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No: QUD13/2023

Federal Court of Australia

District Registry: Queensland

Division: General

On appeal from the NATIONAL NATIVE TITLE TRIBUNAL

Gomeroi People (NC2011/006)

Applicant

Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd & Another

Respondents

SANTOS' OUTLINE OF SUBMISSIONS IN RESPONSE

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INTRODUCTION

1. Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (**Santos**) proposes to develop the Narrabri Gas Project to the southwest of Narrabri (**Project**).

2. Proceedings were conducted in the National Native Title **Tribunal** before President Dowsett (the **President**) to determine whether or not the grants of petroleum leases for the Project, being future acts, could be done pursuant to s38 of the ***Native Title Act 1993*** (Cth) (**NTA**). The proceedings before the Tribunal were lengthy, involving numerous contested issues and contested evidence, including expert evidence.

3. On 19 December 2022, the President handed down a **Decision** which held that the relevant future acts could be done.

4. By this proceeding, the Applicant appeals parts of the Decision. Ultimately, Santos submits that there is no significant question of law or principle raised in the appeal. Rather, what the Applicant does is seek to elevate findings of fact and comments on evidence to broader "findings" of principle. In doing so, the Applicant mis-states the Decision.

5. On a proper reading of the Decision the so called "findings" which are challenged by the Applicant either were not made at all, or do not have the effect alleged by the Applicant. As set out below, each of the 6 "questions of law" posed by the Further Amended Notice of Appeal (**FANOA**) are subject to this problem.

6. For the reasons set out below from [20] to [90] the Applicant's contentions with respect to each of the 6 "questions of law" posed should be dismissed with the effect being that this Appeal should be dismissed with costs.

7. These submissions address the main arguments of the Applicant as appears in their written submissions filed on 27 June 2023 (**AS**). To the extent that there are grounds in the Further Amended Notice of Appeal which are not addressed specifically or at all in the AS then Santos assumes that such grounds have been abandoned.[1]

[1] This assumption covers ***inter alia*** ground (b) under question 1.

THE DECISION AND THE CASE BELOW

8. The full extent of the proceedings before the Tribunal and the issues that were to be resolved provide important context to this appeal. The Applicant's case before the Tribunal was multifaceted and reliant upon multiple conditional findings being made. It is therefore not appropriate to cherry pick aspects of the Decision in isolation from an understanding of how they fit into the broader case.

9. The Applicant made its case on two broad grounds. First, an allegation that Santos had failed to negotiate in good faith with a view to obtaining an agreement (the **Good Faith Question**) and, second, that, taking into account the required factors to be weighed under s39 of the NTA, the relevant future act should not have been done (the **s39 Question**). The Tribunal found against the Applicant on both of the above questions.

10. As far as the Good Faith Question was concerned, the Applicant's case[2] was based on numerous separate arguments. The Applicant divided the negotiations into four different negotiation periods, making separate arguments in relation to each period.[3] The Applicant's arguments regarding the Good Faith Question span multiple issues and a period of more than a decade.[4]

11. One of the sub arguments made by the Applicant (concerning one "negotiation period") was that Santos' offers were below market value.[5] In making this argument, the Applicant relied upon the evidence given by Mr Kuo ning Ho (**Mr Ho**). The President's treatment of Mr Ho's evidence and his conclusions regarding this argument are raised in specific grounds and are addressed further below.[6] However an important preliminary point to note is that Mr Ho's evidence was in support of only one sub part of the Applicant's broader case on the Good Faith Question.

12. In the context of the number of issues raised by the Applicant regarding the Good Faith Question, the President stated at [114]: (bold added)

The Gomeroi applicant asserts that Santos's conduct during each

[2] The Applicant had the onus of establishing the basis for a finding.

[3] See Decision at [109] where the President comments that such separation into periods is arbitrary.

[4] Decision at [82 – 88].]

[5] Decision at [266].

[6] Indeed, Mr Ho's evidence is the focus of Questions 1, 2, 4 and 5 of the FANOA.

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

13. This passage highlights the President's approach to resolving the Good Faith Question. That paragraph is not challenged in this appeal. Santos submits that it is correct.

