidence[50] about the impacts of climate change because they formed part of a "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. …These are world-wide concerns, to be resolved by governments".[51]

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[44] Determination, [925]; the *Native Title Amendment Act 1998* (Cth) relevantly repealed ss.39(1)(a)(vi) and (b), which were in the following terms:

> *(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 land or waters concerned; any assessment of the effect of the proposed act on the natural environment of the land or waters concerned;*
> *(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;…*

[45] Determination [925]. The Tribunal expressly refers to paragraph 20.56 of the Explanatory Memorandum but it is paragraph 20.57 that refers to particularity.

[46] Section 15AB of the *Acts Interpretation Act 1901* (Cth), *Saeed v Minister for Immigration* (1997) 187 CLR 384*, CIC Insurance* (2010) 241 CLR 252

[47] *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 (***Alcan***) at 46-47.

[48] *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, at [38]-[39] per French CJ, Crennan and Bell JJ approving *Wrotham Park* [1980] AC 74 as reformulated in *Inco Europe* [2000] 1 WLR 586; *Newcastle City Council v GIO General Ltd* (1997) 181 CLR 85 at 113-116 (per McHugh J); *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551 at [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

[49] *Alcan* at 47.

[50] Court Book, 4107 – 4179.

[51] Determination [970]-[972].

27. The Applicant submits that the Tribunal was required to consider Professor Steffen's evidence because, properly construed, s.39 does not prohibit or limit the Tribunal from taking into account environmental considerations in the context of any of the s.39 criteria.

28. It may now be accepted that the effects of climate change are a matter of public interest.[52] The Applicant submits that the "public interest" within the meaning of s.39(1)(e) is broad[53] and includes the public interest in the effects of climate change. It has been accepted since at least 2006 in NSW that the effects of climate change are neither too general nor too temporally or spatially remote to be relevant considerations in relation to the approval of particular projects.[54] In 2006 Pain J observed in *Gray* that *"… the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured".* As noted above, that was no bar to finding that the impacts were not "*de minimis*" or too uncertain to consider.

29. Professor Steffen's evidence illustrates that local impacts *can* now be predicted via the IPCC AR6 report and from the CSIRO and BoM report 2020, including the likely consequences of global warming for the Narrabri region including the Pilliga forest.[55]

30. The effects of climate change were considered by the IPC,[56] and are integral to the principles of environmentally sustainable development.[57] However, as the Tribunal observed, the IPC did not consider and was not required to consider the impact of climate change on the local area[58] and nor, the Applicant submits, on native title.

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[52] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [498] (Preston CJ); and see, in the context of the Queensland *Environmental Protection Act 1994*, *Xstrata Coal Queensland v Friends of the Earth* [2012] QLC 13 at [576] (MacDonald P).

[53] *Evans v State of Western Australia* (1997) 77 FCR 193 at 215 (Nicholson J), citing the HCA in *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216. See also *Walalakoo Aboriginal Corporation v Kallenia Mines Pty Ltd* [2019] NNTTA 91 at [150].

[54] *Gray v The Minister for Planning* [2006] NSWLEC 720 (***Gray***) at [92], citing *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage* [2006] FCA 736 at [72] (in the context of the *Environmental Planning and Assessment Act 1979* (NSW)); *Coast and Country Association of Queensland v Smith* [2015] QSC 260 at [46] (Douglas J) (in the context of the *Environmental Protection Act 1994* (Qld), affirmed on appeal in [2016] QCA 242).

[55] Court Book 4121 [3.1] referred to by the Tribunal at Determination, [954].

[56] Section 4.15(e) of the *Environmental Planning and Assessment Act 1979* (NSW); Court Book, 1396 – 1473 at 1433 [153] and following.

[57] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [498] (Preston CJ).

[58] Determination, [971].

