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Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	9/11/2022 4:42:21 PM AEDT
Date Accepted for Filing:	9/11/2022 4:42:22 PM AEDT
File Number:	VID555/2022
File Title:	SANTOS NA BAROSSA PTY LTD ACN 109 974 932 v DENNIS MURPHY TIPAKALIPPA & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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Federal Court of Australia

District Registry: Victoria

Division: General

No. VID 555 of 2022

Santos NA Barossa Pty Ltd (ACN 109 974 932)

Appellant

Dennis Murphy Tipakalippa and another named in the schedule

Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS IN REPLY TO APPELLANT'S SUBMISSIONS ON NOTICE OF CONTENTION

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A. INTRODUCTION

1. These submissions respond to Santos's submissions on the notice of contention. Because the grounds in the notice of contention and the appeal overlap, aspects of the submissions below take on the character of a rejoinder to Santos's reply on the appeal. To the extent necessary (and at least in respect of paragraphs [24] to [27]), the first respondent will seek the Court's leave to receive these submissions.

B. REASONABLENESS

2. Santos's reply submissions at **ASR [1]-[11]** respond to the first respondent's contention that the standard of reasonable satisfaction in reg 10 demands more of NOPSEMA than the mere avoidance of legal unreasonableness. They should be rejected for the following reasons.

3. The submission at **ASR [2]** is wrong because it overlooks the well-established case law on the consequences of an express requirement of reasonableness for judicial review proceedings. Expressly requiring a state of mind to be reasonable has long been held to do more than direct a decision-maker to avoid legal unreasonableness. If **ASR [2]** were correct, then the approach to judicial review of the state of mind "reasonably suspects" in s 189(1) of the *Migration Act 1958* (Cth) would be wrong, because s 189(1) does not refer to "reasonable grounds" for suspicion.

4. Contrary to **ASR [5]**, the cases concerning s 189(1) cannot be distinguished on the basis that the state of mind which must be reasonable is mere "suspicion", whereas the state of mind that NOPSEMA must form is more demanding ("satisfaction").[1] *First*, Santos overlooks that a provision such as reg 10(1) has three logical components: the requirement of reasonableness, the state of mind to be formed (here, satisfaction), and the subject matter of the state of mind (here, that the criteria in reg 10A are met). The case law has understood the first component consistently with the observations of a unanimous High Court in *George v Rockett*,[2] regardless of the content of the other two components. *Second*, there are many cases that do not implicate liberty yet apply *George v Rockett* to provisions framed in terms of reasonableness rather than "reasonable grounds".[3] This is also an answer to **ASR [6]**. *Third*, if anything the more demanding state of mind (satisfaction vs suspicion) required points to a more demanding standard of reasonableness.

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1 "[T]o be satisfied, in the relevant connotation, means to be furnished with sufficient proof or information, to be assured or convinced": *Agar v Dolheguy* [2010] VSC 506 at [42] (Macaulay J); *Fire Rescue Commissioner v Building Appeals Tribunal* [2021] VSC 217 at [43] (Garde J).

2 (1990) 170 CLR 104 at 112, 115-116.

3 See, eg, *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd [No 3]* (2021) 165 IPR 30 at [54] (Burley J) (provision on preliminary discovery); *Bernadt v Medical Board of Australia* [2013] WASCA 259 at [62]-[66] (McLure P), [173] (Newnes JA; Murphy JA agreeing) (suspension by Medical Board); *Fastbet Investments Pty Ltd v Commissioner of Taxation [No 5]* (2019) 167 ALD 492 at [34]-[35] (Derrington J) (giving of security to the Commissioner of Taxation); *Gill v Minister for Immigration and Border Protection* (2017) 250 FCR 309 at [92] (Logan, Griffiths and Moshinsky JJ) (bogus documents).

5. Santos relies upon the statements of Dixon CJ in *Murray v Murray*:[4] **ASR [3]**. Those statements concerned the civil standard of proof to be applied by the trier of fact having regard to the *Briginshaw* principle (there, in a divorce case). That is irrelevant to the present case involving a specific statutory standard.

