NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	9/11/2022 4:31:16 PM AEDT
Date Accepted for Filing:	9/11/2022 4:31:23 PM AEDT
File Number:	VID555/2022
File Title:	SANTOS NA BAROSSA PTY LTD ACN 109 974 932 v DENNIS MURPHY TIPAKALIPPA & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

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 IN REPLY AND IN RESPONSE TO NOTICE OF CONTENTION

Standard of Review (Response to Section F of First Respondent's Submissions)

Meaning of "reasonably satisfied"

1. The First Respondent contends that the phrase "reasonably satisfied" in reg 10(1)(a) of the Regulations establishes a higher standard for NOPSEMA's lawful satisfaction than is established by the principles of legal unreasonableness, being an "explicit statutory standard" that goes "over and above *Li* unreasonableness" (1RS [5]; [AB:C tab 3, 1-2]), so as to "authorise a court on judicial review to determine for itself whether the facts existing before the decision-maker were sufficient to induce the relevant state of mind" (1RS [47]; [AB:C tab 3, 11-12]). In effect, the First Respondent seeks to equate "reasonably satisfied" with "satisfied on reasonable grounds": 1RS [48]; [AB:C tab 3, 12].

2. For the reasons set out in AS [38]-[44] [AB:C tab 1, 7-9], the word "reasonably" in the phrase "reasonably satisfied" in reg 10(1)(a) should be construed as expressly identifying the standard of legal reasonableness that would otherwise be implied. Contrary to the First Respondent's submission (1RS [46]; [AB:C tab 3, 11]), the inclusion of the word "reasonably" before "satisfied" does not suggest a different standard than would apply if the word "satisfied" was used by itself.

3. In *Murray v Murray*,[1] Dixon CJ, in explaining the civil standard of proof, said:

> *What the civil standard of proof requires is that the tribunal of fact, in this case the judge, shall be 'satisfied' or 'reasonably satisfied'. The two expressions do not mean different things but as in other parts of the law the word 'reasonably', which in origin was concerned with the use of reason, makes its appearance without contributing much in meaning. However, its use as a qualifying adjective seems to relieve lawyers of a fear that too much unyielding logic may be employed. But the point is that the tribunal must be satisfied of the affirmative of the issue.* (Emphasis added.)

4. This is consistent with the extrinsic materials referred to in AS [42]-[43] [AB:C tab 1, 8-9] which explained that the use of different standards of "reasonable grounds for believing" in former

---

[1] (1960) 33 ALJR 521, 524.

reg 11(1) and "reasonably satisfied" in reg 11(2) was "untenable".[2] Accordingly, a deliberate choice was made to harmonise those provisions by adopting the standard of "reasonable satisfaction" rather than "reasonable grounds for believing".[3] The First Respondent in effect submits (1RS [50]-[52]; [AB:C tab 3, 12]) that this deliberate change in language should be disregarded.

5. The decisions in *Thoms v Commonwealth*,[4] *Prior v Mole*[5] and *Goldie v Commonwealth*[6] are distinguishable. *Thoms* and *Goldie* both concern the proper construction of the phrase "reasonably suspects" in s 189(1) of the *Migration Act 1958* (Cth). Those decisions are distinguishable from the proper construction of "reasonably satisfied" because "suspicion" has a different meaning from "satisfaction" and s 189(1) raises considerations about liberty.[7] *Prior v Mole* does not assist in determining whether "reasonably satisfied" imports a requirement for reasonable grounds because the statutory text in that case expressly required "reasonable grounds".

6. The First Respondent at 1RS [49] [AB:C tab 3, 12] seeks to dismiss the obvious textual differences in the phrases "reasonably satisfied" and "satisfied on reasonable grounds" as a "distinction without a difference". However, the proper construction of reg 10(1)(a) must begin and end with the statutory text,[8] which makes no reference to "reasonable grounds".

