Federal Court of Australia

District Registry: Victoria

Division: Administrative and Constitutional Law and Human Rights

No. VID 647 of 2023

**RAELENE COOPER**

Applicant

**NATIONAL OFFSHORE PETROLEUM SAFETY AND ENVIRONMENTAL MANAGEMENT AUTHORITY and others named in the Schedule**

Respondents

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# APPLICANT'S OUTLINE OF SUBMISSIONS




Filed on behalf of (name & role of party) Raelene Cooper, Applicant

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## A SUMMARY AND RELIEF SOUGHT

### A.1 Interlocutory application

1. These proceedings concern a decision of a delegate of the First Respondent made on 31 July 2023 purportedly pursuant to reg 10 of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Environment Regulations**), to accept, subject to conditions, the Scarborough 4D B1 Marine Seismic Survey Environment Plan (Revision 7, June 2023) (**Seismic Survey EP**[1] and the **Decision**).[2]

2. The Decision purports to enable the Second and Third Respondents (collectively, **Woodside**) to undertake a new three-dimensional marine seismic survey (**MSS**)/baseline 4D MSS in the Northern Carnarvon Basin on the Exmouth Plateau located in Commonwealth waters 188 km north-west of Northwest Cape, Western Australia (**Activity**).

3. The Applicant, Ms Cooper, is a Mardudhunera lore woman, elder and a Traditional Custodian of Murujuga. Ms Cooper has cultural responsibilities and obligations relating to places in the northwest of Western Australia, including but not limited to Murujuga and Pannawonica, and Australia more generally.[3] She is also a 'relevant person' within the definition of the Seismic Survey EP who must be consulted prior to the commencement of Activity.[4]

4. By originating application filed 17 August 2023, Ms Cooper commenced these proceedings in the public interest,[5] seeking judicial review of the lawfulness of the Seismic Survey EP. In the alternative, injunctive relief is sought to prevent the commencement of the Activity, until Woodside complies with express conditions identified in the Statement of Reasons for the Acceptance (With Conditions) of the Seismic Survey EP of the delegate of the First Respondent dated 31 July 2023 (**Statement of Reasons**) requiring it to consult with her and others, with whom the required consultation had not been completed at the time of the Decision. That relief is justified, respectively, because:

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1 A copy of the Seismic Survey EP is at JLB-1.2, pp 15ff of the Affidavit of Jessica Border affirmed 17 August 2023 (**First Border Affidavit**).

2 A copy of the **Statement of Reasons** for the Decision is at JLB-1.3 of the First Border Affidavit, pp 1210ff.

3 Affidavit of Jessica Border dated 7 September 2023 (**Second Border Affidavit**), [9(b)] and [11].

4 First Border Affidavit, [10] to [12]. See also *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 at [74]-[78] (Kenny J and Mortimer J as her Honour then was) and [157]-[158] (Lee J).

5 Second Border Affidavit, [10].

(1) NOPSEMA did not have statutory power to make the Decision, because NOPSEMA was not reasonably satisfied that the Seismic Survey EP demonstrated that the consultation required by reg 11A of the Environment Regulations had been carried out, and, therefore, was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii) (Ground 1). The Decision is therefore invalid; and,

(2) in the alternative, even if the Decision is valid, the commencement of the Activity is not authorised by the Seismic Survey EP, and would be unlawful, because the Decision is subject to express conditions with which Woodside has not complied (Ground 2).

5. Following the commencement of the proceedings:

(1) On 21 August 2023, Woodside undertook not to commence Activity without 48 hours' notice to Ms Cooper.[6]

(2) On 25 August 2023 the matter was listed for a first case management hearing before the Honourable Justice Colvin at 9:15am AWST on Thursday, 7 September 2023.

(3) On 29 August 2023, Ms Cooper's lawyers (**EDO**) wrote to the lawyers for the First Respondent (**AGS**) and the Second and Third Respondents (**Allens**) to propose orders for the case management of the proceeding, proposing a timetable directed to the rapid hearing of the proceeding.[7] Between 29 August and 5 September 2023 the parties exchanged correspondence on the proposed timetabling of the matter.[8]

(4) At 7:43pm AWST on Tuesday, 5 September 2023, Woodside gave notice to Ms Cooper of its intention to commence the Activity in 48 hours (ie, from 7:43pm AWST on Thursday, 7 September 2023).[9]

6. As a result of that correspondence, and in order to preserve the subject matter of these proceedings, Ms Cooper now seeks an injunction restraining Woodside, until the final hearing of this proceeding or further order, from undertaking any activity as described in Seismic Survey EP.

7. In support of this application Ms Cooper relies upon:

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6 Second Border Affidavit, [82] and JLB-2.47.
7 Second Border Affidavit, [86] and JLB-2.50.
8 Second Border Affidavit, [7] and JLB-2.1.
9 Second Border Affidavit, [8]-[9], [11].

(1) the affidavit of Jessica Border affirmed 17 August 2023 (**First Border Affidavit**); and,

(2) the affidavit of Jessica Border to be affirmed 7 September 2023 (**Second Border Affidavit**).

8. In short, applying established principles, the injunction should be granted for the following reasons.

(1) The litigation raises a question of public importance about the construction of the Environment Regulations and, in particular, the requirement for consultation during the preparation of an environment plan, pursuant to reg 11A of Div 2.2A:

(a) NOPSEMA proceeded on the basis that, even where it is *not* satisfied that consultation has occurred in compliance with regs 10A(g)(i)-(ii) and 11A, it may nevertheless proceed under reg 10(6) to 'accept the plan subject to limitations or conditions applying to operations for the activity.'

(b) Not only does it strain the text of reg 10(6) to view consultation as a 'condition applying to operations'; to dispense with the requirement to consult by conditions, and, in that way, to defer consultation until *after* a decision has been made to accept an environment plan would be at odds with the 'underlying premise' of the consultation provisions, which is to give 'relevant persons' the opportunity 'to participate in *decision-making*'.[10]

(2) For these reasons and those developed further below, the Applicant's claim has good prospects of success and, certainly, a sufficient likelihood of success to justify the preservation of the *status quo* pending trial of the substantive issues.

(3) The Activity will result in serious harm in the form of disruption to culturally significant songlines and the migration, breeding and feeding of culturally significant animals, including whales, turtles and dugongs. This in turn will impact the health and wellbeing of Murujuga, and the plants, animals and people, including the Applicant and her family, who are intimately connected to it.[11] To allow the Activity to proceed would undermine the utility of the relief sought at final hearing (by rendering that relief if not redundant, then compromised).