14. At [491] of the Decision the President states:

It seems that the Gomeroi applicant and Santos take different approaches to the good faith requirement. Santos looks to apparent intention, having regard to overall conduct. The Gomeroi applicant tends to identify discrete actions or omissions, each of which, it suggests, indicates absence of good faith. The Gomeroi applicant's approach offers no explanation for Santos's clear commitment to negotiation over more than seven years. There is much in Santos's assertion, at para 139 of its contentions, that the Gomeroi applicant has been, 'overly pedantic or mechanistic", and that its complaints comprise a, "list of grievances cherry picked from the lengthy course of the negotiations to attempt to overcome its burden of establishing bad faith". The reference to bad faith (as opposed to absence of good faith) is, as I have said, erroneous.

15. At [549] the President concludes the Good Faith Question as follows:

Because of the fragmented, discursive, and extensive nature of the evidence, and the way in which the case has been conducted, I have, to some extent, had to deal with it in a piecemeal way, leading to a degree of repetition. However the evidence, as a whole, does not substantiate the allegation of absence of good faith made against Santos.

16. The relevant point to note is that the President, consistent with authority, undertook a single global assessment of Santos' conduct to answer the Good Faith Question. As set out above, the President notes the difficulty associated with piecemeal

allegations and “cherry picking” isolated instances.

17. Santos submits that the same issues exist in this appeal. The Decision is necessarily long because it traverses the Applicant's myriad arguments regarding the Good Faith Question. Where the Tribunal has resolved this question in a single global assessment, it should not be sufficient for the Applicant to cherry pick isolated issues which, even if they are legitimate (which is denied), could not possibly alter the Tribunal's ultimate conclusion. Almost all of the Applicant's grounds in this case must be viewed through this lens.

18. In terms of the s39 Question, the specific issues before the Tribunal were again varied and the evidence voluminous.[7] The Applicant’s arguments regarding environmental concerns, for which they relied upon the evidence of **Professor Steffen**, again formed but one part of the broader s39 Question.

19. In concluding the s39 Question the President states at [1024]:

> ***I accept that the Gomeroi applicant has genuine concerns about the recognition and protection of its native title rights and interests, and the associated matters identified in s 39. It is unfortunate that the parties have been unable to agree. I attribute such failure, at least in part, to confusing expert evidence. In any event, the Tribunal must now resolve the matter. There can be little doubt that there is a significant public interest in the responsible exploitation of gas reserves. Substantial resources have been expended by the State and by Santos in ensuring such responsible exploitation. Whilst I understand the Gomeroi applicant’s concern, I consider that, having regard to the matters set out above, its concerns are outweighed by the public interest.***

QUESTION 1 - THE TEST FOR GOOD FAITH AND ITS APPLICATION IN THE DECISION

20. The first question raised by the Applicant asserts that the President made errors with respect to the legal test for considering the Good Faith Question.

21. The Applicant challenges[8] two specific paragraphs of the Decision[9] which relate to findings made on the question of whether Santos’ offers were below market value and to what extent Santos may have known or ought to have known those matters.

[7] Decision at [95], [104], [694].

[8] FANOA at 1(a).

[9] [410] and [450].

22. Santos submits that those paragraphs are not inconsistent with authority and, moreover, are no more than a direct rejection of a specific case put by the Applicant before the Tribunal.

23. The President set out the test for considering the Good Faith Question at [105-108] of the Decision, including by reference to the judgment of White J in ***Charles v Sheffield Resources***[10] and the indicia in ***Western Australia v Taylor***.[11]

24. Further, on the specific question of reasonableness of offers, at [339] the President referred to ***Brownley v Western Australia***[12] and specifically notes that the Tribunal may take into account the reasonableness of offers made. Ultimately the President found that in this case a focus on reasonableness of offers was unhelpful in the application of s 31(1)(b).[13]

25. There is no error evident in the manner in which the President set out (or applied) the test for absence of good faith.

26. At [410] and [450] of the Decision, the President does address the question of whether Santos knew or ought to have known that its offers were significantly below market. But this is because the Applicant made that very allegation as a key plank in its case. The Tribunal is not "misstating its task" rather it is doing no more than addressing a contention put forward by the Applicant.[14]

27. Further, Santos submits that, at [410], where the President found that (in this case and in the context of this specific contention) an absence of good faith on the part of Santos could not be made without an inference that Santos knew or ought to have known that its offers were significantly below the market, then such a finding is correct and entirely consistent with the authorities.[15]

28. The Decision, at [450], further underscores this finding in the context of the Applicant's case. It was the Applicant who sought an inference, from the opinions of Mr Ho and Mr Meaton, that Santos deliberately made an offer which it knew was

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[10] (2017) 257 FCR 29.