31. The Tribunal also considered that it was not "practicable" for the Tribunal to "second-guess State agencies in the performance of their prescribed functions…" when considering whether or not there was any public interest in the doing of the act for the purposes of subsection 39(1)(e).[59]
32. The Applicant submits that the Tribunal is a statutory body carrying out an administrative function within the executive branch of government.[60] In finding that it would not "second-guess" the decision of the IPC, the Tribunal:
    a. failed to have regard to a mandatory consideration under s.39(1), and
    b. failed to exercise the discretion conferred upon it by s.38 and s.39.
33. Mere reference to these matters was not sufficient to discharge the Tribunal's functions.[61]

Question 4: Did the Tribunal deny the parties procedural fairness?

34. The Tribunal denied the parties an opportunity to be heard[62] in relation to its consideration of the:
    a. concept of futures trading,[63] and
    b. Australian Consumer Law definition of "market"[64]

    upon which it relied in its findings on whether there was a "market" or "market price" for agreements contemplated by s.31 of the Act.
35. Those matters were:
    a. not adverted to by any party;[65]
    b. not raised in cross-examination;[66]
    c. in fairness required to be disclosed to the Applicant and Mr Ho;[67] and
    d. not obvious or natural evaluations of the material that was before the Tribunal.[68]

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[59] Determination, [1014]. Determination [957], [968] and [971].
[60] *Hicks v Western Australia* [2002] FCA 1490, [15] (French J).
[61] *Anderson v Director-General Department of Environment and Climate Change* [2008] NSWCA 337 at [51]-[58].
[62] *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415 (WRMF) at [66]-[70] citing *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (SZSSJ) at [82]-[83].
[63] Determination [356], [286]-[290].
[64] Determianton at [286] and [289].
[65] *WRMF* at [66].
[66] Browne v Dunn (1893) 6 R 67.
[67] *SZSSJ* at [83].
[68] *SZLPH v Minister for Immigration and Border Protection* (2018) 266 FCR 105 (Besanko, Gleeson and Burley JJ) at [38] citing *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591.

36. Further and alternatively, the Applicant submits that the matters referred above were not in evidence before the Tribunal for the reasons that:
    a. the matters considered by the Tribunal were not matters of which the Tribunal could take judicial notice;[69] and
    b. were matters within the Tribunal's own knowledge.[70]
37. The notion of judicial notice is limited to matters "so generally known that every ordinary person may be reasonably presumed to be aware of it" and excludes from notice "'particular' facts".[71] The matters referred to cannot be considered to be generally known. Even if they were matters of judicial notice, the Tribunal would be required to give the parties notice of those matters.[72] In the absence of such notice, unfair prejudice accrues.[73]
38. Nor was the Tribunal permitted to take these matters into account as matters within its own knowledge,[74] whether as an expert Tribunal member,[75] by stepping in to the shoes of an expert,[76] or by making any finding of fact not proved by evidence[77] and in particular not on an opinion that is different from the opinion expressed by experts. To do so is an error of law and "underlying that error is a fundamental breach of procedural fairness";[78] a matter determined other than on the evidence before the Tribunal denying a party a right to the determination of its claim based on that evidence.[79]
39. While such an error must be material,[80] it is not necessary to demonstrate what evidence would have been led if notice had been given.[81] Relief for denial of

