Second and third respondents' outline of submissions on preliminary issues

VID 647 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

Raelene Cooper

Applicant

National Offshore Petroleum Safety and Environmental Management Authority and others named in the Schedule

Respondents

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A. Overview

1. These submissions address the Preliminary Issues[1] which the Court has ordered be tried separately, and the Applicant's written submissions dated 19 September 2023 (**AS**).

2. The Preliminary Issues are whether:

   (a) NOPSEMA had statutory power to make the Decision[2] where it was not reasonably satisfied that the Seismic EP demonstrated that the consultation required by regulation 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Regulations**) had been carried out, and so was not

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1 As defined in paragraph 3 of the orders made on 15 September 2023.

2 As defined in the Amended Originating Application, page 2. The Decision comprises the letter from NOPSEMA to Woodside dated 31 July 2023 with Attachment 1 which is Annexure [redacted]-1 to the affidavit of [redacted] affirmed 11 September 2023.

Filed on behalf of: Woodside Energy Scarborough Pty Ltd and Woodside Energy (Australia) Pty Ltd, the Second and Third Respondents

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reasonably satisfied of the criteria in subregulation 10A(g)(i) and subregulation 10A(g)(ii) (**Issue 1**);

(b) if NOPSEMA did not have statutory power to make the Decision, it would be open, as a matter of law, to refuse the relief sought by the Applicant on any discretionary basis identified by Woodside (**Issue 2**);

(c) the Applicant has standing to seek injunctive relief to prevent Woodside from undertaking the activity under the Seismic EP otherwise than after compliance with the conditions to which the Decision is subject (**Issue 3**).

3. Issue 1 concerns the powers of NOPSEMA prescribed by the Regulations and turns on, relevantly, the proper construction of subregulations 10(4)(b)(iii) and 10(6) in light of the text, context and objects of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**) and the Regulations. Woodside contends that the Decision was within the limits of the powers conferred on NOPSEMA by subregulation s10(4)(b)(iii) and 10(6), given the plain language of those subregulations.

4. Issue 2 concerns the consequences of a finding that the Decision is invalid and whether it is open, as a matter of law, to the Court to refuse relief as a matter of discretion. There appears to be some common ground between the Applicant and Woodside in that both parties contend that the grant of public law relief is discretionary.[3] Woodside contends, contrary to the Applicant's position, that: (a) delay on the part of the Applicant, prior to and after the Decision, is a basis upon which the Court may refuse the relief sought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) and the *Judiciary Act 1903* (Cth) (**Judiciary Act**) exercising its discretion; and (b) such considerations are unaffected by the Applicant's assertions that the Decision is a nullity, such a description being of little or no utility in answering the question of discretion.

5. Issue 3 concerns whether the Applicant has standing to seek "an injunction to restrain conduct in breach of the law".[4] The Applicant has no such standing. The Applicant does not have a "special interest" in the subject matter of the litigation as it pertains to Issue 3, namely whether Woodside is complying with the conditions applying to the operations for the activity the subject of the Seismic EP. The subject matter of the litigation, which is concerned with restraining an alleged offence under the Regulations, is a matter which,

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3 See AS [6(2)] and [52].

4 AS [55].

under the regulatory scheme, is entrusted solely to NOPSEMA. The Applicant cannot usurp NOPSEMA's functions and duties to prosecute an alleged offence under the Regulations.

B. Issue 1: The Decision was within power

Principles of construction

6. The principles of statutory construction are well established. Shortly stated, "the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute".[5]

7. The task of statutory construction must begin, and end, with a consideration of the statutory text in its context.[6] Statutory construction requires consideration of a provision with reference to the statute as a whole.[7] The Court will consider legislative provisions in the same statute together. Where there is a conflict between general and specific provisions, it is common sense that the drafter will have intended the general provisions to give way to the specific.[8]

8. Regulations are to be construed in accordance with these ordinary principles.[9] But it is to be recalled that regulations are addressed to practical people skilled in the particular industry and should be construed in light of practical considerations.[10]

Statutory scheme in overview

9. AS [9] to [19] contain an overview of the OPGGS Act and the Regulations.[11] Woodside agrees with that overview but adds the following matters.

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5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, [69] (McHugh, Gummow, Kirby and Hayne JJ).

6 *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12, [22] (French CJ and Hayne, Kiefel, Gageler and Keane JJ) citing *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55, [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

7 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56, [24] (French CJ and Hayne J).

8 *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corporation* (1980) 44 FLR 455, 469 (Deane J).

9 *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509; [2023] HCA 18, [86]-[87] (Gordon, Edelman, Steward and Gleeson JJ).

10 *Melbourne Pathology Pty Ltd v Minister of Human Services* (1996) 40 ALD 568, 581 (Sundberg J), citing *Gill v Donald Humberstone & Co Ltd* [1963] 3 All ER 180, 183 (Lord Reid).