[11] (1996) 134 FLR 211.

[12] (1999) 95 FCR 152 at [34-35].

[13] See also Decision at [453] and also at [184] and [256].

[14] Noting that the Applicant had the onus on establishing matters that would lead to a finding of an absence of good faith on the part of Santos. See s36(2) of the NTA.

[15] In particular ***Brownley*** and also ***FMG Pilbara Pty Ltd v Cox*** (2009) 175 FCR 141 at [20].

so “under value" as to demonstrate an absence of good faith.[16]

29. The President made findings regarding the value of the material provided by Mr Ho and Mr Meaton.[17] If those findings are accepted then the conclusion reached by the President at [450] is not only one that is without error, it is obvious.

30. The Applicant’s reliance upon ***Alpaca Management*** and ***Royal Brunei*** at [AS 7-8] takes the matter no further.

31. In the premises, the Applicant’s contentions regarding question 1 should be dismissed.

QUESTION 2 - IS PAYMENT SYNONYMOUS WITH COMPENSATION?

32. The second question raised by the Applicant concerns an assertion that in making the Decision the President erred in conflating the concept of payment agreed pursuant to the right to negotiate regime with the principle of compensation under s53 of the NTA.

33. The written submissions at [AS 11-22] are somewhat difficult to reconcile with the specific grounds which appear at 2(a-c) of the FANOA. Indeed, the AS does not appear to identify any paragraphs or specific error on the part of the President.

34. In any event, Santos submits that there is no such error. The President makes it clear at [309] of the Decision that there is a difference between negotiation under subdivision P and compensation under s53 of the NTA. Any purported contradiction or inconsistency[18] is based on a misreading of the Decision.

35. The Applicant’s contentions regarding question 2 appear to be based entirely on “findings” that were not in fact made. Contrary to what is alleged in grounds 2(a and b), paragraphs [273, 279 and 429 to 431] of the Decision contain no “finding” that payment agreed pursuant to the right to negotiate is compensation within the meaning of s53 of the NTA. Rather, those paragraphs simply contain comments and criticism about the deficiencies in the Applicant’s evidence.

36. Similarly, contrary to what is alleged in ground 2(c), the impugned paragraphs therein do not involve any “finding” on the part of the President as alleged. Rather,

[16] This characterisation of the Applicant’s case has not been challenged in this appeal.

[17] See [431]. See also [220], [293], [295], [331-333], [338], [407-408], [412], [448].

[18] See [AS] Footnote 29.

again, they are all paragraphs that comment upon and criticise the material from Mr Meaton and the evidence of Mr Ho.

37. What was being asserted by the Applicant (and what was being addressed by the President) was the allegation that the offers made by Santos were so far below market value, that Santos knew or ought to have known this and that this formed the basis for inferring an absence of good faith. As indicated above, the President's findings regarding the probative value of such evidence was critical in his conclusion regarding that part of the case alleging an absence of good faith.[19]

38. In the premises, to assert that these paragraphs constituted a "finding" that negotiations were not the subject of the requirement for negotiation in good faith unless the negotiations related to compensation for the anticipated "effect (…) of a proposed future act on native title rights and interests"[20] is incorrect.

39. The Applicant's contentions regarding this question should be dismissed.

QUESTION 3 - SECTION 39(1)(e) AND "ENVIRONMENTAL MATTERS"

40. The third question raised by the Applicant concerns the President's treatment of the evidence of Professor Steffen.

41. Again, any purported error on the part of the President is apparent only through a misreading of the Decision.

42. Contrary to what is alleged in ground 3(a) of the FANOA and AS [26], the President did not find that he was "prohibited from considering environmental matters" or that he was "not required" to consider Professor Steffen's evidence.

43. Rather, the President plainly did take Professor Steffen's evidence into consideration. The President set out Professor Steffen's evidence in detail as well as the Applicant's contentions regarding the same.[21] The President accepted that greenhouse gases may lead to environmental harm[22] and that the risk of escaping gas and contribution to climate change are factors for consideration when considering the public interest.[23]

[19] See Decision at [450].

[20] See AS [20].

[21] Decision at [952-960].

[22] Decision at [987].

[23] Decision at [1015].

