

**Second and third respondent's outline of submissions
opposing the applicant's application for an interlocutory injunction**

VID 647 of 2023

**Federal Court of Australia
District Registry: Victoria
Division: General**

Raelene Cooper

Applicant

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

Respondents

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A. Overview and summary

1. The second and third respondent (**Woodside**) wish to undertake a seismic survey of the Scarborough gas field (**Seismic Survey**) in the Northern Carnarvon Basin on the Exmouth Plateau. The proposed Seismic Survey is the subject of the Scarborough 4D B1 Marine Seismic Survey Environment Plan (**Seismic EP**), the Seismic EP having been accepted by the first respondent (**NOPSEMA**). The purpose of the Seismic Survey is to obtain an uplift in seismic imaging for the Scarborough gas field to inform the optimal field development design and reservoir management practices.¹ The imaging will assist Woodside to produce a firmer estimate of the amount of gas in the

¹ [REDACTED] Affidavit, [22], [32]-[40].

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

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field.² Woodside does not presently have one continuous survey over the Scarborough field.³

2. The development of the Scarborough gas field is part of the project known as the 'Scarborough Development' comprising the Scarborough Upstream Project and the Pluto LNG Train 2 Project.⁴ Part of the gas from the Scarborough Development is intended to be reserved and made available for Western Australian consumers, with the majority of the gas otherwise being processed into LNG and exported to international markets.⁵
3. The Seismic Survey must be performed as soon as possible as there are important operational and safety reasons why Woodside wishes to conduct the Seismic Survey before the commencement of drilling activities and the arrival of the FPU.⁶
4. The ongoing delay to the commencement of the Seismic Survey is causing Woodside to incur significant costs.⁷ Woodside will be exposed to further significant economic loss if the Seismic Survey is not able to be carried out by 31 December 2023 (being the date by which the Seismic EP requires all activities to be completed).⁸
5. In the above context, Woodside opposes the application for an interlocutory injunction restraining it, until the final hearing of this proceeding or further order, from undertaking any activity under the Seismic EP.
6. The principles to be applied on an application for an interlocutory injunction are well-known. The two main inquiries are whether: (1) the applicant has made out a *prima facie* case; and (2) the balance of convenience favours the grant of the injunction or the refusal of that relief.⁹

² [REDACTED] Affidavit, [33].

³ [REDACTED] Affidavit, [31].

⁴ [REDACTED] Affidavit, [8]-[9].

⁵ [REDACTED] Affidavit, [13].

⁶ Floating Production Unit.

⁷ [REDACTED] Affidavit, [31] and Confidential Annexure [REDACTED]-4.

⁸ [REDACTED] Affidavit, [35] and Confidential Annexure [REDACTED]-7.

⁹ *Samsung Electronics Company Ltd v Apple Inc & Anor* (2011) FCR 328; [2011] FCAFC 156, [57] (Dowsett, Foster and Yates JJ).

7. As to the first enquiry, for the purpose of this application, Woodside accepts that there is a serious question to be tried about the short legal point raised by Ground 1.
8. However, Woodside does contend that a serious question to be tried does not exist with respect to Ground 2 on the basis that the applicant does not have standing to obtain orders to restrain an alleged offence under the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Regulations**).
9. As to the second enquiry, Woodside contends that the balance of convenience favours Woodside as the granting of an injunction will:
 - 9.1 occasion immediate, significant, and irrecoverable economic loss to Woodside in circumstances where the applicant is unable to provide the usual undertaking as to damages;
 - 9.2 materially prejudice the rights of third parties, being Woodside's contractors and associated workforces, who are not before the Court; and
 - 9.3 prejudice Woodside's ability to undertake the Seismic Survey by the deadline imposed by the Seismic EP or at all.
10. In contrast, the refusal of an injunction will not result in serious harm to the applicant. Woodside has demonstrated to the satisfaction of NOPSEMA¹⁰ that the Seismic EP reduces the environmental risks and impacts to a level that is as low as reasonably practicable (**ALARP**) and acceptable. Moreover, there are control measures within the Seismic EP to ensure that the potential risks and impacts on the cultural values in totemic species such as whales, turtles and dugongs, which is the very harm that the applicant asserts as requiring protection by the grant of an interlocutory injunction,¹¹ are minimised to ALARP and acceptable levels.
11. The regulatory scheme promulgated by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGs Act**) and the Regulations 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 and interested persons after the Seismic EP has been accepted. The Court should proceed on the basis that Woodside will act in accordance with the regulatory scheme.

¹⁰ The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is established under Part 6.9 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGs Act**).

¹¹ Applicant's submissions, par 8(3).