"Demonstrates"

7. The First Respondent submits (1RS [53]-[54]; [AB:C tab 3, 12-14]) that the word "demonstrates" is a "strong" word that should be given a "muscular" interpretation. However, the use of the word "demonstrates" in reg 10A(g) simply makes it clear that the foundation for the requisite satisfaction formed by NOPSEMA must be set out in the Drilling EP itself. The word is used in its ordinary meaning of "to show" or "to make evident". It is not intended to require "proof" to any particular standard.[9]

8. Contrary to the First Respondent's submissions (1RS [54(b)]; [AB:C tab 3, 13]), there is no useful contrast between the words "demonstrate" and "describe" as used in the Regulations. The particular regulations cited as examples by the First Respondent (at footnote 15; [AB:C tab 3, 13]) are not comparable to reg 10A(g), nor to the use of the word "demonstrates" in reg 10A(b) and (c), as they deal with a different topic of prescribing the contents of an environment plan. The different usages of "describe" and "demonstrate" respectively is illustrated by reg 13(4)(a) and (b).

---

2 Explanatory Statement, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulation 2014*, 34.

3 The phrase "reasonable grounds" is well understood as a "statutory indication that the repository must meet some higher standard" than legal reasonableness: See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at [53] (Gageler J).

4 (2022) 96 ALJR 635 at [58] (Gordon & Edelman JJ).

5 (2017) 261 CLR 265 at [4] (Kiefel & Bell JJ), [24] (Gageler J), [98] (Gordon J).

6 (2002) 117 FCR 566 at [4].

7 See *Goldie v Commonwealth* (2002) 117 FCR 566 at [4].

8 *Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at [39].

9 Compare *Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at [58].

It can be accepted that reg 10A(g) is not directed simply to a description of the consultations carried out by the titleholder, but that says nothing as to the manner in which, or the standard to which, the environment plan must "demonstrate" that the titleholder has carried out the consultations required by Div 2.2A.

Regulation 11A(1)(d) does not contain a jurisdictional fact

9. The First Respondent contends (1RS [54(e)]; [AB:C tab 3, 13]) that reg 11A(1)(d) identifies "a class of persons which is objectively defined". If this submission is intended to convey that reg 11A(1)(d) contains an objective requirement, or that the class of relevant persons is a matter for judicial determination, it is plainly wrong for the same reasons that led the primary judge to reject Ground 2 of the First Respondent's amended originating application: J [268]-[269]; [AB:A tab 7, A137].

10. The use of the language of "satisfaction" in reg 10 ensures that the matters identified as preconditions to the exercise of the power are not jurisdictional facts: AS [36]; [AB:C tab 1, 7]. It follows that reg 11A(1)(d) does not contain an objective criterion that is capable of review by a court as a jurisdictional fact. It was a matter for NOPSEMA's satisfaction whether the Drilling EP demonstrated that Santos had consulted with relevant persons as required by (relevantly) reg 11A(1)(d). In reviewing the lawfulness of NOPSEMA's satisfaction, this Court is not required to form its own view as to whether or not Santos complied with the consultation requirements.

Ultimate issue

11. The ultimate issue in this appeal is whether it was "open" or "legally open" for NOPSEMA to be reasonably satisfied that the Drilling EP demonstrated that Santos had carried out the consultation required by reg 11A. This does not involve any re-characterisation of the ultimate issue (*cf*. 1RS [41]; [AB:C tab 3, 10]). It is consistent with the way that the primary judge framed the issue at J [156] [AB:A tab 7, A105] by reference to ***One Key*** *Workforce Ltd v CFMEU*,[10] where his Honour concluded that "without knowing [that information] it was not open to [NOPSEMA] to be satisfied [that the Drilling EP met the criteria set out in reg 10A]" (square brackets in original, emphasis added).

Proper construction of reg 11A (Response to Section H of First Respondent's Submissions)

12. The First Respondent contends (1RS [71]; [AB:C tab 3, 17]) that the expression "'function, interest or activity' [sic] must be interpreted broadly", but does not advance any actual construction of those terms either individually or collectively. While the First Respondent disputes the construction given to those terms by Santos at AS [51]-[64] [AB:C tab 1, 10-13], he does not suggest any alternative construction.

