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Federal Court of Australia
District Registry: Queensland
Division: General

No. QUD13/2023

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

Applicant's outline of submissions in reply

1. This is the Applicant's outline of submissions in reply filed pursuant to the Orders of the Court made on 27 February 2023 (**Applicant's reply submissions**). In these submissions, the Applicant adopts the terms defined in its outline of submissions filed 27 June 2023 (**Applicant's submissions**).

Introduction

2. In this introductory section the Applicant addresses three preliminary matters raised by the First Respondent in its outline of submissions filed 11 July 2023 (the **First Respondent's submissions**).
3. First, it is not necessary for the Applicant to identify a "significant question of law or principle"[1] in order to bring an appeal pursuant to s.169(1). Leave is not required: the Court is not exercising its appellate jurisdiction.[2] The requirement for an appeal pursuant to s 169 is the identification of a "question of law".[3] If the Court accepts

[1] Cf [4]-[5] of the First Respondent's submissions.
[2] If it were, the approach required would be quite different.
[3] *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 (***Haritos***) at [110]-[202] is the leading authority on appeals as to "questions of law" and overrules a line of authority excluding "mixed" questions of law and fact from "questions of law" (at [192]). *Haritos* has been applied in a range of both Federal and State statutory contexts in which an appeal from a tribunal decision is limited to a "question of law". See also *Cheedy v WA* [2010] FCA 690 (*Cheedy*) at [24].

that the Determination is attended by error or errors of law capable of affecting the outcome of the enquiry[4] or denied the Applicant practical justice[5] the Court would set aside the Determination.[6]

4. Secondly it is necessary to consider the Determination as a whole and not "minutely and finely with an eye keenly attuned to the perception of error".[7] The Determination is relatively long. The Tribunal's consideration of some issues traverses many parts of the Determination, making it necessary to trace the Tribunal's reasoning process through the Determination in order to identify the operative parts of the decision. For example, the Tribunal commenced its consideration of the issues arising in Question 5 at [277], further considered the admissibility and weight of Mr Ho and Mr Kreicbergs's evidence in paragraphs [227], [295], [314], [327], again at [341]-[343], further at [407], [412], [448], [424], [450] and finally at [505].
5. The Applicant is required to, and has, identified in its Further Amended Notice of Appeal (**FANOA**) and submissions the law according to which the decisions that the Tribunal has made in the course of its reasons for granting the FADA was required to comply. The Applicant has identified serious legal error in the Tribunal's application of that law. The Applicant submits that the errors said to impugn the Tribunal's ultimate decision on the question of good faith (Questions 1, 2, 4, 5 and 6), if found, are capable of having such effect on the outcome of the Tribunal's decision on that question that if any one of them is established the Court would set aside the Determination.[8] It is not sufficient by way of rebuttal of to identify an isolated occasion on which the Tribunal refers to a matter, as the First Respondent has done.[9]

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[4] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 3321 at 353 (Mason CJ) and 384 (Toohey and Gaudron JJ). As to relevancy errors: *Minister for Aboriginal Affairs v Pekoe-Wallsend* (1986) 162 CLR 24 at [40].
[5] As to materiality of legal unreasonableness or denial of procedural fairness see *Hossain v Minister for Immigration* (2018) 264 CLR 123 at [23] (Kiefel CJ, Gageler and Keane JJ); *MZAPC v Minister for Immigration* (2021) 95 ALJR 441 at [2] (Kiefel CJ, Gageler, Keane and Gleeson JJ), [84] (Gordon and Steward JJ), [164] (Edelman J); *Minister for Immigration v SZMTA* (2019) 264 CLR 421 at [38], [44]–[45] (Bell, Gageler and Keane JJ); *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; Nathanson *v Minister for Home Affairs* (2022) 403 ALR 398 at [45]-[47] (Gageler J).
[6] If reasons are affected by legal unreasonableness the decision will be set aside see, eg, *Strinic v Singh* (2014) 231 FCR 437 at [46]-[47]. See also *Haritos* at [213].
[7] *Minister for Immigration v Wu Shang Liang* (1996) 185 CLR 259 at 272 "*The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error*" (quoting *Collector of Customs v Pozzolanic* 1993 43 FCR 280 at 287).
[8] *Haritos* at [213] and [217] – [219]. See also authorities in n.19.
[9] See, for example, at [14]-[15] of the First Respondent's submissions, without engaging with [411] and [459] of the Determination.