12. When assessed in the context of the regulatory scheme and the control measures which are in place in the Seismic EP, it can be seen that the basis on which the applicant seeks to justify the grant of an interlocutory injunction by reference to the risk of harm is fallacious: the applicant cannot by these proceedings obtain greater protection than that which is afforded by the regulatory scheme promulgated by the OPGGS Act and the Regulations. The legislative scheme does not contemplate zero harm: it contemplates harm reduced to ALARP and an acceptable level. The Seismic EP achieves this.

B. Woodside's evidence

13. At the hearing of the injunction, Woodside will read and rely upon affidavits from the following Woodside employees:

13.1 [REDACTED] affirmed
10 September 2023 ([REDACTED] *Affidavit*);

13.2 [REDACTED] affirmed
11 September 2023 ([REDACTED] *Affidavit*);

13.3 [REDACTED] affirmed
11 September 2023 ([REDACTED] *Affidavit*);

13.4 [REDACTED]
[REDACTED] affirmed 11 September 2023 ([REDACTED] *Affidavit*); and

13.5 [REDACTED] affirmed
11 September 2023 ([REDACTED] *Affidavit*).

C. Legislative and regulatory regime

14. Paragraphs 11 to 21 of the applicant's submissions filed 7 September 2023 (**AS**) set out a general overview of the Regulations made under the OPGGS Act. Woodside agrees with that overview, but emphasises, alternatively adds, the following matters.

C.1 Impacts and risks must be ALARP and acceptable: Reg 13

15. Regulation 13 sets out the requirements for the environmental assessment content of an environment plan. An environment plan must include the requirements set out in Regs 13, 14, 15 and 16: Reg 12.
16. Relevantly, Reg 13(5) requires that impacts and risks must be reduced to ALARP "and an acceptable level":

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

(emphasis added)

17. Therefore, the Regulations do not require that there be no impact or risk to the environment. Rather, the standard is that they are identified and managed in a manner that they are ALARP and at an acceptable level.¹²

C.2 Implementation strategy: Reg 14

18. An environment plan must contain an implementation strategy for the relevant activity, in accordance with Reg 14. Regulation 14 contains various obligations relevant to continuous assessment, monitoring, reporting and consultation.
19. Regulation 14(2) directs that the implementation strategy must state when the titleholder will report to NOPSEMA in relation to its environmental performance, which must occur at least annually.
20. Regulation 14(6) requires that the implementation strategy provides for “sufficient monitoring, recording, audit, management of nonconformance and review of the titleholder’s environmental performance and the implementation strategy to ensure that the environmental performance outcomes and standards in the environment plan are being met”.
21. Regulation 14(10) states that the implementation strategy must “comply with the Act, the regulations and any other environmental legislation applying to the activity”.

¹² The criteria for acceptance of an environment plan are contained in Reg 10A and include criteria that the plan “(b) demonstrates that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and (c) demonstrates that the environmental risks of the activity will be of an acceptable level.” These criteria are consistent with the object of the Regulations: Reg 3(b) and (c).

C.3 Must achieve ALARP and acceptable post-acceptance: Reg 14(3)

22. Regulation 14(3) provides that the implementation strategy must contain a description of an environmental management system:

- (3) The implementation strategy must contain a description of the environmental management system for the activity, including specific measures to be used to ensure that, for the duration of the activity:
 - (a) the environmental impacts and risks of the activity *continue to be identified* and reduced to a level that is *as low as reasonably practicable*; and
 - (b) control measures detailed in the environment plan are effective in reducing the environmental impacts and risks of the activity to *as low as reasonably practicable and an acceptable level*; and
 - (c) environmental performance outcomes and standards set out in the environment plan are being met.

(emphasis added)

23. Regulation 14(3), in particular sub regulations (a) and (b) respectively, impose on the titleholder a clear obligation to continue to assess environmental impacts and risks throughout the duration of the activity, and ensure they are reduced to ALARP, and that the EP's control measures are able to reduce these risks to ALARP and an acceptable level.

C.4 Consultation: Reg 14(9)

24. The implementation strategy referred to in paragraph 21 above must "provide for appropriate consultation with: (a) relevant authorities of the Commonwealth, a State or Territory; and (b) other relevant interested persons or organisations".¹³ The regime thus imposes a continuous obligation on the titleholder to consult with relevant interested persons throughout the life of the activity.

C.5 Revise EP if any significant new environmental impacts / risks: Reg 17(6)

25. Regulation 17 sets the requirements for submitting a revision of an environment plan because of a change, or proposed change, of circumstances or operations. In particular, Reg 17(6) provides that a proposed revision must be submitted in the event

¹³ Reg 14(9).

of significant new environmental risks or impacts not provided for by the environment plan:

- (6) A titleholder must submit a proposed revision of the environment plan for an activity before, or as soon as practicable after:
 - (a) the occurrence of any *significant new environmental impact or risk, or significant increase in an existing environmental impact or risk*, not provided for in the environment plan in force for the activity; or
 - (b) the *occurrence of a series of new environmental impacts or risks*, or a series of increases in existing environmental impacts or risks, which, taken together, amount to the occurrence of:
 - (i) a significant new environmental impact or risk; or
 - (ii) a significant increase in an existing environmental impact or risk;

that is not provided for in the environment plan in force for the activity.

