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Federal Court of Australia
District Registry: Victoria
Division: General Division

No VID555 of 2022

Santos NA Barossa Pty Ltd (ACN 109 974 932)
Appellant

Dennis Murphy Tipakalippa and another named in the schedule
Respondents

APPELLANT'S OUTLINE OF SUBMISSIONS

1. This is an appeal from the judgment and orders of the primary judge (Bromberg J) setting aside a decision (**Decision**) made by a delegate of the Second Respondent (**NOPSEMA**) to accept the Barossa Development Drilling and Completions Environment Plan (BAD-200-0003, Revision 3) (**Drilling EP**) [AB:C tabs 18-25] submitted by the Appellant (**Santos**) pursuant to reg 10(1)(a) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Regulations**).

2. In concluding that NOPSEMA could not have lawfully formed the requisite satisfaction that the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A, the primary judge erred by implying a requirement in the Regulations that an environment plan must contain a "methodological demonstration" (J [127], [139]; [AB:A tab 7, A98, A101]) that the exercise of identifying the "universe of relevant persons" (J [82]; [AB:A tab 7, A79]) had been carried out by the titleholder (**Ground 1**). On a proper construction of the Regulations, there is no such requirement.

3. Further, the primary judge erred by wrongly inferring a failure by NOPSEMA to consider certain "sea country material" set out in the Drilling EP (**Ground 2**). There was no basis for any such inference. Rather, the primary judge should have inferred that NOPSEMA did consider the sea country material in finding that the Drilling EP met the criteria set out in reg 10A. Further or alternatively, the sea country material was not itself a mandatory relevant consideration, and any failure by NOPSEMA to have regard to the sea country material did not give rise to legal error.

4. More fundamentally, the primary judge erred in failing to determine the proper construction of reg 11A(1)(d), which was the subject of extensive argument below (**Ground 3**). Although the primary judge disclaimed any attempt to resolve the proper construction of reg 11A(1)(d) (J [289]; [AB:A tab 7, A141]), the errors identified by his Honour were implicitly based on an erroneous construction of that regulation. On the proper construction of reg 11A(1)(d), his Honour ought to have dismissed the amended originating application (**Application**) [AB:A tab 1].

5. Further, the primary judge's approach to the statutory standard of reasonable satisfaction to be applied by NOPSEMA was also erroneous (**Ground 4**). The words "reasonably satisfied" are not directed at the "standard of satisfaction that NOPSEMA must apply" (J [74]; [AB:A tab 7, A76-A77]). Rather, they express a condition that the satisfaction formed by NOPSEMA must be legally reasonable.

Background

6. The Drilling EP was submitted by Santos to permit it to conduct drilling and other activities as part of the Barossa Project. The primary judge gave an overview of the Barossa Project (J [3]-[4], [6]; [AB:A tab 7, A59-A60, A61]) and the activities to be performed under the Drilling EP (J [5]; [AB:A tab 7, A60-A61]).

7. The background as to the Tiwi Islands, the identity of the First Respondent and his claims were set out by the primary judge at J [7]-[10]; [AB:A tab 7, A61-A62]. The primary judge referred in J [10]; [AB:A tab 7, A61] to claims based on "longstanding spiritual connections" to sea country. While this claim might have been relevant to standing, which was not contested (J [24]; [AB:A tab 7, A64]), there is no reference to spiritual connections in the Drilling EP, and there was nothing in the material before NOPSEMA concerning spiritual connections of traditional owners to sea country.

8. The primary judge identified the First Respondent at J [8]; [AB:A tab 7, A61] as a traditional owner of the Munupi clan. There is no reference in the Drilling EP to the Munupi clan, nor to the fact that there are clans on the Tiwi Islands.

9. The Application contained two grounds, which are set out at J [11] and J [16]; [AB:A tab 7, A62, A63]:

   a. the first ground alleged that NOPSEMA could not have been reasonably satisfied that the Drilling EP demonstrated that the consultation required by regs 10A and 11A of the Regulations was carried out; and

   b. the second ground alleged that Santos submitted the Drilling EP without having carried out the consultations required by regs 10A and 11A of the Regulations.

10. The first ground was accepted by the primary judge, albeit on a different basis to that initially advanced by the First Respondent, and is the subject of this appeal. The second ground was rejected by the primary judge: see J [264]-[275]; [AB:A tab 7, A136-A138].

11. During the trial, the First Respondent sought to amend the Application to add a new ground based upon the allegation that NOPSEMA "failed to make an obvious inquiry of [Santos] about a fact critical in the assessment of the Drilling EP, the failure of which was easily ascertained, being whether the Traditional Owners, Indigenous people or Aboriginal people of the Tiwi Islands were relevant persons within the meaning of regulation 11A(1)(d)". This proposed ground is (inaccurately) quoted at J [186]; [AB:A tab 7, A112-A113]. The

primary judge refused leave to amend the Application to include this ground: J [277]-[280]; [AB:A tab 7, A139].

Legislative framework

12. The Regulations were originally made under the former *Petroleum (Submerged Lands) Act 1967* (Cth), and were continued in force under s 781 of the *Offshore Petroleum and Greenhouse Gas Storage **Act** 2006* (Cth) (see the transitional provision in cl 4 of sch 6 of the Act, which is given effect by s 791 of the Act).

13. The object of the Act is set out at s 3 (J [30]; [AB:A tab 7, A65]). The simplified outline of the Act set out in s 4 identifies that the administration of the Act is generally the responsibility of the Joint Authority for the relevant jurisdiction, but that NOPSEMA is responsible for the administration of (among other things) environmental management provisions.

14. The object of the Regulations is set out in reg 3 (J [31]; [AB:A tab 7, A65-A66]) and, in broad terms, concerns environmental management. That object is directed to the manner in which a "petroleum activity" or a "greenhouse gas activity" is carried out in an offshore area. In order to achieve that object, the Regulations establish a "two-tiered" approach by which a titleholder must obtain NOPSEMA's approval before it undertakes a petroleum activity or greenhouse gas activity. The first "tier" in the approval process, dealt with in Part 1A of the Regulations, requires the submission and acceptance of an "offshore project proposal" (**OPP**), which in effect approves the Project. The second "tier" in the approval process, dealt with in Part 2 of the Regulations, requires the submission and acceptance of an "environment plan" (**EP**) for each of the activities included in the OPP.