6. Thirdly, the Respondents incorrectly state that some grounds are not referred to in the Applicant's submissions.[10] The Applicant presses all questions and grounds set out in the FANOA.

Question 1: Did the Tribunal apply the wrong test for good faith or, alternatively, incorrectly apply the test correctly identified?

7. The Applicant concedes that the Tribunal identified the correct test for good faith.[11] What is less clear is whether that was the test in fact applied by the Tribunal. The Applicant submits that the Tribunal fell into error because: (1) it applied the subjective test incorrectly or incompletely; and (2) it failed to apply any objective test, to the conduct of which the Applicant complained. It may be accepted that either or both would be a misapplication of the relevant test constituting a legal error.[12]
8. At [410] of the Determination the Tribunal said (emphasis added):

> *Santos's production levy offer has been fixed since it was first offered in 2017. To establish absence of good faith, one would have to infer that Santos knew, or ought to have known, that such offer was significantly below the benefits conferred by the comparable projects and associated agreements then, and perhaps subsequently. Quite apart from my rejection of Mr Ho's evidence and (to some extent) Mr Meaton's, it is clear that in Santos's own dealings, it was not always paying a production levy or similar payments. That fact, by itself, suggests that emphasis placed by the Gomeroi applicant upon the amount of the production levy is unjustified. It seems that native title holders or claimants are willing to deal with Santos in connection with future acts, without necessarily receiving payment by way of production levy.*

[10] Question 1 ground (b) relates to the subjective test for good faith and is referred to in paragraphs [8] – [9] of the Applicant's submissions (cf [7] and footnote 1 of the First Respondent's submissions). Question 3, ground (c) relates to the Tribunal's imposition of a requirement of "practicability" in s 39(1)(e) before it would consider material said to be relevant to this consideration and is addressed at [31]-[33] of the Applicant's submissions (cf [23] of the Second Respondent's outline of submissions filed 11 July 2023 (the **Second Respondent's submissions**). See also the comments on submissions of this nature in *Thomas v Golden Destiny Investments* [2015] NSWSC 1176 at [415].

[11] At [105]-[108] and [339] of the Determination ([23]-[25] of the First Respondent's submissions). That is the test stated in *Strickland v Minister for Lands* (1998) 85 FCR 303 at 312 (*Strickland*) per R D Nicholson J.

[12] *Haritos* at [135] – [136] and [201] – [202]. See also Ascic v Comcare [2020] FCAFC 105 at [55] per Flick, Banks-Smith and Jackson JJ) and *Price Street Professional Centre Pty Ltd v Commissioner of Taxation* [2007] FCAFC 154 (2007) 243 ALR 728 at [22], [24] and [27] (per Kenny J); *Commonwealth Superannuation Corporation v Truan* [2020] FCA 364 at [7] per Bromberg.

9. The Tribunal's ultimate findings were to the effect that the First Respondent was right to think as it said it did.[13] The Tribunal identified no reason for doubting the First Respondent's stated views. In arriving at these conclusions, the Tribunal considered only Mr Kreicbergs's evidence as to the First Respondent's knowledge and state of mind. It failed to consider the First Respondent's actual knowledge of Mr Meaton's and Mr Ho's opinions that the proposed production levy was below market value.[14]