(emphasis added)

- 26. If significant new environmental risks or impacts arise which are not provided for in the accepted Seismic EP, Woodside is therefore obliged to submit a proposed revision of the EP to NOPSEMA.¹⁴
- 27. The obligation in Reg 17 is reinforced by the offence of undertaking an activity after a significant new environmental risk or impact arises which is not provided for by the relevant environment plan,¹⁵ before submitting a proposed revision in accordance with Reg 17(6).¹⁶

C.6 NOPSEMA's role as the regulator under the OPGGS Act

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

¹⁴ The substantive provisions of the Regulations which apply to consideration and acceptance of an Environment Plan also apply to a revised Environment Plan: Reg 21(1). This includes the consultation obligation under Reg 11A.

¹⁵ Reg 8(1).

¹⁶ Reg 8(2).

29. NOPSEMA's functions are primarily set out in s.646.¹⁷
30. NOPSEMA's ordinary powers are set out in s.648 and include the "power to do all things necessary or convenient to be done for or in connection with the performance of its functions": s.648(1), also ss.649 to 650.
31. In relation to environmental management associated with petroleum operations, NOPSEMA's functions under s.646 include the following:
- (gg) the functions conferred on it by or under [the OPGGS Act] in relation to offshore petroleum environmental management in connection with operations in Commonwealth waters;¹⁸
 - (gk) to develop and implement effective monitoring and enforcement strategies to ensure compliance by persons with their obligations under an environmental management law;¹⁹ and
 - (j) to do anything incidental to or conducive to the performance of any of the above functions.
32. Investigatory, reporting, and advisory functions for NOPSEMA related to environmental management are prescribed under ss.646(g) to (go).
33. NOPSEMA and its inspectors have the powers and functions set out in Schedule 2A of the OPGGS Act, which relate to "environmental management laws".²⁰ s.602J. The functions in Schedule 2A generally relate to environmental inspections
34. Under the Regulations, NOPSEMA, defined as the "Regulator", has functions with respect to assessing offshore project proposals and environment plans and with respect to monitoring and compliance: Regulations, Parts 1A, 2 and 3.
35. Under the OPGGS Act, NOPSEMA's powers are extended with respect to "listed NOPSEMA laws" to include powers under Parts 2 and 3 of the *Regulatory Powers*

¹⁷ See also ss.649 to 650. NOPSEMA's functions are limited in certain respects by s.646A.

¹⁸ A similar function is prescribed in respect of offshore greenhouse gas storage environmental management: s.646(gh).

¹⁹ "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."

(*Standard Provisions*) Act 2014 (Cth): ss. 602C to 602F and 602L. “Listed NOPSEMA laws” include:

- (a) the provisions of Schedule 2A of the OPGGS Act that relate to “environmental management laws”: Item 13 of the table set out in s.601(1); and
 - (b) provisions of prescribed regulations that relate to the topic of environment regulation: Item 16 of the table set out in s.601(1).
36. 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 s.574 of the OPGGS Act: s.576(1).
37. 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: s.586(2). A person must comply with a remedial direction given by NOPSEMA: see s.587B.

D. NOPSEMA is satisfied that the Seismic EP complies with the Regulations

38. There is no dispute that, on 31 July 2023, the Seismic EP was accepted by NOPSEMA, along with Conditions 1 to 8 thereof (**Decision**).

D.1 NOPSEMA’s Statement of Reasons

39. The Statement of Reasons for the Acceptance (With Conditions) of the Seismic EP (**Statement of Reasons**) clearly demonstrates NOPSEMA’s satisfaction that the Seismic EP complied with the following aspects of the Regulations:
- (a) As to Section C.1 above, Section 2 of the Seismic EP, in particular Section 2.2, acknowledges Woodside’s risk evaluation and control obligations and sets out its “Environmental Risk Management Methodology”. Relevantly, section 6.6.2 sets out the control measures in place to manage potential risks and impacts from the underwater noise from the seismic vessel. In its Statement of Reasons, NOPSEMA was satisfied the requirements of Regulation 13(5) and 13(6) were met in the Seismic EP.²¹

²¹ Statement of Reasons, [25].