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10 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [104] (Kenny J and Mortimer J as her Honour then was).

11 Second Border Affidavit, [20]-[22].

(4) Woodside has failed to act expeditiously in its conduct of the proceeding to date, in failing to act on proposals made by the Applicant to facilitate a rapid hearing. Woodside has been prepared to undertake not to commence the Activity until 7 September and given its conduct, there is no basis why the status quo should not continue until final determination, noting the irreversible harm to the Applicant's interests which would arise should the Activity commence prior to the determination of this matter.

(5) Applying well-established principles, no undertaking as to damages should be required where Ms Cooper is without means to provide any meaningful undertaking as to damages[12] and the litigation is brought in the public interest.[13]

### A.2 Application to amend the originating application

9. In order to respond to matter raised by the Respondents, the Applicant seeks leave pursuant to r 8.21 of the *Federal Court Rules 2011*, to amend the originating application filed with this Court on 17 August 2023. The amendments clarify the relationship between the two grounds and correct a minor typographical error.

10. A copy of the proposed Amended Originating Application is JLB-2.58 to the Second Border Affidavit. The Respondents have been given notice of this application. Woodside has advised that it does not consent to it.

## B RELEVANT LEGISLATIVE AND REGULATORY SCHEME

11. The Environment Regulations are made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

12. The express object of the Regulations is as follows:

> **3 Object of Regulations**
>
> The object of these Regulations is to ensure that any petroleum activity or greenhouse gas activity carried out in an offshore area is:
>
> (a) carried out in a manner consistent with the principles of ecologically sustainable development set out in section 3A of the EPBC Act; and
>
> (b) carried out in a manner by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and
>
> (c) carried out in a manner by which the environmental impacts and risks of the activity will be of an acceptable level.

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12 Second Border Affidavit, [15]-[17].

13 Second Border Affidavit, [10].

13. Subject to contrary intention, reg 4 relevantly defines the following terms for the purposes of the Regulations:

> ***environment*** means:
>
> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) natural and physical resources; and
>
> (c) the qualities and characteristics of locations, places and areas; and
>
> (d) the heritage value of places; and includes
>
> (e) the social, economic and cultural features of the matters mentioned in paragraphs (a), (b), (c) and (d).
>
> ***environmental impact*** means any change to the environment, whether adverse or beneficial, that wholly or partially results from an activity.

14. Part 2 of the Regulations deals with 'Environment plans'. Within that Part, Div 2.1, titled 'Requirement for an environment plan', contains provisions that emphasise the centrality of the environment plan to the scheme for managing environmental impacts created by the Regulations. Relevantly:

    (1) Regulation 6 makes it an offence for a titleholder to undertake an activity where no environment plan is in force for the activity; and,

    (2) Regulation 7 makes it an offence for a titleholder to undertake an activity in a way that is contrary to an environment plan in force for the activity,[14] or any limitation or condition applying to operations for the activity under these Regulations.[15]

15. Division 2.2, which is titled 'Acceptance of an environment plan', contains what are, for relevant purposes, the operative provisions.

16. Regulation 9 requires, relevantly and in substance, that before commencing an activity, a titleholder must submit an environment plan for the activity to the Regulator. The regulator is NOPSEMA.[16] Regulation 9 also prescribes requirements as to the form of the environment plan which include, at sub-reg (8), a requirement that the full text of any response by a relevant person to consultation under reg 11A in the course of preparation of the plan must be contained in the sensitive information part of the plan.

17. Regulation 10 contains the relevant power for NOPSEMA to make a decision on a submitted environment plan. It provides as follows:

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14 Regulation 7(1)(a).

15 Regulation 7(1)(b).

16 See reg 4, "*Regulator*".

**10 Making decision on submitted environment plan**

(1) Within 30 days after the day described in subregulation (1A) for an environment plan submitted by a titleholder:

(a) if the Regulator is reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must accept the plan; or

(b) if the Regulator is not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must give the titleholder notice in writing under subregulation (2); or

(c) if the Regulator is unable to make a decision on the environment plan within the 30 day period, the Regulator must give the titleholder notice in writing and set out a proposed timetable for consideration of the plan.

…

(2) A notice to a titleholder under this subregulation must:

(a) state that the Regulator is not reasonably satisfied that the environment plan submitted by the titleholder meets the criteria set out in regulation 10A; and

(b) identify the criteria set out in regulation 10A about which the Regulator is not reasonably satisfied; and

(c) set a date by which the titleholder may resubmit the plan.

(3) The date referred to in paragraph (2)(c) must give the titleholder a reasonable opportunity to modify and resubmit the plan.

(4) Within 30 days after the titleholder has resubmitted the modified plan:

(a) if the Regulator is reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must accept the plan; or

(b) if the Regulator is still not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must:

(i) give the titleholder a further notice under subregulation (2); or

(ii) refuse to accept the plan; or

(iii) act under subregulation (6); or

(c) if the Regulator is unable to make a decision on the environment plan within the 30 day period, the Regulator must give the titleholder notice in writing and set out a proposed timetable for consideration of the plan.

(5) If the titleholder does not resubmit the plan by the date referred to in paragraph (2)(c), or a later date agreed to by the Regulator, the Regulator must:

(a) refuse to accept the plan; or

(b) act under subregulation (6).

(6) For subparagraph (4)(b)(iii) and paragraph (5)(b), the Regulator may do either or both of the following:

(a) accept the plan in part for a particular stage of the activity;

(b) accept the plan subject to limitations or conditions applying to operations for the activity.

(7) A decision by the Regulator to accept, or refuse to accept, an environment plan is not invalid only because the Regulator did not comply with the 30 day period in subregulation (1) or (4).

18. Regulation 10A sets out the criteria for the acceptance of an environment plan:

**10A Criteria for acceptance of environment plan**

For regulation 10, the criteria for acceptance of an environment plan are that the plan:

(a) is appropriate for the nature and scale of the activity; and

(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 impacts and risks of the activity will be of an acceptable level; and

(d) provides for appropriate environmental performance outcomes, environmental performance standards and measurement criteria; and

(e) includes an appropriate implementation strategy and monitoring, recording and reporting arrangements; and

(f) does not involve the activity or part of the activity, other than arrangements for environmental monitoring or for responding to an emergency, being undertaken in any part of a declared World Heritage property within the meaning of the EPBC Act; and

(g) demonstrates that:

(i) the titleholder has carried out the consultations required by Division 2.2A; and

(ii) the measures (if any) that the titleholder has adopted, or proposes to adopt, because of the consultations are appropriate; and,

(h) complies with the Act and the regulations.