10. As is set out in the Applicant's submissions (at [68]), the First Respondent's failure to inquire while holding such knowledge is capable of supporting an inference that it was not negotiating in good faith.[15] The Tribunal appears to have considered that, because the Tribunal itself was not persuaded of the truth of Mr Meaton's and Mr Ho's evidence, and rejected it, it was not necessary to consider the significance of that information in the hands of the First Respondent in the course of negotiations. It may be correct as a matter of law to say, as the Tribunal does, that the First Respondent was "entitled" to reject Mr Meaton's report because it considered it to be wrong, but that does not answer the question of whether such rejection was in good faith: the companies in *Alpaca Management* were not breaking the law by failing to make inquiries, but the Courts found that their failure to do so meant that they could not rely on a good faith defence. In the same vein, the Tribunal's finding that Mr Meaton and Mr Ho were wrong does not answer the question of whether the First Respondent acted in good faith in the circumstances considered as a whole.[16] The Tribunal's observation that the First Respondent's knowledge is to be assessed at the time of the offer appears to have led it to disregard that proposition by focusing on the position at the time the offer was made, to the exclusion of later knowledge (such as the evidence of Mr Ho).[17]

11. In the result, the Tribunal did not, except in the barest terms,[18] consider any of the First Respondent's impugned conduct either within any of the negotiation "periods" or within the whole of the more than 10-year negotiation. As well as being a

[13] Determination [411] and [459].
[14] At [10] of Applicant's submissions.
[15] *International Alpaca Management Pty Ltd v Ensor* (1995) 133 ALR 561 at 597 (Beaumont and Carr J), cited by Lee J in *Brownley* at [27].
[16] *Strickland* at 312.
[17] Determination [410].
[18] See e.g. Determination [207], [167].

misapplication of the test for good faith, the Tribunal's resultant failure to consider all of the evidence relevant to Santos's state of mind was itself an error of law.[19]

Question 2: Is "payment" in Division 3 of Part 2 of the Act synonymous with "compensation" in Division 5 of Part 2 of the Act?

12. The Tribunal appears at paragraph [309] to have correctly interpreted the Act by observing the difference between payments made for consent to future acts under Division 3, and compensation for impact on native title under Division 5 of Part 2. The Tribunal then appears to have required Mr Meaton and Mr Ho to have complied with what the Tribunal itself has identified as an erroneous interpretation of the Act before their evidence could be considered "valid", and ultimately rejected their evidence because it did not comply with this requirement. That is an irreconcilable contradiction in the Tribunal's reasons. [20]
13. The evidence shows that the original source of the requirement for "impact" on native title is in the First Respondent's formula for calculating the production levy.[21] That formula appears to be intended to convert a payment for consent into compensation, which is consistent with releases from compensation claims in favour of the Second Respondent embedded in the proposed agreement.[22] Mr Ho necessarily picks up that formula in his report.[23] In cross-examination of Mr Ho the First Respondent then sought to establish that *all* payments for consent amount to

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[19] Such error is said to be jurisdictional in nature and amount to a constructive failure to exercise power: *Minister for Immigration v SZRKT* (2013) 212 FCR 99 (***SZRKT***) *at* [77]-[79], [98] citing *Kirk v Industrial Commission (NSW)* (2010) 239 CLR 531 and [111] (Robertson J). The Minister's application for special leave to appeal was dismissed: Minister for Immigration and Citizenship v SZRKT [2013] HCATrans 251, and Robertson J's decision has been upheld by the FCAFC in *Minister for Immigration v MZYTS* (2013) 230 FCR 431 at [38] and [70] (per Kenny, Griffiths and Mortimer JJ) and recently applied in *Minister for Immigration v SZSRS* (2014) 309 ALR 67 at [47]-[54] (Katzman, Griffiths, Wigney JJ) and recently applied J in *XFZC v Minister for Immigration* [2022] FCA 1162 at [49] (Hespe J). In *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389 (***Dranichnikov***) at [32] (Gummow and Callinan JJ, Hayne J agreeing at [95]), [88]-[89] (Kirby J), in which a failure to consider and understand a case was considered a breach of the rules of natural justice and a constructive failure to exercise jurisdiction; In similar vein, the FCAFC found in *SZRBA v Minister for Immigration* (2014) 314 ALR 146 (***SZRBA***) (Siopis, Perram and Davies JJ) that a failure of the Tribunal's duty to give "proper genuine and realistic consideration to evidence and submissions" was a denial of procedural fairness (at [11], citing *Dranichnikov* and *SZRKT* and at [23] *MZYTS*). Chief Justice Allsop reached the same conclusion in *Promsopa v Minister for Immigration* [2020] FCA *1480* at [60] (Allsop CJ).