- (b) As to Section C.2 above, the Seismic EP contains an implementation strategy in Section 7, in particular sections 7.5.1 Monitoring; 7.5.1.2 Management of Knowledge; 7.5.1.3 Management of Newly Identified Impacts and Risks; 7.5.2 Auditing; 7.6 EP Management of Change and Revision; 7.9.2.1 Ongoing Consultation.
- (c) NOPSEMA, in its Statement of Reasons, is satisfied that the Seismic EP contains the matters in Division 2.3 of the Environment Regulations.²² In particular, it was reasonably satisfied that the requirements of Regulation 14 were met.²³
- (d) As to Section C.3 above, Woodside has, to NOPSEMA's satisfaction, included an implementation strategy in the Seismic EP.²⁴ The Seismic EP contains an explanation of the specific measures that Woodside's implementation strategy includes to ensure that environmental impacts and risks continue to be identified and reduced to a level that is ALARP and an acceptable level: see generally Section 2, and in particular Section 2.11, and Section 7.
- (e) As to Section C.4 above, Woodside's strategy for compliance with this obligation is contained in Section 7.9.2.1 of the Seismic EP, which also contains Table 7-2, listing the ongoing consultation engagements Woodside intends to progress for the EP, as part of its implementation strategy. Table 7-2 provides for consultation with '*Relevant cultural authorities*' and '*All Relevant Persons for the Proposed Activity*'. NOPSEMA was reasonably satisfied that Woodside complied with the requirement of Reg 14(9),²⁵ in particular stating that '*the implementation strategy provides for appropriate ongoing consultation during the implementation of the petroleum activity...[t]he EP also provides for ongoing consultation with relevant cultural authorities in relation to the identification, assessment, and consideration of cultural values relevant to the petroleum activity (Table 7-2)*'.²⁶

²² Statement of Reasons, [12]. The reasons for this decision are at Statement of Reasons, [16]-[32].

²³ Statement of Reasons, [29].

²⁴ Statement of Reasons, [29], and see in particular [28(b)].

²⁵ Statement of Reasons, [28(n)], [29].

²⁶ Statement of Reasons, [28(n)].

- (f) The Statement of Reasons records NOPSEMA's imposing of Condition 1, requiring consultation above that required by Reg 14(9): Statement of Reasons, [133], which was imposed due to NOPSEMA's state of satisfaction about the identification of First Nations relevant persons, and consultation undertaken with specific First Nations relevant persons (see e.g., [95]-[100]).²⁷ This condition requires that Woodside consult with registered native title bodies corporate, representative Aboriginal / Torres Strait Islander bodies and other persons or organisations identified as a relevant person in relation to First Nations cultural heritage in Tables 5-3 and 5-4 of the Seismic EP **before** commencement of the activity, to confirm whether:
- (i) they are aware of any people, who in accordance with Indigenous tradition, may have spiritual and cultural connections to the environment that may be affected by the activity that have not yet been afforded the opportunity to provide information that may inform the management of the activity; and
 - (ii) there is any information they wish to provide on cultural features and / or heritage values.

Consultation that Woodside engages in pursuant to Reg 14(9) is additional to this condition in the Statement of Reasons.

- (g) As to Section C.5 above, the Seismic EP acknowledges that "risk assessment outcomes are reviewed in compliance" with Reg 17 and if required the environment plan will be revised.²⁸ As noted above, NOPSEMA was reasonably satisfied that the Seismic EP met the requirements in respect of an implementation strategy, including in respect of Woodside's management of change process, by which the necessity of a revision under Reg 17 is assessed.²⁹

40. In its Statement of Reasons, NOPSEMA was not reasonably satisfied as to the satisfaction of Regs 10A(b) and 10A(g).³⁰ As to Reg 10A(b), NOPSEMA considered that there was a perceived inconsistency regarding the use of Marine Fauna

²⁷ See also [REDACTED] Affidavit, [REDACTED]-1.

²⁸ Seismic EP, Section 7.6.

²⁹ Statement of Reasons, [28(b)], [29].

³⁰ Statement of Reasons, [120].

Observers and this resulted in the imposition of Condition 8.³¹ As to reg 10A(g), whilst NOPSEMA considered that Woodside’s consultation was “comprehensive”, the residual concerns identified by NOPSEMA meant it could not be satisfied that Reg 10A(g)(i) had been complied with in respect of Traditional Custodians, nominated representative corporations and Native Title Registered Bodies, and because of this, it also could not be satisfied as to compliance with Reg 10A(g)(ii).³²

D.2 Engagement with NOPSEMA about Conditions 1 to 7

41. In the period 31 July 2023 to 5 September 2023, there was engagement between Woodside and NOPSEMA about Woodside’s compliance with Conditions 1 to 7.³³
42. During that engagement, in a draft inspection report issued on 31 August 2023, NOPSEMA stated:
- (a) to the effect that Woodside had complied with condition 1 and condition 2, and that condition 3 had been met; and
 - (b) relevantly to condition 5(b), that Woodside had not evaluated and adopted all feasible controls to address First Nations concerns relating to cultural value of migratory species such as: (i) increased shut down zones for migratory species such as whales; and (ii) a shut down zone for marine turtles, and therefore control measures had not been evaluated or adopted by Woodside in accordance with condition 6.³⁴
43. In response to the 31 August 2023 draft inspection report, Woodside notified NOPSEMA that relevant sections of the Seismic EP had been updated to evaluate and adopt all feasible controls to address the issues raised by NOPSEMA.³⁵
44. On 5 September 2023, Woodside received an email from NOPSEMA which stated that “it appears that the requirements of condition 6 are being complied with”.³⁶ On the basis of this email, and its prior communications with NOPSEMA, Woodside considered on 5 September 2023 that it was meeting the conditions imposed by NOPSEMA for the

³¹ Statement of Reasons, [46]-[48] (Reg 10A(b)).