[69] *Evidence Act 1995* (Cth), s.144; *Bolitho v Cohen* (2005) 33 Fam LR 471.
[70] *Strinic v Singh* (2009) 74 NSWLR 419 (***Strinic v Singh***) at [60] (Beazley JA, Ipp and Basten JJA agreeing).
[71] *Holland v Jones* (1917) 23 CLR 149 at 153 (Isaacs J).
[72] *Evidence Act 1995* (Cth), s.144(4).
[73] *Aytugrul v R* (2012) 247 CLR 170 at [21] (French CJ, Hayne, Crennan and Bell JJ).
[74] *Strinic v Singh* at [60]-[67] (Beazley JA, Ipp and Basten JJA agreeing); *Dasreef v Hawchar* (2011) 243 CLR 588 at [47]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[75] *Holland v Jones* (1917) 23 CLR 149 at 153.
[76] *Strinic v Singh* at [59]-[61] (Beazley JA, Ipp and Basten JJA agreeing); *Arian v Nguyen* (2001) 33 MVR 37 at [22] (Ipp AJA); *Ohlstein v E & T Lloyd t/as Otford Farm Trail Rides* (2006) Aust Torts Reports at [155] (Ipp JA).
[77] *Strinic v Singh* at [64] (Beazley JA, Ipp and Basten JJA agreeing).
[78] *Strinic v Singh* at [64] (Beazley JA, Ipp and Basten JJA agreeing) referring to *Saunders v Adderley* [1999] 1 WLR 884 at 889.
[79] *Strinic v Singh* at [115] and [128] (Beazley JA, Ipp and Basten JJA agreeing)
[80] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [31]-[32] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
[81] *Degning v Minister for Home Affairs* (2019) 270 FCR 451 at [39] (Allsop CJ, Collier J agreeing).

procedural fairness on this basis would be granted unless it is shown that the denial did not deprive the party of the possibility of a successful outcome.[82]

40. The Tribunal relied on the matters referred to above to find that as matters of fact that:
    a. future act agreements were "unique" and therefore incapable of comparison,[83] and
    b. no "market" and no "market price" existed for future act agreements.[84]

41. No party contended that:
    a. no market could exist; or
    b. s.31 agreements were incapable of "price comparison".

42. The Applicant submits that the Tribunal's decision as to its ability to determine the existence of a market[85] and conclusion that no market existed[86] is, additionally, contrary to authority. The conventional approach to establishing "fair value market price" is set out in *Spencer v Commonwealth*.[87] Stated broadly, the conventional approach is to ask, in the absence of an actual buyer: if there were a willing buyer and willing seller, what would those persons pay. The Tribunal found that economic principles, such as the "willing buyer willing seller" concept referred to in *Spencer*, "fair value within a free market" and the transaction as a voluntary exchange, did not apply in the context of s.31 negotiations.[88] In the Tribunal's view, these principles were obviated by "the requirement to negotiate in good faith, the absence of a right of veto and the role of the Tribunal".[89] The Tribunal's conclusion equates s.31 negotiations to those of a forced sale (where, because of the nature of such a transaction, there is no "willing seller" and the concept of "fair value in a free market" does not apply).[90] That conclusion is contrary to the purpose of s.31,[91] which is in part to address past dispossession of native title claimants and to do so

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[82] *WRMF* at [70] (Flick, Mortimor and Banks-Smith JJ); *Minister for Immigration & Border Protection v WZARH* (2015) 256 CLR 326 at [60] (Gageler and Gordon JJ).
[83] Determination [384]-[385].
[84] Determination [356].
[85] Determination [388]-[390].
[86] Determination [356].
[87] (1907) 5 CLR 418 (***Spencer***). See also *Goode v Valuer-General* (1979) 22 SASR 247 at 256-260 (Wells J).
[88] Determination [448]-[449].
[89] Determination [449].
[90] *Spencer* at 441 (Isaacs J).
[91] *Brownley* at [21]-[22].

from a bargaining position where consent must be sought, may be conditional and may not be given.

