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Federal Court of Australia

District Registry: Victoria

Division: General

No. VID 555 of 2022

Santos NA Barossa Pty Ltd (ACN 109 974 932)

Appellant

Dennis Murphy Tipakalippa and another named in the schedule

Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

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A. SUMMARY

1. For a titleholder to conduct petroleum activities in an offshore area, NOPSEMA must accept an environment plan submitted by the titleholder. An environment plan is integral to achieving the regulatory object of ensuring that such activities are carried out in a manner consistent with the principles of ecologically sustainable development, reducing environmental impacts and risks as low as reasonably practicable. The environment, in this context, includes people and communities, the heritage value of places, and their social, economic and cultural features.

2. Before accepting an environment plan, NOPSEMA must be reasonably satisfied that the plan demonstrates that, in the course of preparing the environment plan, the titleholder has consulted each person or organisation (a **relevant person**) whose functions, interests or activities may be affected by the activities to be carried out under the environment plan.

3. In March 2022, NOPSEMA accepted an environment plan submitted by Santos in relation to a drilling and completions campaign to be carried out 138 km north of the Tiwi Islands (**Drilling EP**). That Drilling EP contained a list of the persons that Santos considered were relevant persons, whom Santos also claimed to have consulted. But the Drilling EP did not provide information as to how it identified those relevant persons that was sufficient to demonstrate that all relevant persons had been identified and consulted. The Drilling EP neither identified the traditional owners of the Tiwi Islands as relevant persons nor explained that they were not relevant persons, despite the Drilling EP containing material which suggested that those traditional owners had "functions, interests or activities" which may be affected by the activity to be carried out.

4. In these circumstances, the primary judge held that NOPSEMA's decision to accept the Drilling EP was affected by jurisdictional error. The first error was in substance *Li*[1] unreasonableness: NOPSEMA's decision was legally unreasonable and thus no real state of satisfaction at all. The basis for this finding was that the Drilling EP did not explain how relevant persons were identified with sufficient clarity to satisfy NOPSEMA that all relevant persons had been identified. The second error was in substance failure to give proper consideration to a mandatory relevant consideration (being the Drilling EP submitted for acceptance).[2]

5. The first respondent submits that the primary judge's conclusions were correct and the appeal should be dismissed. The first respondent goes further and contends, by notice of contention, that the two deficiencies summarised in paragraph 3 above should have led the primary judge to conclude that NOPSEMA was not reasonably satisfied, within the meaning of the explicit

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1 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

2 **J[218], Appeal Book, Pt A, tab 7, 124; J[257], Pt A, tab 7, 134**.

statutory standard, that the Drilling EP demonstrated that the relevant consultation with each and every relevant person had occurred, a requirement over and above *Li* unreasonableness. Even if the identified deficiencies do not amount to *Li* unreasonableness or a failure to consider, they do lead to the conclusion that NOPSEMA did not reach a reasonable state of satisfaction.

B. BACKGROUND

B.1 The statutory scheme

Objects and guiding principles

6. The Act and Regulations relevantly regulate the undertaking of activities (defined in reg 4 to include both petroleum activities and greenhouse gas activities) in offshore areas, by establishing a scheme for NOPSEMA to accept an environment plan in respect of those activities. It is uncontroversial that the activities to be undertaken by Santos are petroleum activities (and therefore "activities") to be undertaken in an offshore area.

7. The object of the Act is to "provide an effective regulatory framework for petroleum exploration and recovery … in offshore areas" (s 3). The object of the Regulations is to "ensure that any petroleum activity … carried out in an offshore area" is (reg 3):

    (a) carried out in a manner consistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act; and

    (b) carried out in a manner by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and

    (c) carried out in a manner by which the environmental impacts and risks of the activity will be of an acceptable level.

8. The principles of ecologically sustainable development identified in s 3A of the EPBC Act are:

    (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

    (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

    (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

    (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

    (e) improved valuation, pricing and incentive mechanisms should be promoted.

9. The term "environment", referred to in the object of the Regulations, is defined consistently with the definition used in the EPBC Act (s 528), as follows (reg 4):

(a) ecosystems and their constituent parts, including people and communities; and

(b) natural and physical resources; and

(c) the qualities and characteristics of locations, places and areas; and

(d the heritage value of places;

and includes

(e) the social, economic and cultural features of the matters mentioned in paragraphs (a), (b), (c) and (d).

The environment plan

10. The requirement of an environment plan is integral to the achievement of these objectives. It is an offence of strict liability for a titleholder to undertake an activity if there is no environment plan in force for the activity (reg 6); and for a titleholder to undertake an activity in a way that is contrary to the environment plan in force for the activity (reg 7).

11. Before commencing an activity, a titleholder must submit an environment plan to NOPSEMA in writing, which sets out "the full text of any response by a relevant person to consultation under reg 11A in the course of preparation of the plan" (reg 9) and includes "the matters set out in regulations 13, 14, 15 and 16" (reg 12).

12. Regulation 13(1) relevantly provides:

> The environment plan must contain a comprehensive description of the activity including the following:
>
> (a) the location or locations of the activity;
>
> …
>
> (c) an outline of the operational details of the activity (for example, seismic surveys, exploration drilling or production) and proposed timetables;
>
> (d) any additional information relevant to consideration of environmental impacts and risks of the activity.

13. "Environmental impact" is defined broadly as "any change to the environment, whether adverse or beneficial, that wholly or partially results from an activity" (reg 3), again engaging application of the comprehensive definition of "environment".

14. Regulation 13(2), which introduces the concept of "environment that may be affected" ("**EMBA**"), relevantly provides:

> The environment plan must:
>
> (a) describe the existing environment that may be affected by the activity; and
>
> (b) include details of the particular relevant values and sensitivities (if any) of that environment.

15. The expression "values and sensitivities" is undefined, but reg 13(3) provides in a non-exhaustive fashion as follows:

> Without limiting paragraph (2)(b), particular relevant values and sensitivities may include any of the following:
>
> (a) the world heritage values of a declared World Heritage property within the meaning of the EPBC Act;
>
> (b) the national heritage values of a National Heritage place within the meaning of that Act;
>
> (c) the ecological character of a declared Ramsar wetland within the meaning of that Act;
>
> (d) the presence of a listed threatened species or listed threatened ecological community within the meaning of that Act;
>
> (e) the presence of a listed migratory species within the meaning of that Act;
>
> (f) any values and sensitivities that exist in, or in relation to, part or all of:
>
> (i) a Commonwealth marine area within the meaning of that Act; or
>
> (ii) Commonwealth land within the meaning of that Act.

16. Regulation 13(5) relevantly provides that:

> The environment plan must include:
>
> (a) details of the environmental impacts and risks for the activity; and
>
> (b) an evaluation of all the impacts and risks, appropriate to the nature and scale of each impact or risk; and
>
> (c) details of the control measures that will be used to reduce the impacts and risks of the activity to as low as reasonably practicable and an acceptable level.

17. In relation to the evaluation required by reg 13(5)(b), reg 13(6) relevantly provides:

> To avoid doubt, the evaluation mentioned in paragraph (5)(b) must evaluate all the environmental impacts and risks arising directly or indirectly from:
>
> (a) all operations of the activity; and
>
> (b) potential emergency conditions, whether resulting from accident or any other reason.