13. The First Respondent's first argument (1RS [72]-[73]; [AB:C tab 3, 17-18]) relies on an incorrect understanding of the purpose of consultation for the reasons set out in Santos' submissions at AS [93] [AB:C tab 1, 19]. The First Respondent contends that "functions, interests or activities" of

---

[10] (2018) 262 FCR 527 at [113].

a person are "encompassed within" the definition of the environment in reg 4. However, "activity" is expressly defined in reg 4 to mean "a petroleum activity or a greenhouse gas activity" – such an activity could not have been intended to come within the scope of the meaning of "environment" in reg 4. The First Respondent's argument is essentially circular, in that it assumes a broad construction of "activities" in order to call in aid a broad construction of "environment", which in turn is said to support a broad construction of "functions, interests or activities".

14. The First Respondent's second argument (1RS [74]; [AB:C tab 3, 18]) is that reg 11A(1)(d) "is a provision plainly designed to benefit a particular class of persons" and therefore should be broadly construed. There are three difficulties with this argument. First, even if a consultation provision is intended to benefit the class of persons to be consulted, it does not necessarily follow that the class of persons to be consulted should itself be broadly construed. Secondly, it is not established that environmental legislation such as the Regulations is in a category that should be given a beneficial construction.[11] Thirdly, it is wrong to "begin consideration of issues of construction by positing that a 'liberal', 'broad', or 'narrow' construction will be given" as this "tends to obscure the essential question, that of determining the meaning the relevant words used require".[12]

"Activities"

15. The First Respondent contends that the definition of "activities" in reg 4 should not be applied in the phrase "functions, interests or activities" in reg 11A despite the rule of construction identified in AS [54] [AB:C tab 1, 10-11] which was recently reaffirmed by the High Court.[13] The First Respondent's contention that there is "simply nothing in the extrinsic materials" to suggest that the definition in reg 4 is to apply (1RS [75]; [AB:C tab 3, 18]) is not sufficient to meet the onus of showing there is a contrary intention sufficient to displace the application of that express definition.[14]

"Functions"

16. The First Respondent contends that Santos' construction of "functions" is too narrow (1RS [80]; [AB:C tab 3, 20]) but does not articulate its own "broader" construction. For instance, the First Respondent disputes Santos' contention that a "function" is not "conferred upon a natural person in their private capacity" (AS [52]; [AB:C tab 1, 10]) without identifying any examples of when

---

11 See the list of recognised categories of legislation that attract a beneficial interpretation in Pearce, *Statutory Interpretation in Australia* (9th Ed), [9.5].

12 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797; (2003) 201 ALR 260 at [33]; see also *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668 at [10]-[11]. Compare *e.g. Carr v Western Australia* (2007) 232 CLR 138 at [5]-[6] (Gleeson CJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [51]-[53]; *R v A2* (2019) 269 CLR 507 at [34]-[36] (Kiefel CJ & Keane J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [40] (French CJ & Hayne J), [88]-[89] (Kiefel J); *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* (2019) 99 NSWLR 730 at [90]; *McGlade v Native Title Registrar* (2017) 251 FCR 172 at [351]; *Narrier v State of Western Australia* [2016] FCA 1519 at [1095].

13 *BHP Group Limited v Impiombato* [2022] HCA 33 at [72] (Gordon, Edelman & Steward JJ) citing *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376; 328 ALR 375 at [65] and *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at [95].

14 *Anti-Doping Rule Violation Panel v XZTT* (2013) 214 FCR 40 at [92].

any function has been so conferred. While reg 11A contemplates that a "person or organisation" may have functions, a "person" in this context can include "a body politic or corporate"[15] and need not mean a natural person.