Offshore Project Proposal

15. Regulation 5A(1) of the Regulations requires that, prior to commencing an "offshore project", a person must submit an OPP to NOPSEMA. An "offshore project" is defined in reg 4 to mean:

> *one or more activities that are undertaken for the purpose of the recovery of petroleum, other than on an appraisal basis, including any conveyance of recovered petroleum by pipeline (whether or not the activity is undertaken for other purposes).*

16. "Activity" is defined in reg 4 to mean "a petroleum activity or a greenhouse gas activity", and "petroleum activity" is defined to mean:

> *operations or works in an offshore area undertaken for the purpose of:*
>
> *(a) exercising a right conferred on a petroleum titleholder under the Act by a petroleum title; or*
>
> *(b) discharging an obligation imposed on a petroleum titleholder by the Act or a legislative instrument under the Act.*

17. Among other things, an OPP must include a summary of the project, including a description of each activity, and must describe the existing environment that may be

affected and include details of the particular relevant values and sensitivities (if any) of that environment: reg 5A(5)(b), (c) and (d); see also reg 5A(6).

18. Regulation 5C(3) provides that, if NOPSEMA decides that an OPP is suitable for publication (according to the criteria in reg 5C(2)), it must publish the OPP on its website and invite public comment. Regulation 5D(5) provides that NOPSEMA must "accept" an OPP if it is reasonably satisfied that the proposal meets the criteria set out in reg 5D(6), which relevantly include that the proposal "adequately addresses comments given during the period for public comment" (reg 5D(6)(a)). Regulation 5D(7) provides that NOPSEMA must publish an accepted OPP on its website within 10 days of deciding to accept it. NOPSEMA accepted the OPP for the Barossa Project on 13 March 2018.

Environment Plan

19. Regulation 9(1) provides that, before commencing an activity, a titleholder must submit an EP for the activity to NOPSEMA. It is an offence for a titleholder to undertake an activity if there is no EP in force for the activity (reg 6(1)), or to undertake an activity in a way that is contrary to the EP in force for the activity (reg 7(1)(a)). Regulation 9(3) relevantly provides that a titleholder may submit an EP for an activity that is, or is part of, an offshore project only if NOPSEMA has accepted an OPP that includes the activity. It is this provision that establishes the "two-tiered" process.

20. If NOPSEMA decides provisionally that a submitted EP includes material apparently addressing all of the requirements as to the contents of an EP, NOPSEMA must as soon as practicable publish the EP and associated details on its website: regs 9AA and 9AB. Otherwise, it must invite the titleholder to modify and resubmit the EP: reg 9AC.

21. Regulation 9A(1) confers power on NOPSEMA to request the titleholder to provide further written information about any matter required to be included in the EP. The titleholder must then resubmit the EP to NOPSEMA with the information incorporated into it: reg 9A(3).

22. Regulation 10(1) deals with acceptance of an EP. Under reg 10(1)(a), NOPSEMA must accept an EP if it is "reasonably satisfied" that the EP meets the criteria set out in reg 10A. If NOPSEMA is not reasonably satisfied, it must give a notice to the titleholder in accordance with reg 10(2), which identifies the criteria about which NOPSEMA is not reasonably satisfied and sets a date by which the titleholder may resubmit a modified EP. If NOPSEMA is "reasonably satisfied" that the modified EP meets the criteria set out in reg 10A, it must accept the EP: reg 10(4). If NOPSEMA is still not reasonably satisfied, it must either give the titleholder a further notice under reg 10(2), refuse to accept the EP, or accept the EP in part or subject to limitations or conditions (see reg 10(6)).

23. The criteria for acceptance of an EP are set out in reg 10A (see J [45]; [AB:A tab 7, A69]). The relevant criteria for this appeal are contained in reg 10A(g):

> *For regulation 10, the criteria for acceptance of an environment plan are that the plan:*

...

> (g) *demonstrates that:*
>
> (i) *the titleholder has carried out the consultations required by Division 2.2A; and*
>
> (ii) *the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate[.]*

Consultation with relevant persons

24. Division 2.2A of the Regulations, which is headed "Consultation in preparing an environment plan" contains only one regulation, being reg 11A. Regulation 11A(1) provides that a titleholder must consult specified classes of "relevant person" in the course of preparing an EP. The specified classes are:

> (a) *each Department or agency of the Commonwealth to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;*
>
> (b) *each Department or agency of a State or the Northern Territory to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;*
>
> (c) *the Department of the responsible State Minister, or the responsible Northern Territory Minister;*
>
> (d) *a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan;*
>
> (e) *any other person or organisation that the titleholder considers relevant.*
>
> (Emphasis added)

25. For the purposes of the consultation, the titleholder must give each relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person, and must allow a relevant person a reasonable period for the consultation: reg 11A(2), (3).

Content requirements

26. Division 2.3 of the Regulations sets out the content requirements for an EP. Among other things, the EP must contain "a comprehensive description of the activity" (reg 13(1)), must "describe the existing environment that may be affected by the activity", and must "include details of the particular relevant values and sensitivities (if any) of that environment" (reg 13(2)). Regulations 5A(5)(c) and (d) impose analogous requirements for OPPs.

27. Regulation 14(1) provides an EP must contain an implementation strategy, which must (among other things) provide for "appropriate consultation" with relevant authorities of the Commonwealth, a State or Territory and "other relevant interested persons or organisations": reg 14(9).