44. The nature of the case put by the parties required the President to weigh up the evidence of Professor Steffen with other evidence including the findings of the Independent Planning Commission which, after rigorous assessment, had concluded that the Project was in the public interest.[24]

45. What is asserted by the Applicant to be "findings" in paragraph [970-972] of the Decision is no more than the President considering what weight or emphasis to place upon the evidence of Professor Steffen. The President plainly does not find that he is prohibited or not required to consider Professor Steffen's evidence. What the President does is highlight aspects of the evidence (including, ***inter alia*** that there was no evidence as to the particular effect of his concerns on native title)[25] which lead him to the conclusion reached in [987].

46. To the extent that the environmental matters raised by Professor Steffen's evidence went to consideration of "public interest" under s39(1)(e) and were a mandatory consideration for the Tribunal, then such matter was considered.

47. The Applicant's contentions regarding this question should be dismissed.

QUESTION 4 - PROCEDURAL FAIRNESS

48. The Applicant asserts that the Tribunal denies the parties an opportunity to be heard in relation to its consideration of the concept of futures trading and the ***Australian Consumer Law*** definition of "market."[26]

49. The impugned part of the Decision is paragraphs [286-290]. Those paragraphs address the concept of "market" for the purposes of addressing Mr Ho's assertion that the comparable projects (referred to in his report) were a fair substitute for the Project and could be used to determine a "market price."

50. It is accepted by Santos that no party took the President to the definition of "Market" in ***Miller's Australian Competition and Consumer Law Annotated (Millers)***.[27] However that does not mean that this was not a matter that was squarely raised

[24] A further matter to balance was the fact that the Independent Planning Commission's decision had withstood judicial review on the question of climate change. See Decision at [834], [869].

[25] There were of course other deficiencies in Professor Steffen's evidence, most tellingly that he had incorrectly assumed that the Project would involve fracking. See Decision at [969].

[26] AS [34].

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

before the Tribunal.

51. As indicated above, the whole premise of Mr Ho's evidence was that Santos' offers were significantly below what Mr Ho himself described as "fair value within a free market."[28] That proposition (and the concept of "market price")[29] was then relied upon by the Applicant to assert that Santos had negotiated in the absence of good faith.

52. Santos' case was always that the "market" asserted by Mr Ho by way of his "comparable projects" was one that could not be accepted by the Tribunal. Santos' critique of Mr Ho's "market" formed part of its written submissions,[30] its cross examination of Mr Ho[31] and its closing submissions.[32] A consistent theme of that critique was that Mr Ho's assertion that the "comparable projects" in his report were similar enough to the Project to enable them to be a reliable market sample was not supported by the evidence. It is precisely this issue that the President addresses at [289] of the Decision.[33]

53. A reference to a textbook definition of a concept that is squarely in issue in both the expert evidence and submissions does not render the consideration of that concept procedurally unfair.[34]

54. Further, the Applicant again conflates the President's criticisms of Mr Ho's evidence with actual "findings" of law made in error. For example, the Applicant criticises paragraphs [384-385] of the Decision, however these are no more that the President's assessment of certain aspects of Mr Ho's evidence (including, again, the difficulty caused by the lack of information about Mr Ho's "comparable projects").[35]

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[28] Decision at [373], [440-441].

[29] See Decision at [354].

[30] Decision at [340].

[31] See Decision at [278], [422-424].

[32] Decision at [440].

[33] And also at [384].

[34] See ***Freeman v Military Rehabilitation and Compensation Commission*** (2018) 75 AAR 249 at [65], where the Federal Court found that reference to medical dictionaries without notice to the parties was not procedurally unfair because "no new point raised by the dictionary material, and the Tribunal was, for the most part, responding to the submissions that had been presented to it"; ***Kirkpatrick v Commonwealth*** (1985) 9 FCR 36 at p 42; ***Noureddine v Adlard*** [2022] VSC 719 at [49].

[35] [356] of the Decision is the same – it is no more than the President setting out the findings of Mr Ho and expressing difficulty with them.

55. In any event, the Applicant's contentions in this regard must be viewed through the prism of what was being argued by the Applicant. As set out above, this issue was but a part of the broader question of whether or not Santos negotiated in good faith.

56. Mr Ho's evidence, and his "market", was relied upon by the Applicant to assert that Santos' offer was so far below market that it could be inferred that Santos was not negotiating in good faith.