43. Contrary to the Tribunal's findings, but consistent with *Spencer*, it may be accepted that:
    a. the absence of a comparator does not mean that value cannot be ascertained;[92]
    b. valid comparators do not require a "point by point comparison of each characteristic" of a transaction;[93] and
    c. whether or not two transactions are comparable is a "matter of degree…for the expert valuer to determine".[94]
44. In *Bingham v Cumberland County Council*,[95] Sugerman J held that in the absence of a "*market value to guide him … he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land*" and "*the valuer, in arriving at his opinion in these difficult matters may have to draw upon his general knowledge and experience, including perhaps experience in the other situations which, although lacking in complete comparability, may yet provide an experienced valuer with guidance and suggestions as to the general approach which may be made and as to considerations which may become relevant.*" Nor are things that are "unique"[96] incapable of comparison.[97]
45. The Applicant submits that these authorities are consistent with the approach taken by Mr Ho,[98] but not by the Tribunal.[99] In particular, the Tribunal's finding that "the subject of any market…depends upon the characteristics of the projects…" and that "the absence of such information concerning the comparable projects prevents identification of the subject matter being traded, and therefore the existence of a

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[92] *Bingham v Cumberland County Council* (1954) 20 LGR (NSW) 1 at 18-19 citing *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer Vizapatam* [1939] AC 302 at 312-313 (in a land valuation context).
[93] *Brisbane City Council v Bortoli* [2012] QLAC 8 at [54]; *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 (Hope JA) (in a land valuation context).
[94] *Duffy v The Minister for Planning* (2003) 129 LGERA 271 at [25] (McLure J).
[95] (1954) 20 LGR (NSW) 1 at 18-19.
[96] Determination, [384]-[385].
[97] For example, specific performance is available as a contractual remedy in transactions for land because each parcel of land is unique (and yet, of course, parcels of land can be valued): *Siracusa v Siracusa* [2022] ACTSC 94 at [26] (Kennett J); *Pianta v National Finance & Trustees* (1964) 180 CLR 146; *Rudd v Lascelles* [1900] 1 Ch. 815; *Graham v Pitkin* [1992] 1 WLR 403 at 406.
[98] Ho Report [8.3]-[8.12] and Tables A and B.
[99] Determination [388].

market",[100] is not correct. To the extent that characteristics of projects may make them more or less comparable to other projects this may make a comparison by an expert more or less preferable.[101] However, this has no bearing on whether or not a market and market price exists: a market value exists even for unique things.[102]

46. The Tribunal further found, in part on the basis of the matters referred to above, that Mr Ho's evidence was:
    a. misconceived;[103]
    b. irrelevant;[104]
    c. lacked probative value[105]

    and ultimately rejected that evidence.

47. For these reasons, the Applicant was "deprived … of a realistic possibility of a different outcome".[106]

Question 5: Was the Tribunal's finding as to the weight of Mr Ho's and Mr Kreicbergs's evidence legally unreasonable?

48. The Tribunal found that Mr Ho failed to disclose the "basis" of his opinion.[107] The Tribunal considered that the information disclosed by Mr Ho was inadequate and that 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"[108] and occasioned unfair prejudice to Santos.[109] The Tribunal "reject[ed] Mr Ho's evidence to the extent that it is said to demonstrate

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[100] Determination [388].
[101] *Re Holdco* (2021) 391 ALR 418 at [304]-[308] (O'Bryan J).
[102] *James v Valuer-General* (1942) 15 LGR (NSW) 110 at 111: "*It frequently happens, where the site is unique, that there are no sales of really comparable land whether improved or unimproved. In those circumstances the purpose for which the land would normally be acquired and the return which the purchaser would expect form his purchase must be looked to furnish a guide to values generally…*".
[103] Determination [293] and [408].
[104] Determination, [390] and [448]-[449].
[105] Determination, [450].
[106] *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 at [1] (Kiefel CJ, Keane and Gleeson JJ).
[107] Determination [277], [295], [341]-[344], [386], [390], [407], [412] and [448].
[108] Determination [295], [386]-[387], [412].
[109] Determination [412].

