NOTICE OF FILING

Details of Filing

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File Number:	QUD13/2023
File Title:	GOMEROI PEOPLE v SANTOS NSW PTY LTD AND SANTOS NSW (NARRABRI GAS) PTY LTD (FORMERLY KNOWN AS ENERGYAUSTRALIA NARRABRI GAS PTY LTD) AND ORS
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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

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

Federal Court of Australia

District Registry: Queensland

Division: General

No: QUD 13/2023

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

Applicant's outline of written submissions on application for stay

1. These submissions are the outline of written submissions of the Gomeroi People on their application for a stay (**Proposed Stay**) and are filed pursuant to the orders of the Court made on 20 February 2023.

2. The Gomeroi People are the Appellant in the appeal proceedings *Gomeroi People v Santos NSW Pty Ltd And Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) And Ors* (QUD13/2023) filed on 13 January 2023 (the **Appeal**) and the applicant for the Interlocutory Application filed in those proceedings on 20 February 2023 (the **Applicant**, the **Application**).

The Appeal

3. The Appeal is from the determination of the National Native Title Tribunal (**Tribunal**) in *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2022] NNTTA 74 (19 December 2022) at paragraph [1041] (**Determination**). The Determination is in the following terms:

> [1041] The National Native Title Tribunal determines that the proposed future acts, pursuant to the *Petroleum (Onshore) Act 1991*

Filed on behalf of (name & role of party) Gomeroi People (NC2011/006)

Prepared by (name of person/lawyer) Natasha Case, Counsel of Alinea Chambers

Law firm (if applicable) NTSCORP Limited

Tel (02) 9230 3188 Freecall: 1800 111 844 Fax (02) 9310 4177

Email cwakefield@ntscorp.com.au

Address for service (include state and postcode) Unit 1a, Suite 2.02, 44-70 Rosehill Street, Redfern NSW 2016

(NSW), being the grants of Petroleum Production Lease Application Numbers 13, 14, 15 and 16 may be done, subject, in each case, to a condition, pursuant to s 38(1)(c) of the Native Title Act 1993 (Cth), such condition being that Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) take all necessary steps to ensure that the Additional Research Program, identified in para 5.7 of the Narrabri Gas Project Aboriginal Cultural Heritage Management Plan dated 21 February 2022, be implemented and completed prior to the commencement of Phase 2 of the Narrabri Gas Project, pursuant to the Development Consent granted by the Independent Planning Commission of New South Wales on 30 September 2020.

4. As stated by the Tribunal, the Determination permits the doing of a future act by the State of NSW, being the grant of the Petroleum Production Lease Application Numbers 13, 14, 15 and 16 (PPLAs) to Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) (Santos). Santos applied for the PPLAs on 1 May 2014, which were first notified pursuant to s.29 of the NTA on 28 May 2014 and following an amendment of the coordinates of the PPLAs, was further notified on 4 June 2015 (Affidavit of Conor Wakefield affirmed on 17 February 2023 at paragraph [7] and Annexure "CPW3" at page 13 and Annexure "CPW4" at page 040 (page 18 of the Determination) at [17] – [18]).

5. The Appeal is brought as of right pursuant to s.169(1) of the *Native Title Act 1993* (Cth) (the **NTA**), which relevantly provides:

> **169 Appeals to Federal Court from decisions and determinations of the Tribunal**
>
> Appeal from Tribunal determination or decision—right to negotiate applications

(1) A party to an inquiry relating to a right to negotiate application before the Tribunal may appeal to the Federal Court, on a question of law, from any decision or determination of the Tribunal in that proceeding.

…

(4) An appeal is to be instituted:

…

(b) in such manner as is prescribed by rules of court made under the Federal Court of Australia Act 1976.

6. The Appeal is brought in the original jurisdiction of the Court.[1] Section 23 of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), which confers upon the Court the power to make orders in its original jurisdiction, does not expressly confer the power to grant a stay.[2]

Proposed Stay

7. The source of the Court's power to grant the Proposed Stay is s.170(2)(a) of the NTA, which is in the following terms:

> **170 Operation and implementation of a decision or determination that is subject to appeal**
>
> **Operation of decision or determination**
>
> (1) Subject to this section, the institution of an appeal to the Federal Court from a decision or determination of the Tribunal does not affect the operation of the decision or determination or prevent the taking of action to implement the decision or determination.
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> **Court or Judge may make orders**

[1] Section 19(2) of the FCA.
[2] *Stirling Harbour Services Pty Ltd v Bunbury Port Authority (No. 2)* [2000] FCA 87 at [11].