28. Under reg 16(b), the EP must contain:

> *a report on all consultations under regulation 11A of any relevant person by the titleholder, that contains:*
>
> *(i) a summary of each response made by a relevant person; and*
>
> *(ii) an assessment of the merits of any objection or claim about the adverse impact of each activity to which the environment plan relates; and*
>
> *(iii) a statement of the titleholder's response, or proposed response, if any, to each objection or claim; and*
>
> *(iv) a copy of the full text of any response by a relevant person[.]*

NOPSEMA's assessment of the Drilling EP

29. NOPSEMA accepted the Drilling EP on 14 March 2022. The assessment process is described at [11] to [19] of NOPSEMA's statement of reasons (**SOR**);[1] see also J [54]-[62]; [AB:A tab 7, A72-A73]. Among other things, an assessment team (which included "environmental technical specialists") conducted "a general assessment of the whole EP and detailed topic assessments of the EP content", including the topic of "[c]onsultation with a focus on adequacy of consultation with relevant persons": SOR at [18]; [AB:C tab 10, 4]. The delegate considered the findings of the assessment team and agreed with its conclusions in relation to the general assessment and each topic assessment: SOR at [19]; [AB:C tab 10, 4].

30. The key materials considered by NOPSEMA in making the Decision were set out at [20] of the SOR [AB:C tab 10, 4-5].

31. At [45] of the SOR [AB:C tab 10, 18-20], NOPSEMA specifically addressed the criteria in reg 10A(g), and found that it was "reasonably satisfied that the EP demonstrates that [Santos] has carried out the consultations required by Division 2.2A and the measures adopted because of the consultations are appropriate". NOPSEMA found that "[r]elevant persons were identified and consulted during the course of preparing the plan as required by regulation 11A and set out at Table 4-1 of the EP", and that "[t]he EP includes a method for identification of, and consultation with, relevant persons that is consistent with the definition of relevant person provided by regulation 11A". At [53] of the SOR [AB:C tab 10, 22], NOPSEMA concluded that it was "reasonably satisfied" that the Drilling EP met the criteria set out in reg 10A.

Approach to review

32. The applicable jurisdictional precondition in this appeal is set out in reg 10(1)(a), namely that NOPSEMA "is reasonably satisfied that the EP meets the criteria set out in regulation 10A". If it was so satisfied, NOPSEMA was obliged to accept the Drilling EP.

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[1] Grebe Affidavit at CG 11 (CB94 at 9368-9369) [AB:C tab 10, 3-4].

33. The specific issue raised by the Application was whether it was legally open to NOPSEMA to have been "reasonably satisfied" for the purposes of reg 10(1)(a) that the Drilling EP "demonstrate[d]" that Santos had "carried out the consultations required by Division 2.2A" (that is, required by reg 11A). This is in circumstances where the EP must contain, among other things, a report on all consultations under reg 11A of any relevant person by the titleholder: reg 16(b).

34. The SOR demonstrates that the delegate considered the Drilling EP as a whole and was satisfied that it demonstrated that Santos had carried out the consultations required by reg 11A. NOPSEMA expressly found that the Drilling EP included both a method for the identification of relevant persons that was consistent with the definition of relevant person in reg 11A, and a method for consultation with such persons.[2] This included "community based representative bodies" such as the Northern Land Council and Tiwi Land Council (**TLC**).

35. The question of whether NOPSEMA's state of satisfaction was lawfully formed is to be determined according to orthodox judicial review principles, as considered recently in ***Djokovic*** *v Minister for Immigration*.[3] The state of satisfaction is not shown to have been unlawfully formed by demonstrating that a different conclusion could or should have been reached on the facts.

36. In ***One Key*** *Workforce Ltd v CFMEU*,[4] the Court (Bromberg, Katzmann & O'Callaghan JJ) addressed the nature of a legislative requirement that is expressed by reference to a state of satisfaction. The Court quoted with approval the observations of Basten JA in *D'Amore v Independent Commission Against Corruption*:[5]

> *The language of "satisfaction" or "opinion" is a statutory device to ensure that the matters identified as preconditions to the exercise of power are indeed not jurisdictional facts, but facts which need only be established to the satisfaction of the decision-maker.*

37. Where a purported state of satisfaction has been reached which is irrational, illogical and not based on findings or inferences of fact supported by logical grounds, such a state of satisfaction is erroneously formed.[6] Such a characterisation of a decision-maker's state of satisfaction is not one that is "lightly given".[7]

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2 SOR at [45(a)(i)]: Annexure CG 11 (CB94 at 9383) [AB:C tab 10, 18].

3 (2022) 289 FCR 2; [2022] FCAFC 3 at [20]-[35].

4 (2018) 262 FCR 527; [2018] FCAFC 77 at [103].

5 (2013) 303 ALR 242; [2013] NSWCA 187 at [241].

6 *Minister for Immigration and Citizenship v* ***SZMDS*** (2010) 240 CLR 611; [2010] HCA 16 at [40] (Gummow ACJ and Kiefel J), quoting from *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12; [2004] HCA 32 at [37]-[38] (Gummow and Hayne JJ).

7 *SZMDS* at [40].

Ground 4 – Standard of review

38. One issue before the primary judge concerned the standard of legal reasonableness that was set by the phrase "reasonably satisfied" in reg 10(1)(a). Santos contended that the word "reasonably" was included as an express statement of a requirement of legal reasonableness that would otherwise be implied.

39. The primary judge accepted a submission by the First Respondent that the use of the word "reasonably" raised the standard of legal reasonableness by analogy to cases such as *Goldie v Commonwealth*,[8] which concerns the meaning of the phrase "reasonably suspects". In *Goldie* at [5], it was held that "[r]easonable suspicion … lies somewhere on a spectrum between certainty and irrationality". The primary judge held at [74] that legal unreasonableness does not have a "fixed standard" and that "a requirement of 'reasonable satisfaction' … feeds into … the standard of reasonableness required".

40. In *Minister for Immigration and Citizenship v* ***Li***,[9] the High Court held that it was implied from the statutory conferral of a discretionary power that the discretion must be exercised in a legally reasonable manner. Justice Gageler specifically addressed the implication of reasonableness for a jurisdictional precondition of a state of satisfaction:[10]

> *Implication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty[.]*

That is, there is a statutory implication that a state of satisfaction is to be reached reasonably.