11 AS [8] to [19] omits regulations 11, 17 and 18.

10. AS [9] adverts to the object of the Regulations. To that, Woodside adds the object of the OPGGS Act, which is set out at section 3. The object was described by Colvin J in *Shell Energy Holdings Australia Limited v Commissioner of Taxation*[12] as being "to provide an effective regulatory framework for "petroleum exploration and recovery" and for "the injection and storage of greenhouse gas substances" in offshore areas."[13]

11. Part 6.9 of the OPGGS Act establishes NOPSEMA as a primary administrative body responsible for the administration of aspects of the OPGGS Act: section 645.

12. AS [8] records that the Regulations are made pursuant to section 781 of the OPGGS Act. The Regulations are themselves a restatement of the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999*.[14] The Explanatory Statement to the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* explained that those regulations provide for an "objective-based" system of regulation - not "prescriptive regulation" – being a framework within which "the government, industry and the community can work together to ensure the environmental risks and effects from exploiting Australia's petroleum resources are as low as reasonably practical and acceptable and encourages continuous improvement in industry environmental performance".[15]

13. The following propositions emerge from the statutory scheme and its history:

    (a) the text of subregulation 10(4)(b)(iii) and subregulation 10(6), which are the start and end of the interpretative task, are contrary to the Applicant's construction of the Regulations in AS [36];

    (b) whilst accepting the importance of compliance with the criteria in regulation 10A, the context of regulations 10A and 11A are not determinative of the proper construction of subregulations 10(4)(b)(iii) and 10(6). It is of no consequence that the criteria in regulation 10A have not been satisfied objectively. The text and subject matter of regulations 10A and 11A yield to the power conferring provisions in regulation 10; and

    (c) there are no express or other features of the relevant statutory context that operate

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12 (2021) 113 ATR 262; [2021] FCA 496.

13 (2021) 113 ATR 262; [2021] FCA 496, [208] (Colvin J).

14 *Petroleum (Submerged Lands) (Management of Environment) Amendment Regulations 2009 (No 1)* (Cth) Schedule 1, Clause 1.

15 Petroleum (Submerged Lands) (Management of Environment) Regulations 1999 Explanatory Statement, pages 4, 7.

to limit the scope of the conditioning power in subregulation 10(6). To the contrary, consistently with "objective-based" system of regulation, the relevant statutory context supports, rather than precludes, a broad interpretation of the power in subregulation 10(6).

14. Each proposition is addressed below.

Subregs 10(4)(b)(iii) and 10(6) confer power absent satisfaction of reg 10A criteria

15. The starting point for Issue 1 is the text in regulation 10, which is set out at AS [14].

16. The text of subregulation 10(4)(b)(iii) is that NOPSEMA can act under subregulation (6) "*if* [NOPSEMA] is *still* not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A" (emphasis added). The text of subregulation 10(4)(b)(iii) is unqualified: its plain meaning is that it includes *all* of the criteria in regulation 10A.

17. NOPSEMA's power under subregulation 10(6) is thus enlivened where NOPSEMA "is still not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A". The Applicant's contention at AS [36] that "NOPSEMA does not have the power to accept an environment plan under reg 10" is to subvert or disregard the clear words of subregulation 10(4)(b)(iii).

18. The fact of subregulation 10(4)(b)(iii) conferring power in the absence of reasonable satisfaction as to the regulation 10A criteria is supported by its immediate context: namely, subregulation 10(5). Subregulation 10(5) provides that if the titleholder does not resubmit the plan in response to a request by NOPSEMA, and by the date set by NOPSEMA, NOPSEMA "*must*: (a) refuse to accept the plan; or (b) act under subregulation (6)" (emphasis added). Self-evidently, both subregulations 10(4)(b)(iii) and 10(5)(b) enable acceptance by NOPSEMA of an environment plan despite, or indeed because of, a lack of reasonable satisfaction as to compliance with regulation 10A.

Criteria for acceptance in reg 10A does not control NOPSEMA's power

19. In an effort to overcome what the text of subregulation 10(4)(b)(iii) provides, the Applicant relies on two asserted contextual factors in support of its proposed construction.

20. The first matter is the proposition that consultation is to be completed prior to acceptance of an environment plan.[16] It may be accepted that matters to which the Applicant refers in AS [38]-[43] are in general terms features of the Regulations, namely: (a) the evident

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16 AS [38]-[43].

purpose of an environment plan;[17] (b) that the consultation requirements of subregulation 10A(g) is to give "relevant persons" a *reasonable* opportunity to be consulted; and (c) the language that is used in regulation 10A(g).[18] But these matters, properly analysed in the context of the Regulations as a whole and it objects, do not bear upon the proper construction of subregulation 10(4)(b)(iii).