19. Division 2.2A contains a single regulation, reg 11A, which provides for a requirement, on the part of a titleholder preparing an environment plan, to consult:

**11A Consultation with relevant authorities, persons and organisations, etc**

(1) In the course of preparing an environment plan, or a revision of an environment plan, a titleholder must consult each of the following (a relevant person):

(a) each Department or agency of the Commonwealth to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;

(b) each Department or agency of a State or the Northern Territory to which the activities to be carried out under the environment plan, or the revision of the environment plan, may be relevant;

(c) the Department of the responsible State Minister, or the responsible Northern Territory Minister;

(d) a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the revision of the environment plan;

(e) any other person or organisation that the titleholder considers relevant.

(2) For the purpose of the consultation, the titleholder must give each relevant person sufficient information to allow the relevant person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities of the relevant person.

(3) The titleholder must allow a relevant person a reasonable period for the consultation.

(4) The titleholder must tell each relevant person the titleholder consults that:

(a) the relevant person may request that particular information the relevant person provides in the consultation not be published; and

(b) information subject to such a request is not to be published under this Part.

20. Division 2.3, titled 'Contents of an environment plan', provides requirements as to the contents of such plans. Within that part, regs 12, 13 and 16 relevantly provide:

**12 Contents of an environment plan**

An environment plan for an activity must include the matters set out in regulations 13, 14, 15 and 16.

**13 Environmental assessment**

*Description of the activity*

…
*Description of the environment*

(2) The environment plan must:

(a) describe the existing environment that may be affected by the activity; and

(b) include details of the particular relevant values and sensitivities (if any) of that environment.

Note: The definition of environment in regulation 4 includes its social, economic and cultural features.

[…]
*Evaluation of environmental impacts and risks*

(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.

(6) To avoid doubt, the evaluation mentioned in paragraph (5)(b) must evaluate all the environmental impacts and risks arising directly or indirectly from:

(a) all operations of the activity; and

(b) potential emergency conditions, whether resulting from accident or any other reason.

**…**

**16 Other information in the environment plan**

The environment plan must contain the following:

(a) a statement of the titleholder's corporate environmental policy;

(b) a report on all consultations under regulation 11A of any relevant person by the titleholder, that contains:

(i) a summary of each response made by a relevant person; and

(ii) an assessment of the merits of any objection or claim about the adverse impact of each activity to which the environment plan relates; and

(iii) a statement of the titleholder's response, or proposed response, if any, to each objection or claim; and

(iv) a copy of the full text of any response by a relevant person;

(c) details of all reportable incidents in relation to the proposed activity.

21. Regulation 29 provides for the notification of the start and end of any activity. Regulation 29(1) provides:

> (1) A titleholder must notify the Regulator that an activity is to commence at least 10 days before the activity commences.

## C RELEVANT BACKGROUND FACTS AND PROCEDURAL HISTORY

### C.1 Submission of the Seismic Survey EP

22. On 11 October 2021, Woodside submitted an Environment Plan to NOPSEMA in accordance with reg 9(1).[17] Between 16 December 2021 and 18 April 2023, NOPSEMA issued four "not reasonably satisfied notices" requiring Woodside to modify and resubmit the Environment Plan, pursuant to reg 10. In addition, NOPSEMA made four requests for further information during this timeframe pursuant to reg 9A.[18]

23. On 2 June 2023, Woodside submitted the Seismic Survey EP (identified as Revision 7, June 2023).[19]

### C.2 The Activity

24. The Seismic EP described the Activity. It proposes a Petroleum Activities Program that:[20]

> …comprises a marine seismic survey (MSS) of the Scarborough field, the 'Scarborough 4D Baseline (B1) MSS', which will be acquired in the Northern Carnarvon Basin on the Exmouth Plateau within Woodside's permit areas …as well as surrounding permit areas … and gazettal block …. Additionally, the proposed activity includes a potential extension to cover the Jupiter field to the north-east… .

25. The purpose of the Activity is described as follows:[21]

> The objective for the Petroleum Activities Program is to acquire a new marine 3D / Baseline 4D seismic survey over the Scarborough and Jupiter fields, as part of an appraisal program for reservoir management. This new 3D survey will provide an uplift in seismic imaging for the Scarborough field from the 2004 vintage seismic data (HEX-003) and ultimately be used as the baseline for time lapse data in the event of acquisition of future monitoring seismic surveys. This will help inform the optimised management of hydrocarbon reserves.

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17 Statement of Reasons, [4]; First Border Affidavit, p 1210.

18 Statement of Reasons, [7]; First Border Affidavit, p 1210.

19 Statement of Reasons, [7], First Border Affidavit, p 1210.

20 Seismic Survey EP, 3.1 "Project Overview", p 38; First Border Affidavit, p 49.

21 Seismic Survey EP, 3.2 "Purpose of the Activity", p 38. First Border Affidavit, p 49.

26. The survey method of the Activity is described as:[22]

> The marine seismic surveys proposed are typical seismic surveys similar to most others conducted in Australian marine waters (in terms of technical methods and procedures). The surveys will be conducted using a purpose-built seismic vessel.
>
> During the proposed activities, the survey vessel will traverse a series of pre-determined sail lines within the Active Source area at a speed of about 4–5 knots. **As the vessel travels along the survey lines, regular pulses of sound will be emitted from a seismic source array and directed down through the water column and seabed. The produced sound waves are attenuated and reflected at geological boundaries and the reflected signals are detected using sensitive hydrophone microphones and potentially micro electro-mechanical system (MEMS) accelerometers arranged along cables (called 'streamers') which are towed behind the survey vessel.** The reflected sound is then processed to provide 3D data about the structure and composition of geological formations below the seabed. … (Emphasis added.)

27. Four project vessels (Seismic, support, chase and spotter vessel) are expected to be required for the Activity.[23]

### C.3 Consultations with Save our Songlines, Ms Alec and Ms Cooper

28. The EP must contain a report on all consultations with any relevant persons, including a full text of any response from a relevant person: reg 16. Save our Songlines, Ms Alec and Ms Cooper are listed in Table 5-3 of the Seismic Survey EP ('Assessment of relevance') as a 'relevant person'.[24]

29. A history of interactions between Woodside and Save our Songlines, Ms Alec and Ms Cooper up to 1 June 2023 are recorded in Table 5-4 ('Consultation report with relevant persons or organisations') at pages 185 to 191 of the Seismic Survey EP. A more comprehensive account of those interactions, including communications following 1 June 2023, is contained in the Second Border Affidavit.[25]

30. In particular, the following interactions are of note:

    (1) On 14 March 2023, Ms Alec and Ms Cooper met with representatives from Woodside. Ms Alec and Ms Cooper considered this to be an initial meeting with Woodside, and one that did not form part of substantive consultation on any of Woodside's Environment Plans, including the Seismic EP.[26] This understanding was communicated by the EDO to Woodside in writing on 24 March 2023.[27]

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22 Seismic Survey EP, 3.5.1 "Survey Method", p 42. First Border Affidavit, p 53.