6. The first sentence of **ASR [4]** requires careful consideration. Although the Explanatory Statement did say that the use of different language ("reasonable grounds" in former reg 11(1) and "reasonably satisfied" in reg 10(2)) in reference to the same decision was "untenable", and did refer to there previously being a different "description", it did not say that the two descriptions of the requirement provided any difference in meaning. It certainly did not say that the change of language from "reasonable grounds" to "reasonably satisfied" was to introduce any lower standard. It is precisely because the content of the different language was the same that the Explanatory Statement could say "[o]n the whole, the process for assessment and decision-making in relation to an environment plan in new regulation 10 is largely unchanged from the former process".[5] The first respondent's analysis of the extrinsic materials at **1RS [50]-[52]** is to be preferred.

7. The word "demonstrate" does more than simply direct attention to the content of the Drilling EP (cf **ASR [7]-[10]**). If that is the only work that the word "demonstrate" was intended to do, contrary to its natural and ordinary meaning, that result would have been achieved through different drafting (for example, that the Drilling EP itself must "describe" the relevant persons consulted).

8. As to the submission at **ASR [9]-[10]** that reg 11A(1)(d) does not involve any objective criterion, reg 11A(1)(e) is helpful context to show why it is not enough for NOPSEMA that the Drilling EP merely name relevant persons, because that would tend to conflate reg 11A(1)(d) with reg 11A(1)(e). That is not to deny, though, that a list of relevant persons may, in the context of other information in the relevant EP, be on its face exhaustive of persons with functions, activities or interests so as to permit NOPSEMA to form the requisite state of mind. For the avoidance of doubt, the first respondent does not contend that reg 11A (through reg 10) raises matters for a court as opposed to NOPSEMA to determine.

9. This all leads to Santos's assertion at **ASR [11]** as to the ultimate issue. The question "was it reasonably open" is a question of *Li* unreasonableness[6] and is not the only question where a statute expressly imposes a reasonableness requirement.

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4 (1960) 33 ALJR 521 at 524.

5 Explanatory Statement, *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment (Environment Measures) Regulation 2014* (Cth) at 34.

6 See, eg, *BP Refinery (Kwinana) Pty Ltd v Tracey* (2020) 276 FCR 9 at [16] (Besanko, Perram and Jagot JJ); *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [133], [135] (Crennan and Bell JJ).

C. FUNCTIONS, INTERESTS OR ACTIVITIES

10. The place of the proper interpretation of "function, interest or activity" in the appeal and notice of contention is made clear in **ASR [27]-[28]**. If that expression is not, as a matter of construction, as narrow as Santos contends at **ASR [13]-[21],** then its contentions at **ASR [28]** that the Drilling EP did identify the universe of "relevant persons" as so understood cannot succeed. If Santos's submissions were accepted [**ASR [13], [15]**], reg 11A(1)(d) would need to be read as follows: "… a titleholder must consult each of the following (a *relevant person*): a person or organisation whose [legal] functions, [legal] interests or [petroleum or greenhouse gas] activities may be affected by the [petroleum or greenhouse gas] activities to be carried out under the environmental plan, or the revision of that plan". That approach is incredibly narrow. Santos's submissions on construction should be rejected.

11. *First*, Santos complains that the first respondent does not suggest an alternative construction of the words "function, interest or activity" (**ASR [12]**). But it should be apparent (and was put below) that the words "function, interest or activity" take their ordinary meaning (see, eg, **1RS [80], [82]**). A "function" is "the kind of action or activity proper to a person, thing, or institution"[7]. The word "interest" conveys a concern held by a person. It includes "something in which one has an interest, as of ownership, advantage, attention, etc.", "in relation of being affected by something in respect of advantage or detriment", "benefit or advantage".[8] "Activity" means "a specific deed or action; sphere of action".[9] Each of these words is used in ordinary language and there is no warrant to qualify them with limitations not found in the statutory text.