21. The consultations required by Division 2.2A may ordinarily be expected to be completed prior to an acceptance of an environment plan. But the Regulations do not express these consultations as a prior condition precedent to the acceptance of an environment plan. The regime in regulation 10 for the making of a decision on a submitted environment plan expressly provides that NOPSEMA can act under subregulation 10(6) if NOPSEMA is still not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, including subregulation 10A(g).

22. The position as to the regulation 10A criteria may be contrasted with regulation 5G, which makes plain that NOPSEMA must not accept an environment plan unless it is reasonably satisfied that the titleholder is compliant with section 571(2) of the OPGGS Act.

23. The regime is consistent with the object of the Regulations, which is to "ensure that any *petroleum activity* or *greenhouse gas activity* carried out in an offshore area is" relevantly carried out in a manner that is ALARP and acceptable.[19] From a timing perspective, the focus is on things occurring prior to the commencement of the *activity*.

24. It is therefore a misconception to suggest, as the Applicant does, that consultation is to be *carried out*, focussing on the past tense, such that it is complete prior to acceptance of an environment plan. Leaving aside the distinct sphere of operation raised by subregulation 10(6), the regime should be understood. The regime established by the Regulations is premised on an environment plan being a 'live document'. The regime imposes a continuous obligation on the titleholder to consult with relevant interested persons throughout the life of the activity: subregulation 14(9). Woodside has, as part of its implementation strategy, an obligation to engage in ongoing consultation during the implementation of the petroleum activity.[20]

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17 AS [38].

18 AS [43].

19 Regulation 3(b) and (c).

20 Seismic EP, Section 7.9.2.1.

25. This is not to deny that the regulatory scheme regards compliance with the requisite criteria in regulation 10A as important. But as Bromberg J observed in *Tipakalippa v NOPSEMA (No 2)*[21] "the extent of the importance which the scheme attaches to compliance is reflected, as it must be, in how the scheme deals with non-compliance and its consequence".[22]

26. The scheme confers upon NOPSEMA an ability to act under subregulation 10(6) if NOPSEMA is not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, including subregulation 10A(g). The criteria for acceptance of an environment plan must give way to the specific provisions that prescribe NOPSEMA's power to accept an environment plan.

The conditioning power in subregulation 10(6) is broad

27. The second contextual factor relied on by the Applicant is that the imposition of conditions on an acceptance of an environment plan cannot overcome an absence of reasonable satisfaction as to the subregulation 10A(g) criteria.[23] The Applicant contends that the limitations or conditions which are expressly provided for in subregulation 10(6) "must be of a kind which are consistent with the criteria for acceptance of the environmental plan".[24] It is unclear what level of consistency is called for.

28. But there is nothing in the text or context of subregulation 10(6) that mandates such a construction. That construction seeks to curtail NOPSEMA's power to act under subregulation 10(6).

29. In this regard, "[i]t is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do".[25] As explained in *Taylor v The Owners – Strata Plan No 11564*:[26]

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the

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21 (2022) 406 ALR 41; [2022] FCA 1121.

22 (2022) 406 ALR 41; [2022] FCA 1121, [266]. See further *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union and Another* (2018) 262 FCR 527; [2018] FCAFC 77. See at [99] and [103]-[106] and the cases cited therein.

23 AS [44]-[50].

24 AS [46].

25 *Thompson v Goold & Co* [1910] AC 409, 420 (Lord Mersey), cited with approval in *R v Holliday* (2017) 260 CLR 650, [83]; [2017] HCA 35 (Nettle J).

26 (2014) 253 CLR 531, [38]; [2014] HCA 9 (French CJ, and Crennan and Bell JJ).

> case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature". (citations omitted)

30. There is no basis in the text, context or purpose of the Regulations to conclude that subregulation 10(6) manifests an intention that NOPSEMA's power be limited in the way that the Applicant contends.

31. The Applicant unduly elevates the importance of the criteria for acceptance in subregulation 10A(g) – seemingly above all of the other criteria in subregulation 10A – and the purpose of the consultation requirement so as to render those matters repugnant to the clear text of subregulation 10(6)(b).[27] All of the criteria in subregulation 10A are important. All of them are capable of treatment under subregulation 10(6). To unduly elevate subregulation 10A(g) is without basis and risks rendering subregulation 10(6)(b) devoid of any work to do (as is partly recognised in AS [47]).

32. The Applicant posits possible constructions as to the scope of NOPSEMA's power under subregulation 10(6)(b) in AS [48]. These constructions gloss over the broad language that is used in subregulation 10(6)(b). They seek to read down the power in the absence of clear words. As is acknowledged at AS [49], the effect of the Applicant's construction is that "it is unlikely that there could be any condition which could be appropriate under this subsection". Such an outcome does not sit comfortably with the broad powers conferred upon by NOPSEMA by the legislation.