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".[110]

49. The evidence shows that Mr Ho did in fact disclose the basis for his reasoning.[111] Mr Ho's report provided fifteen comparable onshore oil and gas projects subject to agreements with Traditional Owners upon which Mr Ho based his expert opinion.[112] In relation to each agreement, Mr Ho provided details of the location, date, whether or not the project was a "conventional" or "unconventional" oil and gas project, and the kind of title held by Traditional Owners.[113] Mr Ho presented his data in a "sanitised manner" because, as he explained, the agreements were confidential.[114]

50. The Applicant does not deny that the circumstance of a witness relying on evidence, particularly hearsay evidence, not independently proved would affect the weight of the witness's evidence.[115] But Mr Ho's evidence is neither hearsay[116] nor has it entirely been withheld from the Tribunal.[117] A decision-maker may make findings on the basis of detailed financial information provided by a valuer even if the underlying assumptions and modelling are not put in evidence.[118] Mr Ho's evidence about the confidential agreements did not offend the opinion rule.[119] For those reasons, the weight of his evidence should not, absent other factors, be reduced to nought.[120]

51. Contrary to the Tribunal's findings, and as set out above, it is not the case that there was "no evidence" as to the comparability of the agreements.[121]

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[110] Determination [407].
[111] Determination [412].
[112] Court Book, 4045 – 4050 [8.3]-[8.9] and Tables A and B.
[113] Court Book, 4045 Table A.
[114] Court Book 4045, [8.3].
[115] *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 7)* [2008] FCA 1364 (***Citrus***) at [338]-[347] (Collier J); *Miller v State of South Australia (Far West Coast Sea Claim) (No 3)* [2022] FCA 466 (***MIller***) at [16], [22]-[23] (Charlesworth J).
[116] As was the case in *Miller*. *Borowski v Quaylr* [1966] VR 382 at 386 cited in *Bodney v Bennell* (2008) 167 FCR 84 (***Bodney***) at [92] (Finn, Sundberg and Mansfield JJ).
[117] As was the case in *Citrus*.
[118] *Woollahra Municipal Council v Minister for Local Government* (2016) 95 NSWLR 620 at [96]-[97] and [110] (Beazley P, Bathurst CJ and Ward JA agreeing).
[119] For a recent summary of jurisprudence relating to the "basis rule", see Miller v State of South Australia (Far West Coast Sea Claim) (No. 3) [2022] FCA 466 at 17 – 19 per Charlesworth J.]
[120] Bodney at [94] in respect of anthropological evidence not based on eyewitness evidence (citing Selway J in Gumana v Northern Territory (2005) 141 FCR 457 at [156]): "expert evidence is not necessarily opinion evidence." See also Miller v State of South Australia (Far West Coast Sea Claim) (No,.3) [2022] FCA 466 at 17 – 19 per Charlesworth J.
[121] Determination [277] and [386]-[387].

52. Santos made no objection to the receipt of Mr Ho's evidence.
53. The Applicant submits that the Tribunal's finding that:
    a. Mr Ho failed to disclose the basis of his opinion is contrary to the evidence before it;
    b. Mr Ho's evidence occasioned unfair prejudice to Santos is also contrary to the evidence before it, and
    c. Mr Ho's evidence carried no weight was not available to it.
54. Mr Kriecbergs' responsive evidence was, like Mr Ho's, based on confidential material, the documentary "basis" of which (applying the Tribunal's analysis of "basis") he did not fully disclose.[122] Mr Kreicbergs provided "particulars" of five projects involving Santos in Queensland between 2013 and 2021[123] in which no royalty was paid, but did not provide these particulars in any more useful level of detail than Mr Ho.[124] Mr Kriecbergs also asserted that Santos' offer was the highest ever made by Santos for an onshore gas project in Australia.[125]
55. The Tribunal did not, despite the Applicant's objection to Mr Kreicbergs' evidence and submissions about its weight,[126] consider whether unfair prejudice was occasioned to the Applicant by Mr Kriecbergs' evidence.
56. The Tribunal accorded full weight to Mr Kreicbergs' evidence,[127] including stating that there was "no basis for doubting" Mr Kreicbergs' assertion regarding the Santos offer.[128]
57. The Applicant submits that the Tribunal's diametrically opposite approaches to the evidence of Mr Ho for the Applicant and Mr Kreicbergs for Santos is legally unreasonable[129] in that no reasonable decision maker could have reached the conclusion that the Tribunal did.[130] The Applicant further submits that the Tribunal's