41. The legislative history of the Regulations confirms that the phrase "reasonably satisfied" does no more than make express the condition of legal reasonableness that would otherwise be implied.

42. The Regulations were amended in 2014 by the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulations 2014* (Cth). That amendment had the effect of changing the previous requirement that NOPSEMA have "reasonable grounds for believing" that the operator had carried out the required consultations to the present standard of "reasonable satisfaction". As was stated in the Explanatory Statement for the 2014 amendments, the current requirement "has two elements: (a) the Regulator must be satisfied that the plan meets the criteria; and (b) that satisfaction must be reasonable".

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8 (2002) 117 FCR 566; [2002] FCAFC 100.

9 (2013) 249 CLR 332; [2013] HCA 18 at [29], [63] (Hayne, Kiefel and Bell JJ) and [88]-[92] (Gageler J).

10 ***Li*** at [90] (footnote omitted).

43. The primary judge at [72] [AB:A tab 7, A76] referred to the observation made by Gageler J in *Minister for Immigration and Border Protection v SZVFW* that a requirement for "reasonable grounds" might impose a higher standard than the standard of legal reasonableness.[11] However, the removal of a requirement for "reasonable grounds" in 2014 is inconsistent with any intention to set a higher standard than that of legal reasonableness that would otherwise be implied. Further, the Explanatory Statement expressly confirmed that the standard set by the phrase "reasonably satisfied" is that NOPSEMA's satisfaction "must be reasonable".

44. In these circumstances, it is evident that the phrase "reasonably satisfied" does no more than make express what would otherwise be implied. Accordingly, the correct standard of review of the lawfulness of NOPSEMA's satisfaction is governed by the principles of legal unreasonableness.

Material before the decision-maker

45. The assessment of the legal validity of the decision-maker's state of satisfaction according to this standard falls to be considered by reference to the material before the decision-maker.[12]

46. The materials that were before NOPSEMA in the present matter include the materials that were in the Decision Documents Bundle.[13] On that material, NOPSEMA was lawfully entitled to be reasonably satisfied that the Drilling EP demonstrated compliance with the consultation requirements.

47. The particulars to ground 1 of the Application at paragraphs (h)-(l) allege that the First Respondent and other members of the Munupi clan are relevant persons within the meaning of reg 11A(1)(d) of the Regulations; that the Drilling EP did not demonstrate any consultation with the First Respondent or the Munupi clan; and therefore NOPSEMA ought to have been aware that the Drilling EP did not demonstrate the consultations required by Div 2.2A were carried out. The case advanced by the First Respondent "shifted" during the course of the trial, and may have ultimately been put on the basis that there was a failure to consult "the traditional owners of the Tiwi Islands": J [173]-[174]; [AB:A tab 7, A109].

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11 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 at [53].

12 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [2008] HCA 4 at [28] (Gummow, Hayne, Heydon and Kiefel JJ); *Kajewski v Federal Commissioner of Taxation* (2003) 52 ATR 455; [2003] FCA 455 at [107] (Drummond J); *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; [2000] HCA 5 at [34] (Gleeson CJ, Gummow, Kirby and Hayne JJ), and authorities cited therein.

13 Decision Documents Bundle: Annexure CG7 (CB44 to CB81) [AB:C tabs 11-51]; Stakeholder correspondence register for the Drilling EP assessment: Annexure CG9 (CB90 to CB92) [AB:C tabs 52-54]; NOPSEMA Environment plan assessment standard operating procedure dated 13 December 2021: Grebe Affidavit at CG10 (CB93) [AB:C tab 55].

Errors identified by primary judge

48. Ground 1 was "developed in the course of the trial" on the basis that reg 10A(g) imposes a requirement that an EP must demonstrate that the titleholder has undertaken a "methodological exercise of identifying each and every relevant person": J [127]; [AB:A tab 7, A98]. This reformulation of Ground 1 was "expressly taken up" by the First Respondent in closing reply submissions: J [128]; [AB:A tab 7, A98]. It was linked to a proposition that reg 10A(g) requires NOPSEMA to conduct a task described by the primary judge as the "universe of relevant persons inquiry": J [82]; [AB:A tab 7, A79]. Ground 1 as reformulated by the primary judge should be rejected.

49. The primary judge identified a second error, which was described as the "failure to consider flaw". The primary judge acknowledged that the parties may not have had a proper opportunity to be heard on that issue: J [195]-[196]; [AB:A tab 7, A114-A115]. This Court should conclude that the primary judge wrongly found there was a "failure to consider" error.

Proper construction of reg 11A

50. It is necessary to address the proper construction of the key terms in reg 11A(1)(d) before turning to the primary judge's findings and conclusions. Regulation 11A(1)(d) identifies as a relevant person:

> *a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment[.]*

Functions

51. A "function" is a power, which may be coupled with a duty, or a corporate capacity.[14] It has also been described as "a form of activity or mode of action by which an officer holder or institution fulfils his, her or its appointed purpose".[15] The *Oxford English Dictionary* relevantly defines "function" as "[a] duty attached to a role or office; an official duty".

52. In public law, a "function" is conferred by a statute upon a body, such as an authority, or statutory office holder and, in a private law context, an organisation may have "functions". While it may be carried out by natural persons, the function is ordinarily that reposed in the body.[16] A "function" is not something conferred upon a natural person in their private capacity.

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14 *Chief Executive Centrelink v Aboriginal Community Benefit Fund Pty Ltd* (2016) 248 FCR 236; [2016] FCAFC 153 at [69]; *Noy v Tapgnuk and Northern Land Council* (1997) 138 FLR 205.

15 *Blayney Abattoirs Pty Ltd v New South Wales* (1996) 86 IR 369 at 393.

16 See *Northern Land Council v Quall* (2020) 271 CLR 394; [2020] HCA 33 at [21], [32] and [41].

Activities

53. “Activity” is defined in reg 4 to mean “a petroleum activity or a greenhouse gas activity”. In reg 11A(1)(d), the word “activities” is used twice and in its second use, is self-evidently using “activities” in its defined sense.

