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File Title:	GOMEROI PEOPLE v SANTOS NSW PTY LTD AND SANTOS NSW (NARRABRI GAS) PTY LTD (FORMERLY KNOWN AS ENERGYAUSTRALIA NARRABRI GAS PTY LTD) AND ORS
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Registrar

Important Information

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Federal Court of Australia No. QUD13/2023
District Registry: Queensland
Division: General

Gomeroi People (NC2011/006)
Applicant

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

On appeal from the NATIONAL NATIVE TITLE TRIBUNAL

Second Respondent's outline of submissions

Introduction

1. These submissions address the Notice of Contention filed by the Second Respondent (**State**) on 3 February 2023, question 3 in the Further Amended Notice of Appeal and aspects of question 6. The remaining questions raise issues as to the negotiations between the Applicant and the First Respondent (**Santos**), the weight the Tribunal gave to particular witnesses and whether the Tribunal denied the Applicant procedural fairness. Consistently with the approach adopted before the Tribunal (where the State filed evidence dealing with objective factual matters and did not make contentions or submissions dealing with the question whether Santos was in breach of the requirement to conduct negotiations in good faith), the State does not make submissions with respect to the remaining questions.

Notice of Contention and question 6

2. At [177]-[178] of the National Native Title Tribunal's Determination dated 19 December 2022 (**Determination**), the Tribunal rejected the proposition that the differently constituted applicant, ie, as reconstituted by the resolution passed on 20 July 2016,[1] was the "true" Gomeroi applicant between 20 July 2016 and 7 December 2017. The Tribunal accepted that the differently constituted applicant could not have replaced the previously constituted applicant before 7 December 2017, ie the date of

[1] Determination, [170].

Rangiah J's order in *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464. The Tribunal relied on that finding (together with other findings) to reject the Applicant's argument that Santos breached the obligation of good faith in s 31(1)(b) of the NTA by continuing to negotiate with the previously constituted Gomeroi applicant following the resolution on 20 July 2016.

3. The State submits that the Tribunal's rejection of the Applicant's argument is supported not only by the authorities referred to by the Tribunal dealing with s 66B of the NTA,[2] but also by s 30(4)(c) of the NTA. That provision is within subdivision P. By the operation of s 30(4)(c), the differently constituted Gomeroi applicant became "*the native title party*" once it became the *"registered native title claimant*". That expression is defined in s 253 of the NTA to mean "*... a person or group of persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters*". In the circumstances here, the *"Register of Native Title Claims*" (defined in s 253 to mean "*the Register established and maintained in accordance with Part 7*") could have only been amended to include the differently constituted Gomeroi applicant on the Register once an order was made pursuant to s 66B(1) for the differently constituted Gomeroi applicant to replace the prior applicant and the Chief Executive Officer of this Court notified the Native Title Registrar of the new applicant: s 66B(3) and (4).

4. The duty in s 31(1)(b) to negotiate in good faith is owed to "*the negotiation parties"*, defined in s 30A to mean *"the Government Party*", "*any native title party*" and "*any grantee party*". The effect of s 30(4)(c), read together with the other provisions referred to in the preceding paragraph, is that the differently constituted Gomeroi applicant was not *"the native title party*" for the purposes of the duty in s 31(1)(b) until such time as it became the *"registered native title claimant*".[3] That could not have occurred prior to the order made by Rangiah J on 7 December 2017. Prior to that date,

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[2] See Determination at [170].

[3] Equally, the differently constituted Gomeroi applicant was not *"the native title party*" for the purposes of s 29(2)(b)(i) until such time as it became the *"registered native title claimant*".

the prior Gomeroi applicant was the *"registered native title claimant*". This state of affairs was recorded in the letter sent by Santos dated 6 October 2017 (referred to at [176] of the Determination):[4]

> *We understand that this decision will be in relation to your client's application under section 66B….for an order replacing the 19 persons whose names currently appear on the Register of Native Title Claims as the applicant in relation to the Gomeroi People's native title claim NSD 2308/2011 (**Current Applicant**).*
>
> ….
>
> *While the persons who make up the Current Applicant are listed on the register, they remain the correct negotiation party for any RTN process. As soon as they are removed from the register, they no longer have that status.*

5. These aspects of the statutory regime provide additional support for the Tribunal's rejection of the Applicant's argument that Santos breached the obligation of good faith in s 31(1)(b) by continuing to negotiate with the previously constituted Gomeroi applicant between 20 July 2016 and 7 December 2017.