18. Regulation 14 requires the environment plan to contain an implementation strategy, which itself must provide for "appropriate consultation" with "relevant interest persons or organisations" (reg 14(9)).

19. Regulation 16(b) relevantly provides:

> The environment plan must contain the following:
>
> ...
>
> (b) 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 …

20. If NOPSEMA considers that the environment plan provisionally includes the material apparently addressing all of the contents of an environment plan, NOPSEMA must publish the environment plan on its website as soon as practicable (regs 9AA, 9AB).

21. NOPSEMA may request, in writing, that the titleholder provide further written information about any matter required by the Regulations to be included in an environment plan, and may require a response within a reasonable period (reg 9A). A titleholder must resubmit to NOPSEMA the environment plan within the new information incorporated, and NOPSEMA must then have regard to the new information submitted (reg 9A).

Criteria for acceptance by NOPSEMA of an environment plan

22. For the purpose of this appeal, the key provisions of the Regulations are regs 10(1), 10A(g) and 11A(1)(d) and (2).

23. Regulation 10(1) relevantly provides:

> Within 30 days after the day described in subregulation (1A) for an environment plan submitted by a titleholder:
>
> (a) if the Regulator is reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must accept the plan; or
>
> (b) if the Regulator is not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must give the titleholder notice in writing under subregulation (2); or
>
> (c) if the Regulator is unable to make a decision on the environment plan within the 30 day period, the Regulator must give the titleholder notice in writing and set out a proposed timetable for consideration of the plan.

24. Regulation 10A relevantly provides:

> For regulation 10, the criteria for acceptance of an environment plan are that the plan:
>
> …
>
> (b) demonstrates that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and
>
> (c) demonstrates that the environmental impacts and risks of the activity will be of an acceptable level; and
>
> …
>
> (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…

25. Division 2.2A relevantly requires, by reg 11A(1)(d), that:

> In the course of preparing an environment plan, or a revision of an environment plan, a titleholder must consult each of the following (a relevant person):
>
> …
>
> (d) a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan …

26. Division 2.2A also relevantly requires, by reg 11A(2)-(4) that:

> (2) 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.
>
> (3) The titleholder must allow a relevant person a reasonable period for the consultation.
>
> (4) The titleholder must tell each relevant person the titleholder consults that:
>
> (a) the relevant person may request that particular information the relevant person provides in the consultation not be published; and
>
> (b) information subject to such a request is not to be published under this Part.

27. Read together, regs 10(1), 10A(g) and 11A(1)(d) require NOPSEMA, before it may accept an environment plan, to be reasonably satisfied that the environment plan demonstrates that, in the course of preparing it, the titleholder has consulted (in compliance with the requirements of reg 11A(2)-(4)) each person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan. Relevantly to a proper understanding of this requirement, NOPSEMA must also be reasonably satisfied that the environment plan demonstrates that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable and to an acceptable level (reg 10A(b) and (c)).

C THE DRILLING EP

C.1 The Barossa Project

28. The Barossa Project is a project, proposed by Santos, to exploit an offshore gas-condensate field in the Timor Sea known as the Barossa Field, to provide a new source of natural gas for approximately 20 years to Santos's existing onshore Darwin Liquefied Natural Gas Facility at Wickham Point (**J[3]-[4], Appeal Book Pt A, tab 7, 59)**. Santos intends to exploit that field using a floating production storage and offloading facility, subsea production system, supporting in-field infrastructure and a gas export pipeline connected to an existing pipeline (**J[3], Pt A,**

tab 7, 59). Santos holds a petroleum production licence in respect of the Barossa Field (**J[3], Pt A, tab 7, 59**). The operational area of the Barossa Project is located approximately 138 km north of the Tiwi Islands (**J[4], Pt A, tab 7, 59**).

29. The Drilling EP relates to one part of the Barossa Project, referred to as the "drilling and completions campaign", which entails the drilling and completion of up to eight production wells using a semi-submersible mobile offshore drilling unit (**J[5], Pt A, tab 7, 60**). The activity under the Drilling EP is intended to take place between 2022 and 2025, with the entire drilling campaign to take approximately 18 months (**J[5], Pt A, tab 7, 60)**. The drilling and completions campaign is to be followed by the installation of project facilities, after which condensate is intended to be offloaded to vessels, and gas is to be exported through the new pipeline (**J[6], Pt A, tab 7, 61**).

30. As part of the Barossa Project, other environment plans were also submitted to NOPSEMA, referred to in materials before the decision-maker as "previous EPs" (**J[121], Pt A, tab 7, 95-96; J[169], Pt A, tab 7, 108; J[227], Pt A, tab 7, 126-127**) and by the primary judge as "related EPs" (**J[244], Pt A, tab 7, 132; J[248], Pt A, tab 7, 132; J[287], Pt A, tab 7, 141**). The primary judge assumed without deciding that the related EPs were material before the delegate and therefore admissible (**J[244], Pt A, tab 7, 132; J[287], Pt A, tab 7, 141**). Those related EPs included a Pipeline Revision EP, relating to the gas export pipeline, submitted to NOPSEMA in December 2021,[3] in the period during which the Drilling EP was being considered.

C.2 The Drilling EP

31. Revision 1 of the Drilling EP was submitted to NOPSEMA in October 2021 (**J[55], Pt A, tab 7, 72**). Following requests made by NOPSEMA under reg 9A for further information, Revision 2 was submitted in December 2021 (**J [59], Pt A, tab 7, 73**)[4] and Revision 3 was submitted in February 2022 (**J[60], Pt A, tab 7, 73**). It is Revision 3 that is the subject of this appeal.

32. The Drilling EP is 590 pages, divided into 9 chapters and 7 appendices. Each of chapters 2 to 9 are addressed to specific criteria set out in the Regulations:

    (a) Chapter 2 addresses the requirement in reg 13(1) that the Drilling EP contain a description of the activity to be carried out (**J[93], Pt A, tab 7, 82**);

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[3] Affidavit of Cameron Charles Grebe affirmed 1 August 2022 (Grebe affidavit), Appeal Book Pt C, Tab 9, [23] and CG6, Pt C, tab 58 (pp 448-9).

[4] As noted by the primary judge, Revision 2 was not in evidence and NOPSEMA's failure to produce it as a document before the decision-maker was not explained: **J[124], Pt A, tab 7, 97-98**.

(b) Chapter 3 addresses the requirements in reg 13(2) and (3) to describe the existing "environment that may be affected", or EMBA, including details of the "values and sensitivities" of that environment (**J[94], Pt A, tab 7, 82**);

(c) Chapter 4 purports to address the consultation requirements in regs 11A and 16(b) (**J[95], Pt A, tab 7, 83; J[102]-[107], Pt A, tab 7, 85-87**), including:

(i) in section 4.2 and Table 4-1, identifying a list of "relevant persons" (**J[102], Pt A, tab 7, 85; Annexure 1, Pt A, tab 7, 143**);

(ii) in section 4.3 and Table 4-2, describing how relevant persons were contacted, and their response to such contacts (**J [104], Pt A, tab 7, 86**)

(d) Chapters 5, 6 and 7 address the requirements in reg 13(5) and (6) that the Drilling EP must include details of the environmental impacts and risks, an evaluation of those risks, and details of measures used to "reduce the impacts and risks … to as low as reasonably practicable" (**J[96], Pt A, tab 7, 83**), divided as follows (**J[96]-[98], Pt A, tab 7, 83-84**):

(i) Chapter 5 discusses the "methodology" adopted by Santos to address the requirements in reg 13(5) and (6);

(ii) Chapter 6 discusses the assessment undertaken by Santos in relation to planned risks and impacts that will occur by reason of the activity to be carried out under the Drilling EP;

(iii) Chapter 7 discusses the assessment undertaken by Santos in relation to unplanned risks that may occur by reason of the activity to be carried out under the Drilling EP, including a "loss of well control" event; and

(e) Chapter 8 addresses the requirements in reg 14 (**J[99], Pt A, tab 7, 85**).