54. In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft*,[17] the High Court held that the rule of construction that the same meaning is to be given to the same words appearing in different parts of a statute unless there is reason to do otherwise has “particular strength” where “two identical expressions are collocated in the same paragraph”.

55. There is no reason to depart from the strong presumption that “activities” has its defined meaning where it first appears in reg 4. In fact, it makes good sense that those conducting petroleum activities or greenhouse gas activities that may be affected by an activity proposed to be carried out under an EP should be consulted. Santos did in fact identify neighbouring petroleum project operators and exploration companies as “relevant persons” for the purpose of reg 11A(1)(d) in section 4 of the Drilling EP.[18]

Interests

56. “Interests” is a word that can carry a range of meanings. Where a word can carry many different shades of meaning, it must be construed in the context in which it appears.[19] The relevant principle of statutory interpretation is considered in Pearce, *Statutory Interpretation in Australia* (9th Ed), [4.33] by reference to the following passage from Spigelman CJ in *Deputy Commissioner of Taxation v Dick*:[20]

> *This general principle of the law of interpretation that the meaning of a word can be gathered from its associated words –* noscitur a sociis *– has a number of specific sub-principles with respect to the immediate textual context. The most frequently cited such sub-principle is the* ejusdem generis *rule. The relevant sub-principle for the present case is the maxim propounded by Lord Bacon:* copulation verborum indicat acceptationem in eodem sensu *– the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word ‘stands with’ other words it ‘must mean something analogous to them’.*

57. The meaning of “interests” in the phrase “functions, interests or activities” must derive its meaning from this context, and have some analogous meaning to “functions” and “activities”. It should not be given such a wide meaning as would effectively swallow up the other terms and render them superfluous.

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17 (2021) 95 ALJR 557; [2021] HCA 19 at [25].

18 Accepted Drilling EP: Grebe Affidavit at CG 7.7 (CB51 at 5180) [AB:C tab 18, 92].

19 *Federal Commissioner of Taxation v Applegate* (1979) 38 FLR 1 at 4 (Franki J), 11 (Northrop J), 16 (Fisher J).

20 (2007) 226 FLR 388; [2007] NSWCA 190 at [13] (citations omitted).

58. As reg 11A imposes a consultation obligation upon a titleholder, it is to be expected that the persons whose "functions, interests or activities" may be affected by the activity will be capable of being readily ascertained by the titleholder in the course of preparing an EP. Otherwise, the obligation to consult could become unworkable. That conclusion is reinforced by the fact that reg 11A requires the titleholder to consult "each and every relevant person", which was accepted by the primary judge: J [81]; [AB:A tab 7, A78-A79].

59. The meaning of "functions" and "activities" permits ready ascertainment of persons or organisations to be consulted. To have an analogous meaning, and a practicable operation, "interests" must also permit the ready ascertainment of such persons or organisations. It cannot be equated to the broad concept of "special interest" used for the purposes of determining whether a person has standing to challenge an administrative decision.[21]

60. The primary judge implicitly attributed a meaning to "functions, interests or activities" that would render the task of identifying relevant persons one of "substantial complexity", where "the number of persons falling within the description [in reg 11A(1)(d)] may be very large and in numerous categories" and "the nature and extent of any potential effect of a petroleum activity upon the 'functions, interests or activities' of particular persons or the categories of particular persons may be difficult to assess": J [137]; [AB:A tab 7, A100-A101]. It is highly unlikely that the legislative intention was to require a titleholder to perform such a complex, difficult and indeterminate task in order to comply with the consultation requirements, or to require NOPSEMA to assess whether the EP demonstrated such compliance. When reg 11A(1)(d) is properly construed, the task of identifying relevant persons does not result in large numbers of people in numerous categories being "relevant persons".

61. The broader context of the Regulations supports the notion that the consultation is to be targeted rather than expansive or open-ended. Regulation 5C(3) requires OPPs to be the subject of public comment. There is also a requirement in reg 11B for EPs for "seismic or exploratory drilling activity" (as defined in reg 4) to be made available for public comment <u>after</u> they have been the subject of consultation pursuant to reg 11A.

62. The construction of "interests" that is most capable of permitting ready ascertainment of those organisations or persons whose "interests" may be affected by the activity is a meaning that is directed to "legal interests". This construction gives the word "interests" important work to do. For example, those with fishing licences that may be affected by the activity under the EP have a relevant legal interest and should be consulted as relevant

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21 *Cf Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; compare, in relation to "person aggrieved" under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64 at 79.

persons. On the other hand, a spiritual or cultural connection of an indigenous person to an area of land or waters is not itself an “interest” within the meaning of reg 11A(1)(d).

63. On the approach adopted by the primary judge, in addition to the complexity and difficulty of identification of relevant persons within the meaning of reg 11A(1)(d), the sheer magnitude of the classes of persons who might need to be individually consulted would be unworkable. For example, on the implicit assumption that “interests” in reg 11A(1)(d) is capable of encompassing all “traditional owners” or other persons with a spiritual or cultural connection to “sea country” (or with any other “interests” in the broader sense) within the environment that may be affected by the activity, the titleholder might be required to identify, locate and consult with many thousands of such persons, which would be a practically impossible task.

64. Alternatively, if “interests” is not construed as meaning legal interests, it should be interpreted by reference to the principles that inform the common law rules of procedural fairness. The consultation requirements in reg 11A can be seen as analogous to a statutory form of procedural fairness, providing affected persons with an opportunity to raise objections or claims about the impact of the activities to which the EP relates. In that context, a person must have individual “interests” that may be directly affected by the activities. A person who may be affected by a decision as a member of a class of the general public is not ordinarily entitled to be afforded procedural fairness.[22]

65. The proper construction of reg 11A(d) is also informed by the further category of relevant person in reg 11A(e), being “any other person or organisation that the titleholder considers relevant”. If “interests” were to be given a broad construction encompassing any interest of any kind, then it is difficult to see that reg 11A(e) could have any work to do. That is, it is difficult to see how a person or organisation that did not have an interest of any kind affected by a proposed activity could nevertheless be considered “relevant” under reg 11A(e). Regulation 11A(e) will, however, be given work to do if “interests” is construed in either manner described above.