6. In that part of the Applicant's outline of submissions (**AS**) dealing with question 6, the Applicant accepts that the previously constituted Gomeroi Applicant was the *"registered native title claimant*" and thus "*the native title party*" at least until the order of 7 December 2017: see esp. [67]-[68]. The Applicant also accepts, at least implicitly, that Santos' continued negotiation with the prior Gomeroi applicant whilst it was the *"registered native title claimant*" was not of itself a breach of the good faith obligation in s 31(1): AS, [68], esp. the last sentence in parentheses.

7. Having accepted those two matters, the Applicant seeks to rely on the indoor management rule to argue that the Tribunal is precluded from finding that Santos' "*duty of good faith cannot be discharged unless it negotiates with the registered native title claimant*": AS, [69] (note also AS, [68]). Putting to one side the Applicant's reliance on the indoor management rule, the Applicant's argument suffers from at least two material deficiencies.

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[4] Court Book, 896 (Appeal Book Part B, 10.89)

8. First, it is not apparent that the argument is directed at any error of law the Tribunal might have fallen into. Specifically, at [171]-[177] of the Determination, the Tribunal did not make a finding that it was not possible for Santos to discharge its obligation of good faith unless it negotiated with the registered native title claimant: *cf.* AS, [68]-[69]. The Tribunal's conclusions at [177] were based on its examination of the relevant factual events in 2016 and 2017, Santos' knowledge and conduct during that period, the operation and effect of the relevant parts of the NTA (esp. s 66B), the outcome of Court proceedings following the resolution passed on 20 July 2016 and the contents of correspondence and other materials exchanged between the parties. Whether the obligation of good faith required Santos to negotiate with the registered native title claimant only was not a matter which was considered by the Tribunal. In those circumstances, no question of law properly arises for consideration by this Court in the terms suggested by the Applicant's submissions.

9. Secondly, the submission at AS, [67] concerning the revocation of authority, does not properly account for the content and operation of s 66B. As is apparent from s 66B(1)(a), a material issue that arises in an application under s 66B is whether the person to be replaced is no longer authorised by the claim group to make the native title application and whether the person seeking an order under s 66B is authorised by the claim group to make the native title application: *Daniel v State of Western Australia* (2002) 194 ALR 278; [2002] FCA 1147, at [17]. Where there is a contest about those questions (as was the case here), the resolution of those questions by the Court in its consideration of the application under s 66B determines (relevantly) whether an existing applicant's authorisation has been revoked. Here, that occurred in Rangiah J's decision of 7 December 2017. Prior to that time, there was a live issue as to whether the authorisation of the prior Gomeroi applicant had been withdrawn.

Question 3

10. The State submits that the Tribunal did not fall into error as asserted by the Applicant.

11. A proper examination of the reasons as a whole[5] reveals that, whilst the Tribunal expressed views about the Parliament's intention in connection with the repeal of the previous ss 39(1)(a)(vi) and (b) by the *Native Title Amendment Act 1998* (Cth) (**1998 Amending Act**), it considered the specific "*environmental matters*" raised by the Applicant at length and did not confine its consideration of those matters as the Applicant now suggests.

12. At [769]-[771] and [802]-[804] of the Determination[6], the Tribunal summarised the Applicant's contentions and submissions concerning, *inter alia*, greenhouse gas emissions, climate change and the evidence of Professor Steffen. The Tribunal summarised Professor Steffen's evidence elsewhere in the Determination.[7] At [802(c)] the Tribunal specifically referred to the Applicant's submission that the Narrabri Gas Project was "*not in the interests of the public because of the greenhouse gas emissions and climate change*". The Tribunal then summarised the extensive contentions and submissions made by both Santos and the State on these issues at length.[8] The contentions and submissions of all the parties addressed the issues of greenhouse gas emissions and climate change in detail and were not confined to the effect that those matters might have on the Gomeroi's native title.