"Interests"

17. Contrary to the First Respondent's submissions (1RS [76]; [AB:C tab 3, 19]), Santos' construction of "interests" does not involves an impermissible "reading in" of additional words into the text of the Regulations; rather, it seeks to give meaning to the word "interests" as used in reg 11A(1)(d).[16] As observed at AS [56] [AB:C tab 1, 11], the word "interests" can carry a range of meanings. The "choice between alternative meanings" requires "evaluation of the relative coherence of the alternatives with identified statutory objects or policies".[17]

18. The First Respondent wrongly contends (1RS [76]; [AB:C tab 3, 19]) that "Santos identifies no contextual support" for its construction of "interests". That submission ignores Santos' submissions at AS [56]-[63] [AB:C tab 1, 11-13], which set out in detail the contextual support for the construction for which Santos contends. The expectation that the proper construction of "interests" should permit the ready ascertainment of persons or organisations with "interests" affected by the activities is not an impermissible *a priori* assumption about the purpose of the legislation (*cf* 1RS [77]; [AB:C tab 3, 19]), but is grounded in the fact that "functions" and "activities" have that ascertainable character and that "interests" should be given an analogous meaning: AS [59]; [AB:C tab 1, 11-12].

19. The First Respondent argues (1RS [78]; [AB:C tab 3, 19]) that Santos' construction would not "achieve the reasonable certainty for which it strives" by pointing to various legal interests in land. As the Regulations concern activities "carried out in an offshore area" (reg 3), being an area starting three nautical miles from the territorial sea baseline and extending seaward to the outer limits of the continental shelf,[18] any postulated difficulty in ascertaining legal interests in land is irrelevant in this context.

20. The First Respondent's argument at 1RS [79] [AB:C tab 3, 19] asserts that the meaning of "interests" must encompass spiritual and cultural interests in light of the definition of "environment", but gives no cogent explanation as to why the meaning of "functions, interests, and activities" in reg 11A(1)(d) should be governed by the definition of the "environment" in reg 4.

21. The breadth of the interpretation of "functions, interests and activities" for which the First Respondent contends is evident in 1RS [81] [AB:C tab 3, 20], which asserts an intention "to cover

---

15 *Acts Interpretation Act 1901* (Cth), s 2C. Compare reg 11A(1)(a)-(c) which refer to government agencies and Ministers.

16 See *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [65]-[66] (Gageler & Keane JJ); *Regis v Secretary, Department of Health (Cth)* (2018) 261 FCR 120 at [130]. See generally Pearce, *Statutory Interpretation in Australia* (9th Ed), [2.54]-[2.56].

17 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [66] (Gageler & Keane JJ).

18 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s 4; see also s 8.

comprehensively the range of persons who may be affected by the proposed activities". But this would give no work to the phrase "functions, interests or activities", and would treat reg 11A(1)(d) as if had been drafted to refer simply to "a person or organisation who may be affected by the activities to be carried out". The words "whose functions, interests or activities may be affected" are words of limitation which confine the persons or organisations who are to be regarded as "relevant persons" within the meaning of reg 11A(1)(d), and those words must be given some operation.[19]

Workability

22. The First Respondent seeks to meet the inevitable workability problems that would arise from his broad construction of "interests" by submitting that the consultation obligation in reg 11A(2) can be "adapted to the circumstances", that consultation "need not be direct" and would "permit a range of ways of communicating with a relevant person" (1RS [83]-[84]; [AB:C tab 3, 20-21]). That is difficult to reconcile with his later submission (1RS [98]; [AB:C tab 3, 24]) that consultation cannot be treated "as a mere formality" but must be "'deep' or 'meaningful'", and must involve at a minimum "some form of dialogue". Further, it is difficult to understand how "indirect" consultation would be consistent with the primary judge's finding, which is not the subject of any cross-appeal by the First Respondent, that reg 11A requires the titleholder "to consult each and every relevant person" (J [81]; [AB:A tab 7, A78-A79]).

23. While reg 11A(2) does permit information to be given to a relevant person in different ways including in writing (such as by email) and orally, the heart of the workability problem arising from the First Respondent's broad construction of "interests" in reg 11A(1)(d) is the difficulty or impossibility of ensuring that all relevant persons have been identified so that a titleholder can ensure that *each and every* relevant person has been given "sufficient information" as required by reg 11A(2).