Methodological demonstration – Grounds 1 and 3(b)

66. The primary judge considered that NOPSEMA was required to be reasonably satisfied that the Drilling EP demonstrated that each and every relevant person was consulted, describing this as the “universe of relevant persons inquiry”: J [82]; [AB:A tab 7, A79]. At J [155]-[156] [AB:A tab 7, A105], the primary judge held that the Drilling EP provided insufficient information to enable NOPSEMA to perform that task, essentially because his Honour considered that the Drilling EP did not set out the methodology by which Santos

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22 See generally *Kioa v West* (1985) 158 CLR 550 at 584 (Mason J), 632 (Deane J); *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537 at 555 (Lehane J); *Castle v Director General, State Emergency Service* [2008] NSWCA 231 at [6] (Basten JA).

had identified each relevant person with whom it had consulted. The primary judge referred to this as the "methodological flaw": J [126]; [AB:A tab 7, A98].

67. The premise of the primary judge's reasoning, that NOPSEMA is obliged to inquire into or have regard to the "universe of relevant persons" as an independent legal prerequisite, may be doubted. NOPSEMA is not expressly required by regs 10A(g) and 11A to perform a stand-alone inquiry in order to satisfy itself that each and every relevant person was consulted. Rather, NOPSEMA is only required to be reasonably satisfied that the EP demonstrates that the titleholder has carried out the consultations required by reg 11A.

68. The primary judge stated that identifying relevant persons within the description of reg 11A(1)(d) requires the titleholder to "at least broadly understand the extent of the physical environment that may be affected [by the proposed activity], the values and sensitivities in that physical environment, and thus the functions, interests or activities of each person or category of persons that may intersect with that physical environment": J [138]; [AB:A tab 7, A101]. The existing environment that may be affected by the activity and "the particular relevant values and sensitivities (if any) of that environment" are matters that the titleholder must address under reg 13(2) for the purpose of setting out an environmental assessment. However, the Regulations do not identify them as having any direct bearing upon the identification of relevant persons within reg 11A(1)(d) for the purposes of consultation.

69. The primary judge erred by treating reg 11A(1)(d) as governed by an "intersection" of functions, interests or activities with the physical environment including its values or sensitivities: J [138]-[139], [153]; [AB:A tab 7, A101, A104-A105]. That involved a departure from the language of reg 11A(1)(d) and a misstatement of the applicable statutory test. On a proper construction of reg 11A(1)(d), the identification of relevant persons with "functions, interests or activities" that may be affected does not turn on "the identification of the totality of values and sensitivities" (cf. J [139]; [AB:A tab 7, A101]). It follows that there is no need for an EP to demonstrate how each of the values and sensitivities of the existing environment was "evaluated to discover their possible intersection with the functions, interests and activities of particular people or organisations" (cf. J [139]; [AB:A tab 7, A101]).

70. At J [144] [AB:A tab 7, A102-A103], the primary judge identified the "methodological flaw" as being the absence in the Drilling EP of a "methodological demonstration" showing "the basis for the identification of the universe of relevant persons" in the manner earlier described. However, the implication of such a requirement for a "methodological demonstration" would be inconsistent with the prescriptive nature of the Regulations, in particular Div 2.3 which contains detailed requirements as to the contents of an EP. There is no express requirement for an EP to set out any "methodological demonstration" and no such additional requirement can properly be implied in the Regulations.

71. Santos' method for identifying relevant persons was addressed in section 4.2 of the Drilling EP: J [142]; [AB:A tab 7, A102]. The Drilling EP stated that "Santos began the process of identifying relevant persons for this EP with a review of its stakeholder database, including relevant persons consulted for other recent activities in the area", and then reviewed and refined that list based on the defined operational area and the relevance of the stakeholder according to the terms of reg 11A. A range of specific inquiries used to identify relevant persons were then set out. Table 4-1 explained the basis on which each of the currently identified relevant persons consulted by Santos was considered to fall within reg 11A.

72. This provided a basis on which it was open for NOPSEMA to be reasonably satisfied that the Drilling EP demonstrated that relevant persons had been identified and consulted in accordance with reg 11A. NOPSEMA's SOR at [45] [AB:C tab 10, 18] specifically found that the Drilling EP included "a method for identification of … relevant persons that is consistent with the definition of relevant person provided by reg 11A". Thus, even on the premise that NOPSEMA was required to be separately satisfied in relation to the methodology employed by the titleholder to identify relevant persons, NOPSEMA expressly found that it was so satisfied. It cannot be said that this finding by NOPSEMA was irrational or otherwise not open on the available material.

73. The primary judge was critical of section 4.2 at J [145] [AB:A tab 7, A103] as not "demonstrating that relevant persons were identified through a methodological approach of the kind" proposed by his Honour but showing "a different, or at least incomplete approach". The primary judge concluded at J [150] [AB:A tab 7, A104] that table 4-1 was "not sufficient to reveal the criteria applied to persons not listed".

74. As an administrative decision-maker, NOPSEMA was not required to provide reasons for decision of the kind required to be given by a judicial officer,[23] nor was Santos required to give an explanation for its consultation process which expounded its legal construction of reg 11A and contained detailed factual findings in respect of each person and organisation found or not found to be a relevant person within reg 11A. Neither was essential in order for NOPSEMA to be reasonably satisfied that Santos has complied with reg 11A.

