FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

NO VID 647/2023

RAELENE COOPER
Applicant

NATIONAL OFFSHORE PETROLEUM SAFETY AND ENVIRONMENTAL MANAGEMENT AUTHORITY and others named in the Schedule
First Respondent

FIRST RESPONDENT'S WRITTEN SUBMISSIONS

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PART I INTRODUCTION

1. On 2 June 2023, the second and third respondents (**Woodside**) resubmitted a modified environment plan (the **Plan**) to the first respondent (**NOPSEMA**) in response to an earlier notice under reg 10(2) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment)* ***Regulations*** *2009* (Cth).

2. On 31 July 2023, a delegate of NOPSEMA was not reasonably satisfied that the Plan met the criteria in reg 10A – relevantly, the delegate was not reasonably satisfied that the Plan met the criterion in reg 10A(g). That criterion is that the environment plan demonstrates that: (i) the titleholder has carried out the consultations required by Div 2.2A (comprising reg 11A); and (ii) the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate.

3. Regulation 10(4)(b) provides that, within 30 days after the titleholder has resubmitted the modified plan, if the Regulator (being NOPSEMA or its delegate) is still not reasonably satisfied that the environment plan meets "the criteria set out in regulation 10A", the Regulator must: (i) give the titleholder a further notice under subregulation (2); (ii) refuse to accept the plan; or (iii) act under subregulation (6)".

4. The delegate decided to take the action described in reg 10(4)(b)(iii) – that is, to "act under subregulation (6)". In particular, acting under reg 10(6)(b), the delegate decided

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to accept the Plan subject to certain conditions applying to operations for the activity (**Decision**; **Conditions**).

5. By an amended originating application filed on 7 September 2023, the applicant seeks relief on two distinct bases. First, the applicant contends that the delegate "did not have the statutory power to make the Decision because" the delegate "was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii)" (**ground 1**). Second, and alternatively, the applicant contends that Woodside has not complied with the Conditions (**ground 2**).

6. It is important to focus on the single, narrow question of construction raised by ground 1. As NOPSEMA has previously observed,[1] ground 1 involves a simple but absolute proposition about power: NOPSEMA has no power to act under reg 10(6)(b) if it is not reasonably satisfied that the environment plan meets the criterion in reg 10A(g).[2] As was also previously explained, NOPSEMA does not understand the applicant to contend in the alternative that, if NOPSEMA could act under reg 10(6)(b) in circumstances where it was not reasonably satisfied that the plan meets the criterion in reg 10A(g), there was some particular legal error affecting the Decision (e.g., legal unreasonableness, or some lack of power to impose particular Conditions).

7. On 15 September 2023, the Court ordered that the following "Preliminary Issues" be heard on an expedited basis:

    7.1. *first,* whether the delegate had statutory power to make the Decision in circumstances where he was not reasonably satisfied that the Plan met the criterion in reg 10A(g) (i.e., whether ground 1 is established);

    7.2. *second*, if ground 1 is established, whether it would be open, as a matter of law, to refuse the relief sought on any discretionary basis identified by Woodside;

    7.3. *third*, whether the applicant has standing to seek relief in relation to ground 2.

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1 Transcript (14 September 2023), pp 48-51.

2 See also: the applicant's concise statement filed on 11 September 2023, [17]-[18]; and the applicant's submissions (**AS**), [6(1)], [36]. In her submissions, the applicant accepts that NOPSEMA would have power in certain circumstances to act under reg 10(6)(a) if NOPSEMA is not reasonably satisfied that the environment plan meets the criterion in reg 10A(g). See AS, [36], [47(1)].

8. Consistent with the confined approach that NOPSEMA has adopted in these proceedings,[3] and subject to any questions from the Court, NOPSEMA does not seek to be heard on the second or third preliminary issues.[4] NOPSEMA's submissions are confined to the first issue, which raises a question of construction.