33. The Applicant's submissions do not engage at all with what is meant by the phrase "limitations or conditions applying to operations for the activity". It is accepted that NOPSEMA's power to accept the plan subject to limitations or conditions is not at large. The limitations or conditions must be of a nature capable of "applying to operations for the activity".

34. In defining the limits of NOPSEMA's power, the legislature had a host of drafting options available to it by reference to concepts which are familiar under the OPGGS Act and the Regulations e.g., "works", "activity", "operations *of* the activity" and "operations for the

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27 AS [46(1), (2) and (3)].

activity". Consistently with its ordinary meaning, the term "operations" refers to "a particular course or process".[28]

35. The phrase "operations *for* the activity" denotes that the operations, although distinct from the activity itself, must be *for* the activity. Moreover, the text of subregulation 10(6) refers to conditions "*applying to* operations for the activity" (emphasis added). To meet this threshold, the condition or limitation needs only to *apply* to operations for the activity. No greater nexus to the operations is needed.

36. The conditions imposed by NOPSEMA are set out in Attachment 1 to the Decision. Attachment 1 states that "[i]n accordance with regulation 11(1)(c) NOPSEMA gives notice that acceptance of the EP is subject to the following conditions applying to operations for the Scarborough 4D MSS activity". The conditions are relevantly directed to consultation with First Nations groups and people.

37. The text in Condition 1 demands that Woodside must consult in accordance with the condition "[p]rior to commencement of the *activity*". The text of Condition 5 is relevantly that Woodside must comply with the condition "[a]t any time prior to or during the activity". The temporal nature of the conditions are consistent with the ongoing consultation before activity, and with the ongoing consultation requirements that are imposed upon a titleholder during the implementation of the activity.

38. As to AS [50(1)], the conditions imposed by NOPSEMA are entirely consistent with how the regulatory scheme works in practice. The regulatory scheme requires continual vigilance by Woodside as titleholder to manage the activity to ALARP and acceptable, and to continue to consult with relevant interested persons after the Seismic EP has been accepted.

39. The conditions imposed by NOPSEMA are thus a manifestation of the "effective regulatory framework" promulgated by the OPGGS Act based on objective-based regulation.

40. As to AS [50(2)], the contention that the conditions imposed by NOPSEMA would defer to the titleholder NOPSEMA's statutory function, or give rise to delegation of function, does not bear scrutiny in light of what the regulatory scheme provides in terms of oversight by NOPSEMA. There are a number of regulatory touch points for NOPSEMA to consider whether it agrees with Woodside's view as to the satisfaction of the conditions. A summary of the key regulatory touch points is set out at **Annexure A** to these submissions.

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28 Macquarie Dictionary (online), "operation".

41. NOPSEMA can require a titleholder to submit a proposed revision of an accepted environment plan under regulation 18 and, separately, has the power to withdraw acceptance of an environment plan under regulation 23. NOPSEMA can withdraw acceptance of an environment plan under regulation 23 if, relevantly, the titleholder has not complied with regulation 7. If Woodside does not comply with the conditions imposed on the Seismic EP then NOPSEMA can withdraw its acceptance pursuant to regulations 7 and 23.

42. The email from NOPSEMA to Woodside dated 5 September 2023[29] does not signal any abdication by NOPSEMA of its statutory duties. Rather, that email shows NOPSEMA, as a prudent regulator, reminding Woodside of the severe consequences that will follow in the event that it does not comply with the terms of the acceptance of the Seismic EP.

43. As to AS [50(3)], any alleged "transparency objectives" evident in the Regulations, as suggested at AS [50(3)], are dubious at best.[30] The Regulations do not contemplate that any ongoing consultation engaged in by Woodside pursuant to the implementation plan in the Seismic EP are to be made public. If consultation engaged in pursuant to the Conditions resulted in the identification of a significant new or increased impact or risk triggering a revision to the environment plan, that revised plan would need to be the subject of consultation. That consultation would be captured in the environment plan in the ordinary course. Further, the responses by a relevant person are not made public but are placed in a sensitive information report.[31]

C. Issue 2: The Court can refuse relief for a discretionary reason

44. The Applicant accepts that public law relief is discretionary: AS [52].

45. But while accepting the discretionary nature of public law relief, the Applicant caveats her position by submitting, in effect, that if NOPSEMA's decision is invalid it is to be regarded in law as "no decision at all": AS [52(2)]. On this basis, and others, the Applicant submits that conduct on the part of the Applicant could not reasonably justify refusing the relief sought in the Amended Originating Application: AS [52].

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29 Annexure [redacted]-7 to the affidavit of [redacted] affirmed 11 September 2023.