(2) If an appeal is instituted in the Court from a decision or determination of the Tribunal, the Court or a Judge of the Court may make such order staying or otherwise affecting the operation or implementation of either or both of the following:

(a) the decision or determination of the Tribunal or a part of that decision or determination; and

(b) the decision or determination to which the proceeding before the Tribunal related or a part of that decision or determination; as that Court or Judge considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the appeal.

Court or Judge may vary orders

(3) The Court or a Judge of the Court may vary or revoke an order at any time.

Effect of orders

(4) An order:

(a) is subject to such conditions as are specified in the order; and

(b) has effect until:

(i) if a period for the operation of the order is specified in the order—the end of that period or, if a decision is given on the appeal before the end of that period, the giving of the decision or determination; or

(ii) if no period is so specified—the giving of a decision on the appeal.

8. Rule 33.40 of the Federal Court Rules 2011 (Cth) (**Rules**) states that "Division 33.2 applies to an appeal under section 169 of the *Native Title*

Act 1993 from a decision or determination of the National Native Title Tribunal". Division 33.2 is entitled "Administrative Appeals Tribunal" and is within Part 33 of the Rules, which is entitled "Appeals from decisions of bodies other than courts".

9. The Rules deemed to apply to the Appeal refer to s.44A of the *Administrative Appeals Tribunal Act* 1975 (Cth) (the **AAT Act**), the AAT equivalent to s.170. Section 44A(2) of the AAT Act provides:

> Stay orders
>
> (2) Where an appeal is instituted in the Federal Court of Australia from a decision of the Tribunal, that Court or a Judge of that Court may make such order or orders staying or otherwise affecting the operation or implementation of either or both of the following:
>
> (a) the decision of the Tribunal or a part of that decision; and
>
> (b) the decision to which the proceeding before the Tribunal related or a part of that decision;
>
> as that Court or Judge considers appropriate for the purpose of securing the effectiveness of the hearing and determination of the appeal.

10. Rule 33.22(k) of the Rules expressly provides that an appellant from a decision of the AAT and by virtue of R33.40 the Tribunal, may seek directions in the nature of a stay. Rule 33.17 provides that such an application is to be made by way of interlocutory application.

11. The power to order a stay of execution of the orders or determination of a decision pending appeal is discretionary.

Engaging and exercising the power

12. Accepting that the jurisdiction of the Court is established, the next question is whether the discretion is engaged and then whether the Court would exercise it in the present circumstances.

13. It is appropriate to apply the principles relevant to the grant of a stay of execution of judgment when considering the engagement and exercise of a power to grant a stay in the context of appeals from non-judicial bodies (*Stirling Harbour Services v Bunbury Port Authority (No. 2)* [2000] FCA 87 at [13]). In the present case, those principles may be stated as follows.

14. To establish that the power to grant a stay is engaged, the Applicant must satisfy the Court of the following.

15. First, that this is an appropriate case to warrant the exercise of the power (*Powerflex Services Pty Ltd v Data Access Corp* (1996) 67 FCR 65, citing *Alexander v Cambridge Credit Corp Ltd (recs apptd)* (1985) 2 NSWLR 685 and *Re Middle Harbour Investment Ltd (in liq)* (CA(NSW), Moffitt P, Glass and Mahoney JJA, CA 282/76, 15 December 1976, unreported).[3]

16. Secondly, that there is an at least arguable ground of appeal (*Maher v Commonwealth Bank of Australia* [2008] VSCA 122 at [27]).

17. It is not necessary for the Applicant to show the existence of special circumstances as a condition of the exercise of the power (*Stirling Harbour* at [13]-[14]; *Westaflex (Aust) Pty Ltd v Wood* 1990) AIPC 90-666 at 36,227; *Ng v Van Der Velde* [2010] FCA 89 at [20]).

18. In *Hicks v WA* [2002] FCA 1490 at [13] Justice French said:

> In s 170 the power in subs (2) to order a stay or to make an order otherwise affecting the operation of a decision or determination appealed against is conditioned upon the requirement that the Court considers the order "appropriate for securing the effectiveness of the

[3] The same test was applied in *Westaflex (Aust) Pty Ltd v Wood* (1990) 18 IPR 168; (1990) AIPC 90-666 at 36,228; per Gray J; *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd (No 2)* (1991) 30 FCR 548; (1991) ATPR 41- 138 at 52,992; per Morling J; *Henderson v Amadio Pty Ltd* (No 3) (1996) 65 FCR 66 per Heerey J.

hearing and determination of the appeal". That condition mandates consideration by the Court of what is appropriate for securing the effectiveness of the hearing and determination of the appeal. So if, absent a stay, the subject matter of the appeal would be lost or the relief sought rendered nugatory, then it might be said that a stay would be appropriate in the requisite sense.