24. The workability problem cannot be resolved by reference to the different statutory context in which ***McGlade*** *v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)*[20] was decided (*cf* 1RS [85]; [AB:C tab 3, 21]). *McGlade* concerned a statutory requirement in s 203BE of the *Native Title Act 1993* (Cth) regarding the certification of authorisation by "all the persons" in a native title group that was expressly subject to a requirement to make "all reasonable efforts … to ensure that all persons" had been identified.[21] In contrast, reg 11A imposes a strict requirement to consult with each "relevant person" and is not qualified by an expression such as "all reasonable efforts".

---

19 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71].

20 (2019) 374 ALR 329.

21 Set out in *McGlade* (2019) 374 ALR 329 at [24].

Methodological demonstration (Response to Section G of First Respondent's Submissions)

Universe of relevant persons inquiry

25. In respect of the "methodological flaw" identified by the primary judge (J [126]; [AB:A tab 7, A98]), the First Respondent contends at 1RS [56] [AB:C tab 3, 14] that "the primary judge was correct to hold that NOPSEMA's decision was affected by *Li* unreasonableness". However, the primary judge did not explicitly base his decision on the principles of legal unreasonableness, but rather held, by analogy with *One Key*, that NOPSEMA had not been provided with the information necessary to form the requisite state of satisfaction under reg 10(1)(a): J [67]-[69], J [155]-[156] [AB:A tab 7, A75-A76, A105]; see AS [66] [AB:C tab 1, 13].

26. The First Respondent contends (1RS [57]; [AB:C tab 3, 14]) that NOPSEMA must satisfy itself that all of the relevant persons who were required to be consulted are identified in an environment plan. This is the inquiry referred to by the primary judge as the "universe of relevant persons inquiry" (J [82]; [AB:A tab 7, A79]). However, the Regulations do not require any such stand-alone inquiry to be performed by NOPSEMA, let alone by the titleholder: AS [66]-[67]; [AB:C tab 1, 13].

27. At 1RS [59] [AB:C tab 3, 14], the First Respondent contends there is "no single way" for an environment plan to provide the information necessary for NOPSEMA to satisfy itself that all relevant persons were identified. The primary judge said at J [139] [AB:A tab 7, A101] that the relevant persons could be identified in two ways (not three ways as contended by the First Respondent): by "being described person by person, category by category, or alternatively, by the titleholder describing the methodology utilised" (emphasis added). However, the Drilling EP did just that – it identified and classified relevant persons and set out the method by which relevant persons had been identified (J [103], Annexure 1 [AB:A tab 7, A86, A143]; AS [71] [AB:C tab 1, 14]). In essence, it adopted the first approach proposed by the judge, being a "person by person" approach, but supported by an accompanying explanation of the method by which those persons were identified. The Drilling EP did not rely upon "mere assertion" (*cf* 1RS [64]; [AB:C tab 3, 16]).

28. The primary judge, however, held that the "person by person" approach employed in the Drilling EP was insufficient to allow NOPSEMA to satisfy itself that all relevant persons were identified and that "none were missed" (1RS [60]; [AB:C tab 3, 15]) because it did not "reveal the criteria applied to persons not listed": J [150]; [AB:A tab 7, A104]. The question arises whether a "person by person, category by category" approach could ever be sufficient to allow NOPSEMA to conduct a "universe of relevant persons inquiry". The answer given by the First Respondent is that the environment plan would need to list relevant persons in a manner "that was self-evidently exhaustive of each relevant person, in terms of 'values and sensitivities'": 1RS [61]; [AB:C tab 3, 15]. However, for the reasons at AS [68]-[69] [AB:C tab 1, 14], the identification of relevant persons by reference to "values and sensitivities" is inconsistent with the requirement in

reg 11A(1)(d) that relevant persons are identified by reference to their "functions, interests and activities". In the Drilling EP, Santos took the correct approach of identifying relevant persons by reference to their "functions, interests and activities".

Demonstration of relevant persons in the Drilling EP

29. The method used in the Drilling EP to identify relevant persons is both logical and readily comprehensible: *cf.* 1RS [65]-[66]; [AB:C tab 3, 16]. The First Respondent submits at 1RS [66] [AB:C tab 3, 16] that the Drilling EP "did not provide any information as to how" the list of persons initially generated by Santos was "reviewed and refined", but it is expressly stated in the Drilling EP that it was "reviewed and refined based on the defined operational area … and the relevance of the stakeholder according to Regulation 11A".