30 Woodside accepts that subregulation 16(b)(iv) requires the full text of each relevant person response to be included in an environment plan, but those responses are contained in the sensitive information part of the plan and are not made public: see subregulation 9(8), 9AB.

31 See Annexure [redacted]-3 to the affidavit of [redacted] affirmed 11 September 2023.

Consequences of an invalid decision

46. The starting point is to observe the statements of Gaudron and Gummow JJ in *Minister for Immigration v Bhardwaj*[32] that:

> …it is neither necessary nor helpful to describe erroneous administrative decisions as "void", "voidable", "invalid", "vitiated" or, even, as "nullities". To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made.[33]

47. Consistently with this sentiment, the Full Federal Court has twice observed that the consequences of a decision infected by jurisdictional error will be determined by the Act which empowers the decision: *Ma v Minister for Immigration and Citizenship*;[34] and *SZKUO v Minister for Immigration*.[35]

48. In *Leung v Minister for Immigration and Multicultural Affairs*,[36] Finkelstein J, discussing the effect of decisions that are invalid because of jurisdictional error, or on other grounds, said:

> There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.[37]

49. An invalid decision made under the Regulations will have effect until it is set aside. On a plain reading of the Regulations, NOPSEMA has power to make another decision pursuant

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32 (2002) 209 CLR 597; [2002] HCA 11.

33 (2002) 209 CLR 597; [2002] HCA 11, [46] (Gaudron and Gummow JJ).

34 [2007] FCAFC 69, [27] (Mansfield, Lander and Siopis JJ).

35 (2009) 180 FCR 438; [2009] FCAFC 167, [26] (Moore, Jagot and Foster JJ).

36 (1997) 79 FCR 400.

37 (1997) 79 FCR 400, 413 (Finkelstein J), and referred to with apparent approval by Gleeson CJ in *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11, [12].

to subregulation 10(4)(b). There is nothing in the text of the OPGGS Act or the Regulations that suggests otherwise.[38]

50. If, on Issue 1, the Decision is found to be invalid, the logical outcome is that the environment plan goes back to NOPSEMA to make a decision in accordance with regulation 10(4).

The Court's discretion is wide

51. The balance of the Applicant's submissions on Issue 2 (AS [51], [52(1) and (3)] and [53]) are directed to whether, as a matter of fact, conduct on the part of the Applicant *could* reasonably justify refusing the relief sought in the Amended Originating Application. These submissions raise factual matters which go beyond the legal question raised by Issue 2.

52. For the reasons that follow, Woodside's position is that conduct on the part of the Applicant, including conduct occurring *after* the Decision, *could* reasonably justify refusing the relief sought in the Amended Originating Application.

53. The Applicant's submissions make clear that paragraphs 1, 2 and 3(a) of the orders sought in the Amended Originating Application are for the application for judicial review, and that paragraph 3(b) of the Amended Originating Application is, in the alternative, for the application to restrain: AS [4]. The relevant legal bases for the relief sought, as relevant to Issue 2, are therefore section 16 of the ADJR Act and section 39B of the Judiciary Act.

54. Section 16(1) of the ADJR Act, and the ADJR Act as a whole, was considered by the Full Federal Court in *Lamb v Moss*.[39] There, the Full Federal Court recognised "a power in the court to refuse relief notwithstanding that the statutory preconditions to a grant of relief are satisfied".[40] This conclusion was reached because of the language in which the court is given power in section 16, including in section 16(4) "with its grant to the court of power … to revoke vary or suspend the operation of any order made by the court under s.16".[41] This feature, the Court said, "strongly suggests that there is no absolute right in an applicant

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38 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 218-219 (Gummow J).

39 (1983) 76 FLR 296.

40 (1983) 76 FLR 296, 312.

41 (1983) 76 FLR 296, 313.

for relief to relief one kind or another once the basis of a claim for relief is established".[42] Further support for this conclusion was found in sections 10, 12 and 18 of the ADJR Act.[43]

55. The conclusion reached in *Lamb v Moss* was affirmed by Mason CJ in *Australian Broadcasting Tribunal v Bond.*[44] It accords with the conclusion reached in *Kamha v Australian Prudential Regulation Authority,*[45] which confirms that the express discretion conferred by section 10(2)(b) of the ADJR Act does not derogate from the general discretion arising under section 16.

56. The issuing of writs under section 39B of the Judiciary Act is similarly discretionary. Discretionary relief may be refused under section 39B if the conduct of the party is inconsistent with the application for relief. It may be inconsistent, for example, if there is, relevantly, delay on the part of the applicant or the applicant has waived or acquiesced in the invalidity of the decision: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs.*[46]

57. The contentions in AS [52(1)] are expressed in absolute terms and without reference to authority. There is authority in support of Woodside's contention that the Applicant's conduct with respect to consultation after the Decision may be relevant. Notably:

    (a) In *Vangedal Niesel v Commissioner of Patents*,[47] Bowen CJ proceeded on the basis that matters occurring after the decision which is the subject of an application for an order of review may well be relevant to exercise of this discretion in making an order under section 16(1) of the ADJR Act.