57. The President relied upon the concept of "market" as only one of the bases on which he considered that the evidence of Mr Ho lacked "probative value." Other reasons why the Tribunal attributed less weight to Mr Ho's evidence include that he:

(a) took no account at all of the impact of the Project (or any of his "comparable projects") on native title rights and interests;[36]

(b) considered only financial benefits without taking into account other matters that may have been relevant to the parties in their negotiation;[37]

(c) lacked any specific detail as to why his "comparable projects" were in fact comparable,[38] which the President found was "reason alone" to reject Mr Ho's evidence;[39]

(d) appeared to (wrongly) assume that the native title party had a veto right in negotiations;[40] and

(e) was based on assertions that agreements that did not involve royalty payments were out of date despite clear evidence being provided to the contrary.[41]

58. The President's ultimate rejection of Mr Ho's evidence is multifaceted and emphatic. It does not in any way rely upon the ***Millers*** definition of "market".

59. Even if Mr Ho's evidence were not to be so emphatically rejected, it would not automatically support a finding that Santos had not negotiated in good faith. The

[36] Decision at [409-411] and [430-431].

[37] Decision at [370-377].

[38] Decision at [386-403] and [422-423].

[39] Decision at [407].

[40] Decision at [435-436].

[41] Decision at [438] and [441].

Applicant would still be required, at the very least, to establish that Mr Ho's evidence justifies an inference that Santos deliberately made an offer which it knew or ought to know was so under value as to demonstrate an absence of good faith. The Tribunal, relying on the evidence of Mr Kreicbergs, declined to make such an inference – in other words, entirely separate to the question of "market" in Mr Ho's evidence.

60. The President summarises his conclusions regarding this particular part of the Good Faith Question at [465-467]. Again, the issue is plainly far broader than the question of "market" in Mr Ho's evidence.

61. It follows that even if this Court were to find that references to futures trading and ***Millers*** definition of "market" were a denial of the Applicant's procedural fairness in respect of that sub part of the Applicant's case, such denial cannot form the basis of the relief as it was not material.[42] On a proper reading of the Decision there were myriad other factors which, standing alone, formed a basis for the President to reject the Applicant's contentions regarding good faith. Any further submissions about "market" could not possibly have made any difference to the outcome.

62. The Applicant's contentions regarding this question should be dismissed.

QUESTION 5 - THE TRIBUNAL'S FINDING AS TO THE WEIGHT OF MR HO'S AND MR KREICBERGS' EVIDENCE

63. The Applicant contends that the finding that Mr Ho's evidence attracted no weight but that Mr Kreicbergs' evidence attracted full weight was legally unreasonable.

64. Legal unreasonableness is difficult to establish;[43] and it is not enough to show that another rational decision-maker might have emphatically disagreed with the reasoning process and findings of the person who made the impugned decision.[44]

65. In short, the Applicant suggests that the decision of the President to accept the evidence of Mr Kreicbergs but reject the evidence of Mr Ho was unreasonable

[42] See eg ***Nathanson v Minister for Home Affairs*** (2022) 96 ALJR 737 per Kiefel CJ, Keane and Gleeson JJ, [1], [60]; ***MZAPC v Minister for Immigration and Border Protection*** (2021) 95 ALJR 441 at [27]-[30].

[43] ***Minister for Immigration and Citizenship v Li*** (2013) 249 CLR 332 at [108] (Gageler J); ***Minister for Immigration and Border Protection v SZVFW*** (2018) 264 CLR 541; [2018] HCA 30 at [11] (Kiefel J), [52] (Gageler J). See also ***Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure and Planning*** [2014] QSC 36 at [71] (Applegarth J); ***Francis v Crime and Corruption Commission*** [2015] QCA 218 at [33].

[44] ***SZTDD v Minister for Immigration and Border Protection*** [2016] FCA 136 at [35].

because the Applicant contends that both witnesses' evidence should have been treated the same.[45]

66. The Applicant's contentions in this regard should be rejected as they are based on a misreading of the specific evidence and also the findings of the President in this context.

67. Firstly, contrary to the grounds in paragraph 5 of the FANOA, at no stage does the President apply "full weight" to the evidence of Mr Kreicbergs. Rather, a fair reading of the Decision is that the President relied upon Mr Kreicbergs' evidence as but one matter to reject the Applicant's contentions regarding good faith. Specifically, the issue was the Applicant's allegation that Santos knew or ought to have known that its offers were significantly below market.