9. NOPSEMA has had the advantage of considering the applicant's and (for a short period) Woodside's submissions. Woodside contends that the applicant's contention underlying ground 1 as to the construction of the Regulations is not correct. NOSEPMA agrees with that conclusion.

10. There are particular principles bearing on the construction question, and particular aspects of the text and context, that NOPSEMA itself wishes to emphasise. And NOPSEMA considers that it would best assist the Court to present its submission on the construction question as a coherent whole, rather than seeking to only add to or subtract from particular points raised by Woodside bearing on construction.

PART II APPLICABLE PRINCIPLES OF STATUTORY CONSTRUCTION

11. The task of construction is to give the words of legislation the meaning that the legislature is taken to have intended them to have.[5] Ascertaining such intention, including in the context of delegated legislation such as the Regulations,[6] involves

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3 NOPSEMA makes submissions as to its "powers and procedures", including the proper construction of the Regulations, so as to ensure that the Court receives appropriate assistance. NOPSEMA does not consider that the fact that the Woodside entities are respondents to the originating application entails that it should not assist the Court in this respect. As "the repository of the powers and responsibilities conferred on it by the legislative scheme under which it made the relevant decision", and as "the only party … whose participation is governed exclusively by the aims and objectives of the statutory scheme", NOPSEMA is in a "unique" position to provide assistance to the Court: see *Zaitsev v Building Appeals Board* [2019] VSC 455, [46] (Quigley J). See also, e.g., *Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* (2020) 280 FCR 397, [5] (Perry and Stewart JJ); *Tipakalippa v NOPSEMA (No 2)* (2022) 406 ALR 41, [14] (Bromberg J).

4 Consistently, NOPSEMA will not seek any costs order in its favour if the application is (partially or wholly) unsuccessful. NOPSEMA would, however, seek to be heard if any party sought an order that NOPSEMA pay (part or all) of its or their costs. NOPSEMA would submit that, in light of its confined approach in these proceedings, no such order should be made against it. See, in particular, *Bob Brown Foundation Inc v Minister for the Environment and Water (No 3)* [2022] FCA 989, [6]-[10] (Moshinsky J), and the cases referred to therein.

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78] (McHugh, Gummow, Kirby and Hayne JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [25] (French CJ and Hayne J).

6 *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575, [14] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

compliance with rules of construction, both common law and statutory, which are known both to the legislature and to the judiciary.[7]

12. "[T]he fundamental duty of the Court is to give meaning to the legislative command according to the terms in which it has been expressed".[8] That is because the legislature "manifests its intention by the use of language".[9] Construction is a "text-based activity";[10] construction must begin with, and end with, the text itself.[11]

13. While the Court will properly seek to ascertain the purpose of a provision, including where appropriate by reference to context in its widest sense (including legislative history and extrinsic materials[12]), the purpose of a provision "is not something which exists outside the statute"; "[i]t resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."[13] Context has utility "if, and in so far as, it assists in fixing the meaning of the statutory text".[14]

14. Accordingly, "a danger that must be avoided in identifying a statute's purpose is the making of some *a priori* assumption about its purpose"; "[t]he purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions".[15] The Court "does not seek to identify the legislative intention separate from the statutory text and then to 'harmonise' the two".[16]

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7 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)).

8 *Northern Territory v Collins* (2008) 235 CLR 619, [16] (Gummow ACJ and Kirby J).

9 *Wilson v Anderson* (2002) 213 CLR 401, [8] (Gleeson CJ).

10 *Northern Territory v Collins* (2008) 235 CLR 619, [16] (Gummow ACJ and Kirby J); *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, [42] (Crennan, Bell and Gageler JJ).

11 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39] (the Court). See also, e.g., *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Certain Lloyds Underwriters v Cross* (2012) 248 CLR 378, [23] (French CJ and Hayne J); *Baini v The Queen* (2012) 246 CLR 469, [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Thiess v Collector of Customs* (2014) 250 CLR 664, [22]-[33] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, [115] (Gageler J).

12 *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509, [86] (Gordon, Edelman, Steward and Gleeson JJ).