    (b) In *The Queen v Ross-Jones; Ex parte Green*,[48] Gibbs CJ spoke of the court retaining its discretion to refuse relief "if in all the circumstances that seems the proper course".[49]

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42 (1983) 76 FLR 296, 313.

43 (1983) 76 FLR 296, 312-313.

44 (1990) 170 CLR 321, 338.

45 (2005) 147 FCR 516; [2005] FCAFC 248, [87] (Emmett, Allsop and Graham JJ).

46 (2005) 228 CLR 294; [2005] HCA 24, [80] (McHugh J), citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57, [57]-[58] (Gaudron and Gummow JJ).

47 (1980) 49 FLR 44.

48 (1984) 156 CLR 185; [1984] HCA 82.

49 (1984) 156 CLR 185, 194; [1984] HCA 82.

58. To be clear, the scope of Woodside's contention does not solely "depend on things done or not done by the Applicant between now and the 'final hearing"'.[50] The contention raised in Woodside's concise statement at paragraph 18.2 would fall to be considered naturally in the context of the whole of the Applicant's conduct to date.[51]

59. The point that is raised in AS [50(3)] is, in truth, no answer to whether the Court should refuse relief to the Applicant on a discretionary basis. Even if the Decision is set aside pursuant to section 16(1)(a) of the ADJR Act, it is set aside only as against the Applicant in the particular proceeding in which the order is made.[52] In the unlikely event of subsequent proceedings, the Court would need to embark on a fresh enquiry as to the conduct of any new applicant as relevant to the Court's discretion.

D. Issue 3: the Applicant has no standing to restrain a breach of law

60. There is a fundamental distinction between public rights and private rights. In contrast with private rights and other rights of action conferred by statute, the enforcement of public rights, owed to the public at large, was usually by the Attorney-General as the representative of the public, either ex officio or on the relation of a private person. In the absence of a statutory right of action, a plaintiff will only be able to bring a legal action to enforce a purely public right if the rules of standing permit the plaintiff to enforce that public right: *Hobart International Airport Pty Ltd v Clarence City Council*.[53]

61. The Applicant has labelled her application to restrain as an application for "an injunction to restrain conduct in breach of the law".[54] The Applicant says that she wishes to vindicate a public interest and has standing as person with a special interest in the subject matter of the litigation.[55]

62. The Applicant relies on the observations of Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission*[56] (AS [55(1)], FN 49) as authority for the proposition that an injunction is available as a public law remedy to restrain an apprehended breach of

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50 AS [53].

51 The breadth of the contention was recognised by Justice Colvin in *Cooper v National Offshore Petroleum Safety and Environmental Management Authority* [2023] FCA 1112, [17]. Woodside can amend its concise statement in response if that is thought to be necessary.

52 *Wattmaster v Alco P/L v Button* (1986) 13 FCR 253, 259 (Sheppard and Wilcox JJ).

53 (2022) 399 ALR 214; [2002] HCA 5, [84] and [87] (Edelman and Steward JJ).

54 AS [55].

55 AS [55].

56 (2000) 199 CLR 135; [2000] HCA 5.

statute. But the observations made by Gaudron J commence by acknowledging the potential for "executive and administrative decisions to affect adversely the rights, interests and legitimate expectations of the individual"[57] and that "the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise".[58]

63. The Applicant, when claiming standing to restrain an alleged unlawful act, makes no criticism about NOPSEMA not exercising its executive and administrative powers in accordance with applicable legislation. It is not an application directed to NOPSEMA. The application is not concerned with an executive or administrative decision, said to affect the public interest.

64. When considered in the above context, the Applicant's reliance on *Corporation of the City of Enfield v Development Assessment Commission* is misplaced.

65. It may be accepted that, in exceptional circumstances, a private citizen may use a civil process to seek injunctive relief to prevent a criminal offence: *Onus v Alcoa of Australia Ltd.*[59] According to Wilson J in *Onus*, "[i]t is a jurisdiction which must be jealously guarded".[60] The private citizen will have standing to sue if he or she has a "special interest in the subject matter" of the proceedings.[61]

66. While the rule is flexible, the nature and the subject matter of the litigation will dictate what amounts to a special interest: *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA).*[62] Relevant matters are the objects of the applicable legislation which is sought to be enforced and the means of enforcement, including the presence of a specialty regulator.