33. Crucially, the Drilling EP contains extensive references to the interests of traditional owners, including traditional owners of the Tiwi Islands, in the sea country relevant to the environment that may be affected by the activities to be carried out under the Drilling EP. Those references were identified by the primary judge at **J[205]-[206], Pt A, tab 7, 117-121**. While all of the references should be considered, in context, to understand their significance, the following are illustrative:

(a) "The key physical characteristics of the [North Marine Region] and [North-west Marine Region] relevant to the EMBA" include "significant sea country for Traditional Owners" (**J[205](i), Pt A, tab 7, 117**);

(b) The "socio-economic-related activities that occur or may occur in the operational area and/or environment that may be affected" included "[u]se of marine resources by Aboriginal and Torres Strait Islander peoples is generally restricted to coastal waters and therefore not expected within the offshore deeper waters of the operational area" (**J[205](ii), Pt A, tab 7, 117**);

(c) concerns had been raised over "potential environmental impacts and risks of the activities" on "Tiwi Islands Sea Country" and "other areas of marine or terrestrial Aboriginal Cultural significance and/or heritage" (**J[205](iv), Pt A, tab 7, 117**);

(d) "[m]arine resource use by Indigenous people is generally restricted to coastal waters. Fishing, hunting and the maintenance of maritime cultures and heritage through ritual, stories and traditional knowledge continue as important uses of the nearshore region and adjacent areas. While the MEVA [moderate exposure value area discussed in chapter 7, see eg Figure 7-5] is largely offshore, the potential visible presence of surface oil within the EMBA would be of concern to Indigenous people" (**J[205](viii), Pt A, tab 7, 118**);

(e) "while direct use by Aboriginal and Torres Strait Islander peoples [of] deeper offshore waters is limited, many groups continue to have a direct cultural interest in decisions affecting the management of these waters. The cultural connections Aboriginal and Torres Strait Islander peoples maintain with the sea may be affected, for example, by offshore fisheries and industries" (**J[205](xiii), Pt A, tab 7, 118**).

34. Santos accepted below that (**J[220], Pt A, tab 7, 124-125**):[5]

> The Drilling EP therefore both acknowledged and assumed that there was sea country in the EMBA. It acknowledged that indigenous cultural heritage values in sea country could be affected by unplanned activities, being a hydrocarbon release resulting from loss of well control or a marine diesel oil spill from a vessel collision.

D THE REASONS

35. NOPSEMA accepted Revision 3 in March 2022 (**J[61], Pt A, tab 7, 73**). The Reasons provided by NOPSEMA in May 2022 (**J[62], Pt A, tab 7, 73**) relevantly stated (**J[63], Pt A, tab 7, 73-74**):

> In accordance with regulation 10 and based on the available facts and evidence, NOPSEMA was reasonably satisfied that the [Drilling EP] met the following criteria set out in sub-regulation 10A of the [Regulations]:
>
> …
>
> f. the [Drilling EP] demonstrates that:

[5] This was a reference to Santos's pre trial Outline of Submissions dated 17 August 2022, at [140].

i. the titleholder has carried out the consultations required by Division 2.2A …

36. The Reasons provided by NOPSEMA's delegate also relevantly stated (**J[116], Pt A, tab 7, 90-91**):

> NOPSEMA is reasonably satisfied that the [Drilling EP] demonstrates that the titeholder has carried out the consultations required by Division 2.2A … are appropriate because:
>
> a. Consultation has taken place with relevant persons as required by regulation 11A.
>
> i. Relevant 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 [Drilling EP]. The [Drilling 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 …

E. CONCISE STATEMENT OF THE ISSUES ON APPEAL

37. The issues on this appeal are:

(a) the content of the statutory standard set by the phrase "reasonably satisfied" (arising under appeal ground 4 and notice of contention ground 1) (Section F below);

(b) the relevance of the methodological approach (arising under appeal grounds 1, 3(a) and 3(b), and notice of contention ground 1(a)) (Section G);

(c) the meaning of the statutory expression "functions, interests or activities" (arising under appeal ground 3(a)) (Section H);

(d) the relevance of the "sea country material" contained in the Drilling EP (arising under appeal grounds 2(a)-(c) and 3(c)-(e), and notice of contention ground 1(b)) (Section I); and

(e) the adequacy of the consultation with the Tiwi Land Council (arising under notice of contention ground 2) (Section J).

F APPEAL GROUND 4; CONTENTION GROUND 1: "REASONABLY SATISFIED"

38. At trial, it was uncontroversial that the ultimate issue for the Court to determine was whether NOPSEMA's delegate reached the requisite state of satisfaction. Thus, the primary judge considered it was not in contest that "the jurisdictional precondition for the exercise of NOPSEMA's power to accept an environment plan is that NOPSEMA 'is reasonably satisfied that the environment plan meets the criteria set out in reg 10A'" (**J[65], Pt A, tab 7, 74**).

39. What was in contest at trial was the content of the expression "reasonably satisfied" in reg 10. The primary judge considered that the first respondent was required to "establish more than that NOPSEMA came to a wrong conclusion" (**J[13], Pt A, tab 7, 62**). Rather, the first respondent was required to establish that, in reaching the requisite standard of satisfaction, NOPSEMA failed to "proceed reasonably and on a correct understanding and application of the applicable law" (**J[13], Pt A, tab 7, 62; J[66], Pt A, tab 7, 74**).

40. It was in that context that the primary judge considered that the words "reasonably satisfied" were "directed at the standard of satisfaction that NOPSEMA must apply in making the assessment required of it" (**J[74], Pt A, tab 7, 76-77**), and concluded that "NOPSEMA did not have the requisite state of satisfaction that it was required to have" (**J[157], Pt A, tab 7, 105**).

41. Both Santos and NOPSEMA on appeal now characterise the ultimate issue on the appeal as whether it was "open" [**2RS[1]**] or "legally open" [**AS[33]**] for NOPSEMA's delegate to be "reasonably satisfied", and that the primary judge erred in proceeding in some different way.

42. In fact, despite describing his reasoning as proceeding from the statutory requirement for NOPSEMA to be "reasonably satisfied", the primary judge's actual reasoning on ground one was directed to satisfying *Li* unreasonableness principles.[6] So much is clear from **J[65]-[75], Pt A, tab 7, 74-77; J[77], Pt A, tab 7, 77; J[177], Pt A, tab 7, 110; J[208], Pt A, tab 7, 121-122**. Once this is appreciated, two things follow. Ground four of the notice of appeal fails, because the primary judge's explanation of unreasonableness was accurate and adequate to justify the finding of error on NOPSEMA's part. And the primary judge erred in not appreciating that an explicit statutory requirement for reasonable satisfaction demands more than the *Li* standard. Not only was the decision legally unreasonable (and even if it was not legally unreasonable), it was not a reasonable state of satisfaction on the authorities.[7] By ground 1 of his notice of contention, the first respondent submits that the judge erred and ought to have applied the standard required by reg 10(1) of the Regulations. The Regulations require a higher standard than a decision that is merely not legally unreasonable.

