

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Notice of Appeal from a Tribunal - Form 75 - Rule 33.12(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 17/02/2023 7:42:38 PM AEST
Date Accepted for Filing: 20/02/2023 10:34:42 AM AEST
File Number: QUD13/2023
File Title: GOMEROI PEOPLE v SANTOS NSW PTY LTD AND SANTOS NSW
(NARRABRI GAS) PTY LTD (FORMERLY KNOWN AS
ENERGY AUSTRALIA NARRABRI GAS PTY LTD) AND ORS
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



Sia Lagos

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.

Form 75
Rules 33.12(1); 33.34; 33.40



Supplementary Notice of appeal from a tribunal

No. QUD13 of 2023

Federal Court of Australia
District Registry: Queensland
Division: General

On appeal from the NATIONAL NATIVE TITLE TRIBUNAL

Gomeri People (NC2011/006)

Applicant

Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd) and others named in the schedule

Respondents

To the Respondent

The Applicant appeals from the decision as set out in this notice of appeal.

The Court will hear this appeal, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date]

Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable].

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of Gomeri People, Applicant
Prepared by Natasha Case, Barrister
Law firm Mishka Holt, Principal Solicitor NTSCORP Limited
Tel (02) 9310 3188 Fax _____
Email mholt@ntscorp.com.au
Address for service Unit 1, Suite 2.02 Level 1, 44-70 Rosehill Street, Redfern, NSW 2016



The Applicant appeals from the decision of the Honourable J A Dowsett AM KC, President, given on 19 December 2022 at Brisbane.

The Tribunal decided Santos NSW Pty Ltd and Another v Gomeroi People and Another [2022] NNTTA 74.

The Applicant appeals from parts of the decision as set out below.

Questions of law

1 Questions of construction

1.1 On a proper construction of the *Native Title Act 1993* (Cth) (**NTA**), is the Native Title Party (**Gomeroi**), for the purposes of Part 2 Subdivision P Right to Negotiate provisions (**Right to Negotiate**):

(a) the Applicant authorised by the Claimant Group or

(ii) the Applicant registered on the Native Title Register?

1.2 On a proper construction of the NTA, does the requirement for negotiation in good faith under s.31(1)(b) of the NTA only apply to negotiations about compensation for the anticipated effect of a proposed future act on a claimed native title right or interest?

1.3 Is the mandatory public interest criteria under s.39(1)(e) subject to a condition of “practicability”?

2. Questions of admissibility

2.1 Is conduct occurring prior to a notification date irrelevant to the question of good faith?

2.2 Was Mr Ho’s evidence inadmissible or of no weight?

2.3 Was the Gomeroi evidence as to Santos’s knowledge that the Gomeroi had authorised another applicant inadmissible?



- 2.4 Is it permissible to disregard the “national” and “state” impacts of climate change because climate change is a “global” problem?

3. Questions of proof

- 3.1 What is the test for establishing a want of good faith in negotiations within the meaning of s.31(1)(b) of the NTA in respect of an offer of compensation?

- 3.2 Is an offer of compensation made in the course of negotiations conducted under the “right to negotiate”:

(a) “unique” and incapable of comparison?

(b) required to be considered within the statutory language of s.31 of the NTA?

(c) required to be considered only in the context of the whole of an agreement?

(d) not amenable to analysis by reference to a “market”?

- 3.3 Did the Tribunal misrepresent or fail to understand Mr Ho's evidence?

4. Questions of fairness

- 4.1 Did the Tribunal deny the Gomeri procedural fairness pursuant to s.109 of the NTA by introducing and applying a range of concepts, definitions and considerations not raised by the parties and of which it did not give the parties notice before making the Determination?

- 4.2 Did the Tribunal fail to consider relevant considerations, and take into account irrelevant considerations?

Orders sought

1. Appeal allowed;



2. An order setting aside the Determination pursuant to s.169(7)(a) of the NTA;
3. An order remitting the Application for hearing by a different member of the Tribunal pursuant to s.169(7)(b) of the NTA;
4. Such further or other orders as the Court may deem appropriate.

Grounds relied on

1. Questions of construction

1. In relation to question 1.1, the Tribunal erred (at [170]-[177]) in finding that the Applicant registered on the Native Title Register was the Native Title Party for the purposes of the Right to Negotiate in that that construction is contrary to the objects and purposes of the NTA.
2. In relation to question 1.2, the Tribunal erred (at [273]) in finding that negotiations for compensation under the Right to Negotiate were not the subject of the requirement for negotiation in good faith under s.31(1)(b) unless the negotiations related to compensation for the anticipated effect of a proposed future act on native title rights and interests in that no such limitation is contained in the scheme of provisions comprising the "right to negotiate".
3. In relation to question 1.3 the Tribunal erred (at [542-3], [1014], and [1024]) in finding that it was "impracticable" for the Tribunal to make a determination in relation to the public interest criterion under s.39(1)(e) in that it:
 - a. failed to discharge the function, or to exercise the power conferred on it, or
 - b. alternatively, failed to consider a relevant consideration, being the mandatory consideration set out in s.39(1)(e) and the Gomeroi's evidence in that regard.



2. **Questions of admissibility**

4. In relation to question 2.1, the Tribunal erred in finding (at [79], [495], [543] 234-5) that conduct occurring prior to a notification date was irrelevant to the question of good faith in negotiations in that such a finding was inconsistent with binding authority.