[20] First Respondent submissions [34]. In *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435 at 453:26 – 32 (***Taveli*)** Wilcox J identified a form of legal unreasonableness in the Tribunal's "illogicality or in, or misapplication of, the reasoning adopted by [it]; so that the factual result is perverse, by the decision-maker's own criteria" while not entirely on point, a contradiction exists between the Tribunal's correct identification of the distinction between payment and compensation and application of an incorrect interpretation of the Act (or conflation of these two distinct concepts) in its assessment of the evidence of Mr Meaton and Mr Ho. In contrast with the decision under review in *Taveli*, the Applicant challenges not the Tribunal's conclusion as to fact but its apparently legal decision to dismiss the evidence of Mr Meaton and Mr Ho. See also authorities referred to above at n.12.

[21] The production levy formula is reproduced at CB 1002.

[22] An example is at CB 1924.

[23] The production levy formula is reproduced at CB 4098.

compensation for the purposes of Division 5. That is not correct as a matter of law,[24] and in truth Mr Ho did not agree with that proposition.[25] To the extent that the Tribunal adopted that proposition,[26] it was wrong to do so. That reasoning was particularly applied to discredit the Applicant's valuation evidence[27] and, ultimately, dismiss the claim that the proposed production levy was so low as to demonstrate an absence of good faith.[28] Those findings fail to distinguish between a negotiated payment agreed to under Subdivision P and entitlement to compensation under s.24MD. That distinction is necessary to properly assess the value of a proposed payment under s.33, which is not compensation for diminution of native title but payment for consent to the doing of a future act.

14. The errors identified above are capable of being characterised as errors of statutory construction, a failure to consider relevant material, and legally unreasonable. If found such errors would require the setting aside of the Determination.

Question 3: Does s.39(1)(e) of the Act exclude "environmental matters" or include the requirements of particularity or practicability?

15. The Applicant does not complain about the Tribunal's treatment of Professor Steffen's evidence.[29] It is the Applicant's contention that the Tribunal has referred to but not in substance[30] considered Professor Steffen's evidence, and did not consider its weight[31] at all, but rather having traversed the material set it aside as unnecessary to consider.[32] The Tribunal set that material aside for two reasons. First, because it considered it was prohibited from doing so by the history of

[24] Applicant's submissions [21] - [22],
[25] Contrary to what was found by the Tribunal at Determination [409], and is apparent from the following exchange at T.240/18-32; T.241/16-26:

> "***Q:*** *You accept, don't you, that the Gomeroi in this case are not buying a share in the Narrabri Gas Project; they are being offered financial compensation for the impact that the project will have on their native title; do you agree?---*
> ***A:*** *Yes. I agree. I understand that that's the nature of these agreements. Yes.*". And then he says at 241 "*…what I'm saying is that…to point the compensation and point…directly…at the native title impact, in terms of the cultural aspects and things like that is, I think, is a misapplication…of how the financial aspects of the compensation agreements are derived. It's…not how they're derived. No agreement is derived that way*".

[26] See, e.g., Determination [429]-[431].
[27] Determination [409]; T.240/18-32; T.241/16-26.
[28] Determination [431].
[29] Cf First Respondent's submissions [40]. See also Second Respondent's submissions at [21] regarding merits review.
[30] Cf First Respondent's submissions [42]. *Anderson v Director-General Department of Environment and Climate Change* [2008] NSWCA 337 at [51]–[58]. See also the authorities referred to above at n 19.
[31] Cf First Respondent's submissions [45]. Notwithstanding the Tribunal's reference to that evidence Determination [952], [954]-[955]. And the applicant's submissions Determination [944]-[945], [953].
[32] Determination [539], [541]-[542], [780], [1022]; cf Second Respondent's Submissions [18]-[19].

s.39(1)(e)[33] unless the environmental matter had a particular effect on native title within the project area.[34] Secondly, because it was not "practicable" to do so, irrelevant under s.39(1)(f).[35] These are both errors of construction involving the "reading in" of words that do not form part of the language of ss. 39(1)(e) or (f).