43. *First*, reg 10(1) turns upon NOPSEMA forming a particular state of mind described in terms of "satisfaction". That must be more than mere suspicion. It involves "an affirmative belief".[8]

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6 See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363-4, 367 (Hayne, Kiefel and Bell JJ), 370-1, 375-6 (Gageler J); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 550-1 (Kiefel CJ), 572-3, 575-7 (Nettle and Gordon JJ),. Both authorities were cited at **J [70]**; **Pt A, tab 7, 76.**

7 See fn 9 below.

8 See, eg *BOY19 v Minister for Immigration and Border Protection* (2019) 165 ALD 39 at [55] (O'Bryan J).

44. *Second*, like any state of mind, it must be reasonably formed and based on a proper understanding of the applicable law (**J[13], (Pt A, tab 7, 62); J[66], Pt A, tab 7, 74**)). A state of mind which is unreasonably formed is in law no state of mind at all.

45. *Third*, the effect of providing, expressly, that a particular state of mind must be "reasonable" or formed "reasonably" is firmly established in Australian law. Indeed, it is so firmly entrenched that the drafters of the Regulations should be presumed to appreciate, and intend, the consequences of this drafting choice.[9]

46. The fact that the word "reasonably" has been placed before the word "satisfied" makes it clear that the state of satisfaction that the Regulator must reach must be "justifiable upon an objective examination of the relevant material", meaning that facts must exist which are sufficient to induce a reasonable state of satisfaction in the mind of a reasonable decision-maker.[10]

47. The effect of doing so is 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 in the mind of a reasonable person in that decision-maker's position, and not just whether the decision-maker's own stated view that it was "reasonably satisfied" was itself unreasonable. The scope for judicial intervention is greater than reviewing merely for legal unreasonableness.

48. In saying so, the words "reasonably satisfied" are to be treated in the same way that the courts have approached provisions framed in terms of being "satisfied on reasonable grounds". It is convenient to pre-empt two objections to doing so.

49. One possible objection is that the regulatory words are "reasonably satisfied" and not "satisfied on reasonable grounds". This is a distinction without a difference. Take a provision familiar to this Court: s 189(1) of the *Migration Act 1958* (Cth). It compels an officer to detain a person whom she or he "knows or reasonably suspects" to be an unlawful non-citizen in the migration zone. The High Court has approached this language by applying authorities on what it means to require "reasonable grounds".[11] This objection can be put firmly to one side.

50. Another possible objection is specific to these Regulations. As Santos notes, a previous version of the Regulations did use the language of "reasonable grounds" and that language was replaced

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[9] See *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582 at [39] (Gageler J); *Wilkie v Commonwealth* (2017) 263 CLR 487 at [98] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[10] *Thoms v Commonwealth* (2022) 96 ALJR 635 at [58] (Gordon and Edelman JJ); *Prior v Mole* (2017) 261 CLR 265 at [4] (Kiefel and Bell JJ), [24] (Gageler J), [98] (Gordon J); *Goldie v Commonwealth* (2002) 117 FCR 566 at [4] (Gray and Lee JJ).

[11] See *Thoms v Commonwealth* (2022) 96 ALJR 635 at [58] (Gordon and Edelman JJ); *Ruddock v Taylor* (2005) 222 CLR 612 at [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Gill v Minister for Immigration and Border Protection* (2017) 250 CLR 309 at [92] (Logan, Griffiths and Moshinsky JJ).

in 2014 with the language of "reasonably satisfied" [**AS[42]**]. A fair examination of the reasons for this change show that no difference in approach was intended by this change.

51. Prior to the *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulation 2014* (**2014 Amending Regulation**), acceptance of an environment plan was governed by reg 11 of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth). Regulation 11(1) provided that "The Regulator must accept the environment plan if there are reasonable grounds for believing that the plan" met certain criteria, and reg 11(2) provided that "If the Regulator is not reasonably satisfied that the environment plan when first submitted meets the criteria set out in subregulation (1), the Regulator must give the operator a reasonable opportunity to modify and resubmit the plan".

52. The point of the 2014 Amending Regulation was to eliminate the different language in reg 11(1) (reasonable grounds for believing) and reg 11(2) (reasonably satisfied). There is nothing in the explanatory statement to suggest that any departure from the well-established case law on what it means to have a reasonable state of mind was intended.[12] This objection may be put aside.

53. *Fourth*, the subject matter of the state of mind is whether or not the environment plan "demonstrated" something. The word "demonstrate" is not defined. It takes its ordinary meaning of "to show or make evident by reasoning" (*Oxford English Dictionary*) or "to make evident by arguments or reasoning; prove" (*Macquarie Dictionary*).[13]

54. This is self-evidently a strong word. Giving it a muscular interpretation consistent with its ordinary meaning coheres with the context and purpose of the Regulations.

    (a) An object of the Regulations is to "ensure" — itself a strong, prescriptive word, meaning here something to the effect of making sure that something occurs or does not occur[14] — that petroleum activities and greenhouse gas activities are carried out in a manner by which the environmental impact and risks will be of an acceptable level. "Environment" is defined to include the heritage value of places and the cultural features all aspects of the environment. NOPSEMA can "ensure" this by being satisfied that a plan demonstrates, in the sense of proves or establishes, that all relevant persons have been consulted.

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[12] See Explanatory Statement, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendent (Environment Measures) Regulation 2014* (Cth) at 34.

[13] See *Re O'Neill and Pharmacy Restructuring Authority and Anor* (1993) 29 ALD 910 at 913-914.

[14] See *DPP (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402 at 412 [65]-[66]; *ACCC v Chrisco Hampers Australia Ltd* (2015) 239 FCR 33 at 54 [117], 55 [124] (Edelman J).

(b) The verb "demonstrate" is used from time to time in the Regulations by contrast to the verb "describe".[15] The contrast is important. It suggests that one does not "demonstrate" something merely by "describing" what was done.

(c) Acceptance of the environment plan can result in activities that irrevocably affect rights and interests. That suggests that the regulator should be sure that those whose rights and interests may have been affected were consulted. The titleholder is best placed to know, and then to include information in the EP as to, the relevant persons with respect to its proposed activity, and who it has in fact consulted. This favours a robust interpretation of "demonstrate".

(d) Such an interpretation does not unworkably intrude upon the titleholder's interests. Ultimately, what they need to do is "consult". What is demanded of them is rigour in identifying with whom they must consult.

(e) One of the groups of relevant persons is those who the titleholder "considers relevant", and so has chosen to consult: reg 11A(e). This reinforces that paragraph (d) of the list of relevant persons cannot be confined to those who the titleholder has chosen or subjectively considers relevant. Paragraph (d) is, rather, a class of persons which is objectively defined.