23 Seismic Survey EP, 3.5.5 "Project Vessels", p 44. First Border Affidavit, p 49.

24 Seismic Survey EP, Table 5-3, p 66. First Border Affidavit, p 139.

25 Second Border Affidavit, [23] to [63] and [67] to [77].

26 Second Border Affidavit, [26].

27 Second Border Affidavit, JLB-2.3.

(2) On 29 March 2023, Woodside responded to that correspondence. Among other things, Woodside said of the meeting on 14 March 2023 that Woodside '*heard you tell us that you were not prepared to share some information with us at this stage and you weren't sure when you would be ready to share it with us*.' The letter also set out further matters that Woodside was interested in learning from Ms Alec and Ms Cooper.[28]

(3) There was further correspondence between the EDO (on behalf of Ms Alec, Ms Cooper and Save our Songlines) regarding the scheduling of a further meeting on Country.[29]

(4) On 1 June 2023, the EDO sent a letter to Woodside confirming that Ms Alec and Ms Cooper were '*available and would like to meet in Karratha on the morning of Tuesday, 13 June 2023*'.[30] On Wednesday, 7 June 2023 Woodside confirmed the availability of its representatives to attend this meeting.[31]

(5) On Friday, 9 June 2023 Woodside sought further confirmation that the meeting on 13 June 2023 would proceed, and asked for confirmation by 5pm that day.[32]

(6) EDO responded to that email at 5:05pm that day, confirming availability for the proposed meeting.[33]

(7) Woodside responded at 5:09pm to say that because 'logistics timed out at 5pm' they would be unavailable.[34]

(8) The EDO sent further correspondence to Woodside between 10 and 12 June 2023 seeking to preserve the meeting, noting the availability of commercial flights, and offering to meet on Tuesday afternoon, or Wednesday, 14 June 2023 as alternatives.[35]

(9) On 14 June 2023, Woodside responded to the EDO proposing further dates for a meeting between 20 and 30 June 2023.[36]

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28 Second Border Affidavit, JLB-2.4.
29 Second Border Affidavit, [29]-[35].
30 Second Border Affidavit, JLB-2.11.
31 Second Border Affidavit, JLB-2.12.
32 Second Border Affidavit, JLB-2.13.
33 Second Border Affidavit, JLB-2.15.
34 Second Border Affidavit, JLB-2.16.
35 Second Border Affidavit, [42]-[48] and JLB-2.17 to JLB-2.20.
36 Second Border Affidavit, [49] and JLB-2.22.

(10) A further meeting was held on 25 July 2023 via Teams. The meeting lasted for 2 hours and 20 minutes. The first hour and 10 minutes was occupied discussing Ms Alec and Ms Cooper's request for the meeting to be recorded (a request to which Woodside ultimately conceded).[37] During that meeting Ms Alec and Ms Cooper made clear that there was more that they needed to tell Woodside, but that they needed time to do so and emphasised the importance of storytelling on Country.[38] In any event, this meeting was held after Woodside submitted the Seismic Survey EP to NOPSEMA on 2 June 2023.

**C.4 The Decision**

31. On 13 July 2023, NOPSEMA wrote to Woodside providing an opportunity to review the draft conditions which may be imposed if NOPSEMA were to find that the criteria in reg 10A were not met.[39]

32. On 26 July 2023, Woodside responded with a number of comments on the draft conditions and NOPSEMA took these into consideration when finalising the conditions, but did not change the scope and intent of the conditions.[40]

33. On 31 July 2023 a delegate of NOPSEMA made the Decision, accepting the Seismic Survey EP subject to conditions. Significantly, these included conditions requiring Woodside to conduct further consultation (the **Consultation Conditions**):[41]

> 1) Prior to commencement of the activity, the titleholders must 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 EP to confirm whether:
>
> a) 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.
>
> b) There is any information they wish to provide on cultural features and/or heritage values.
>
> 2) The purpose of the consultation outlines in Condition 1 is to be communicated, and relevant persons are provided with a copy of the NOPSEMA Consultation on offshore environment plans Brochure as part of consultation.
>
> 3) The method of consultation is informed by the relevant persons being consulted.

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37 Second Border Affidavit, [58]-[59].

38 Second Border Affidavit, [59]-[60].

39 Statement of Reasons, [8]; First Border Affidavit, p 1211.

40 Statement of Reasons, [8]; First Border Affidavit, p 1211.

41 Statement of Reasons, [133]; First Border Affidavit, p 1245.

4) If at any time, as a result of compliance with Condition 1, relevant persons are identified, they must be consulted in accordance with the NOPSEMA Guideline on Consultation in the course of preparing an environment plan (GL2086).

…

34. By 17 August 2023, the NOSPEMA website recorded that Woodside had advised NOPSEMA that activity would commence on 10 August 2023.[42] By operation of reg 29(1) of the Regulations, which requires 10 days notice to NOPSEMA before commencing any activity, it is open to infer that this notification of an intention to commence the Activity was given by Woodside to NOPSEMA on 31 July 2023. In other words, on the date of the Decision.

## C.5 Statement of Reasons for the Acceptance of the Seismic EP

35. The basis for the Decision is set out in the Statement of Reasons.

36. In particular, the delegate made several findings that they were not satisfied that consultation criteria in reg 10A had been satisfied.

37. The Statement of Reasons includes the following relevant findings:[43]

> [15] **I consider that the criteria in reg 10A were not all satisfied**. However, I exercised my discretion to accept the Environment Plan, subject to conditions.
>
> …
>
> [94] Despite the consultation with First Nations relevant persons outlined above, I remained concerned that the titleholders had not carried out all consultations required by Division 2.2A. I considered that there was uncertainty in the Environment Plan as to whether all First Nations persons who may have cultural interests that may be affected by the activities have been identified, whether a reasonable period has been afforded to consult with them on the consequences of the activity, and whether appropriate measures have been adopted as a result of the consultation. In this regard I considered the following matters:
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> …
>
> e. consultation records indicate that representatives of Save our Songlines have requested a second meeting with the titleholders in order to further understand the proposed activity and to share information on their functions, interests or activities that may be affected by the proposed activity, and that this had not yet taken place before the Environment Plan was resubmitted. This indicated to me that, at least at the time the Environment Plan was resubmitted, further consultation was to occur.
>
> [95] I am aware that, since the Environment Plan was resubmitted, further consultation has occurred between the titleholders and Save our Songlines. Correspondence from the titleholders dated 3 July 2023 was copied to NOPSEMA, and indicated that the titleholders considered that consultation with Save our Songlines has been completed under reg 11A, but that the titleholders is willing to continue discussions. NOPSEMA

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42 First Border Affidavit, [5] and JLB-1.