[122] Court Book, 1930-1931. Mr Kreicbergs did provide a breakdown of financial vs non-financial benefits, whether a royalty was paid, and what future act consent was being provided for which was not responsive to but served to contrast the with Mr Ho's identification of comparative features being, date, geographic location, and financial amount.
[123] Determination [342].
[124] Exhibit HK-14, pp 1930-1931.
[125] Determination [343].
[126] T4/28 – T5/6 and T7/3 – T14/1; Native Title Party's Table of objections.
[127] Determination [424] and [427].
[128] Determination [343].
[129] *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332.
[130] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

approach to the question of "basis" is a "domestic procedural rule" that has necessarily advantaged Santos and necessarily disadvantaged the Applicant.[131]

58. On the Tribunal's approach, either the evidence of both witnesses carried some weight, or the evidence of both witnesses carried no weight. In the circumstances it was not open to it to accord full weight to Mr Kriecbergs and none to Mr Ho.

Question 6: On a proper construction of the Act, does a negotiating party's knowledge that the registered Applicant is not authorised by the claimant group, and that the claimant group has authorised another applicant, operate as an exception to the requirement that the negotiating party must negotiate with the Registered Applicant?

59. The Tribunal found that Santos had a duty to continue to negotiate with the registered Applicant [132] and appeared not to countenance the Applicant's contentions that Santos's reliance on the Register of Native Title Claims for that purpose was not in good faith in circumstances where Santos knew that the registered applicant was no longer authorised by the claimant group, and that a new Applicant had made a s.66B application.

60. The terms "native title party" (s.28), "registered native title party" (s.29(2)(b)(i)) and "negotiation party" (s.30) all mean "those persons whose names appear on the Register of Native Title Claims" (s.253).

61. A person's name will appear on the Register of Native Title Claims if, relevantly, having been authorised[133] to make a native title claimant application on behalf of a native title claim group,[134] that application is registered[135] on the Register of Native Title Claims.[136]

62. Section 62 provides, relevantly, that in relation to an applicant *authorised* to make an application by a native title claim group:

> *(c) the person is, or the persons are jointly, the applicant; and*
>
> *(d) none of the other members of the native title claim group … is the applicant.*

[131] *Re Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 493 (Brennan J).
[132] Determination [11] and [170]-[177].
[133] Section 61.
[134] Section 61.
[135] Section.61 and s.190B.
[136] Section 253.

63. The Applicant submits that, while not amounting to separate legal personality,[137] the applicant:

    a. is conferred with a legal identity separate from both the individual persons holding the authority conferred by the native title claimant group, and from the native title claim group itself;[138]

    b. the applicant's legal identity is unitary ("joint") in the sense that the natural persons comprising the applicant cannot act individually but must act collectively;[139]

    c. together with the provisions conferring particular legal capacities on the applicant, [140] the native title claimant group, and the natural persons comprising that group, are deemed to have no legal capacity in respect of those matters. Instead, legal capacity to deal with those matters is conferred exclusively on the applicant;[141]

    d. the provisions conferring capacity on the applicant compel third parties to "deal" exclusively with the applicant, in relation to any matters arising under a native title claimant application in relation to which it is authorised

64. The Applicant submits that the separate identity of the applicant, and the conferral upon it of exclusive capacities, establishes a presumptive scheme analogous to the indoor management rule.[142] In particular, the presumption that parties may assume that anyone put forward as an officer has been duly appointed.[143] The common law rule has been stated as follows:

    …persons dealing with a company in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.[144]