(g) The regulatory obligation exists for the benefit of persons who may be affected by the proposed activity, and to benefit the environment as broadly defined. It is not there to benefit titleholders. A beneficial interpretation is, in this context, one which is more demanding of NOPSEMA than mere avoidance of *Li* unreasonableness.

55. The first respondent submits that the primary judge ought to have applied not only *Li* unreasonableness to determine if a lawful state of satisfaction was reached, but also, as submitted below, and now in the first ground of the notice of contention, the standard mandated by the text of the Regulations. When that statutory standard is applied, the deficiencies in the Drilling EP readily lead to the conclusion that any state of satisfaction was not "reasonable", even if that satisfaction was not legally unreasonable or the result of a failure to consider mandatory matters.

G APPEAL GROUNDS 1 AND 3(b), AND CONTENTION GROUND 1(a): "THE UNIVERSE OF RELEVANT PERSONS" AND METHODOLOGY

56. The first respondent submits that the primary judge was correct to hold that NOPSEMA's decision was affected by *Li* unreasonableness because the Drilling EP did not demonstrate that Santos had identified, and thus could consult with, all relevant persons. Even if, to the contrary,

[15] See eg regs 13(1) and (2) which requires "a comprehensive description of the activity" and that the environment plan "describe the existing environment that may be affected by the activity".

the primary judge erred in concluding that this rose to the level of unreasonableness, the primary judge should have found that NOPSEMA's satisfaction was not "reasonable".

G.1 Appeal Ground 1

57. The deficiency to which this issue is directed arises from the requirement, imposed by reason of regs 10(1), 10A(1)(g) and 11A(1), that NOPSEMA be reasonably satisfied that the Drilling EP demonstrates that Santos consulted with *each* relevant person. NOPSEMA must have some way of satisfying itself that the persons identified in the Drilling EP as having been consulted were *all* of the relevant persons who were required to be consulted. There must be adequate information in the environment plan to demonstrate that each relevant person had been identified, in order for NOPSEMA to be satisfied that each of those relevant persons had been consulted. Even without the explicit requirement of reasonable satisfaction, this would require objective material in the environment plan to demonstrate that identification.

58. NOPSEMA accepts on appeal that the "identification step" forms part of the scheme in r 11A [**2RS [12]**].

59. There is no single way to discharge this identification step, and the primary judge did not suggest otherwise. The primary judge identified three ways by which an environment plan can contain sufficient information for NOPSEMA to form a lawful state of satisfaction. The environment plan could identify each person by name or description, identify them by category, or "describe[s] the methodology utilised in terms which … demonstrate an understanding of the considerations which have to be and which were taken into account" (**J [139], Pt A, tab 7, 101**). That is to say, how relevant persons were identified might be explained in sufficient detail as to permit NOPSEMA to be satisfied that all relevant persons must have been identified, given the nature and quality of the method applied. The primary judge did not mandate that such a methodological demonstration be included in every environment plan. Rather, it was one means (but not the only means) by which a titleholder could, in an environment plan, demonstrate that each relevant person had been consulted.

60. This approach coheres with the regulatory language. The environment plan must contain sufficient information to enable NOPSEMA to know enough about how the relevant persons were identified in order to satisfy itself that none were missed. This does not introduce a "stand-alone inquiry" into the Regulations [**AS[67]**]. It simply gives content to the requirement to be "reasonably satisfied" of a particular subject matter, namely that the environment plan "demonstrates" that each relevant person have been consulted.[16]

[16] Compare, eg, the approach taken to the requirement that the Drilling EP identify "all the impacts and risks" (reg 13(5)), which Santos sought to satisfy by including Chapter 5 of the Drilling EP, which sets out a "methodology".

G.2 Appeal Ground 3(b)

61. Santos takes specific objection to the primary judge explaining the detail required of the relevant methodology, if the environment plan did not otherwise describe the list of relevant persons in a way that was self-evidently exhaustive of each relevant person, in terms of "values and sensitivities" [**AS[68]-[69]**]. Specifically, the primary judge said "[a] critical aspect of such a demonstration would be the identification of the totality of the sensitivities and values considered relevant and how each was evaluated to discover their possible intersection with the functions, interests and activities of particular people or organisations" (**J[139], Pt A, tab 7, 101**).

62. Plainly, that language derives from reg 13(2), which requires environment plans to include details of relevant "values and sensitivities" of the "environment". To describe how one goes about demonstrating that each relevant person was consulted in terms used in a different part of the Regulations is not to depart from the language of reg 11A(1)(d). Rather, it is to read the Regulations as a whole.

63. What reg 13(2) requires of a titleholder is to describe the existing "environment" that may be affected by the activity and to include in that description the "particular relevant values and sensitivities (if any) of that environment", being the environment that may be affected by the activity. The Note to reg 13(2) expressly recalls that the definition of "environment" includes its social, economic and cultural features. It could not be suggested that the description required by reg 13(2) is anything other than comprehensive. The primary judge reasoned at **J [138], (Pt A, tab 7, 101)** that having an understanding of the different values and sensitivities of the EMBA, as required by reg 13(2), is an indicator of the functions, interests and activities which may be affected by the activities, and thus of who will constitute a relevant person within the meaning of reg 11A(1)(d). In this sense, there is, as the primary judge correctly recognised, an "intersection" between the "value and sensitivities" and relevant "functions, interests or activities" (**J[139], Pt A, tab 7, 101**).

G.3 Why the Drilling EP's methodology was deficient (Appeal ground 1; Contention Ground 1(a))

64. The Drilling EP contained a list of the persons with whom Santos said it had consulted and a statement, aptly described by the primary judge as "self-serving recital of a conclusion" (**J[171], Pt A, tab 7, 108-109**), that all relevant persons had been identified. Given the breadth of the proposed activity, and the scope and nature of the activity's environmental impacts, that list was not self-evidently exhaustive of each relevant person. What is required is that the environment plan *demonstrates* the required consultation, which cannot be satisfied by mere assertion.

65. The identification step could nevertheless be demonstrated by information showing NOPSEMA how the relevant persons had been considered and identified, which requires consideration of

what was disclosed of Santos's methodology. The Drilling EP discloses that it "began the process of identifying relevant persons for this EP with a review of its stakeholder database" (**J [142], Pt A, tab 7, 102**). However, NOPSEMA was told little about how this starting point of a set of existing "stakeholders" was compiled. It is described as being populated with "relevant persons for other recent activities in the area", but no description of those recent activities or how relevant persons were identified in respect of those activities is provided, or why the fact that their identification with respect to the effects of different activities was a reliable guide to identifying all relevant persons whose functions, interests or activities may be affected by the drilling and completions activity. To compound the uncertainty, the relevant persons identified for the Drilling EP were only a subset of the stakeholder database.

66. Then, the Drilling EP stated that "[t]his list" (inferentially, the stakeholders in the database) was "reviewed and refined" (**J [142], Pt A, tab 7, 102**), but did not provide any information as to how. All that the Drilling EP disclosed (**J [142], Pt A, tab 7, 102**) was that (a) Santos checked legislation (point one), (b) identified commercial interests (including industry bodies) and licence holders (points two to four and seven) and (c) talked to (unidentified) people (points five, six and eight). This describes (in a summary way) actions taken by Santos but provided no information capable of demonstrating that each statutory relevant person was identified.