16. However, legislative history cannot displace the meaning of the statutory text[36] and it is "no function of the courts to fill in gaps in legislation".[37] The Act does not in terms prohibit or prevent the consideration of environmental matters under s.39(1)(e) or impose a threshold of "practicability" before they can be considered under s.39(1)(f).[38]
17. As a matter of statutory construction, the words "any public interest" import a broad, discretionary value judgment to be made by the decision-maker.[39] The Tribunal appeared to consider Professor Steffen's evidence to be relevant to the public interest.[40] On that basis, the Applicant submits that it was required to consider Professor Steffen's evidence and the Applicant's submissions relying on that evidence in a substantive manner and did not do so.
18. The Tribunal failed to exercise its function under s.31(1)(f) because it adopted the views of other bodies as to the public interest and did not in fact consider the Applicant's materials and submissions on that question.[41]
19. If it is found that the Tribunal misconstrued the Act as alleged by the Applicant, that was an error of law that led the Tribunal to fail to consider relevant material[42] and resulted in a constructive failure by the Tribunal to exercise its function.[43]

Question 4: Did the Tribunal deny the parties procedural fairness?

20. It is clear that the question joined between the Applicant and First Respondent before the Tribunal was the market value of the production levy. The Applicant

[33] Determination [925]-[928]; cf First Respondent's submissions [46].
[34] Determination [987], [970], [972]; cf Second Respondent's submissions [17].
[35] Determination [1014].
[36] *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[37] *Minogue v Victoria* (2018) 264 CLR 252 at [43] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[38] Cf Second Respondent's Submissions at [20] and [22].
[39] *Evans v State of Western Australia* (1997) 77 FCR 193 at 215 per Nicholson J, citing the HCA in *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216. See also *Walalakoo Aboriginal Corporation v Kallenia Mines Pty Ltd* [2019] NNTTA 91 at [150].
[40] Determination [1015], in which the Tribunal noted that "Aspects of the public interest may be in conflict" directly after referring to Professor Steffen's evidence.
[41] Determination [1014], [1022]; cf Second Respondent's submissions [20].
[42] *Cheedy* at [24].
[43] *Dranichnikov* at [24] (Gummow J).

contended that it was below market, the First Respondent contended that it was the best in market.

21. By "market", each party was referring to s.31 agreements entered into for other unconventional gas projects. The issue contested before the Tribunal was whether those other unconventional gas projects were truly comparable. No party disputed that s.31 agreements had been entered into for other unconventional gas projects, or that comparison with such agreements was relevant to establishing the relative value of the production levy. Indeed, it was on the basis of such a comparison that Santos contended (and the Tribunal found) that Santos's production levy was best in market.
22. The First Respondent may be *satisfied* with the Tribunal's finding that there was no market and no market price for the production levy[44] but that finding was not the First Respondent's idea, and indeed was not presaged in anything said or done by any party before the Tribunal.[45]
23. In circumstances where *existence of a market* and ascertainability of *market price* was not contested by the parties, the Tribunal introduced irrelevant material and inapt legal principle without notice to the parties and to which it was, consistent with the requirements of procedural fairness, not entitled to have regard.[46]
24. The Applicant submits that, in addition to being procedurally unfair, the Tribunal's adoption of competition law definitions and principles was misconceived.[47]
25. Section 4E of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) defines a market "in relation to any *goods or services*" for the statutory purpose of determining whether conduct "substantially lessens competition in a market". It has been observed that this is a "very specific meaning" of the tern market and may be contrasted with the use of that term by economists.[48] The "antitrust market" relevant to competition enquiries comprises "a set of close constraints" against