5. In relation to question 2.2, the Tribunal erred in finding that Mr Ho's evidence was inadmissible (at [448] – [450], [466]) because it:

- a. was misconceived (at [293], [408]);
- b. was irrelevant (at [390] 4, [354], [402]—[404], [448] – [449]);
- c. failed to disclose the factual basis upon which his opinions were based, being the actual agreements referred to (at [390], [407], [408], [448]);
- d. lacked probative value (at [450] 4) and
- e. was of no weight (at [406] – [407])

when those findings were legally unreasonable.

6. In relation to question 2.3 the Tribunal erred in impliedly finding (at [170] – [171], [176] – [177]) that evidence adduced by the Gomeroi in relation to Santos's knowledge that:

- a. the claim group had limited the authority of the Applicant (and the terms of the limitation), and
- b. the Gomeroi objected to Santos negotiating with claimants who (despite their remaining on the Native Title Register) were not authorised by the claim group

was irrelevant or of no weight, in that such findings were legally unreasonable.



7. In relation to question 2.4, the Tribunal erred (at ~~[903]~~ and ~~[907]~~) in finding that the impacts of climate change:

- a. on the local area were not sufficiently specific to the project area to be relevant to consider (at [970]), and
- b. on the nation as a whole could not be considered because climate change was a “global problem” (at [972])

in that such findings were legally unreasonable.

3 Questions of proof

8. In relation to question 3.1, the Tribunal erred:

- a. in finding (at [410-4], and [450]) that an offeror must actually know that its offer is under-value at the time of making it before the question of whether the offer was not made in good faith within the meaning of s.31(1)(b) can arise;
- b. in finding (at [454] – [459] ~~5] – [460]~~) that whether an offer is reasonable must be assessed subjectively from the perspective of the offeror.

in that such findings were legally unreasonable.

9. In relation to question 3.2, the Tribunal erred in finding that compensation offered in the course of negotiations conducted under the Right to Negotiate or contained in agreements reached pursuant to the Right to Negotiate:

- a. was unique and therefore incapable of comparison (at [384-5] – [385]), when that finding was legally unreasonable, contrary to all of the evidence, and not supported by any evidence before the Tribunal.
- b. must, in order to establish a “valid” comparison of amounts of compensation, be demonstrated by expert evidence which:



- (i) utilises the language of s.31 of the NTA (at [356], [377]), and
- (ii) compares the whole of an agreement (at [372], [378], [388 9])

when such requirements do not exist as a matter of law, are contrary to all of the evidence and are not supported by any evidence before the Tribunal.

- c. was not amenable to analysis by reference to a “market” (at [375], and [385], [388]) when there was no proper legal basis for limiting the concept of a “market” in the way found, such findings were contrary to all of the evidence, and not supported by any evidence before the Tribunal.
10. Further in relation to question 3.2, the Tribunal erred (at [388 9]) in finding that no market was established as a question of fact when that finding was legally unreasonable.
11. In relation to question 3.3, the Tribunal erroneously:
- a. attributed factual and legal propositions to Mr Ho that had no basis in Mr Ho’s evidence (at [371], [373]);
 - b. stated that Mr Ho did not compare “like with like” (at [365], [399]), when that finding was against, or failed to consider, Mr Ho’s evidence which did in fact demonstrate a comparison of “like with like” and that finding is legally unreasonable;
 - c. found that Mr Ho did not disclose the “basis” for his reasoning (at [273], [274], [277], [295], [318], [341], [344], [386-7] – [387], [399], [412-43], [448 9], [465 6]) when in fact he did and that finding is legally unreasonable.

4 Questions of fairness

12. In relation to question 4.1 the Tribunal erred by:
- (a) adopting the concept of futures trading to deny the existence of a “market” or “market price” (at [356], [286] – [290] [387]–[390]);



(b) adopting the Australian Consumer Law definition of "market"(at [286], [289], [386] and [450]);

without notice to the parties and without affording the parties an opportunity to be heard.

13. In relation to 4.2 the Tribunal erred by:

- a. alternatively to questions 2.1-2.4 and related grounds, failing to consider relevant considerations, and
- b. alternatively to questions 3.2 and 4.1 and related grounds, considering irrelevant considerations.

Applicant's address

The Applicant's address for service is:

Place: Unit 1a, Suite 2.02, 44-70 Rosehill Street, Redfern, NSW 2016

Email: mholt@ntscorp.com.au

The Applicant's address is NTSCORP Limited, Unit 1a, Suite 2.02, 44-70 Rosehill Street, Redfern, NSW 2016.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: ~~17 February 13 January~~ 2023

A handwritten signature in black ink, appearing to read "Mishka Holt".

Signed by Mishka Holt
Solicitor for the Applicant

Note

Rule 33.12(4) provides that the Applicant must serve a copy of the notice of appeal on each other party to the proceeding and the Registrar of the Tribunal.



Schedule

No. QUD13 of 2023

Federal Court of Australia
District Registry: QUEENSLAND
Division: General

Respondents

First Respondent: **Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd
(formerly known as EnergyAustralia Narrabri Gas Pty Ltd) and
others named in the schedule**

Second Respondent: **State of New South Wales**

Date: 17 February ~~13 January~~ 2023