13. At [925]-[928], the Tribunal referred to the removal of the previous s 39(1)(a)(vi) and (b) by the 1998 Amending Act and the Explanatory Memorandum (**EM**) to the Bill that became that Act. It observed that these amendments evinced a legislative intention to leave environmental considerations for State and Territory environmental processes with the consequence that any consideration of environmental matters by

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[5] Eg *Minister for Immigration and Border Protection v Tran* (2015) 232 FCR 540; [2015] FCA 546, at [24], cited with approval in *Wilson Transformer Company Pty Ltd v Anti-Dumping Review Panel* [2022] FCAFC 4, at [51] (per Griffiths and O'Callaghan JJ).

[6] Also at [945]-[946].

[7] Eg, Determination, [539]-[541].

[8] Eg, Determination, [813], [832]-[841], [855]-[859], [868]-[871] and [876].

the Tribunal would be directed to those that need to be taken into account because of the particular effect they might have on native title. The Tribunal stated at [928] that it "*should accept the processes undertaken by the State and, to the extent that there are particular environmental concerns, having a particular effect upon native title, consider them pursuant to s 39(1)(f)*". The Tribunal made similar statements at [940], [944], [987] and [1016]. It observed that its consideration of environmental matters should be directed to the effect of such matters on the Gomeroi applicant's native title.

14. Two things may be said about these statements.

15. First, it was open to the Tribunal to make the statements. The deletion of the previous s 39(1)(a)(vi) and (b) by the 1998 Amending Act removed the express requirement to consider the effect of the proposed act on the *"natural environment*". As a consequence, there was no longer any express requirement in s 39 to consider "*environmental matters*". The explanation in the EM (which the Applicant accepts is relevant[9]) confirmed that Parliament intended that the Tribunal itself should decide when to take into account "*environmental matters*" (pursuant to s 39(1)(f)). The EM suggested that any such consideration should be limited to the effect on native title rights and interests, given that the environmental effects of a proposed act (generally) will usually be assessed under State and Territory processes. The Tribunal's statements were consistent with the substance of the amendments made by the 1998 Amending Act and the explanation in the EM.

16. Secondly, and relatedly, in making the statements, the Tribunal did not seek to limit itself to only considering the effects of the environmental matters raised by the Applicant (namely, greenhouse gas emissions and climate change) on the Gomeroi Applicant's native title. So much is apparent from the following:

    A. at [947], the Tribunal noted that the parties "*addressed wider environmental issues connected with climate change*" (ie beyond any effect on native tile). It stated that it would "*address such matters*" (but, in doing so, would "*take into account*"

[9] AS, [24].

Parliament's intention as discerned from the changes brought about by the 1998 Amending Act);

B. at [970], the Tribunal stated that it is "*concerned with the effect of the proposed grants on the Santos project area*". It went on to observe at [971] that the State bodies that considered the issue of climate change "*focussed on the quantity of greenhouse gas emissions from the project within the context of state, national, and international commitments to limit temperature rise, with the intention of mitigating the worst impacts predicted to occur as a result of climate change*". It considered that it should take a similar approach;

C. in response to the Applicant's submission concerning the global impacts of greenhouse gas emissions and climate change, the Tribunal noted that its consideration of such matters is "*limited to an assessment of the evidence before it, regarding the effect of the proposed grants*": [972];

D. at [973]-[975], the Tribunal accepted that it may take into account the "*rigorous examination*" of greenhouse gas emissions and climate change issues by the State's Independent Planning Commission. As recorded elsewhere in its Determination,[10] the Commission was a specialist body comprising experts in planning and environmental matters. Its examination of greenhouse gas emissions and climate change issues was detailed and broad[11];

E. at [1015], the Tribunal observed that aspects of the public interest "*may be in conflict*" and that "*the risk of escaping gas and contribution to climate change are factors for consideration*" (when weighing up the public interest).

17. These aspects of the Determination (together with the parts discussed in paragraph 19 below) tell against the assertion by the Applicant that the Tribunal found that it was prohibited from considering "*environmental matters*" except in relation to a "*particular environmental concern having particular effect on native title*". It is clear

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[10] Determination, [540], [542] and [876(b)].