19. That interpretation of s.170(2) of the NTA is consistent with the general rule that a stay will be appropriate where the subject matter of the appeal is irreplaceable or where, if it is not granted, the appeal would be rendered nugatory: *Maher v Commonwealth Bank of Australia* [2008] VSCA 122 at [24]–[26].

20. The Applicant submits that:

    a. the Notice of Appeal discloses grounds of appeal that are at least arguable;

    b. the Determination is "executory" in nature and capable of being stayed (*Stirling Harbour* at [6], and in contrast with *Starkey on Behalf of the Kokatha People v State of South Australia* [2016] FCA 1577 and *Cheedy v Western Australia* [2010] FCA 1305);

    c. if a stay is not granted, it is likely that the Appeal will be rendered nugatory. That is because:

        i. Santos has applied for the PPLAs (Affidavit of Conor Wakefield affirmed on 17 February 2023 at paragraph [7] and Annexure "CPW3" at page 13 and Annexure "CPW4" at page 040 (page 18 of the Determination) at [17] – [18]);

        ii. The Determination approves the doing of the future acts, being the grant of the PPLAs by the Minister (Affidavit of Conor Wakefield affirmed on 17 February 2023 at paragraph [8]);

iii. If the PPLAs are granted, the future act the subject of the Determination and this Appeal will have been done. The subject-matter of the Appeal would then have been lost (*Stirling Harbour* at [11] citing *Bercove v Hermes (No.2)* (1983) 51 ALR 105 per Toohey J and *Hicks*, ibid).

21. Only where an appeal is not rendered nugatory in the absence of a stay will the Court be required to consider the balance between "the interests of the successful party entitled to its judgment and the risk of irremediable harm to a party should it be successful in the absence of a stay": *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd* [2008] FCA 1867 at [46]–[47]. For the reasons just stated, the Applicant submits that that consideration does not arise in the present case.

22. For these reasons the Applicant respectfully submits that the Court would grant the Proposed Stay in the terms sought in Prayer 2 of the Application.

Injunctive relief

23. The Applicant submit that it would not be necessary for the Court to consider Prayers 3 and 4 of the Application for the reason that the most appropriate power, and approach to the issue is that set out above. Even if that were wrong, the Court would adopt the principles set out above in its consideration of the application for injunctive relief, as outlined by French J in *Stirling Harbour* at [13] and [15]:

> The decision whether or not to grant an interlocutory injunction pending an appeal will be informed by general principles governing the grant of such injunctions and, within those general principles, considerations analogous to those which arise in relation to stay orders made in aid of the court's appellate jurisdiction under s 29 or O 52 r 17 and orders for stay of execution under O 37. …
>
> …

> The order sought by the applicants in this case is in the nature of an interlocutory injunction. In the ordinary course it is a necessary condition of the grant of such an injunction that the applicant demonstrate a serious case to be tried and that the balance of convenience favours imposition of the restraint. These requirements apply with equal force to a case, such as the present, where the restraint is sought effectively to prevent a party from exercising what have been found to be its rights after trial of an action – *Hollier v Australian Maritime Safety Authority* (Fed Court, unrep, 27/4/98, Sundberg J). It is to be remembered also that the strength of the case and the assessment of where the balance of convenience lies are interdependent – *Bullock v Federated Furnishing Trades Society of Australasia (No 1)* (1985) 5 FCR 464 at 472. Where the applicant's case has been tried and found wanting there may nevertheless be a serious case to be tried on appeal. However, the Court's assessment of the strength of that case will be influenced by the fact that there has been an adverse judgment at first instance. It is relevant to the balance of convenience that the appeal may be nugatory if the restraint is not granted. It is also relevant that the successful party will be prejudiced if impeded in the exercise of its judicially vindicated rights. The factors relevant to the grant of an interlocutory injunction under s 23 pending appeal are similar to those applicable under s 29, O 37 and O 52, but capable of expression in terms of the considerations usually applied to the grant of interlocutory relief.

24. The Applicant submits that the Appeal on its face discloses that there is a real issue to be tried.

25. In relation to the balance of convenience, the Applicant repeats its submissions above at paragraph [20(c)] in relation to the failure to restrain the State from granting the PPLAs the subject of the Determination and Appeal resulting in the real risk that the subject matter of the proceedings being lost.

26. As to the undertaking as to damages upon which a grant of injunctive relief is usually conditioned, the Applicant says that it is unable to do so (Affidavit of Conor Wakefield affirmed on 17 February 2023 at paragraph [20]). The Applicant submits that its impecuniosity should not be fatal to the Application and that the interests of justice in the preservation of the process of the Court would in the present case outweigh any inconvenience to the Respondents, or the risk of loss to the Respondents or any third parties.

Natasha Case
Alinea Chambers
22 February 2023