13 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [26] (French CJ and Hayne J).

14 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [37] (Kiefel CJ, Nettle and Gordon JJ), citing *Thiess v Collector of Customs* (2014) 250 CLR 664, [22] and *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39].

15 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [26] (French CJ and Hayne J).

16 Herzfeld & Prince, *Interpretation* (2nd ed., 2020), [1.40].

15. A similar danger that should be avoided is drawing too heavily from a general statement of the object of legislation, and not paying sufficient attention to the text of the operative provisions of the legislation.[17]

16. In particular, the circumstances in which a court is justified in reading a provision as if it contained additional words – whether they be words of limitation or expansion – are limited. A court might be able to read in words in the case of a simple, grammatical drafting error that, if uncorrected, would defeat the legislative object. But construction cannot fill "gaps disclosed in legislation" or make an insertion which is "too big, or too much at variance with the language in fact used by the legislature".[18]

PART III THE PROPER CONSTRUCTION OF REGULATION 10

Regulation 10(4)(b)

17. The starting point in considering the applicant's contention is reg 10(4)(b).

18. The language in that provision is clear.

19. The condition to the engagement of the duty in reg 10(4)(b) is that NOPSEMA is "still not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A".

20. Plainly, the words "the criteria" must mean all of the criteria in reg 10A, including reg 10A(g). That is simply the only available construction of that expression.

21. Moreover, the immediate context powerfully reinforces that conclusion. The duty in paragraph (a) of reg 10(4) is only engaged if, within the requisite period, NOPSEMA is reasonably satisfied that all of the criteria are met. Paragraphs (b) and (c) of

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17 See, e.g., *The Queen v A2* (2019) 269 CLR 507, [35] (Kiefel CJ and Keane J). "The joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* rejected an approach which paid no regard to the words of the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation. Similarly, in *Saeed v Minister for Immigration and Citizenship* the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself…".

18 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, [37]-[38] (French CJ, Crennan and Bell JJ); *HFM043 v Republic of Nauru* (2018) 92 ALJR 817, [24] (Kiefel CJ, Gageler and Nettle JJ). See also, e.g., *Minogue v Victoria* (2018) 264 CLR 252, [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ): "It is no function of the courts to fill in gaps in legislation. There is no clear necessity for such an implication in order to give sense and meaning to s 74AAA(1) construed in its context."

reg 10(4) are designed to deal with the only two logically possible alternative scenarios:

21.1. paragraph (b) being that NOPSEMA, having considered the matter within the requisite period, is not reasonably satisfied that all of the criteria are met; and

21.2. paragraph (c) being that NOPSEMA is unable to make a decision within the requisite period.

22. If the condition to the engagement of the duty in reg 10(4)(b) exists – and it does exist if NOPSEMA is not reasonably satisfied that the environment plan meets reg 10A(g) – then NOPSEMA has a duty to perform one of three alternative actions in reg 10(4)(b)(i) to (iii). And a plain reading of the text reveals NOPSEMA would discharge its duty by performing any of the three alternative actions described in (i) to (iii).

23. It is accepted that NOPSEMA is constrained by an ordinarily-implied condition of reasonableness in choosing which of the three alternative actions it will perform in order to comply with the duty in reg 10(4)(b).[19] However, otherwise, the Regulations do not constrain the discretion of NOPSEMA as to which of the three alternative actions it will take in order to comply with the duty in reg 10(4)(b).

24. In particular, the Regulations do not provide that, if the criteria that NOPSEMA is still not reasonably satisfied that the environment plan meets include the criterion in reg 10A(g), then NOPSEMA may only discharge the duty in reg 10A(4)(b) by taking either of the actions described in (i) or (ii), but not (iii). It would be impermissible for the Court to construe reg 10(4)(b) as if it contained words of limitation to that effect. That would involve a substantial variation from "the language in fact used by the legislature"; the Court cannot "re-draft" reg 10(4)(b) "as an exercise in statutory construction".[20]

25. The applicant's submissions tend to invite the Court to adopt a "purposive" approach to the construction of the Regulations, relying significantly in that respect on aspects of the Full Court's reasons in *Tipakalippa*,[21] being a case in which reg 10(4)(b) (and (6)(b)) were not considered.[22] However, in light of the principles outlined in Part II of

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19 Although it is reiterated that no complaint about reasonableness is advanced by the applicant in this case.