[44] Determination [356], [384], [385], [389], [390].
[45] Contra First Respondent's submissions [50] – [52]
[46] Cf First Respondent's submissions [50]-[53]. The authorities relied on by the First Respondent in support of its submission that a specialist tribunal may refer to specialist textbooks are distinguishable. What has occurred here is very different from the use of a medical dictionary to define, for example, "melanoma": *Freeman v Military Rehabilitation and Compensation Commission* (2018) 75 AAR 249 at [62]-[67]. There is no comparison, given that the National Native Title Tribunal is not a specialist economic tribunal. Likewise, the principles in *Noureddine v Adlard* [2022] VSC 719 at [49] have no application on the context of the NNTT. Even where those principles do apply, they do not make the judge an expert in the case such as to permit a Tribunal to make findings that were not based on evidence before it: *Strinic v Singh* (2009) 74 NSWLR 419 at [59], [65] (Beazley JA); *Yebdoo v Holmewood* [2021] NSWCA 119 at [40].
[47] Determination [286]-[288].
[48] Rhonda L Smith and Arlen Duke "What is the 'Market" *Current Issues in Competition Law Vol I* (Gvozdenovic and S Puttick (eds.), 2021) at 179.

which allegedly anti-competitive conduct may be assessed. The "economic market" (consistent with the principles in *Spencer*[49]) may be described as a "price discovery mechanism".[50]

26. The Tribunal found that there was no analogy between the competition law definition of market, and no application of the elements used to define a competition market, to agreements made under s.31. That was not, however, the question either before the Tribunal or the purpose of the evidence put to it.

27. The question properly before the Tribunal was the relative value of the proposed production levy, for the purpose of determining whether it was proposed in good faith. That question and purpose was appropriately answered by Mr Ho's orthodox approach to valuation.[51] The Tribunal's failure to apply these principles, and rejection of Mr Ho's evidence on the basis of his reliance on fundamental principles of valuation:

> *…raises questions of legal principle, including whether in fixing the valuation the Tribunal acted on a wrong principle of law, including a wrong principle of law that led it to ignore relevant material, or rely on irrelevant material, in arriving at the valuation. …, or whether the Tribunal otherwise failed to act in accordance with established legal principles in relation to the valuation of assets.*"[52]

28. The role of a judge is not to "bring a third set of opinions into the arena, and to supplement or condemn testimony properly adduced before him in reliance on his own theoretical grasp of principles and precepts" of the subject matter in question.[53] That is precisely what the Tribunal has done.[54]

29. The Tribunal's erroneous approach led to the rejection of Mr Ho's valuation[55] and the evidentiary basis for the Applicant's contention that the production levy was below market value. A finding that it was undervalue could have provided a basis

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[49] (1907) 5 CLR 418.
[50] Rhonda L Smith and Arlen Duke "What is the 'Market" *Current Issues in Competition Law Vol I* (Gvozdenovic and S Puttick (eds.), 2021) at 179.
[51] [42]-[43] of the Applicant's submissions.
[52] *Commissioner of Taxation v Miley* [2017] FCA 1395 at [67]-[69] (Wigney J).
[53] *Brewarrana Pty Ltd v Commissioner of Highways (No 2)* (1973) 6 SASR 541 at 544–5, approved in *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 440 at [420]-[421].
[54] See especially Determination at [284], [286]-[289].
[55] Determination [294], [373], [384]-[385].

for inferring that the First Respondent's fixed adherence to the proposed production levy was not in good faith.[56]