67. The subject matter of the proceedings, as it pertains to Issue 3 and the application to restrain, is whether Woodside has met, objectively, the Conditions applying to the operations for the activity the subject of the Seismic EP.

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57 (2000) 199 CLR 135; [2000] HCA 5, [54].

58 (2000) 199 CLR 135; [2000] HCA 5, [54].

59 (1981) 149 CLR 27.

60 (1981) 149 CLR 27, 63 (Wilson J).

61 *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 531 (Gibbs CJ); *Shop Distributive and Allied Employees Assn v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552, 558; [1995] HCA 11 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

62 (1995) 183 CLR 552, 557-559 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ).

68. Whether Woodside has objectively met the Conditions is a matter that is to be assessed and acted upon within the regulatory scheme. The regulatory scheme requires continual vigilance by Woodside as titleholder to manage the activity to ALARP and to an acceptable level and to continue to consult with relevant interested persons after the Seismic EP has been accepted. This is all under the oversight of NOPSEMA who has entrusted to it all the necessary powers and functions to investigate and prosecute breaches of the Act and the Regulations.

69. Part 6.9 of the OPGGS Act establishes NOPSEMA as a primary administrative body responsible for the administration of aspects of the OPGGS Act.[63] NOPSEMA's functions are primarily set out in section 646.[64] A summary of NOPSEMA's powers and functions is set out in **Annexure B** to these submissions.

70. The text, scope and purpose of the OPGGS Act and the Regulations show that it is for NOPSEMA to administer and enforce the regulatory scheme. The regime as summarised in Annexure B gives no room for a private citizen to intervene, especially where NOPSEMA is in the fray. This is what distinguishes the Applicant's position from that which the High Court considered in *Onus*.[65]

71. There is nothing in the OPGGS Act nor the Regulations which confers on any third party, such as the applicant, an entitlement to investigate, monitor or enforce the provisions of the OPGGS Act or the Regulations.[66]

72. As to AS [56], the Applicant does not explain how or why her interest in the subject matter of these proceedings is greater than that of any other person, including those who assert themselves to be "relevant person" for the purposes of the Regulations. The class of "relevant persons" for the purposes of the Regulations is wide. The concomitant outcome of the Applicant's approach is a wide class of persons who are capable of asserting a special interest in the subject matter of these proceedings.

73. Even accepting the truth of the Applicant's asserted cultural interests in AS [56], she cannot reserve to herself an ability to prosecute an alleged offence under the Regulations.

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63 s.645.

64 See also ss.649 to 650. NOPSEMA's functions are limited in certain respects by s.646A.

65 (1981) 149 CLR 27.

66 See, by way of contrast, s.475 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which provides a mechanism for third parties with requisite 'standing' to seek injunctive relief to restrain breaches of that Act.

E. Conclusion

74. The questions raised by the Preliminary Issues involve intricate matters of statutory construction. Apparent conflict between provisions are resolved by ascertaining legislative intention, where all available indications are brought into play.[67] Once that is done, the questions of power and standing ought be answered to recognise NOPSEMA's broad powers under subregulations 10(4) and 10(6), and NOPSEMA's integral and existential functions as regulator so as to cover the field with respect to the enforcement of the relevant regulations. It is not the function of the Applicant to prosecute Woodside for asserted failures or breaches.

75. To the extent that the matter proceeds, there is ample authority to support the capacity of the Court to refuse or mould relief as a matter of discretion. The specific matters for consideration may need to be the subject of further evidence or amplification, or could be subsumed by a process arising under the legislation upon the Court's conclusion as to Issue 1.

S K Dharmananda

S B Nadilo

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67 See Barnes et al, *Modern Statutory Interpretation* (CUP, 2023), 35.8.

Annexure A – NOPSEMA's powers after acceptance of an environment plan

Provision	Power	Overview
OPGGS Act, s. 574	General power to give directions—NOPSEMA	Discretionary power of NOPSEMA to issue directions to titleholders in relation to 'any matter in relation to which regulations may be made'. A direction has effect and must be complied with despite anything in the Regulations.
OPGGS Act, Sch 2A	Environmental inspections	Broad powers of NOPSEMA to conduct environmental inspections 'at any time'. The inspection powers include (among other things) the ability to enter and search offshore premises, to require a titleholder to provide assistance in relation to the inspection, to require a titleholder or its representative to answer questions, and to require the titleholder to produce documents.
Regulations, reg 7	Operations must comply with the accepted environment plan	A titleholder must not undertake an activity in a way that is contrary to the environment plan in force for the activity or contrary to any limitation or condition applying to operations for the activity under the Regulations.
Regulations, reg 17	Revision because of a change, or proposed change, of circumstances or operations	A titleholder must submit a proposed revision of an environment plan before, or as soon as practicable after, the occurrence of any significant new environmental impact or risk, or a significant increase in an existing environmental impact or risk, that is not provided for in the environment plan in force for the activity.
Regulations, reg 18	Revision on request by the Regulator	NOPSEMA can 'call-in' an already accepted environment plan and require a titleholder to submit a proposed revision of that EP. It will then assess the proposed revision in accordance with reg 21.
Regulations, reg 23	Withdrawal of acceptance of environment plan	NOPSEMA has the power to withdraw the acceptance on a number of bases, including if the titleholder does not comply with reg 7.
Regulations, reg 26B	Reporting recordable incidents	A titleholder is required to provide written reports of any 'recordable incidents' that occur while undertaking an activity. A recordable incident is a breach of an environmental performance outcome or environmental performance standard, in the environment plan that applies to the activity (other than a 'reportable incident').