30. More significantly, the First Respondent has not responded to Santos' submissions at AS [72] [AB:C tab 1, 15] regarding NOPSEMA's finding 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" (SOR at [45]; [AB:C tab 10, 18]). That finding was supported by the material in section 4.2 of the Drilling EP, and was not irrational. Even if that finding of fact were objectively wrong (which is not accepted), it is a complete answer to the First Respondent's criticisms of the method set out in the Drilling EP.[22]

31. In relation to the First Respondent's submissions at 1RS [68] [AB:C tab 3, 17], it is NOPSEMA (and not Santos) who makes the holistic assessment of the Drilling EP. That is, NOPSEMA assesses the relevant person list and method by having regard to the whole of the Drilling EP, including the nature of the activity, and draws on its knowledge and expertise including in relation to consultation on other environment plans.[23]

"Sea country material" (Response to Section I of First Respondent's Submissions)

32. The First Respondent characterises the second error identified by the primary judge as a failure to consider a mandatory relevant consideration, being the Drilling EP (1RS [4], [95]; [AB:C tab 3, 1, 23]). The primary judge actually characterised the second error as a failure by NOPSEMA "to properly consider the sea country material" (J [190]; [AB:A tab 7, A113]; AS [78]-[79] [AB:C tab 1, 16]).

---

22 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77.

23 *Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at [86], see also [53], [58]-[59], [64], [69], [80]. See generally *Ellis v Central Land Council* (2019) 267 FCR 339 at [126(c)(ii)], [148]; *Minister for Immigration and Citizenship v SZQHH* (2012) 200 FCR 223 at [40], [43]; *Myoung v Northern Land Council* (2006) 154 FCR 324 at [58]; *Minister for Immigration and Multicultural Affairs v WAFJ* (2004) 137 FCR 30 at [73] (French J); *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at [7], [12] (Gleeson CJ), [116] (McHugh J), [263] (Hayne J), [300] (Callinan J); *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [179]-[180] (Hayne J); *Szelagowicz v Stocker* (1994) 54 IR 302, 306. See also *Minister for Immigration, Citizenship, Migrant Services v Viane* (2021) 96 ALJR 13; (2021) 395 ALR 403 at [17]-[20]; *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [76]-[78]; *Dekker v Medical Board of Australia* [2014] WASCA 216 at [63].

33. The First Respondent responds to appeal ground 2(a) by summarising the judge's reasons for concluding that the "sea country material" was probative and was not considered by NOPSEMA (1RS [91]; [AB:C tab 3, 22]). However, ground 2(a) turns on the proper construction of the Regulations and the application of the principles established in *Minister for Aboriginal Affairs v Peko-Wallsend*,[24] that is, whether the particular references contained in the Drilling EP can themselves be regarded as mandatory relevant considerations for the purposes of the Regulations (AS [86]-[87]; [AB:C tab 1, 17-18]). The First Respondent does not address those questions. His reliance on NOPSEMA's failure to make inquiries of Santos about the sea country material (1RS [91]; [AB:C tab 3, 22]) is redolent of the proposed ground in respect of which the First Respondent was refused leave to amend: J [277]-[280]; [AB:A tab 7, A139].

34. The First Respondent does not explain how the findings set out in AS [88] [AB:C tab 1, 18] in support of ground 2(b) can do anything other than support the inference that NOPSEMA did consider the sea country material in its assessment of the Drilling EP. Grounds 2(b)-(c) do not rely on the proposition that the "sea country materials" were not probative of the existence of relevant persons (*cf* 1RS [92]; [AB:C tab 3, 22-23]). The primary judge acknowledged the possibility that NOPSEMA did appreciate the relevance of the sea country material, but nevertheless came to the view that the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A: J [218]; [AB:A tab 7, A124]. In the circumstances, that was the proper inference to be drawn.