75. The present case is distinguishable from *One Key*, which was erroneously applied by the primary judge: J [128], [146], [156], [171]; [AB:A tab 7, A98, A103, A108]. In *One Key*, the Fair Work Commission approved an agreement on the basis of an employer's declaration that it had provided the necessary explanation to staff but without knowing the content of the explanation. That was a jurisdictional error because the employer's conclusory statement was insufficient for the Commission to reach the state of satisfaction that the relevant information was provided. In the present case, the Drilling EP did not

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[23] As Derrington J stated in *EHF17 v Minister for Immigration and Border Protection*, (2019) 272 FCR 409; [2019] FCA 1681 at [87], "care must … be taken not to conflate administrative fact finding with that which occurs in a curial setting".

simply make a conclusionary statement that all relevant persons had been consulted: J [146]; [AB:A tab 7, A103]. In fact, there was a description of the method, and an identification of the relevant persons who were consulted, and an explicit finding by the decision-maker that such a method was disclosed. In contrast to *One Key*, the information necessary for NOPSEMA to reach its state of satisfaction was contained in the Drilling EP.

76. NOPSEMA was entitled to form its state of reasonable satisfaction on the basis of an exercise of judgment upon a holistic assessment of the Drilling EP, informed by those matters set out in the Drilling EP, including the relevant persons identified by Santos and the method used by Santos for identifying relevant persons, assessed in the light of its own knowledge and experience as the regulator administering the Regulations (encompassing its regulation of all of the offshore projects governed by the Regulations). NOPSEMA's knowledge and experience means that it is well placed to form a judgment about whether a particular EP has properly identified relevant persons for the activity proposed by an EP.

77. Accordingly, the primary judge ought to have concluded that NOPSEMA was legally capable of reaching the requisite state of satisfaction that the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A. The Drilling EP did not need to include the detailed methodological demonstration proposed by the primary judge in order for NOPSEMA to reach that state of reasonable satisfaction.

Failure to consider "sea country material" – Grounds 2 and 3(a), (c), (d), (e)

78. The primary judge held that a second reason why NOPSEMA had failed to carry out the postulated "universe of relevant persons inquiry" was because it had failed to consider "material in the Drilling EP dealing with sea country and the interests and activities of traditional owners": J [126]; [AB:A tab 7, A98]. The "sea country material" in the Drilling EP was set out by the primary judge at J [205]-[206] [AB:A tab 7, A117-A121].

79. The primary judge identified the contention by the First Respondent in support of that alleged error at J [190] [AB:A tab 7, A113] as being that "'sea country material' contained in the Drilling EP … showed that the functions, interests or activities of the traditional owners of the Tiwi Islands may be affected by the Activity", and that "NOPSEMA failed to properly consider the sea country material in determining whether the Drilling EP demonstrated that each relevant person had been identified and consulted". The primary judge treated this as a contention that NOPSEMA had not considered "the references made to the traditional owners of the Tiwi Islands in the sea country material" (J [190]; [AB:A tab 7, A113]), and that NOPSEMA had "failed to properly engage with that material" in addressing the postulated "universe of relevant persons inquiry": J [192]; [AB:A tab 7, A114].

Ground 3(a)

80. The premise of the contention addressed by the primary judge is that references to "traditional owners of the Tiwi Islands" in the sea country material should have led to the identification of the traditional owners of the Tiwi Islands as relevant persons in the Drilling EP, and was on that basis probative material on the issue of whether the Drilling EP demonstrated that each and every relevant person was consulted.

81. However, on a proper construction of reg 11A(1)(d), the connection of individuals, who are part of a traditional land owning group, with "sea country" is not a "function, interest or activity" for the purposes of reg 11A(1)(d).

82. As to "function", the traditional owners are referred to as natural persons. As explained above, on its proper construction, a "function" is not conferred upon natural persons. As to "activities", on its proper construction, this means petroleum activities or greenhouse gas activities. The traditional owners are not engaged in activities of this kind due to their connection with "sea country".

83. As to "interests", for reasons explained above, if that term is not directed to legal interests, it must be understood by reference to the principles relating to requirements of procedural fairness. As Basten JA explained in *Castle v Director General, State Emergency Service*,[24] "[t]he larger the class of persons reasonably expected to be affected, the less the likelihood that procedural fairness will be attracted … [and] the duty is less likely to be attracted if membership of the class if variable and not readily ascertained".

84. The concept of "sea country" is not a term of art, and does not have a precise content. The class of traditional owners who might have a connection to "sea country" in the areas around the proposed drilling activities will be potentially large and difficult to ascertain, and will have an indeterminate and variable membership and unclear boundaries. It follows that the connection of individuals in a traditional land owning group with "sea country" is not properly characterised as an "interest" for the purposes of reg 11A(1)(d) (being a legal interest or, alternatively, an interest that would attract procedural fairness). It was open to NOPSEMA to take the view that references to "sea country" in the Drilling EP were referring to cultural connections of indigenous people and did not lead to the identification of individual traditional owners as relevant persons.

85. On the proper construction of reg 11A(1)(d), the primary judge should have concluded that traditional owners with a connection to sea country are not on that basis relevant persons under reg 11A(1)(d). There is therefore no basis for an inference that NOPSEMA failed to consider the "sea country material" when reaching its satisfaction that the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A.

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[24] [2008] NSWCA 231 at [6].

Ground 2

86. In any event, on a proper construction of the Regulations, NOPSEMA was not bound to consider the sea country material as a relevant consideration in forming its satisfaction under reg 10(1)(a).

87. On the principles established in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[25] a mandatory relevant consideration is identified by implication from the "subject-matter, scope and purpose of the Act",[26] as opposed to the specific facts of a particular decision or the specific evidence or material before the decision-maker.[27] In other words, there is a recognised distinction between relevant considerations and pieces of evidence.[28] The sea country material was not itself a mandatory relevant consideration in the *Peko-Wallsend* sense. Nor did it give rise to any claim that NOPSEMA was bound to but failed to consider it in reaching its state of satisfaction under reg 10(1)(a).