20 Cf. *Country Carbon Pty Ltd v Clean Energy Regulator* [2018] FCA 1636, [104] (Mortimer J).

21 *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124.

22 *Tipakalippa* concerned whether NOPSEMA could reasonably be satisfied that the environment plan met the criterion in reg 10A(g), and in particular the scope of the category of "relevant persons" to be consulted

these submissions, the legislature's purpose cannot be discerned separately from (or inconsistently with) the text in reg 10(4)(b). And the text of that provision is clear: subject to NOPSEMA acting within the bounds of legal reasonableness, it is open to it to "act under" reg 10(6)(b) (or reg 10(6)(a)) if, within the requisite period, NOPSEMA is still not reasonably satisfied that the environment plan meets the criteria in reg 10A (including reg 10A(g)).

Regulation 10(6)

26. If the above submissions are accepted, then that is dispositive of the applicant's contention in ground 1. If it could be open to NOPSEMA to act under reg 10(6)(b) in circumstances where it is not satisfied that the environment plan meets the criterion set out in reg 10A(g), then the applicant's contention must be rejected (noting again that the applicant does not contend that there was some particular legal error affecting the Decision (e.g., some lack of power to impose particular Conditions).

27. At AS [49], the applicant submits that "[i]n a situation where the criteria of which NOPSEMA is not reasonably satisfied are those in reg 10A(g)(i) and (ii) … it is unlikely that there could be any condition which could be appropriate under this subsection" (emphasis added). But it is not for this Court to assess, in some hypothetical way, the likelihood or otherwise of a range of possible conditions being "appropriate". If anything, the applicant's submission in this respect tends against the absolute proposition that she must establish to sustain her ground: that NOPSEMA could not lawfully act under reg 10(6)(b) if it is not reasonably satisfied that the environment plan meets the criterion in reg 10A(g).

28. If a more particularised challenge were to be made in another case, then it would be necessary for the Court to consider the particular grounds of challenge and the relevant facts of the case.

    28.1. For example, if it was contended that a decision was unreasonable, either as to process or outcome,[23] then resolution of that challenge would involve a fact intensive exercise.[24]

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by a titleholder under reg 10A(1)(d). It did not concern or consider the power of NOPSEMA to accept an environment plan subject to conditions despite not being reasonably satisfied that the plan met the criterion in reg 10A.

23 See, e.g., *Plaintiff S183/2021 v Minister for Home Affairs* (2022) 96 ALJR 464, [31] (Gordon J).

24 See *Minister for Home Affairs v DUA16* (2020) 271 CLR 550, [26] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ): "[W]hether the implied requirements of legal reasonableness have been satisfied requires

28.2. Or, if it was contended that a particular condition was not one that, properly characterised, "applies to operations for the activity", then again that is properly done by reference to a particular condition and the particular activity at issue.[25]

29. As to the second point, however, as a general observation, the expression "applying to operations for the activity" is apt within its ordinary meaning to encompass both pre-conditions to such operations, as well as (for example) conditions as to the particular manner in which an activity is undertaken. The power in reg 10(6) is broad and multi-faceted. In particular:

29.1. Paragraph (b) permits NOPSEMA to impose "conditions" *or* "limitations" applying to the operations for the activity. Those terms are not synonymous; they must be given separate work to do. And, as Woodside submits,[26] the only requisite nexus is that the conditions or limitations "apply" to operations for the activity.

29.2. Paragraph (a) separately allows NOPSEMA to accept an environment plan in part, for a particular stage of the activity. Again, that paragraph must be given work to do, additional to the work done by paragraph (b).