43 First Border Affidavit, pp 1211, 1234-1236.

was copied into correspondence on 25 July 2023 that further confirms additional consultation has been undertaken with Save our Songlines. Noting that these matters took place after the Environment Plan was submitted, it has no bearing upon whether the Environment Plan demonstrates that the titleholders has carried out the consultations required by Division 2.2A**. However, this information indicates that there is uncertainty as to whether there is additional information held by First Nations people on the cultural features of the environment, including spiritual and cultural connections to the environment that may be affected by the activity.** The conditions set out at [133] require that additional consultation is undertaken with relevant First Nations people and groups **so that information on cultural features and/or heritage values that may be impacted by the activity can be provided and control measures can be adopted/revised by the titleholders where necessary to manage any impacts and risks to as low and reasonably practicable and acceptable levels**.

[96] While I considered that the consultation undertaken by the titleholders was comprehensive, the concerns I have raised above meant that I am not reasonably satisfied that consultation as required by Division 2.2A had been carried out (and therefore I am not reasonably satisfied that reg 10A(g)(i) was met).

[97] I also considered whether the Environment Plan demonstrates that the measures (if any) that the titleholders has adopted, or proposes to adopt, because of the consultations are appropriate. **Given that I am not satisfied that consultation undertaken had met the requirements of Division 2.2A, I am not satisfied that reg 10A(g)(ii) was met.**

(Emphasis added.)

## D LEGAL PRINCIPLES: INTERLOCUTORY RELIEF

38. In order to grant the injunctive relief sought, the Court must be satisfied that:[44]

(1) there is a serious issue to be tried (or a *prima facie* case[45]) in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief;

(2) that the plaintiff will suffer irreparable injury for which damages will not be an adequate compensation; and,

(3) the balance of convenience favours the grant of the injunction.

39. On the first limb, it is unnecessary that the plaintiff establish that it is more likely than not that it will succeed. Rather, it must show a sufficient likelihood of success to justify the preservation of the *status quo* pending trial of the substantive issue.[46] The strength of the

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44 *Castlemaine Tooheys v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ); *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, 622-623 (Kitto, Taylor, Menzies and Owen JJ).

45 *Australian Broadcasting Corporation v O'Neil* (2006) 227 CLR 57, [65]-[72] (Gummow and Hayne JJ). However, as has been observed by this court, there is little practical difference between the formulations of a "serious question to be tried" and a "*prima facie* case": *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor* [2020] NTSC 65, [14] (Grant CJ)

46 *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing & Anor* [2020] NTSC 65, [14] (Grant CJ).

likelihood required will depend upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from refusal to grant the injunction.[47]

40. In circumstances such as the present, where the case presents a strong serious question to be tried (for the reasons set out in Part E), and the potentially irreparable harm to an area of deep cultural significance will be caused by the Activity, for which damages cannot be an adequate remedy (for the reasons in Part F), the Court can be satisfied of the necessary matters to grant the injunctive relief sought. This is particularly so in circumstances where the parties have proposed procedural orders which would have the matter ready for final hearing by mid-October 2023 (in approximately 6 weeks).

## E PRIMA FACIE CASE

41. There is a strongly arguable case, and certainly a *prima facie* case, that the Activity would be unlawful. That is for the two reasons pleaded as grounds in the Originating Application:

    (1) First, NOPSEMA did not have statutory power to make the Decision because it was not reasonably satisfied that the Seismic Survey EP demonstrated that the consultation required by reg 11A of the Environment Regulations had been carried out, and so was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii); and,

    (2) Second, in the alternative, even if the Decision is valid, the commencement of the Activity is not authorised by the Seismic Survey EP, and would be unlawful, because the Decision is subject to express conditions with which Woodside has not complied.

42. Each ground is addressed below.

### E.1 The Decision is invalid

43. The delegate explicitly stated in the Statement of Reasons for the Decision that the delegate was *not* reasonably satisfied that the consultation required by reg 11A of Div 2.2A had been carried out,[48] and was, therefore:

    (1) not satisfied that the criterion in reg 10A(g)(i) had been met; and,

    (2) not satisfied that the criterion in reg 10A(g)(ii) had been met.

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47 *Australian Broadcasting Corporation v O'Neil* (2006) 227 CLR 57, [66], [71] (Gummow and Hayne JJ).

48 Statement of Reasons, [97]; First Border Affidavit, p 1236.

44. In the absence of reasonable satisfaction that the criteria in reg 10A(g) are met, and that consultation within the meaning of reg 11A has been carried out, NOPSEMA does not have the power to accept an environment plan under reg 10. The Environment Regulations clearly contemplate that consultation will occur, and conclude,[49] *prior* to the making of a decision by NOPSEMA. Sub-regs 10(4) and 10(6) cannot be construed as permitting NOPSEMA to dispense with the requirement to consult by accepting an environment plan subject to conditions that the titleholder consult *after* the decision.

45. The following aspects of the statutory scheme support this construction.

*Consultation is to be completed prior to acceptance of an environment plan*

46. The evident purpose of an environment plan, as demonstrated by regs 13(2), (5) and (6), is to ensure that NOPSEMA is provided with a description of the environment that may be affected by the activity and the values and sensitivities (if any) of that environment, as well as details and an evaluation of the environmental impacts and risks for the activity. These are matters NOPSEMA 'must consider' when 'required to make a decision under reg 10'.[50]

47. As Kenny and Mortimer[51] JJ observed in *Santos NA Barossa Pty Ltd v Tipakalippa*, 'it may be inferred from this, and in particular reg 10A(g), that the consultations under Div 2.2A referred to in reg 10A(g) (that is, those mandated by reg 11A) are ultimately intended to inform NOPSEMA about' those matters and 'to provide a basis for NOPSEMA's considerations of the measures, if any, that a titleholder proposes to take or has taken to lessen or avoid the deleterious effect of its proposed activity on the environment'. [52]

48. Hence, the purpose of the consultation requirement is to facilitate the making of a decision under reg 10, by providing NOPSEMA with information that, under the Environment Regulations, is necessary for the purpose of assessing whether NOPSEMA is reasonably satisfied of the existence of the criteria in reg 10A. As Kenny and Mortimer JJ continued, with respect to the requirements of reg 10A(g)(ii):

> The second element of this criterion is vital to understanding the purpose of the consultation requirement, and contributes to an understanding of the nature of consultation that must occur for compliance with reg 11A. It also confirms that, *unless the duty in reg 11A, properly construed, has been discharged by the titleholder, then the delegate will not be presented with*

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49 Save for in the circumstances described at [54](1), below.