30. It is true that the Tribunal discredits and discounts Mr Ho's evidence in a number of different ways, finding it variously irrelevant, inadmissible, prejudicial and of no weight.[57] The Applicant submits that the Tribunal's operable reasons for dismissing Mr Ho's evidence are addressed in Questions 1, 2, this Question 4 and Question 5. The Applicant submits that, as a matter of law, no sound legal basis for the Tribunals' decision to wholly reject Mr Ho's evidence is apparent in the Determination, and that the circumstances are comparable to those identified in *Haritos*, *Dranichnikov*, *SZRKT* and *SZRBA*. The Tribunals' impugned reasons for rejecting Mr Ho's evidence provided the reason for the Tribunal's attribution of "no weight" to that evidence. Even if there was such a basis for the decision or the determination as a whole, that fact would not affect the assessment of "materiality", correctly understood, nor prevent the Determination from being set aside on any or all of the questions just referred to.[58] It is incorrect as a matter of principle to say, as the First Respondent does,[59] that the availability of another, correct, basis for a decision means that a denial of procedural fairness (or other serious error of law) is not "material" or that for that reason a decision would not be set aside.[60]

Question 5: Was the Tribunal's finding as to the weight of Mr Ho's and Mr Kreicbergs's evidence legally unreasonable?

31. The Applicant repeats its submissions at paragraphs 20-21 and says that the First Respondent's submission (at [63]) that Mr Ho and Mr Kriecbergs were giving evidence as to different matters cannot be accepted.

32. In any event, that submission misapprehends the issue arising in Question 5, in which the Applicant agitates the fact that the *nature* of the evidence given by both Mr Ho and Mr Kreicbergs is the same: personal knowledge of agreements, copies of which were not disclosed. The Tribunal applied different requirements for the admissibility, reliability and weight of that evidence of these two witnesses

[56] An inference of an absence of good faith on the basis of undervalued sales was drawn in *Carver v Westpac Banking Corporation* [2002] NSWSC 431 (Austin J). On a similar argument in *Notaras v St George Bank Limited* (2005) 157 ACTR 1 it was found that the sale was not in fact undervalue and for that reason was done in good faith. More generally, it has been found that an action which is "unfair" is generally in bad faith: *Pendlebury v Colonial Mutual Life Assurance Society* (1912) 13 CLR 676 at 694 (Barton J).
[57] Determination [293], [390], [408], [448]-[450].
[58] *Haritos* at [213].
[59] First Respondent's submissions [11], [56]-[61].
[60] *Haritos* at [261] and authorities referred to at n.12 and n. 5.

despite that fact. The result was that Mr Ho's evidence as the Applicant's expert valuer was rejected, and Mr Kreicbergs's evidence as the First Respondent's lay valuer was accepted.

33. Contrary to the First Respondent's submissions at [65], the Applicant does not say that "both witnesses' evidence should have been treated the same" in broad terms. The Applicant submits that this differential treatment was legally unreasonable and worked to deny it "practical justice".[61]

34. The First Respondent's submissions at [72] do not assist them. The Applicant could not "challenge" the agreements Santos relied on because those agreements were not disclosed to it: Santos's evidence was as prejudicial to it as Mr Ho's evidence was to Santos.[62] The Tribunal did not consider that the fact that Santos had never paid a production levy before was a fact capable of supporting an inference that it had a "propensity to underpay", rather than being a fair sample of the market. That inference was identified in *Re Holdco* [2021] FCA 377 at [307] on similar evidence given by an expert.

Question 6: On a proper construction of the Act, does a negotiating party's knowledge that the registered Applicant is not authorised by the claimant group, and that the claimant group has authorised another applicant, operate as an exception to the requirement that the negotiating party must negotiate with the Registered Applicant?

35. The Respondents' submissions on this question[63] do not assist the Court. The Applicant addresses those submissions compendiously, below.

36. The Applicant's contention is that third parties would not be permitted as a matter of good faith and conscience to assume, in reliance upon the Register of Native Title Claims, that the Registered Applicant is endorsed by the Claimant Group in circumstances where it *knows* that the Claimant Group does not in fact endorse the Registered Applicant.