Together, the powers under reg 10(6) ensure that NOPSEMA itself can impose appropriate controls on when, how and in what circumstances a titleholder is to undertake an activity in circumstances where NOPSEMA is not reasonably satisfied that the environment plan submitted by the titleholder meets the criteria in reg 10A.

Considerations of context and purpose

30. For the reasons outlined above, the text of reg 10 and the legislature's intention reflected in it is clear, and it conflicts with the applicant's contention underlying ground 1. However, insofar as the Court considers that context may bear on the question of construction raised by ground 1, NOPSEMA makes the following points.

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a close focus upon the particular circumstances of the exercise of the statutory power: the conclusion is drawn 'from the facts and from the matters falling for consideration in the exercise of the statutory power'."

25 Cf. *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301, [154]ff (Gilmour, Foster and Barker JJ); *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139, [45]-[69] (Jackson and Kennett JJ).

26 Woodside's submissions, [35].

31. **First**, the applicant is correct to observe: that the criterion in reg 10A(g)(i) includes that the titleholder "has carried out" the consultations required by reg 11A;[27] that the environment plan is to include information about the consultation (see reg 16(b)); and that the consultation under reg 11A is to occur "in the course of preparing" an environment plan.[28] The applicant is also correct to observe that the requirement for a titleholder to prepare an environment plan that meets the criterion in reg 10A(g), as with all of the criteria in reg 10A, promotes the realisation of the expressly stated object of the Regulations in reg 3.[29]

32. However, acceptance of those propositions does not entail, nor should it incline the Court to accept, the applicant's contention that NOPSEMA has no power to act under reg 10(6)(b) if it is not satisfied that the environment plan meets the criterion in reg 10A(g) (or any other criteria in reg 10A). The very premise of reg 10(4)(b) is that NOPSEMA is not reasonably satisfied that the environment plan meets the criteria in reg 10A (including reg 10A), and is therefore essentially deficient in some respect.[30] On that premise, the Regulation expressly confers power on NOPSEMA (acting reasonably) to accept the environment plan subject to such "limitations or conditions applying to operations for the activity" that it devises.

33. The legislature has proceeded on the basis that NOPSEMA (as the expert regulator) may accept an environment plan and thereby allow an activity to be undertaken subject to appropriate limitations or conditions, despite that the titleholder has failed in some respect to prepare an environment plan that satisfies the ordinary criteria. In this way, the legislature has ensured that the expert regulator ultimately retains control over when, how and in what circumstances an activity may be undertaken, such that NOPSEMA is not captive to the titleholder's compliance with the requirements imposed on the titleholder for the preparation of an environment plan.

34. **Second**, that is neither a surprising nor an anomalous outcome, having regard to the objective in reg 3 of the Regulations, and also the object of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)[31] and the *Offshore Petroleum and*

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27 That is, that the criterion is expressed in the "past tense".

28 AS, [43(1)-(3)].

29 AS, [43(4)].

30 Of course, all of the criteria in reg 10A are designed to promote the realisation of the object in reg 3.

31 See s 3. See also *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124, [44], [57] (Kenny and Mortimer JJ).

*Greenhouse Gas Storage **Act** 2006* (Cth).[32] Indeed, it is the absolute position reflected in the applicant's contention that would be apt to give rise to odd and unreasonable consequences.

35. An easy example may be given. There may be an urgent need for a titleholder to conduct an activity to remove infrastructure, or to replace or relocate infrastructure, in order to avoid or mitigate the risk of environmental damage. Under the Regulations an environment plan (whether a new plan or a revised plan) would be required in order for such an activity to be undertaken. The applicant's construction would have the odd and unattractive consequence that NOPSEMA would be precluded from accepting an environment plan for an activity that needs to be performed urgently in order to avoid a risk of environmental damage, unless and until it was reasonably satisfied that the titleholder had complied scrupulously with all of the ordinary requirements attending the preparation of the plan (including consultation).