67. The history of the Drilling EP document confirms the inadequacy of the information to demonstrate the required identification step. Earlier iterations used the language of "stakeholders" and "interested persons", which was then simply replaced wherever they appeared with the language of "relevant persons" (**J[158]-[171], Pt A, tab 7, 105-109**). The history of the Drilling EP and its superficial change in language called for heightened explanation and scrutiny in order to be reasonably satisfied that it did demonstrate that all "relevant persons" have been identified.

68. Santos attempts to buttress this part of the Drilling EP by contending that a "holistic assessment" of the Drilling EP sheds greater light on how "relevant persons" were identified [**AS[76]**], but it is noteworthy that Santos points to no other parts of the Drilling EP that actually do so.

69. The primary judge's explanation of the limits of the Drilling EP was accurate, and justified (**J[143]-[158], Pt A, tab 7, 102-105**). The material was so deficient as to be incapable of demonstrating that all relevant persons had been identified, an essential step in enabling NOPSEMA to be satisfied that each relevant person had been consulted. For NOPSEMA to have regarded it as sufficient when patently it was not reveals legal unreasonableness. Even if the deficiency was not so significant and a state of satisfaction could be formed in compliance with the implied obligation to act reasonably, it remains the case (as contended by notice of contention ground 1) that the statutory standard of satisfaction required that there be facts in existence

which are sufficient to induce a reasonable state of satisfaction in the mind of a reasonable decision-maker. The limits pointed to above and by the primary judge lead to the conclusion that any state of satisfaction was not reasonable.

H APPEAL GROUND 3(a): "FUNCTIONS, INTERESTS OR ACTIVITIES"

70. By ground 3(a), Santos contends that "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)". That contention depends upon a narrow, and flawed, construction of that phrase.

71. The expression "function, interest or activity" must be interpreted broadly, for two reasons.

72. *First*, the objects of the Regulations in reg 3 include ensuring that environmental impacts and risks of the activity will be reduced to as low as reasonably practicable (reg (3)(b)) and will be of an acceptable level (reg 3(c)), and that the activity will be carried out consistently with the principles of ecologically sustainable development in s 3A of the EPBC Act. Those include that "decision-making processes" should "integrate … social and equitable considerations". The environment and environmental impacts are broadly defined in reg 4, as noted at paragraphs 10 and 14 above. These objects are best achieved[17] by construing "function, interest or activity" broadly. Consulting widely is an important means of collecting input into the possible risks and environmental impacts of the activity and ways of reducing those risks and impacts and managing them to an acceptable level. Such input is thus critical to ensuring that the regulatory objects are achieved.

73. In this context it is relevant to respond to **AS[93]**. There, Santos contends that the purpose of consultation is <u>not</u> to inform the titleholder's consideration of environmental effects but to inform, instead, the titleholder's consideration of the impact of the activity on functions, interests or activities of a person. Santos here draws a false distinction, when it is recognised that "environment" is defined in reg 4 to include "ecosystems and their constituent parts, including people and communities". "Functions, interests or activities" of a person are encompassed within this definition of the "environment".

74. *Second*, this is a provision plainly designed to benefit a particular class of persons, namely persons who may be affected by the activity. Such provisions should be given a broad construction.[18] In particular, remedial provisions "should be construed so as to give the most

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[17] *Legislation Act 2003* (Cth) s 13(a); *Acts Interpretation Act 1901* (Cth) s 15AA.
[18] See *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433 (Gibbs CJ).

complete remedy which is consistent 'with the actual language employed' and to which its words 'are fairly open'".[19]

75. Turning then to the specific components of the expression and starting with the word "activities", the definition of the term is an "aid in construing" the Regulations[20] but is expressed to be a definition subject to contrary intention.[21] A contrary intention may relevantly arise where, if the definition were to be applied, the provision "would not appropriately work", or where the context of the Regulations "as a whole" indicate the definition is not to apply.[22] Santos contends that it should take its defined meaning from reg 4. But the principle that language (including a definition) is used consistently in the one instrument is not absolute.[23] Here, there is good reason not to use the definition of "activity" in interpreting the expression "functions, interests or activities". The defined term "activity" is appropriate when referring to the proposed action the subject of the proposal or plan. It is when referring to what the proponent wants to do that the defined term "activity" is sensibly used. But when speaking of "functions, interests or activities", reg 11A is not (uniquely in these Regulations) speaking to what the proponent wants to do. It is directing attention at what others are doing. In that different context, the defined term is inapposite. There is simply nothing in the extrinsic materials to suggest a special solicitude for others engaging in petroleum or greenhouse gas activities.

76. As to interests, Santos contends that it should be confined to "legal interests" (**AS [62]**; **2R [62]]**). There is no warrant for reading the word "legal" into the Regulations. Additional words should be read in only in the case of simple, grammatical errors which would defeat the purposes of the legislation.[24] Had it been intended to confine the concept in this way, the qualifier "legal" could have been inserted, or the apt word "rights" employed. This is a strong textual indicator against Santos's argument. Conversely, Santos identifies no contextual support for its argument that the word "legal" should be read in; but there are strong arguments against it.

77. First, Santos's argument proceeds on an assumption that a construction should be given to the word "interests" which is "capable of ready ascertainment" of the relevant persons by the Titleholder. This assumption is also made by NOPSEMA: **2R [13]**. But that is an *a priori* assumption of the kind against which the High Court has frequently warned.[25] It is not

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[19] *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638 (Mason, Brennan, Deane and Dawson JJ). A beneficial interpretation is "a manifestation of the more general principle that all legislation is to be construed purposively": see *New South Wales Aboriginal Land Council v Minister for Administering the Crown Lands Act* (2016) 260 CLR 232, [96] (Gageler J).

[20] *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [12]

[21] Regulations, reg 4; *Tjungarrayi v Western Australia* (2019) 269 CLR 150 at [89].

[22] *Deputy Commisioner of Taxation (NSW) v Mutton* (1988) NSWLR 104 at [108].

[23] See *R v Jacobs Group (Australia)* [2022] NSWCCA 152 at [98] (Bell CJ; Walton and Davies JJ agreeing).

[24] *Taylor v Owners – Strata Plan No 11564* (2014) CLR 531 at [37]-[38].

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

sufficiently grounded in the text. In fact, the strong words used throughout the Regulations ("ensure", "demonstrate") suggest a powerful concern for those with pre-existing functions, interests or activities.

78. Further: Santos's construction does not even achieve the reasonable certainty for which it strives. Legal interests would, one assumes, include rights which may not be readily ascertainable from public records such as profits a prendre and easements created by prescription; there would also be no reason why it should not encompass legally enforceable equitable interests in land, such as those created by constructive trusts.