³² Statement of Reasons, [94]-[97], [100].

³³ [REDACTED] Affidavit, [8]-[14].

³⁴ [REDACTED] Affidavit, [11], [REDACTED]-5.

³⁵ [REDACTED] Affidavit, [12], [REDACTED]-6 at p.68; [REDACTED] Affidavit, [80]-[81].

³⁶ [REDACTED] Affidavit, [14], [REDACTED]-7 at p.136.

acceptance of the Seismic EP and that it was therefore able to commence activity under it.³⁷

45. Later that day (at 7.43pm WST), Woodside gave 48 hours' notice to the applicant of its intention to commence activity under the Seismic EP.³⁸

E. Principles for the grant of interlocutory injunctive relief

46. The principles to be applied on an application for an interlocutory injunction are well-known. The two main inquiries are whether: (1) the applicant has made out a *prima facie* case; and (2) the balance of convenience favours the grant of the injunction or the refusal of that relief.³⁹
47. To establish a 'prima facie case', it is sufficient that the plaintiff show a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending the trial.⁴⁰
48. The resolution of the question of where the balance of convenience and justice lies requires the Court to exercise a discretion.⁴¹ The assessment of harm to the applicant, if there is no injunction, and the assessment of prejudice or harm to the respondent, if an injunction is granted, is at the heart of the basket of discretionary considerations which must be addressed and weighed as part of the Court's consideration of the balance of convenience and justice.⁴² It may also be necessary to consider and

³⁷ [REDACTED] Affidavit, [15].

³⁸ [REDACTED] Affidavit, [17], [REDACTED]-9 at p.150.

³⁹ *Samsung Electronics Company Ltd v Apple Inc & Anor* (2011) FCR 328; [2011] FCAFC 156, [57] (Dowsett, Foster and Yates JJ).

⁴⁰ *Stewart v State of Western Australia* (2021) 173 ALD 82; [2021] FCA 308, [11] (Colvin J), citing *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; [2006] HCA 46, [65] (Gummow and Hayne JJ), [19] (Gleeson CJ and Crennan J); *Veolia Environment SA v Suez Australia Holding Pty Ltd* (2021) 150 ACSR 114, [29] (Wigney J).

⁴¹ *Samsung Electronics Company Ltd v Apple Inc & Anor* (2011) FCR 328; [2011] FCAFC 156, [65] (Dowsett, Foster and Yates JJ).

⁴² *Samsung Electronics Company Ltd v Apple Inc & Anor* (2011) FCR 328; [2011] FCAFC 156, [62] (Dowsett, Foster and Yates JJ).

evaluate the impact that the grant or refusal of an injunction will have or is likely to have on third persons and the public generally.⁴³

49. The law as to undertakings as to damages is as summarised by Colvin J in *Friends of Gelorup Corridor Inc v Minister for Environment and Water*⁴⁴ at [81]-[83]:

The provision of an undertaking as to damages has been described as the 'price' of an injunction. It is better seen as a mechanism by which the Court ensures that a person who seeks the protection of an interlocutory restraint affords reciprocal protection from any adverse consequence of the grant of the relief if the person is ultimately unsuccessful. It thereby prevents injustice that might otherwise flow from the grant of the interlocutory injunction. Where an undertaking from a party will not afford such protection due to the financial circumstances of the party proffering the undertaking then the Court may require those who stand behind the party (and who will benefit from the injunctive relief) to provide an undertaking.

[...]

Where, as here, the application is brought in the public interest and invokes principles of public law, the Court may grant injunctive relief without conditioning the relief upon a requirement to provide an undertaking as to damages. However, such an approach may not be appropriate where the relief will be of particular private benefit to the applicant.

(Citations removed)

F. Prima facie case

50. For the purpose of this application, Woodside accepts that there is a serious question to be tried about the short legal point raised by Ground 1.
51. As a result, in this application it is unnecessary for the Court to consider Woodside's contentions relating to Ground 2, namely that the applicant has no standing to restrain an alleged offence under the Regulations, and in any event that, having regard to the evidence, the relevant condition has been satisfied.⁴⁵

⁴³ *Samsung Electronics Company Ltd v Apple Inc & Anor* (2011) FCR 328; [2011] FCAFC 156, [68] (Dowsett, Foster and Yates JJ).