36. What the Regulations in reg 10(4)(b) and (6)(b) permit is that, if the titleholder has failed in some respect to comply with the ordinary requirements imposed on it attending the preparation of an environment plan, NOPSEMA as the expert regulator may impose conditions under reg 10(6) that are appropriately tailored to addressing any particular deficiency of the environment plan prepared by the titleholder, in light of the nature and circumstances of the particular proposed activity, and the nature and scope of the identified deficiency.

37. The applicant correctly accepts that reg 10(6)(b) is designed to enable NOPSEMA to "fashion a limitation or condition applying to operations for the activity in a manner that is responsive to, and addresses" deficiencies in the environment plan. But the applicant wrongly, and without justification, confines the scope of NOPSEMA's flexible power to address deficiencies in an environment plan to deficiencies by reference only to the criteria in reg 10A(a)-(f),[33] rather than also by reference to reg 10A(g) (or (h)).

38. **Third**, it is apt to note that consultation is not a "once only" exercise under the Regulations, which is only undertaken by the titleholder while the environment plan is being prepared. The Regulations proceed on the premise than an environment plan will require ongoing consultation with interested persons or organisations after the

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32 See s 3.

33 AS, [48].

environment plan is accepted, in accordance with the implementation strategy for the activity (reg 14(9)) that is to be contained in the environment plan (reg 14(1)).

39. **Fourth,** acceptance of an environment plan does not entail that the activity will be continued, irrespective of information that emerges after acceptance of the plan (including as a consequence of any information obtained as a result of conditions imposed, or consultation under the requisite implementation strategy, or otherwise). In particular:

    39.1. NOPSEMA can withdraw an environment plan under reg 23 on various grounds, including: that the titleholder undertakes an activity in a way contrary to a condition applying under the Regulations (reg 7(1)(b)); the titleholder undertakes an activity after the occurrence of any significant new or increased environmental impact or risk arising from the activity that is not provided for in the environment plan (reg 8(1)); the titleholder does not submit a proposed revision of an environment plan as soon as practicable after the occurrence of any significant new or increased environmental impact or risk (reg 17(6)).

    39.2. NOPSEMA has very broad powers under the Act that it can use in connection with conditions imposed under reg 10(6) in order to achieve its statutory functions and the object of the Regulations, including for example the power to give a titleholder a direction "as to any matter in relation to which regulations may be made" (s 574(2)). A direction under s 574 has effect, and must be complied with, despite anything in the Regulations: see s 574(6).

40. **Fifth**, the scheme of the Regulations is not intolerant of a titleholder undertaking an activity despite NOPSEMA not being satisfied that the environment plan fails to meet one or more of the criteria in reg 10A (including reg 10A(g)).

41. The present proceeding invites attention to reg 10(4)(b), which NOPSEMA submits clearly permits it to act under reg 10(6)(b) if it is not reasonably satisfied that the plan meets the criteria in reg 10A (including reg 10A(g)). However:

    41.1. Regulation 10(5) also permits NOPSEMA to act under reg 10(6)(b) where a titleholder has failed to resubmit its environmental plan to NOPSEMA in response to a notice under reg 10(2). Again, the applicant's absolute contention is difficult (if not impossible) to reconcile with this element of the scheme.

41.2. Furthermore, reg 18(9) allows NOPSEMA to require that a titleholder submit a proposed revision of a plan if NOPSEMA is not satisfied that the plan meets the criteria for acceptance under reg 10A. Importantly, however, the effect of the Regulations are that the titleholder may continue to undertake the activity authorised by the plan in force, while the possibility of the titleholder preparing and submitting a proposed revision of a plan, and NOPSEMA's consideration of any such proposed revised plan until such time as it makes a decision to refuse or accept the proposed revision. Again, while NOPSEMA might exercise one of its various broad regulatory powers to mitigate risk in this period (including its power of direction under s 574 of the Act), it is contextually significant to assessing the applicant's absolute contention that the legislature has not proceeded on the basis that the absence of reasonable satisfaction by NOPSEMA that an environment plan meets the criteria in reg 10A (including reg 10A(h)) must entail that the activity not be permitted.