79. Finally, Santos points to the public comment regime in regs 5C and 11B. But this points in the opposite direction. What it suggests is that a member with no greater interest in the proposed activity than a member of the public will be left to the public and comment regime. Is a person with a cultural and spiritual connection to a place which may be affected by the proposed activity in no different position to any member of the public? That cannot be so given the Regulations' objects and express recognition of cultural features of the "environment", which encompasses not only ecosystems but people and communities. The contrast with the publication and comment regime suggests that it cannot have been intended that persons with cultural and spiritual interests be left with such parlous rights to be heard, and points against the narrow interpretation of "interest" propounded by Santos. The implicit proposition — that persons with cultural and spiritual interests have no greater interest than the general public (**AS [64]**) — should be rejected.[26]

80. Santos's approach to "functions" is the least objectionable. But even then, it fails to acknowledge that the ordinary meaning of "function" is broad. It includes "an activity proper to a person or institution". In some contexts it can include powers and duties.[27] There is no reason why an individual cannot have a function in his or her personal capacity: cf **AS [52].**

81. Santos contends at **AS [51]-[65]** for a narrow meaning, a position supported by NOPSEMA: **2R [13]-[16]**. Rather than seeing these words for what they are — words that by their collocation seek to cover comprehensively the range of persons who may be affected by the proposed activities — Santos seeks to introduce nice legal distinctions (not grounded in the Regulations) with the purpose of excluding certain functions, interests and activities from the Regulation's concern.

82. NOPSEMA justifies the narrow interpretation not by reference to the statutory scheme which it is tasked to administer, but by reference to authorities dealing with how the implied requirements

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[26] The significance of such interests for traditional owners is well documented: see eg *Love v Commonwealth* (2020) 270 CLR 152 at [289] (Gordon J).

[27] *Edelsten v Health Insurance Commission* (1990) 27 FCR 56 at 62-63.

of procedural fairness cases can be ascertained: **2R [22]-[25]**. There is no reason for NOPSEMA to strive for a narrow interpretation by reference to such concepts when the Regulations themselves, and the wider statutory scheme, provide clear guidance as to the significance and purpose of the consultation process. NOPSEMA also submits that, if the ordinary meaning of "interests" is adopted, the result would be "unworkable", and proposes to resolve "the workability problem" by reading additional words into reg 11A(1)(d) [**2RS [13], [29]**]. There is no basis identified, and none available other than speculation, to suggest that such a construction would in fact be "unworkable".[28]

83. NOPSEMA's concern is in any event overstated. Any perceived burden in identifying relevant persons must be assessed in the context of what is then required as part of the consultation process in reg 11A(2) and (4). Consultation may be adapted to the circumstances of the organisation or person being consulted.

84. For example, the obligation to "give" each relevant person sufficient information in reg 11A is not prescriptive. There is latitude as to how the information is to be communicated. Plainly different methods of transmission can be used, and it need not be direct. Similarly, the obligation to "tell" a relevant person is plainly not to be construed literally in the sense of communicating to a personal orally; it is unlimited and would permit of a range of ways of communicating with a relevant person (as was apparent from the modes of communication actually used and demonstrated in the Drilling EP for consultation, primarily emails).[29]

85. Further, existing statutory schemes provide ready examples of how consultation might occur, including a scheme with direct relevance to Traditional Owners on the Tiwi Islands (although not with respect to the area in this case). Section 42 of the *Aboriginal Land Rights Act 1983* (NSW), for example, sets out processes for consultation with traditional owners. In *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)*,[30] it was held that a statutory requirement for authorisation by "all the persons" did not require all members of a particular group to be involved.

86. The Drilling EP itself demonstrated methods by which a titleholder can identify and notify relevant persons through publicly available resources, in identifying the procedural steps it took at part 4.2, Stakeholder identification, in the Drilling EP (**J [142], Pt A, tab 7, 102**). There it states that Santos requested commercial fishing data and other relevant information from

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[28] In fact, to extent that there was any evidence on the issue, the Pipeline Revision EP, which the primary judge treated as admissible (**J[244], Pt A, tab 7, 132; J[287], Pt A, tab 7, 141**), demonstrated how consultation could readily occur with clan representatives of the Tiwi Islands, in the form of meetings with individual clans organised in late November 2021 (Grebe affidavit, annexure CG6, Pt C, tab 58,448-449

[29] Drilling EP, Pt C, tab 18, p96-136.

[30] (2019) 374 329 (Allsop CJ, McKerracher and Mortimer JJ).

government Departments (Department of Industry, Tourism and Trade in the NT, and the Australian Fisheries Management Authority, and representative body the Northern Prawn Fishing Industry Pty Ltd). Again this does not inform the question of statutory construction but illustrates the flaws of a workability argument.

87. If consultations are onerous, that is entirely consistent with the nature and object of an environment plan. It is addressed to managing the environmental impacts and risks of the petroleum activity or greenhouse gas activity operations or works that the titleholder proposes.

88. Once the expression "function, activities and interests" is properly interpreted, the basis for the contention in ground 3(a) that the connection of individuals who are part of a traditional land owning group with sea country is not a "function, interest or activity" falls away, and with it, the whole of ground 3, given that paragraph (a) appears to be a foundation for it.[31]

I APPEAL GROUNDS 2 AND 3(c)-(e); CONTENTION GROUND 1(b): "SEA COUNTRY MATERIAL"

89. The second error upheld by the primary judge was a failure to consider the sea country material. Santos attacks this conclusion first on the basis that there was no obligation to consider it (ground 2(a)) and secondly on the basis that it did consider it (ground 2(b)). The first respondent submits:

(a) the primary judge did not err in finding that NOPSEMA did not reach the requisite state of satisfaction because it failed to consider the sea country material;

(b) alternatively, by ground 1(b) of the notice of contention, the primary judge should have found that in circumstances where the Drilling EP contained the sea country material, which indicated that the traditional owners of the Tiwi Islands had or were likely to have functions, interests or activities that may be affected by the Drilling EP activity, NOPSEMA was not *reasonably* satisfied that the Drilling EP demonstrated that Santos had consulted with each relevant person in that it did not demonstrate that traditional owners of the Tiwi Islands had either been consulted, or were not relevant persons.

I.1 Ground 2 and 3(c)-(e) of the appeal

90. The primary judge approached this issue on the basis that it was a "failure to consider" issue, a matter which the first respondent accepts involved a variation in form (although not substance) from the basis on which it was described in the Concise Statement. The gravamen of the first respondent's position — that NOPSEMA could not have been reasonably satisfied all relevant

[31] In the event that this is not how the notice of appeal should be read, submissions on ground 3(b) are made above at [63]-[71] and ground 3(c) below.

persons were consulted had it had regard to the "sea country material" — is substantially similar, and the relevant sea country material were referred to and in submissions at trial comprehensively identified.[32]

91. The primary judge's reasons for concluding that NOPSEMA failed to consider the "sea country material" are straightforward. The "sea country material" was probative of the issue of whether or not the Drilling EP demonstrated that each relevant person was consulted (**J [213], Pt A, tab 7, 123**). If it was probative, NOPSEMA was bound to consider it (**J [218], Pt A, tab 7, 124**). The primary judge held it was probative, by reason of identified features of the statutory scheme and their relevance to the requirements of reg 11A(1)(d) (**J [214]-[218], Pt A, tab 7, 123-124**). This orthodox reasoning is sufficient to dispose of ground 2(a). The materials before the decision-maker, and the reasons, did not reveal that NOPSEMA considered it (**J [227], Pt A, tab 7, 126-127**). NOPSEMA made no inquiries of Santos as to that material. Had it appreciated that the sea country material was probative, it would have done so (**J [256], Pt A, tab 7, 134**).

92. Each of the related grounds of appeal turn on the proposition that the "sea country materials" were not probative of the existence of relevant persons. By ground 2(b)-(c), it is said that the primary judge ought to have inferred that NOPSEMA did consider the "sea country materials", an inference the primary judge did not draw because the "sea country materials" were relevantly probative. By grounds 3(c)-(e), it is said that, even if NOPSEMA did not consider the "sea country materials", they were not probative of the question, and so there was no error.