⁴⁴ [2022] FCA 944.

⁴⁵ See [REDACTED] Affidavit, [11]-[15] and the annexures cited therein.

G. Balance of convenience: consequences to Woodside if the injunction is granted

G.1 Financial losses to Woodside

52. On or about 25 May 2022, Woodside Energy Ltd entered into a contract with Shearwater Geoservices Pte Ltd to carry out activities under the Seismic EP.⁴⁶ Under the contract with Shearwater Geoservices Pte Ltd, Woodside has already incurred significant costs, which are as stated in confidential annexure [REDACTED]-6' to the [REDACTED] Affidavit.⁴⁷
53. If an injunction is granted, Woodside will suffer immediate, significant, and irrecoverable economic loss. In the period between now and the final hearing in these proceedings (23 and 24 October 2023), Woodside will continue to incur significant costs on a daily basis.⁴⁸
54. The fact that the applicant has not proffered (or has the financial inability to satisfy if required), the usual undertaking as to damages is a significant consideration given the significant financial prejudice that Woodside will incur if an injunction is granted. It should at least weigh heavily in the Court's assessment of whether the balance of convenience lies in favour of an injunction.

G.2 Prejudice to third parties

55. There is the contractor, Shearwater Geoservices Pte Ltd, and associated workforces whose planned operations would be disrupted by the granting of an injunction. On any given day there are approximately 81 crew across the four vessels which are mobilised and ready to conduct the Seismic Survey.⁴⁹

G.3 Operational delays and risks

56. There are important operational considerations which weigh in favour of Woodside being able to undertake the Seismic Survey now. One such reason is that the Seismic EP requires all activities to be completed by 31 December 2023, and does not allow temporal overlap with drilling and completions activities.⁵⁰ The duration of the

⁴⁶ [REDACTED] Affidavit, [14].

⁴⁷ [REDACTED] Affidavit, [30].

⁴⁸ [REDACTED] Affidavit, [31].

⁴⁹ [REDACTED] Affidavit, [45].

⁵⁰ Seismic EP, Section 3.4 (Timing). See also page 243 (Concurrent Woodside Activities).

Seismic Survey is estimated to take between 40 days and 55 days.⁵¹ If the activity does not commence until after 24 October 2023, there is a real risk that it will not be completed by 31 December 2023.

57. Further, the optimal time for Woodside to undertake the Seismic Survey and obtain the highest quality, and most operationally useful, data is before the commencement of drilling activities and the installation of subsea infrastructure and the arrival of the FPU⁵² into the operational area.⁵³

G.4 Further delay may prevent the Seismic Survey being carried out at all

58. The Seismic EP requires activities to be completed by 31 December 2023. After this date, if Woodside wishes to undertake the Seismic Survey, it may need to obtain acceptance by NOPSEMA of a new or revised environment plan.⁵⁴ Practically, there is no prospect of this occurring prior to 31 December 2023. The granting of an injunction would thus jeopardise Woodside's ability to conduct the Seismic Survey at all.
59. Further, if the Seismic Survey cannot be completed before the commencement of drilling operations, and because the Seismic Survey cannot occur during drilling operations, the next feasible opportunity to complete the Seismic Survey is likely to be early 2025.⁵⁵ There is no guarantee that Woodside will be able to extend, or re-negotiate, the contract with Shearwater so that the work can be carried out at a later date, at least without Woodside having to incur further significant cost.⁵⁶ There is thus no guarantee that essential equipment and contractors, who provide specialised

51 [REDACTED] Affidavit, [48], [50].

52 Floating Production Unit.

53 [REDACTED] Affidavit, [24]; [REDACTED] Affidavit, [68]-[72].

54 [REDACTED] Affidavit, [60]. In this event, NOPSEMA's acceptance of the any revised environmental plan would need to be obtained prior to undertaking the activity in the period after 31 December 2023 to avoid a breach of Reg 7(1). The offence in Reg 7(1) does not apply where NOSPEMA provides written consent to undertake the activity in a way that is contrary to the 'in force' EP (Reg 7(2) and (3)).

55 [REDACTED] Affidavit, [27]-[28].

56 [REDACTED] Affidavit, [29], [32]-[34].

services in a small and specialised international market,⁵⁷ will be available to Woodside at that time.⁵⁸

H. Balance of convenience: consequences to the applicant and the interests she represents if the injunction is not granted

H.1 There is no precedent to guide the Court's discretion

60. The applicant identifies two cases in which Australian courts “have previously weighed the significance of a harm to Aboriginal cultural heritage against financial losses”: AS, [71]. Another example is *Adnyamathanha Traditional Lands Association v Minister for Energy & Mining (SA) & Anor*⁵⁹ where interlocutory injunctive relief was refused.
61. None of these cases serve as a precedent which could definitively guide the exercise of this Court's discretion in weighing the balance of convenience. The principles for the granting of interlocutory injunctive relief are to be applied “having regard to the nature and circumstances of the case, under which issues of justice and convenience are addressed”.⁶⁰ In any event, the cases cited by the applicant are clearly distinguishable from the nature and circumstances of this proceeding.
62. In *Thorpe v Head, Transport for Victoria*,⁶¹ the relevant regulatory regime was the *Aboriginal Cultural Heritage Act 2006* (Vic) of which the main purposes are, inter alia, “to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria”.⁶² These main purposes impacted upon the Court's assessment of the balance of convenience in that case.⁶³ In this proceeding, the purpose of the

⁵⁷ [REDACTED] Affidavit, [47]-[47].