35. While the First Respondent contends that the primary judge was not required to consider the precise meaning of "functions, interests or activities" (1RS [94]; [AB:C tab 3, 23]), the real issue is how the "failure to consider" error can be reconciled with the proper construction of reg 11A(1)(d). If the sea country materials did not identify persons with "functions, interests or activities" that may be affected by the activities under the Drilling EP, there is no basis for an inference that NOPSEMA did not consider or "appreciate the relevance" of that material, nor can it be concluded that NOPSEMA was bound to consider it.

36. The First Respondent does not specify which "functions, interests or activities" it contends that NOPSEMA should have understood to arise from the "sea country materials", despite this issue being squarely raised at AS [81]-[85] [AB:C tab 1, 16-17]. The First Respondent also does not explain why the "sea country materials" should be understood as relating specifically to the traditional owners of the Tiwi Islands (see also 1RS [33] [AB:C tab 3, 8], which asserts that there are "extensive references" in the Drilling EP to "traditional owners of the Tiwi Islands" but does not identify any specific reference to them).

37. The reference to the "region of the EMBA" should be clarified, because there are two different EMBAs and the Notice of Contention (**NOC**) [AB:A tab 11, A173] does not distinguish between them. The first EMBA is for the Drilling EP itself and is 44km from the Tiwi Islands at its closest

---

[24] (1986) 162 CLR 24.

point.[25] The second EMBA appears in Appendix C to the Drilling EP and is contiguous with the Tiwi Islands.[26] As the primary judge found, the EMBA in Appendix C is "more extensive than the EMBA for the Drilling EP" (J [199]; [AB:A tab 7, A115]). The NOC's definition of EMBA in [1(b)(ii)] [AB:A tab 11, A174] is for the Drilling EP's EMBA, but references to the EMBA in NOC [1(b)] at (iv), (vi) and (vii) [AB:A tab 11, A174-A175] are to the EMBA in Appendix C.

NOC Ground 2 (Response to 1RS [97]-[99]; [AB:C tab 3, 24-25])

38. Santos does not rely on an argument that consultation with the Tiwi Land Council (**TLC**) discharged an obligation to consult with the traditional owners of the Tiwi Islands. Rather, Santos submits that the TLC was consulted as a relevant person in its own right, on the basis that it had functions that may be affected by the activities (in particular, the function of representing indigenous residents of the Tiwi Islands): AS [97]; [AB:C tab 1, 20]. In the context of the Drilling EP as a whole, it was open to NOPSEMA to be reasonably satisfied that Santos had carried out consultations with relevant persons under reg 11A(1), and the material contained in the Drilling EP (including the "sea country materials") explained or supported the basis on which the TLC (and the Northern Land Council) were consulted as relevant persons.

39. If it remains necessary for the Court to determine NOC Ground 2, Santos submits that the consultation was sufficient. Further, it is not open to the First Respondent to seek to invalidate the Drilling EP on the basis of any alleged inadequacy in the consultation with another relevant person, being the TLC.[27]

31 October 2022

Chris Horan
Owen Dixon Chambers West, Melbourne

Adam Sharpe
Francis Burt Chambers, Perth

Counsel for the Appellant

---

25 Affidavit of Benjamin Luke Kildea sworn on 17 August 2022 (Exhibit SR10), Attachment BLK-1 (CB364 at 20855) [AB:C tab 65, 7].

26 Drilling EP, Appendix C (CB85 at 9081) [AB:C tab 21, 11].

27 *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1169 at[38]; *Ellis v Central Land Council* (2019) 267 FCR 339 at [162]; *Degning v Minister for Home Affairs* [2018] FCA 1152 at [97]-[99]; *Comcare v Post Logistics Australasia Pty Ltd* (2012) 207 FCR 178 at [99]; *Re L* [2010] NSWSC 624 at [4]-[6]; *Bridgetown Greenbushes Friends of the Forest Inc v Executive Director of the Department of Conservation and Land Management* (unreported, WA Sup Ct, Parker J, Library No 950415, 9 August 1995) at 52; *Durayappah v Fernando* [1967] 2 AC 337 at 354-355.

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