[11] See Determination, [43]-[58].

from the passages referred to in the preceding paragraph that the Tribunal made no such finding. The Applicant's assertion (as well as the first and second alleged errors under question 3) should be rejected.

18. Furthermore, and consistently with the matters in the passages referred to in paragraph 16 above, the Tribunal gave extensive consideration to the issues of greenhouse gas emissions and climate change (being the "*environmental matters*" raised by the Applicant), so far as they related to the Narrabri Gas Project and the Project area. Thus:

    A. the Tribunal considered Professor Steffen's evidence concerning climate change, including his views as to its effects. It referred to specific aspects of his evidence, including his erroneous assumption that the Narrabri Gas Project would involve fracking and his dismissal of the Independent Planning Commission's conclusions. The Tribunal observed that climate change was a world-wide issue and was a matter for governments to resolve: [969]-[970];

    B. at [979]-[981], the Tribunal considered the discussion in the Departmental report (prepared for the Independent Planning Commission) concerning environmental matters. At [981], the Tribunal specifically referred to the discussion in that report concerning greenhouse gases and climate change;

    C. at [982]-[984], the Tribunal considered the "Greenhouse Gas Assessment" prepared by an expert on behalf of Santos and included as Appendix R to the Environmental Impact Statement prepared for Narrabri Gas Project. As the Tribunal observed, the assessment "*examined the greenhouse gas emissions associated with the*" Project;

    D. at [985]-[986], the Tribunal referred to its previous discussion of the relevant parts of the Independent Planning Commission's Reasons[12] and set out the Commission's ultimate conclusions concerning greenhouse gas emissions and the environmental impacts of the Project (including its conclusion that environmental

[12] See Determination, [43]-[58].

risks are capable of being mitigated by the imposition of conditions). As the Tribunal noted,[13] the Commission's decision withstood a judicial review challenge in the State's Land and Environment Court;[14]

E. at [987], the Tribunal accepted that greenhouse gas emissions *"may lead to environmental harm*". It noted that the "*matter has been extensively considered by the relevant State agencies*" and it was not prepared to give preference to Professor Steffen's views over those of the relevant State agencies.

19. It is evident from these passages that the Tribunal did not, in fact, confine itself to considering only the effects of greenhouse gas emissions and climate change on the Gomeroi's native title. It considered the issues much more broadly.

20. At AS, [26]-[27] the Applicant submits that the Tribunal (i) decided it was not required to consider Professor Steffen's evidence concerning climate change and (ii) that it was required to do so. These submissions should be rejected. First, they appear to be premised on the proposition that the Tribunal found that it was restricted to considering only "*particular environmental matters that had particular effects on native title*". As submitted above, that proposition is incorrect. Secondly, the Tribunal in fact considered Professor Steffen's evidence concerning climate change. It was unwilling to prefer his views over the conclusions in the environmental reports prepared in the course of the State environmental assessment process and the conclusions reached by the relevant State agencies (in particular, those of the Independent Planning Commission).

21. The Applicant's erroneous submissions at AS, [26]-[27] are compounded by the attempt to engage in merits review at AS, [28]-[30].

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[13] Determination, at [509], [834] and [973].

[14] *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110, per Preston CJ. It is recognised that the NSW Land and Environment Court is a specialist court with "*great expertise in determining disputes based upon the application of environmental protection laws*": *Australian YMCI Ltd v Secretary of the Department of Customer Service* [2021] NSWSC 1114 at [114] (Walton J); see also *JK Williams Staff Pty Ltd v Sydney Water Corporation* [2020] NSWSC 220 at [62] (Robb J).

22. The Applicant's submissions at AS, [31] should also be rejected. First, they also appear to be premised on the proposition that the Tribunal found that it was restricted to considering only "*particular environmental matters that had particular effects on native title*". As submitted above, that proposition is incorrect. Secondly, the submissions suggest that the Tribunal did not independently consider the issues of greenhouse gas emissions and climate change. Again, that is incorrect.

23. The Applicant does not advance any specific submissions in support of the third alleged error under question 3. There was no such error. The Tribunal considered the public interest at length and concluded that the public interest weighed in favour of allowing the proposed act to be made.

Henry El-Hage

11 July 2023