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[137] *Salomon v A Salomon & Co Ltd* [1896] UKHL 1; *Corporations Act 2001* (Cth) (***Corporations Act***) s.119. See also ss.104-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).
[138] s.61(2)(c).
[139] s.61(2)(c). This does not prevent individual applicants from owing fiduciary duties to the claimant group: *Gebadi v Woosup (No.2)* (2017) 253 FCR 310.
[140] Section 62A empowers an applicant to "deal with all matters arising under this Act in relation to the application". An Applicant of a registered claim is deemed by the Act to have the capacity to "deal" with: receiving notifications (s.29), making applications (s.61), negotiating and giving effect to agreements (s.41, 141).
[141] s.61(2)(c) and s.61(2)(d).
[142] *Corporations Act* ss.128 and 129(2)-(4); *Royal British Bank v Turquand* (1856) 6 E&B 327 (***Turquand***).
[143] *Corporations Act* s.129(2); *Turquand*'s *Case*.
[144] Ford, Austin and Ramsay *Principles of Corporations Law (17th Ed*, 2018*)* (***Ford***) at [13.150] citing *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 at 154-5 (Mason CJ), 171 (Brennan J) and 207 (Toohey J).

65. However, a person who is aware of an irregularity cannot rely on the rule.[145] That awareness must be in the nature of actual knowledge.[146] The Corporations Act contains an express exception to the statutory indoor management rule in s.128(4) which provides that a person with knowledge or suspicion that the statutory assumptions are incorrect may not rely upon those assumptions.
66. The Applicant submits that the requirement of "good faith" in s.31(1)(b) operates as such a limit in the context of future act negotiations. The duty of good faith is a substantive obligation the operation of which may not be satisfied by strict formal compliance with the Act. The exception to the indoor management rule is similarly a substantive doctrine. This approach is consistent with authority relevant to the limitations of deeming provisions like those conferring identity and capacity on the applicant.[147] Such provisions do not apply in a universal or at large fashion, but are limited to the purpose for which it applies.[148]
67. The Applicant submits that from the time an applicant's authority is revoked until their name is removed from the Register an irregularity or defect in the Register exists, in that a condition precedent to registration (authorization, the reason for most s.66B refusals) no longer exists. (Put another way, there is a *de jure* and a *de facto* applicant.)
68. A negotiating party with knowledge of those circumstances is therefore aware that the native title register is unreliable in a material respect, and is precluded from claiming (and the Tribunal from finding[149]) that its good faith cannot be impugned by its continued and exclusive reliance on the Register. (It is not said that strict adherence to the native tile register of itself demonstrates a lack of good faith.)
69. In the present case, Santos, which it is not disputed had actual knowledge at 5 September 2016 – 7 December 2017 that the registered applicant was no longer authorised and a new applicant had been authorised to bring a s.66B application,

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[145] *Howard v Patent Ivory Manufacturing Co.* (1888) 38 ChD 156, cited in Ford [13.190].
[146] The standard of knowledge is actual knowledge (including "willful blindness") under both statute and common law: *Re Matlic Pty Ltd (in liq)* [2014] NSWSC 1342 at [45], and may be inferred from a failure to inquire Ford at [13.330.9] and [13.300.12]; *Howard v Patent Ivory Manufacturing Co.* (1888) 38 ChD 156, cited in Ford [13.190].
[147] Herzfeld and Prince at [3.120]; *Commissioner for Railways v Bain* (1965) 112 CLR 246 at 273 (Windeyer J); *Maroney v The Queen* (2003) 216 CLR 31 at [11] (Gleeson CJ, McHugh, Callinan and Heydon JJ) and [56]-[57] (Kirby J).
[148] *Muller v Dalgety* (1909) 9 CLR 693 at 696 (Griffiths CJ).
[149] Determination [171]-[177].

would be precluded from claiming (and the Tribunal from finding[150]) that its duty of good faith cannot be discharged unless it negotiates with the registered native title claimant.

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27 June 2023

[150] Determination [171]-[177].