50 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 [104].

52 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [54].

52 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [54].

*the requisite information on which to form a state of satisfaction about the environmental impacts and risks of the activity*, being the principal subject matter of the criteria in reg 10A.

49. This being the purpose of consultation, it would entirely undermine the structure and purpose of the Environment Regulations to read them as permitting NOPSEMA to dispense with consultation by conditions and, in that way, to defer consultation until *after* a decision to accept an environment plan has been made. Indeed, that would be at odds with what Kenny and Mortimer JJ described as the 'underlying premise' of the consultation provisions, which is to give 'relevant persons' a reasonable opportunity 'to *participate* in *decision-making*'.[53]

50. Were further support needed for the proposition that the Environment Regulations contemplate that the consultation in reg 11A will occur *prior* to the making of a decision under reg 10, it is to be noted that:

    (1) regulation 10A(g) is expressed in the past tense, and requires the plan to demonstrate that 'the titleholder *has carried out* the consultations required by Division 2.2A';

    (2) regulation 11A requires that the relevant consultation occur "*in the course of preparing*" an environment plan; and,

    (3) this construction is most consistent with the express objects of the Environment Regulations, which include, relevantly, the object of 'ensur[ing] that any petroleum activity or greenhouse gas activity carried out in an offshore area is … carried out in a manner by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable', because it is through consultation that NOPSEMA is informed of the nature of the relevant environment, and any risks thereto and impacts thereon.

*The imposition of conditions on an acceptance of an environment plan cannot overcome an absence of reasonable satisfaction as to the reg 10A(g) criteria*

51. As set out above, regs 10(3)-(5) provide a process by which NOPSEMA may provide the titleholder an opportunity to resubmit an environment plan where NOPSEMA is not reasonably satisfied that the environment plan meets the criteria set out in reg 10A.

52. Regulation 10(4) provides the options for NOPSEMA if it is not reasonably satisfied that a resubmitted environment plan meets the criteria set out in reg 10A. The options are to give the titleholder a further notice to resubmit the plan (as occurred on several occasions prior

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53 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [104].

to the final revision of the Seismic Survey EP), to refuse to accept the plan, or, pursuant to reg 10(4)(b)(iii), to 'act under sub-regulation (6)'. To repeat the terms of that sub-regulation:

> (6) For subparagraph (4)(b)(iii) and paragraph (5)(b), the Regulator may do either or both of the following:
>
> (a) accept the plan in part for a particular stage of the activity;
>
> (b) accept the plan subject to limitations or conditions applying to operations for the activity.

53. It is not open to interpret the power in reg 10(6)(b) to 'accept the plan subject to limitations or conditions applying to operations for the activity' to permit a condition which effectively dispenses with the duty on the titleholder to comply with reg 11A, or with the obligation on NOPSEMA to be reasonably satisfied that the criteria in reg 10A(g) are met. This is because:

(1) The scheme of the Environment Regulations is such that there is no qualification on:

(a) the criteria for acceptance in reg 10A, which are not expressed to be subject to any other regulation;

(b) the contents of the environment plan, which 'must':

(i) describe the existing environment that may be affected by the activity and the relevant values and sensitivities of that environment (reg 13(2));

(ii) include details of the environmental impacts and risks for the activities (reg 13(6)) which as noted above, are to be informed by the consultation process; and

(iii) contain a report on 'all of the consultations under regulation 11A of any relevant person by the titleholder' containing stipulated information (reg 16(b)).

(2) These mandatory contents could not be included in the environment plan, as required by reg 12, if the consultation process required by reg 11A is incomplete.

(3) Such a construction would undermine, if not defeat entirely, the purpose of the consultation requirement, as identified at [46]-[49] above, because 'relevant persons', including Traditional Owners, could be denied the opportunity to '*participate* in decision-making' by deferring consultation with them until after a decision has been made.

54. This interpretation of the nature of the conditions which might be imposed under reg 10(6) does not mean that the power in reg 10(6) to accept a plan, notwithstanding that NOPSEMA may not be reasonably satisfied that the environment plan meets the criteria in reg 10A, (as contemplated by reg 10(4)(iii)) is devoid of any content. In such a circumstance, NOPSEMA's power is either to:

    (1) accept a plan for 'a particular stage of the activity' under reg 10(6)(a). This may arise, for example, where NOPSEMA is not reasonably satisfied as to the criteria insofar as they relate to a later stage of the activity, but is satisfied insofar as the criteria relate to earlier stages. Where the absence of reasonable satisfaction relates to compliance with reg 11A, it may be that there has been adequate consultation on a particular stage but not later stages, or that the lack of consultation affects all stages (in which case, it will not be appropriate to act under this subsection); or

    (2) accept the plan subject to limitations or conditions applying to operations for the activity under reg 10(6)(b). This may provide for a situation where NOPSEMA is able to fashion a limitation or condition applying to operations for the activity in a manner that is responsive to, and addresses, what would otherwise be its lack of satisfaction as to one or more criteria in reg 10A(a)-(f). Alternatively, it could encompass a condition that the activity be conducted in a certain manner, or that only one of the activities identified in the plan be undertaken until further information is submitted, which would be consistent with the recognition in reg 9(7)(c) that an environment plan may relate to more than one activity. However, in a situation where the criteria of which NOPSEMA is not reasonably satisfied are those in reg 10A(g)(i) and (ii), relating to the consultations required by reg 11A, it may be that there is no condition which could be appropriate under this subsection. This is because NOPSEMA could not be reasonably satisfied that all the information required to be included in the environment plan has been obtained, this information being necessary for it to reach a state of satisfaction on all of the reg 10A criteria.

55. A contrary interpretation, which would permit acceptance of the environment plan subject to a condition that a criteria is either not to be met, or to be met in the course of conducting the activity to which it relates, would not promote the objects of the Regulations, being to ensure that activity is carried out in a manner by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable, and in a manner by which the environmental impacts and risks of the activity will be of an acceptable level.