68. Mr Ho's evidence was relied upon by the Applicant as expert evidence to the effect that Santos' offers were below the "fair market price". There were numerous difficulties with Mr Ho's evidence, as set out above in 57 and 58.

69. On the other hand, Mr Kreicbergs' evidence:

(a) did not claim to be, nor was it relied upon by Santos as being "expert evidence";[46]

(b) contained straight factual evidence (such as the fact that Santos' offers were the highest ever made by it for an onshore gas project in Australia) which was not challenged by the Applicant;[47] and

(c) was not evidence establishing a "market price", being instead evidence of other right to negotiate agreements involving Santos and going squarely to allegations that Santos knew or ought to have known that its offers were under value.[48]

70. The Applicant places significant reliance upon paragraph 89 and exhibit HK-14 to Mr Kreicbergs' affidavit. Whilst it is true that this evidence referred to other agreements that Santos had entered into and did not, for reasons of confidentiality, provide full details of those agreements, it is simply incorrect to state that such

[45] See AS [58].

[46] See Decision at [343], [442] and [505].

[47] Decision at [343].

[48] Decision at [450].

evidence is the same as Mr Ho's and should be treated the same.

71. The President never accepted Mr Kreicbergs' evidence as being opinion evidence directed towards "market value." Rather, the thrust of the evidence is accepted to establish, as a fact, previous agreements that Santos had entered into which did not involve royalty payments. This fact (that there were agreements entered into post the GFC which did not involve royalty payments) was directly contradictory to assumptions made by Mr Ho and the President relied upon that accordingly.[49]

72. Further, the President, in part, relied upon the unchallenged fact that each of the offers made by Santos were the highest ever made by Santos for an onshore gas project in Australia[50] to reject the Applicant's contentions on the Good Faith Question.

73. In short, Mr Ho and Mr Kreicbergs were two different witnesses giving very different evidence directed towards different matters. The President provides a logical, cogent and reasoned basis for rejecting the evidence of Mr Ho and for relying upon Mr Kreicbergs' evidence with regard to the Good Faith Question.

74. The Applicant clearly would prefer that the President had placed more weight upon the evidence of Mr Ho, however that does not make the Decision legally unreasonable. The Applicant's contentions regarding this question should be dismissed.

QUESTION 6 - WHO MUST A NEGOTIATING PARTY NEGOTIATE WITH? – THE REGISTERED APPLICANT QUESTION

75. Question 6 concerns a proper interpretation of "negotiation party" under s30 of the NTA.

76. The Applicant correctly accepts that the terms, "native title party", "registered native title party", and "negotiation party" all mean "those persons whose names appear on the Register of Native Title Claims" (**Register**).

77. Section 31 of the NTA imposes a duty upon Santos (and other negotiation parties) to negotiate in good faith with a view to obtaining the agreement of each of the

[49] Decision at [427]. See also [505] which provides further explanation as to the reliance place upon Mr Kriecbergs' evidence. That paragraph is entirely at odds with the contentions made by the Applicant on appeal.

[50] Decision at [343] and [450]. See affidavit of Hayden Kreicbergs, Appeal Book Part B 13, at [88].

native title parties to the relevant act.

78. Notwithstanding the clear meaning of the NTA, in particular s31, the Applicant contends that Santos should not have negotiated with the applicant on the Register because it was aware of circumstances whereby that applicant was to be changed.

79. The Applicant's contention should be rejected as it is contrary to established authority and also based on incorrect facts.

80. In terms of authority, the Applicant's contention is contrary to the well-established principle that a decision under s66B of the NTA is a discretionary exercise and takes effect only once that discretion has been exercised.[51] The President referred to and followed those cases at [170] of the Decision. He was correct to do so. The scheme of the NTA is predicated upon the clear identification of those who hold a right to negotiate.