⁵⁸ [REDACTED] Affidavit, [29].

⁵⁹ [2018] SASC 142.

⁶⁰ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19] (Gleeson CJ and Crennan J).

⁶¹ [2020] VSC 804.

⁶² [2020] VSC 804, [65].

⁶³ [2020] VSC 804, [65]. Further, the Aboriginal cultural heritage that the applicant in *Thorpe* sought to protect through injunctive relief had been the subject of a declaration by the Minister of Environment under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The applicant in this proceeding has not made an application under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) in relation to the environment that may be affected for the Seismic EP.

Regulations is broadly stated and includes that petroleum activities carried out in an offshore area be carried out in a manner by which the environmental impacts and risks of the activity will be reduced to ALARP and will be of an acceptable level.⁶⁴

63. In *Carriage v Stockland (Constructors) Pty Ltd*,⁶⁵ the activities which the application for interlocutory relief sought to restrain required a permit under the *National Parks and Wildlife Act 1974* (NSW) before the movement and possible destruction of Aboriginal relics. Relevantly, the respondent in *Carriage* had obtained no such permit. Further, the financial losses relied on by the respondent were estimated site costs comprising “contractor’s delay costs at \$15,000-\$20,000 per day, contractor’s site re-establishment costs when work recommences at \$20,000 and security cost at \$12,000 a week”.⁶⁶

H.2 The applicant’s cultural concerns

64. Woodside has more than 35 years of operating experience in the Murujuga region.⁶⁷ Woodside has been consulting with the Murujuga Aboriginal Corporation (**MAC**) since late 2018 in respect of Woodside’s growth projects, including for the Scarborough Development.⁶⁸
65. MAC represents the members of overlapping Native Title claims over Murujuga, collectively known as the Ngarda-Ngarli, which comprises the following five Murujuga Traditional Owner groups:
- (a) Ngarluma People;
 - (b) Yindjibarndi People;
 - (c) Yaburara (Jaburrara) People;
 - (d) Mardudhunera (Martuthunira); and
 - (e) Wong-Goo-Tt-Oo People.⁶⁹

⁶⁴ Regulations, r.3.

⁶⁵ [2002] NSWLEC 216.

⁶⁶ [2002] NSWLEC 216, [31].

⁶⁷ [REDACTED] Affidavit, [14].

⁶⁸ [REDACTED] Affidavit, [17].

⁶⁹ [REDACTED] Affidavit, [19].

66. The Applicant, Raelene Cooper, is a former board member and former chair of MAC.⁷⁰ She resigned from the MAC Board in around February 2022, after she and Josie Alec co-founded Save our Songlines (**SOS**) in about November 2021.⁷¹
67. Woodside has corresponded with Ms Cooper and SOS, and met with them, in person, and their solicitors, several times since December 2021.⁷² Meetings have occurred on Country and via Microsoft Teams.⁷³ During these meetings and in this correspondence, Woodside has provided information about the Seismic EP to the applicant.⁷⁴ In turn, Woodside has requested information about the applicant's functions, interests, and activities.⁷⁵ Where possible, Woodside has endeavoured to accommodate requests made by the applicant or SOS with respect to organising consultation.⁷⁶
68. From these consultations, Woodside has received information about the applicant's functions, interests, and activities.⁷⁷
69. The applicant's solicitor, Jessica Border of the EDO, deposes on information and belief, as to the applicant's cultural values and the impact that the activity under the Seismic EP will have. The applicant's cultural values as stated are broadly consistent with the information that the applicant provided to Woodside over the course of their engagement since November 2021.⁷⁸ Until the filing of Ms Border's affidavit, Woodside had not previously been aware of the asserted existence of the Whale Dreaming within Murujuga or of the applicant's carriage of a Whale songline.⁷⁹

70 [REDACTED] Affidavit, [26].

71 [REDACTED] Affidavit, [26], [35].

72 [REDACTED] Affidavit, [40], [44]-[56], [58]-[81].

73 [REDACTED] Affidavit, [58]-[69], [74]-[81], Confidential Annexure [REDACTED]-4.

74 [REDACTED] Affidavit, [56], [67]-[69], [71], [73], [79]-[81].