**E.2 The commencement of the Activity would be unlawful**

56. Even if, contrary to the above submissions the Decision could be regarded as valid, the commencement of the Activity is not authorised by the Seismic Survey EP, and would be unlawful, because the Decision is subject to express conditions with which Woodside has not complied.

57. As already noted, NOPSEMA was *not* satisfied that Woodside had discharged the obligation to consult contained in reg 11A. It noted that there 'was uncertainty as to whether there is additional information held by First Nations people on the cultural features of the environment, including spiritual and cultural connections to the environment that may be affected by the activity'.[54] NOPSEMA specifically identified Save our Songlines as one such body comprised of, or representing, First Nations people.[55]

58. As a result of those concerns, NOPSEMA imposed the Consultation Conditions, which required Woodside to consult *prior* to commencing the Activity. In summary:

    (1) Condition 1 of the Decision provides that, '[p]rior to the commencement of the activity', Woodside, '*must* 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 EP' to determine, relevantly, whether '[t]here is any information they wish to provide on cultural features and/or heritage values'.[56]

    (2) That consulation is subject to the processes set out in Conditions 2 to 6, including, significantly, Condition 3, which requires that the 'method of consultation is informed by the relevant persons being consulted.'[57]

59. Woodside's authority to undertake the Activity is not effective until such time as it satisfies the Consultation Conditions. This follows from the from the express terms of Condition 1, as well as the reasons NOPSEMA gave for imposing the Consultation Conditions.

60. There have been no further meetings with Save our Songlines since 31 July 2023.[58] Accordingly, it cannot be said that any further consultation has been undertaken since the Decision. To the extent that Woodside suggests that an online meeting with the Applicant

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54 Statement of Reasons, [95]; First Border Affidavit, 1236.
55 First Border Affidavit, p 139.
56 Statement of Reasons, [133]; First Border Affidavit, p 1245.
57 Statement of Reasons, [133]; First Border Affidavit, p 1245.
58 Second Border Affidavit, [67] to [77].

on 25 July 2023 constituted 'consultation', not only did this meeting occur *prior* to the Decision, it was not 'informed by the relevant persons being consulted' as required by Condition 3. To this end, the Applicant and Save our Songlines have clearly, and consistently, explained that there is significant cultural information that they can only share in person and on Country.[59] On any view, Woodside has not complied with the conditions on the Decision.

61. Further, Woodside apparently notified NOPSEMA on 31 July 2023 of its intention to commence activity on 10 August 2023.[60] By reason of operation of reg 29(1) of the Regulations which requires 10 days' notice to NOPSEMA before commencing any activity, it is open to infer that Woodside gave notice on the *same day* as the Decision.[61] This suggests, either, that Woodside did not intend to comply with the Consultation Conditions before it commenced the Activity (given that it could not have known how long it would take to comply with those conditions), or that Woodside took a view that it would be permissible to consult *after* commencing the Activity and while the Activity was ongoing. Neither view is consistent with the express terms or obvious intent of the conditions, especially if they are to be interpreted consistently with the regulatory scheme. Both would render any the requirement to consult 'superficial or token'.[62]

62. Of equal concern is that NOPSEMA accepted that notification and published a 10 August 2023 start date for the activity.[63] This might be regarded as endorsing a view that Woodside could commence activity on that date despite there being no assurance that the conditions would all be fulfilled by then, and despite having no realistic idea how long fulfilment of the conditions would take. That is not consistent with the Statement of Reasons insofar as it was apparent that the delegate intended that the consultation would obtain further information as to cultural features and heritage values of the environment, including potentially new cultural features or new heritage values of places (reg 10(6)).

63. Pursuant to reg 7(1)(b) of the Environment Regulations, it is an offence for a titleholder to undertake an activity in a way that is contrary to any limitation or condition applying to operations for the activity under the Environment Regulations. Ultimately, the problematic

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59 Second Border Affidavit, [59(j) an d(k)]; [60(c)]; [76].

60 First Border Affidavit, JLB-1, p 11.

61 See date of decision being, the "Acceptance Date" of 31 July 2023: First Border Affidavit, p 10.

62 Contrary to *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [104].

63 See First Border Affidavit, JLB-1, p 10-11.

nature of these conditions and their interpretation in practice supports the argument that the conditions have no ability to ensure compliance with the regulatory scheme and reinforces the view that a Decision with conditions of this nature is invalid, consistent with the Applicant's primary contention.

## F INJURY AND BALANCE OF CONVENIENCE

### F.1 Injury for which damages are not an adequate remedy

64. If the injunction is not granted, injury will be occasioned for which damages are not an adequate remedy.

65. The impact of the Activity on the cultural heritage of Ms Cooper and her family is explained in the Second Border Affidavit at [20] to [22].

66. The Activity proposed to be undertaken will involve:[64]

(1) seismic testing that involves loud, regular underwater pulses of sound and vibrations;

(2) in circumstances where:

(a) the sound and vibrations are created using very large amounts of pressure and the sound happens every 5/6 seconds;

(b) the sound and vibrations are emitted from an airgun array that will be towed at a depth of between 6 and 8 metres; and,

(c) the sound and vibrations reflected off the ocean floor will be detected by sensors connected to long cables towed behind the vessel. These cables are known as 'streamers'. The streamers are 8km long and 1.5km wide, taking up a huge area in the ocean.

67. This seismic testing will interfere with the songlines used for migration, breeding and feeding of culturally significant animal and bird life, including whales, turtles and dugongs.[65] In particular, whales carry important songlines, including the whale Dreaming – which in Ms Cooper's lore is important for sustaining the creation of all animals and humans.[66] The disruption that will flow from the Activity will have significant impacts upon the spiritual health and wellbeing of Murujuga and all the plants and animals present

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64 Second Border Affidavit, [20(a) to (d)].

65 Second Border Affidavit, [20]-[22].

66 Second Border Affidavit, [19].

on Murujuga and connected to the songlines in and around Murujuga; and the people connected to Murujuga, including Ms Cooper and her family.[67]

68. The impact that the Activity will have upon songlines represents a serious threat to Aboriginal cultural heritage. The spiritual importance of songlines to First Nations peoples is well recognised by Australian courts, including the High Court of Australia.[68]

69. In the result, the practical consequence of a refusal to grant the injunction would be to seriously threaten the interests that this litigation seeks to protect.

**F.2 Applicant's injury outweighs inconvenience or injury to Woodside**

70. Against that, the damages suffered by Woodside if the injunction is granted for the short period until trial is unlikely to be commensurate with the harm to Ms Cooper's cultural and spiritual interests.