Annexure B – Overview of regulatory scheme

Provision	Topic	Overview of power
OPGGS Act, Part 6.2	Directions relating to petroleum	Part 6.2 of the OPGGS Act concerns several types of directions related to petroleum which NOPSEMA (and others) may give. **Section 574(2) of the OPGGS Act empowers NOPSEMA in a general sense to give the registered holder of a title "a direction as to any matter in relation to which regulations may be made". A person must comply with a direction given by NOPSEMA under section 574 of the OPGGS Act: section 576(1).** A direction under section 574(2) has effect and must be complied with despite anything in the regulations.
OPGGS Act, Part 6.4, Division 1	Restoration of the environment; Petroleum	Division 1 of Part 6.4 of the OPGGS Act concerns remedial directions related to petroleum that NOPSEMA may give for the purposes of restoring the environment. NOPSEMA is empowered to give such a direction to a registered holder of a petroleum title: section 586(2). A person must comply with a remedial direction given by NOPSEMA: see section 587B.
OPGGS Act, ss. 602C-602F, 602J and 602L	Listed NOPSEMA laws	**NOPSEMA's powers are extended with respect to "listed NOPSEMA laws" to include powers under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth): ss. 602C to 602F, 602J and 602L. "Listed NOPSEMA laws" include those relating "environmental management laws".**[68]
OPGGS Act, Part 6.5, Division 6	Injunctions	**Division 6 of the OPGGS Act provides for the grant of injunctions to enforce compliance with the OPGGS Act, by specifying provisions in respect of NOPSEMA (relevantly) may seek an injunction under Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth).**

[68] "Environmental management law" is defined under cl. 2 of Schedule 2A to mean, among other things, "the provisions of [the OPGGS Act], to the extent to which the provisions relate to, or empower NOPSEMA to take action in relation to, offshore petroleum environmental management (within the meaning of [section 643 of] Part 6.9 of [the OPGGS Act] in relation to Commonwealth waters)."

Provision	Topic	Overview of power
OPGGS Act, s. 646	NOPSEMA's functions	NOPSEMA's functions under sections 646 include the following: (gk) to develop and implement effective monitoring and enforcement strategies to ensure compliance by persons with their obligations under an environmental management law; (gl) to investigate accidents, occurrences and circumstances that involve, or may involve, deficiencies in offshore petroleum environmental management; (gq) to develop and implement effective monitoring and enforcement strategies to ensure compliance by persons with their obligations under the OPGGS Act and the regulations; (j) to do anything incidental to or conducive to the performance of any of the above functions.
OPGGS Act, ss. 648-650	NOPSEMA's powers	Include the "power to do all things necessary or convenient to be done for or in connection with the performance of its functions": sections 648(1), 649 to 650.
OPGGS Act, Schedule 2A	Environmental management laws: additional NOPSEMA inspection powers	**NOPSEMA and its inspectors have the functions set out in Schedule 2A of the OPGGS Act, which relate to "environmental management laws".[69] The functions in Schedule 2A generally relate to environmental inspections.**
Regulations, Parts 1A, 2 and 3	Offshore project proposals; Environment Plans; Incidents, reports and records	NOPSEMA, defined as the "Regulator", has functions with respect to assessing offshore project proposals and environment plans and with respect to monitoring and compliance.

69 Under cl. 2 of Schedule 2A of the OPGGS Act, "environmental management laws" means, among other things, "the provisions of [the OPGGS Act], to the extent to which the provisions relate to, or empower NOPSEMA to take action in relation to, offshore petroleum environmental management (within the meaning of [section 643 of] Part 6.9 of [the OPGGS Act] in relation to Commonwealth waters)."

Schedule

No. VID 647 of 2023

Federal Court of Australia
District Registry: Victoria
Division: General

Respondents

Second Respondent:	Woodside Energy Scarborough Pty Ltd (ACN 650 177 227)
Third Respondent:	Woodside Energy (Australia) Pty Ltd (ACN 006 923 879)

Date: 21 September 2023