75 [REDACTED] Affidavit, Confidential Annexure [REDACTED]-3, pp. 55-56, 59-60, 62-71; 78-83 (see in particular, p.80); Confidential Annexure [REDACTED]-4; Annexure [REDACTED]-6, p. 193

76 [REDACTED] Affidavit, [41]-[42].

77 [REDACTED] Affidavit, [82]; Confidential Annexure [REDACTED]-3, pages 60-62, 62-71, 78-83; Confidential Annexure [REDACTED]-4

78 [REDACTED] Affidavit, [82]; Confidential Annexure [REDACTED]-4.

79 [REDACTED] Affidavit, [84].

H.3 Risks to the applicant's cultural concerns are controlled by the Seismic EP

70. Through collaboration between Woodside's First Nations and Environment teams, the information provided to Woodside about the applicant's and SOS's functions, interests, and activities has been considered by the Environment team and addressed in the Seismic EP.⁸⁰ There are controls in the Seismic EP to reduce the risks and impacts to Ms Cooper and SOS to ALARP and an acceptable level.⁸¹
71. The applicant submits that "the practical consequence of a refusal to grant the injunction would be to seriously threaten the interests that this litigation seeks to protect": AS [69]. But that submission ignores entirely the controls that exist in the Seismic EP and the regulatory regime within which the Seismic EP has now been accepted.
72. The applicant's position as to the risk of harm is, with respect, misconceived. The applicant cannot by this application for interlocutory relief, nor by these proceedings, obtain greater protection than that which is afforded by the regulatory scheme promulgated by the OPGGS Act and the Regulations. The scheme does not contemplate zero harm: it contemplates harm reduced to ALARP and an acceptable level. The Seismic EP achieves this.

H.4 NOPSEMA is satisfied that the Seismic EP complies with the Regulations

73. As explained in Section D above, Woodside has demonstrated to the satisfaction of NOPSEMA that the Seismic EP complies with the Regulations. In particular, Woodside has demonstrated to the satisfaction of NOPSEMA that the Seismic EP reduces the environmental risks and impacts to an acceptable level.
74. The regulatory scheme requires continued vigilance by Woodside to manage the risks and impacts of the activity under the Seismic EP to ALARP and acceptable levels and to continue to consult with relevant interested persons after the Seismic EP has been accepted: see paragraphs C.14 to C.24 above.
75. In particular, Woodside is obliged, by Reg 17(6) of the Regulations, if a significant new environmental risk or impact arises which was not contemplated by the accepted Seismic EP, to submit a proposed revision. It is an offence for Woodside to undertake

⁸⁰ [REDACTED] Affidavit, [24]-[26], [69]-[70], [78].

⁸¹ Seismic EP, section 6.6.2; [REDACTED] Affidavit, [78], [80], [89], [98], [99]-[103].

an activity after the occurrence of a significant new or increased environmental risk or impact which is not provided for by the Seismic EP.⁸²

76. Woodside has an internal process for managing the receipt of new information and assessing whether it meets the significance threshold to require a change to the Seismic EP. This process has been subject to inspection by NOPSEMA previously.⁸³
77. Additionally, Woodside is obliged to communicate any new cultural values or information it learns of to NOPSEMA and report on any new controls introduced as a result of that information, in accordance with condition 5 and 6.⁸⁴
78. The Court should proceed on the basis that Woodside will act in accordance with its obligations.

I. Woodside has acted with expedition

79. Woodside rejects vehemently the submission made at AS [4] and [72] that it has not acted expeditiously in the face of this litigation. That submission is contrary to the evidence and the submissions made by Woodside to this Court.⁸⁵
80. Woodside did not wait “until 5 September 2023 to notify Ms Cooper of its intention to commence the Activity” deliberately, as is suggested at AS [72(4)]. The decision to issue 48 hours’ notice on 5 September 2023 was taken by [REDACTED], on behalf of Woodside, as soon as Woodside had concluded its engagement with NOPSEMA.⁸⁶
81. The so-called facts on which the applicant relies at AS [72] have all been addressed in the evidence filed by Woodside. The rationale for the commencement of the Seismic Survey is explained and Woodside has articulated the prejudice it will suffer.

J. Conclusion

82. While accepting the existence of matters of cultural concern to the applicant, Woodside contends that these matters are not sufficient, in all of the circumstances, to establish that the balance of convenience favours the grant of an injunction.

⁸² Reg 8(1).

⁸³ [REDACTED] Affidavit, [36]-[43], [103]-[105].

⁸⁴ [REDACTED] Affidavit, [106].

⁸⁵ Woodside’s outline of submissions filed 6 September 2023.

⁸⁶ [REDACTED] Affidavit, [15].

83. The Court should dismiss the application for an interlocutory injunction and enable Woodside to proceed with the Seismic Survey pursuant to the Seismic EP as accepted by NOPSEMA.

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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: 12 September 2023