93. It is important to note what the primary judge did not do in identifying this error. It is no part of the primary judge's reasoning that the actual "longstanding spiritual connections" (**J [10], Pt A, tab 7, 45**), which were pleaded by the first respondent and the subject of evidence relevant to the application for injunctive relief, were established or known to NOPSEMA by reason of the "sea country materials" (cf **AS [7]**). Nor did he suggest that it was known to NOPSEMA that the first respondent was a traditional owner of the Tiwi Islands (cf. **AS [8]**), a matter admitted by Santos in its Concise Statement (at [3]). The issue that the trial judge had to consider — and did consider — was what NOPSEMA ought to have known, based on the material before it.

94. As addressed above in Section H, save for identifying the outer bounds of the meaning of "functions, interests or activities", the error identified by the primary judge did not require the primary judge to consider the precise meaning of that expression. If the "sea country materials" were probative of whether the Drilling EP demonstrated that Santos had identified all relevant persons, NOPSEMA needed to consider those materials. The primary judge found that it did not.

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[32] The primary judge noted that Santos's failure to directly respond to this issue may have been a "strategic choice", and Santos does not, in its notice of appeal, complain of any procedural unfairness (cf. **AS [49]).**

95. The first respondent submits that, when regard is had to the whole of the "sea country materials", it is clear that those materials are relevantly probative in that they identify specific features of the environment — in this case, features of the sea country within the EMBA which were of significance to or relevant to indigenous people in the vicinity of the Tiwi Islands — that are indicative of functions, interests or activities that may be affected by the activity under the Drilling EP; in this case, indigenous people in the region of the EMBA and specifically traditional owners of the Tiwi Islands. There can be no doubt that the Drilling EP itself is a mandatory relevant consideration: as a matter of construction, NOPSEMA must consider the Drilling EP itself in considering what is demonstrated.[33] It follows that the primary judge was not in error in concluding that the failure to consider was an error.

J.2 Notice of Contention Ground 1(b)

96. The first respondent submits that if NOPSEMA did not fail to consider the "sea country materials" in the sense needed to resist appeal ground two, then the Court should hold that NOPSEMA was not *reasonably* satisfied that the Drilling EP demonstrated that all relevant persons had been consulted. To make good that proposition, the first respondent relies upon the same deficiencies which show that the sea country material was not considered. Given that they revealed the existence of other potential relevant persons yet the Drilling EP did not deal with them (even to explain that they were not relevant persons), NOPSEMA could not be reasonably satisfied that the Drilling EP demonstrated compliance with the consultation requirements.

E NOTICE OF CONTENTION GROUND 2: THE TIWI LAND COUNCIL (TLC)

97. Santos's submission at **AS[97]** might be understood as an argument that if the traditional owners of the Tiwi Islands had to be consulted, then consultation with the TLC discharged this obligation and NOPSEMA could have been reasonably satisfied that the Drilling EP demonstrated compliance with reg 11A on this account. Such an argument has no ready foothold in the notice of appeal. The first respondent presses ground 2 of his notice of contention on the contingent hypothesis that this argument is made. By this ground, he contends that NOPSEMA was not reasonably satisfied that the Drilling EP demonstrated that the consultation required by reg 11A was carried out, because the communications with the TLC could not satisfy the requirements of reg 11A on the material before it.

98. The "stakeholder consultation package" annexed to the primary judge's reasons (**J, Annexure 2, Pt A, tab 7, 149**) was the information provided to the TLC by Santos (and all relevant persons, with the exception of commercial fishers who were also provided with information specific to

[33] Compare, for example, representations for revocation of a mandatory cancellation of a visa under s 501CA of the *Migration Act 1958* (Cth), which are a mandatory relevant consideration.

them: **J [104]-[105], Pt A, tab 7, 86-87**). The extent of the consultation with the TLC demonstrated in the Drilling EP is limited to sending an email on 11 June 2021 (see **J [105], Pt A, tab 7, 87)** and **Annexure 2, Pt A, tab 7, 149**); the title "Q2 2021 Barossa Quarterly Update" that did not identify that it contained a consultation package on proposed new drilling activity, intended as being directed to the TLC), and a further email on 2 July 2021, and "contact attempts via phone".[34] There was no information in the Drilling EP that any of the emails were responded to, or that the telephone calls were answered or returned. Neither the Reasons nor the Assessment Findings considered whether sending two emails and making telephone calls, without receiving any response, constituted "consultation" for the purposes of the Regulations. NOPSEMA had no material before it in the Drilling EP from which it could conclude that the email addresses for the TLC were even the correct addresses, were likely to come to the attention of relevant persons within the organisation, or that the telephone numbers were correct. Consultation at that level treats the obligation to consult perfunctorily or as a mere formality,[35] and is far from the "deep" or "meaningful" level of consultation that the first respondent submits is the appropriate standard.[36] On any view, it falls far short of creating some form of dialogue,[37] which is the minimum required by the statutory obligation.

99. When regard is had to the substance of the consultation package, even if it was appropriate to assume that it had come to the attention of the TLC, NOPSEMA was not *reasonably* satisfied that the statutory consultation requirements were met. The consultation must, at the very least, "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": reg 11A(2). The "stakeholder consultation package" refers to a "500-metre exclusion zone" and a 2-5 km radius operational area, suggesting the area affected is so limited, and without any reference to the considerably more expansive size of the EMBA. Although there is reference to the possibility of a "loss of well control", described in fairly technical language, there is nothing showing that such an oil spill could affect the whole EMBA. There are no "possible consequences" identified for the TLC or for affected traditional owners of the Tiwi Islands, despite the Drilling EP elsewhere identifying that the "key physical characteristics of the [North Marine Region] and [North-west Marine Region] relevant to the EMBA" include "significant sea country for

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[34] See Drilling EP, Pt C, tab 18, 123.

[35] *Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 at [1124].

[36] See, for examples in other jurisdictions, *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2021] ZAECGHC 118; [2022] 1 All SA 796 (ECG); 2022 (2) SA 85 (ECG) (28 December 2021), [26], [33] and at final hearing *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55 (1 September 2022), [95]; *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511, [43]-[44]; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* [2017] 1 SCR 1069, [44].

[37] *Gondarra v Minister for Families, Housing, Community Services & Indigenous Affairs* (2014) 220 FCR 202 at [95].

Traditional Owners" (**J [205](i), Pt A, tab 7, 117**), and that "the potential visible presence of surface oil within the EMBA would be of concern to Indigenous people" (**J [205](viii), Pt A, tab 7, 118**). The information provided was wholly inadequate to allow a relevant person in the position of the TLC (consulted on the basis of its "function is to represent indigenous residents of the Tiwi Islands": Drilling EP Table 4-1, **J Annexure 1, Pt A, tab 7, 144**) to make any informed assessment of the possible consequence of the activity on its functions, interests or activities, even had that information come to its attention.

Date: 24 October 2022

C M Harris

C Tran

C Mintz

N J Baum

SCHEDULE

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 555 of 2022

Respondents

Second Respondent: National Offshore Petroleum Safety and Environment Management Authority

Date: 24 October 2022