71. It is anticipated that the damage suffered to Woodside will be primarily financial. Australian courts, considering whether to grant interlocutory injunctive relief, have previously weighed the significance of a harm to Aboriginal cultural heritage against financial losses.

    (a) In *Thorpe v Head, Transport for Victoria*, the Court found that in terms of the balance of convenience, where the claimed cultural heritage was a 'loss of culture of … great antiquity', the 'unique nature of what is put at risk' outweighed a financial cost that was 'substantial in absolute terms'.[69]

    (b) Similarly, in *Carriage v Stockland (Constructors) Pty Ltd*, the Court placed significant weight on Aboriginal cultural interests over financial loss. The Court stated that 'destruction of Aboriginal heritage' is a 'serious matter' and 'not one for which damages are appropriate compensation', on the basis that the risk of 'destruction of Aboriginal heritage' outweighed 'inconvenience and possible loss of income'.[70]

72. Further, Woodside has not acted expeditiously in the face of this litigation. In particular, Woodside has:

    (1) been on notice of Ms Cooper's application since 17 August 2023;

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67 Second Border Affidavit, [22].

68 For example, see *Northern Territory v Griffiths* (2019) 269 CLR 1 where the High Court recognised the significance of the *Wirip* (Dingo Dreaming) songlines.

69 *Thorpe v Head, Transport for Victoria*, [2020] VSC 804, [64], [74] (Forbes J).

70 *Carriage v Stockland (Constructors) Pty Ltd* [2002] NSWLEC 216 [33] (Pain J).

(2) not sought expedition of the proceedings;

(3) offered, including on one occasion of its own motion, extensions to its preliminary undertaking not to commence Activity;[71]

(4) waited until 5 September 2023 to notify Ms Cooper of its intention to commence the Activity, only days after refusing to propose procedural orders for the efficient conduct of the matter until after NOPSEMA provided the material that was before the decision-maker at the time of making the decision;

(5) not offered any rationale for its sudden commencement date of Activity of 7 September 2023, given that it has been prepared to offer an ongoing undertaking with 48 hours notice since 21 August 2023;

(6) not identified in correspondence any prejudice that it would face should the Court grant the interlocutory relief preventing it from commencing the Activity.

73. Ultimately, the balance of convenience favours granting the interlocutory relief sought, bearing in mind that the matters arising in the substantive proceeding are discrete and, subject to the capacity of the Court to accommodate the parties, could be ready for final hearing by the second half of October.

**F.3 Absence of the usual undertaking should not prevent the injunction being granted**

74. The Applicant has not provided instructions to give the 'usual undertaking' referred to in the Usual Undertaking as to Damages Practice Note (GPN-UNDR), due to her limited resources. [72]

75. However, an undertaking as to damages is not a precondition to the grant of an interlocutory injunction and the Court has a discretion to grant such relief in its absence.[73] Although the absence of an undertaking is a factor that may weigh against the grant of an interlocutory injunction, the public interest may nonetheless weigh in favour of the grant of the interlocutory injunction.[74] In *Ross v State Rail Authority (NSW)*, Cripps CJ considered that:[75]

> … where a strong prima facie case has been made out that a significant breach of an environmental law has occurred, the circumstance that an applicant is not prepared to give the

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71 Second Border Affidavit, JLB-2.35, p 386.

72 See Second Border Affidavit, [15]-[17].

73 *Inetstore Corporation Pty Ltd (in liq) v Southern Matrix International Pty Ltd* (2005) 221 ALR 179 [27] (Campbell J).

74 *Environment East Gippsland Inc v VicForests* (No 2) [2009] VSC 421.

75 *Ross v State Rail Authority (NSW)* (1987) 70 LGERA 91, [100] (Cripps CJ).

> usual undertaking as to damages is but a factor to be taken into account when considering the balance of convenience.

76. There is ample precedent of courts declining to insist upon such an undertaking before granting interlocutory relief in such circumstances,[76] including in proceedings restraining the conduct of a private party where the injunction in sought in the public interest.[77]

77. In circumstances similar to the present case, in *Tipakalippa v NOPSEMA (No 1)* [2022] FCA 838, where an injunction was sought to restrain offshore drilling activity the subject of an environment plan under the Environment Regulations by an applicant without any significant financial resources, the injunction was refused primarily because of a delay in seeking it. However on the question of the undertaking as to damages, the Court held at [47]:

> For justifiable reasons concerned with his financial capacity to do so, the applicant does not offer the usual undertaking as to damages. Although the absence of an undertaking is a factor that may weigh against the grant of an interlocutory injunction, I accept that, in the circumstances, the absence of an undertaking should not be a disqualifying factor against the applicant: See *Inetstore Corporation Pty Ltd (in liq) v Southern Matrix International Pty Ltd* (2005) 221 ALR 179 at [27] (Campbell J); *Environment East Gippsland Inc v VicForests (No 2)* [2009] VSC 421 at [12]-[21] (Forrest J ); *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746 at [8] (Logan J). Those circumstances include the applicant's financial position, the strength of his prima facie case and the fact that the litigation is not confined to the enforcement of private rights but engages the public interest. …

78. The Applicant submits that she has demonstrated a strong prima facie case sufficient to attract this principle. She brings these proceedings in the public interest, and is not motivated by personal gain (be it financial or otherwise). Rather, she has a cultural obligation, as a Mardudhunera lore woman, elder and a Traditional Custodian of Murujuga, to care for and protect Country, including the waters and the creatures within it and the songlines that extend across it.[78] She seeks relief in respect of the lawfulness of a public decision which will have wide ranging repercussions extending beyond the impact to parties to this proceeding in respect of the manner in which NOPSEMA is permitted to use conditions in its approval of environment plans.

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76 For example, *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC 806, [29] (Preston CJ)' *Kaurared Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746, [8] (Logan J); *Lottoland (Australia) Pty Ltd v Minister for Racing, Gaming and Licensing* [2020] NTSC 65, [21] (Grant CJ); *National Trust of Australia (NT) v Minister for Lands, Planning and Environment* (1997) 7 NTLR 20, 26 and 32 (Mildren J).

77 See *Williams v Director General National Parks and Wildlife Service and Ors* [2002] NSWLEC 235, [76] and [102] (Bignold J) where no undertaking as to damages was required before restraining private companies from undertaking exploratory drilling pursuant to a contested Permit.

78 Second Border Affidavit, [18]-[19].

79. Accordingly, the balance of convenience favours the grant of the interlocutory injunction sought.

**Claire Harris**

**Laura Hilly**

**Patrick Coleridge**

7 September 2023