37. The First Respondent's actual knowledge that the Claimant Group did not endorse the Registered Applicant is established on uncontested documentary evidence and not denied by the First Respondent at first instance, that it was informed by NTSCORP Limited and therefore knew that the Claimant Group had revoked the

[61] The principles on legal reasonableness were recently collated in *Bushfire Survivors for Climate Action v Narrabri Coal Operations* [2023] NSWLEC 69 (Duggan J) at [38]-[39]. *Haritos* at [218].
[62] Determination [342]-[343], [450].
[63] First Respondent's submissions [75]-[90]; Second Respondent's submissions [2]-[9].

authority of the extant applicant and endorsed a new Applicant, and made a s.66B application.[64]

38. The Applicant submits that the rule contended for by it is *analogous* to the exception to the indoor management rule applicable to companies and incorporated associations. It does not *extend* that rule *per se* to Applicants (and nor could it). The analogy arises because the principle of conscience embodied in the rule has clear application to the legal fiction that is the Applicant. The principle embodied in the exception to the indoor management rule (like the form of actual knowledge embodied in *International Alpaca Management*) delineates the limits of good faith (as opposed to the requirements for establishing bad faith).[65]

39. The Court's role in s.66B application is to prevent fraud on the Claimant Group, the Register and third parties by testing the veracity of the "authorisation" claimed by the applicant on the s.66B application. The Applicant submits that once it is satisfied of the matters set out in s.66B(1), it does not retain any discretion to refuse to grant the application. The word "may" in s.66B(2) is in this sense not permissive but is a rare example of the term being used in a mandatory sense.[66] Upon satisfaction of the matters in ss (1), the Court must approve the application.

40. It is true that an applicant on a s.66B application may not be *bona fides* and may not succeed on an application,[67] and that bona fide applications may be opposed.[68] Such cases are exceptional. The fact that the Registered Applicant is the "negotiation party" does not mean that other negotiation parties may not *communicate* with the Claimant Group. The Gomeroi people's communication with Santos through its legal representatives demonstrates that communication is possible. The negotiating party which chooses not to communicate with the Claimant Group in circumstances when it knows that the Registered Applicant is

[64] Determination [172], noting that Santos was advised by NTSCORP of resolution on 5 September 2016. As a respondent to the native title claim Santos was served with a copy of the s.66B application.
[65] See also the cases referred to above at n. 56.
[66] *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1970 – 1971) 127 CLR 106 at 128 (per Barwick CJ), 134 (per Windeyer J), 138 (Owen J). That has not been the approach of this Court. In *Kum Sing on behalf of the Mitakoodi & Mayi People #5 v State of Queensland* [2017] FCA 860 at [23] and *Daniel and Others v Western Australia And Others* (WAG 6017 of 1996, WAG 127 of 1997 and WAG 6256 of 1998) (2002) 194 ALR 278, *Ward v Northern Territory* [2002] FCA 171, Reeves J, French J and O'Loughlin J respectively considered that a residual discretion remained as to whether the Court ought to grant the application. In *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637 that discretion was considered to derive from or 20 r 2 of the FCR. In the Applicant's respectful submission, that is not correct as a matter of construction. Notwithstanding the contrary approach of the Court, no application has been refused on the "discretion" said to be conferred by ss. 2 or the FCR.
[67] See, for example, *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2015] FCA 818 (Rares J),
[68] *Gomeroi People v Attorney General of NSW* [2018] FCA 71 per Rangiah J.

no longer *authorised* by the Claimant Group may be acting within its ”rights”, but it may not rely on the Register as a shield for an absence, or to refute an alleged absence, of good faith.

41. The error alleged is that the Tribunal's implicit rejection of the Applicant's contended construction of the Act, and in particular the operation of the obligation of good faith, was wrong as a matter of principle.

42. The question is whether the error is incapable of affecting the outcome of the decision.[69] The Applicant submits that the alleged error meant that the Tribunal's understanding of the obligation of good faith was wrong, which error meant that the Tribunal did not consider the evidence relied upon in support of its contentions at all.

43. For the reasons set out in the FANOA, the Applicant's submissions and these submissions in reply, the Application would be upheld.

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25 July 2023

[69] *Bond*, and authorities referred to at n. 5.