81. The Applicant's contention is also inconsistent with Justice Mortimer's (as Her Honour then was) decision in ***McGlade v Native Title Registrar*** [2017] FCAFC 10. In considering the right to negotiate process under the NTA Her Honour states at [457]: (bold added)

> ***The similarity with s 24EA(1) is plain. All claim group members are ultimately bound, "as if" by contract, by the decisions of the individuals constituting the registered native title claimant about the doing of a future act, and any conditions on which it must be done. Yet there are no additional authorisation provisions in Subdiv P. That is because the individuals who constitute the registered native title claimant are assumed by the scheme to be acting in the ongoing representative capacity conferred on them by s 62A, read with s 61 and s 251B. The terms of s 66B would apply to those individuals if they purported to agree to a future act in circumstances where the claim group members did not agree, or at least, did not acquiesce. Other negotiating parties under Subdiv P are entitled to assume, and the scheme is built on the assumption, that the individuals constituting the registered native title claimant will negotiate under Subdiv P in their representative capacity for the claim group. There is no suggestion in Subdiv P they can perform that function by majority decision-making. If they do not share a joint view, the remedy lies in the hands of the claim group in s 66B. The scheme places ultimate authority with the claim group, through ss 61, 251B and 66B, but only through those***

[51] ***Ward v Northern Territory*** [2002] FCA 171 at [16]; ***Daniel v Western Australia*** (2002) 194 ALR 278 at 285; and ***TJ v Western Australia*** (2015) 242 FCR 283 at [107] and [113-117].

processes.

82. Her Honour goes on to state at [462]: (bold added)

> ***In my opinion, there are no competing considerations arising from the text, context or purpose of the NT Act which would suggest that Parliament intended the authority of the individuals chosen by their fellow native title claim group members to be their representatives could be ignored, altered or undermined by subsequent resolutions of the claim group (…) without an application under s 66B. The respondents' arguments are capable of circumventing entirely the process set out by Parliament in s 66B, including the role it gives to this Court.***

83. A similar conclusion can be reached in this case. The Applicant's contention, which casts doubt over the primacy of the Register, circumvents the process set out by Parliament and circumvents the role of the Court.

84. The Applicant's reliance, by analogy, on the indoor management rule is misplaced and is completely contrary to the scheme of the NTA and the Court's role under s66B. The rule, which applies to persons put forward as directors of corporations has no relevant application to the question of who is a "negotiation party" under the NTA. A company does not require the exercise of a Court's discretion to change their directors.

85. In terms of fact, the Applicant incorrectly asserts that Santos had "actual knowledge" that the registered applicant was no longer authorised and a new applicant had been authorised to bring a s66B application.[52] At best, Santos was made aware by NTSCORP of assertions that the registered applicant was no longer authorised. Santos did not know, and had no way of knowing, whether such assertions were valid or whether a Court would exercise its discretion under s66B. The true position regarding authorisation of the Applicant was contested before this Court and on appeal to the Full Court.[53] It is plainly unreasonable to expect Santos to second guess the outcome of the Court proceedings.[54]

86. Accepting the Applicant's interpretation of the NTA would mean that a negotiation party under the NTA has a duty to negotiate in good faith not only with those

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[52] AS [69].

[53] ***Gomeroi People v Attorney General of New South Wales***, [2017] FCA 1464; ***Boney v Attorney General of New South Wales*** [2018] FCAFC 218.

[54] See Decision at [171].

persons who appear as applicant on the Register, but also with those persons who assert that they have a right to so appear (notwithstanding that the Court has not yet decided the matter).

87. In any event, on the facts of this matter, the issue raised is not determinative of the question of whether Santos negotiated in the absence of good faith. At best the Applicant's submission appears to be[55] that Santos would be precluded from claiming that its duty to negotiate in good faith can be discharged by negotiating with the registered native title claimant during the period between the claim group meeting and the formal appointment of the new applicant. Whilst such a conclusion should be rejected for the reasons set out above, it is unclear where such a conclusion gets the Applicant.

88. It is unclear whether the Applicant suggests that Santos had a duty to negotiate with both parties, nor does the Applicant appear to suggest that Santos had a duty to negotiate only with the potential new applicant. Santos submits that either contention would lead to absurd outcomes and this further highlights the difficulties in the Applicant's contentions.

89. None of the Applicant's arguments detract from the findings made at [178] of the Decision, that Santos was ***trying to maximize the prospects of reaching agreement with the Gomeroi applicant, however constituted.*** The President finds no basis for concluding that Santos was negotiating other than in good faith. This is conclusive of the matter.

90. In the above premises, the Applicant's contentions regarding question 6 should be rejected.

Raelene Webb KC, Marc McKechnie

Counsel for the First Respondent

11 July 2023

[55] AS [69].