88. Further and alternatively, the primary judge ought to have inferred that NOPSEMA did consider the sea country material in its assessment of the Drilling EP. The SOR at [18] [AB:C tab 10, 4] stated that the assessment of the Drilling EP included "a general assessment of the whole EP and detailed topic assessments of the EP content" including "[c]onsultation with a focus on adequacy of consultation with relevant persons". Further, NOPSEMA directly addressed the description of the existing environment in Section 3 and Appendix C of the Drilling EP including, as part of the values and sensitivities within the EMBA that may be affected by the activity, "[s]ocial, economic and cultural features of the environment … relating to … cultural heritage": SOR at [26(e)(v)]; [AB:C tab 10, 9].

89. The appropriate conclusion to be drawn is that NOPSEMA did consider the sea country material as part of its holistic assessment of the Drilling EP, but was nevertheless reasonably satisfied that the Drilling EP demonstrated that Santos had consulted with each relevant person as required by reg 11A.

Grounds 3(c), (d) and (e)

90. The primary judge's reasoning that the sea country material was probative was based upon an erroneous assumption that the "functions, interests or activities" within reg 11A(1)(d) were to be identified from or equated with the values and sensitivities of the environment

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25 (1986) 162 CLR 24.

26 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *Foster v Minister for Customs and Justice* (2000) 200 CLR 442; [2000] HCA 38 at [22]-[23], [45], [102]-[105].

27 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 331, 347-348; *Abebe v Commonwealth* (1999) 197 CLR 510; [1999] HCA 14 at [195]; *Chang v Neill* (2019) 62 VR 174; [2019] VSCA 151 at [71]-[73] (Maxwell ACJ, Beach and Kyrou JJ); *Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation (No 5)* (2019) 167 ALD 492; [2019] FCA 2073 at [63] (Derrington J).

28 *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 225 at 236-237 (Carr J, with whom Sheppard and Gummow JJ agreed); *Latitude Fisheries Pty Ltd v Australian Fisheries Management Authority* (2002) 68 ALD 365; [2002] FCA 416 at [15]-[17] (RD Nicholson J); *Dang v Minister for Immigration and Multicultural Affairs* [1999] FCA 38 at [32] (Moore J).

that may be affected by the activity to be conducted under the Drilling EP, as identified for the purposes of reg 13(2).

91. The primary judge found that the "sea country material is sufficiently probative because it … sufficiently suggests the existence of values or sensitivities which may be 'functions, interests or activities' of traditional owners that may be affected by the Activity": J [216]; [AB:A tab 7, A123] (emphasis added). That finding is erroneous because, on a proper construction of reg 11A(1)(d), "values or sensitivities" of the environment cannot be equated with "functions, interests or activities" of persons or organisations that may be affected by the activities to be carried out under the EP.

92. At J [214] [AB:A tab 7, A123], the primary judge made the "general observation" that the provision of material addressing values and sensitivities, which is required by reg 13(2), "is likely to be probative of whether all persons who fall within the description in reg 11A(1)(d) have been recognised by the environment plan as relevant persons". However, on a proper construction of reg 11A(1)(d), the real inquiry is whether a person or organisation has "functions, interests or activities that may be affected by the activities to be carried out under the environment plan". That inquiry is directed to the effect of the activities (being "operations or works" of a particular kind) on "functions, interests or activities" of persons or organisations, and not the effect of the activities on environmental values or sensitivities.

93. The primary judge's incorrect understanding of the purpose of consultation is evident at J [88] [AB:A tab 7, A80] where his Honour referred to consultation under reg 11A as "inform[ing] the proponent of measures that the proponent may take to mitigate the adverse environmental effects that the petroleum activity may otherwise cause." However, the purpose of consultation is not to inform the proponent about how to mitigate adverse environmental effects. Rather, it is to give relevant persons an opportunity to assess the possible consequences of the activity on their "functions, interests or activities" (see reg 11A(2)), and to advance objections and claims about the adverse impact of the activity on those functions, interests or activities (see reg 16(b)) to which the titleholder can respond including by adopting or proposing to adopt measures (see reg 10A(g)(ii)). This mitigation of adverse environmental effects is not the direct concern of reg 11A – that subject is dealt with extensively in regs 13 and 14.

94. Accordingly, on a proper construction of reg 11A(1)(d), the primary judge should not have concluded that the sea country material was probative of "functions, interests or activities" of traditional owners. Any failure to consider the sea country material could not, therefore, provide a proper basis for inferring that any error had been made by NOPSEMA in forming its state of reasonable satisfaction.

95. Further or alternatively, on a proper construction of reg 11A(1)(d) (see ground 3(a) above), it was reasonably open to NOPSEMA to be satisfied that individual traditional owners

(including the First Respondent, members of the Munupi clan and the traditional owners of the Tiwi Islands generally) were not relevant persons, such that the sea country material was not probative of whether relevant persons who fall within the description in reg 11A(1)(d) had been consulted. It follows no adverse inference can be drawn that NOPSEMA failed to consider the sea country material on the basis that traditional owners were not identified in the Drilling EP as relevant persons, and the primary judge erred in drawing such an inference.

96. Further or alternatively, for similar reasons, any failure by NOPSEMA to consider the sea country material could not have been material to its decision to accept the Drilling EP. On a proper construction of reg 11A(1)(d), it was reasonably open to NOPSEMA to be satisfied that individual traditional owners (including the First Respondent, members of the Munupi clan and the traditional owners of the Tiwi Islands generally) were not relevant persons, such that consideration of the sea country material could not have given rise to a realistic possibility of a different decision.

97. Finally, the Drilling EP identified the TLC as a relevant person in its own right, having the function of representing indigenous residents of the Tiwi Islands (as the nearest mainland island to the operational area). In so far as any "sea country" of Tiwi Island traditional owners gave rise to "interests" for the purpose of reg 11A(1)(d), those interests were communal or shared, and not the interests of any particular individual traditional owner. It was open to NOPSEMA to be satisfied that Santos had appropriately consulted with the TLC as the relevant person under reg 11A(1)(d) in respect of any "sea country" of Tiwi Islanders.

10 October 2022

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Schedule

No VID555 of 2022

Federal Court of Australia
District Registry: Victoria
Division: General Division

Respondents

Second Respondent:	National Offshore Petroleum Safety and Environmental Management Authority

Date: 10 October 2022