42. **Sixth**, while it may be accepted that it would be necessary that any limitations or conditions that NOPSEMA applies in acting under reg 10(6)(b) are rationally and reasonably directed to the deficiency in the environment plan,[34] the applicant is not correct to submit that the limitations or conditions "must be of a kind which are consistent with the criteria for acceptance of the environment plan".[35] Indeed, it is not quite clear what the applicant means by this submission.

43. It follows from the clear terms of reg 10(4) and (6)(b) that NOPSEMA is authorised to accept an environment plan, when it is not reasonably satisfied the plan meets the criteria in reg 10A (including reg 10A(g)). The legislature has established a scheme whereby NOPSEMA is empowered to accept an environment plan in those circumstances, subject to limitations or conditions devised by NOPSEMA as appropriate controls in response.

44. **Seventh**, and relatedly, the applicant's submission that "[i]t is not open to interpret the power in reg 10(6)(b) … to permit a condition which effectively dispenses with the duty on the titleholder to comply with reg 11A, or with the obligation on NOPSEMA to be reasonably satisfied that the criteria in reg 10A(g) are met"[36] should not be accepted.

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34 See AS [48].

35 AS, [46].

36 AS, [46].

45. Again, the submission essentially ignores reg 10(4)(b) and (6)(b), which expressly empowers NOPSEMA to accept an environment plan despite it not being reasonably satisfied of the criteria in reg 10A (including reg 10A(g)).[37] Moreover, accepting an environment plan in such circumstances does not involve "dispens[ing]" with the titleholder's duty under reg 11A. That particular consultation duty (not being the only consultation duty required under the Regulations) only subsists "[i]n the course of preparing an environment plan", which particular process does not continue after the environment plan has been accepted.

46. **Finally**, it is accepted, as the applicant submits, that the consultation performed by a titleholder under reg 11A, a report of which is to be set out in an environment plan under reg 16(b), is "intended to inform NOPSEMA about the environment … which may be affected by a titleholder's proposed activities under its environment plan", and therefore "to provide a basis for NOPSEMA's considerations of the measures, if any, that a titleholder propose to take or has taken to lessen or avoid the deleterious effect of its proposed activity on the environment".[38]

47. However, for all of the reasons outlined above, based both on the text of reg 10(4)(b) and (6)(b) and broader context, it does not follow that any failure of the environment plan to demonstrate the matters in reg 10A(g), without consideration of:

    47.1. the nature and circumstances of the proposed activity; and

    47.2. the nature and scope of the identified deficit in the plan;

    47.3. the powers available to and/or exercised by NOPSEMA,

    entails that NOPSEMA cannot (acting reasonably) accept the environment plan subject to limitations or conditions applying to operations for the activity.

48. Whether NOPSEMA is to act under reg 10(4)(b), and to accept an environment plan subject to limitations or conditions applying to operations for the activity under reg 10(6)(b), is a matter that the legislature has entrusted to NOPSEMA as the expert regulator subject to an implied constraint of reasonableness.

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37 Similarly, for the applicant to submit at AS [46(1)] that "the criteria for acceptance in reg 10A … are not expressed to be subject to any other regulation" misses the point. Regulations 10(4)(b) and (6) expressly enable NOPSEMA accept an environment plan, despite that it does not meet the criteria set out in regulation 10A.

38 *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124, [54]. See also AS, [39].

49. The applicant's submissions are apt to invite the Court to do what is impermissible, being either to: (a) read in a substantial limitation to reg 10(4)(b) and/or reg 10(6)(b) that cannot be done as a matter of construction; and/or (b) to ignore or gloss over the plain and unambiguous meaning of the language in those provisions by appeal to a hypothesised purpose of the scheme stated at a high level of abstraction and absoluteness that is (to that extent and extreme) derived otherwise than by reference to, and is inconsistent with, the text in those provisions.

Date: 22 September 2023

NM Wood

CI Taggart

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