12. Whatever the metes and bounds of the meaning of "interests", that word includes cultural or spiritual interests of the kind described in the sea country material within the Drilling EP. The sea country material (**J[205]-[206], <u>Appeal Book Pt A, Tab 7, 117-121</u>**) referred to "significant sea country for Traditional Owners" (**J[205](i), Pt A, Tab 7, 117**), "Tiwi Islands Sea Country" and "areas of marine … Aboriginal Cultural significance" (**J[205](iv), <u>Pt A, Tab 7, 117</u>**), and "a direct cultural interest in decisions affecting the management of these waters" (**J[205](xiii), <u>Pt A, Tab 7, 119-120</u>**). These are interests of a kind known to the law, when regard is had to "the deeper truth" underpinning the decision in *Mabo v Queensland [No 2]*,[10] being the recognition of the spiritual or metaphysical connection between the Indigenous peoples of Australia and the Australian land <u>and waters</u>.[11] If these were not relevant interests, then it would be difficult to understand why (as Santos submits at **ASR [38])** the TLC "had functions that may

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7 This is the first meaning in the Macquarie dictionary.
8 These are the ninth, tenth and eleventh meanings given in the Macquarie dictionary.
9 This is the third meaning given in the Macquarie dictionary.
10 (1992) 175 CLR 1.
11 *Love v Commonwealth* (2020) 270 CLR 152 at [289] (Gordon J).

be affected by the activities (in particular, on the basis that it had the function of representing indigenous residents of the Tiwi Islands)". That submission is an implicit acceptance that traditional owners represented by the TLC must have a relevant *interest*.

13. The sea country material also referred to "socio-economic related activities" (**J[205](ii), Pt A, Tab 7, 117**), "traditional" fishing (**J[205](iii), Pt A, Tab 7, 117**), and "fishing activities" (**J[205](x), Pt A, Tab 7, 118**), which convey matters falling within the ordinary meaning of "activity". Reading the first use of "activities" as "petroleum or greenhouse gas activities" would exclude consultation with persons whose ordinary activities may be profoundly affected by the petroleum activity, and whose consultation may provide important information about the possible risks and environmental impacts of the petroleum activity and ways of reducing those risks and impacts, and managing them to an acceptable level. That approach is contrary to the regulatory object set out expressly in reg 3.

14. The reference to *BHP Group Ltd v Impiombato*[12] in **ASR [15]** does not advance matters. It is not in contest that, ordinarily, words in a single instrument are interpreted to have a consistent meaning. But it cannot seriously be in contest that this "rule" does not always apply, as the introduction to the definitions in reg 4 ("unless the contrary appears") makes clear. The field of debate is whether the rule or defined term applies or not. The word is not used consistently here because, unlike every other use of the word "activity" in the Regulations, the activity referred to is of a third party, not the titleholder. It is unsurprising that a different meaning applies, because the word was used as part of a compendious expression "functions, interests or activities".

15. There is nothing "circular" about the first respondent's construction (cf **ASR [13]**). It accords to the words their ordinary meaning in order to advance the express statutory object, noting the broad meaning of "environment" set out in reg 4. Santos's construction excludes the means by which the titleholder may be informed about the social and cultural features of the environment which are expressly defined to be within the "environment".

16. Finally, the sea country material included reference to "maintenance of maritime cultures and heritage through ritual, stories and traditional knowledge" (**J[205](viii), Pt A, Tab 7, 118**), and noted that sea country "is part of the responsibility of" indigenous peoples and that "sea country is valued for Indigenous cultural identity and Indigenous peoples have been sustainability using and managing their sea country … for tens of thousands of years" (**J[205](xi), Pt A, Tab 7, 118**). Those convey matters falling with the ordinary meaning of "function".

17. *Second*, Santos contends that reg 11A(1)(d) is not a beneficial provision that should be interpreted accordingly [**ASR [14]**]. That is wrong. There are a number of cases in which

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[12] [2022] HCA 33 at [72].

environmental or planning provisions have been held to be beneficial,[13] and this is closely analogous. The classes of "beneficial" legislation are not closed.[14] Relevantly, in *Paull v Munday*,[15] the High Court considered whether reg 7 of the *Clean Air Regulations 1969-1973* (SA) was a valid regulation. Murphy J (although dissenting in the result) observed that "legislation (including delegated legislation) directed towards preservation of the environment and public health should be given a beneficial construction".[16] In any event, as the first respondent submitted (**1RS [74], fn 19**), a "beneficial interpretation" is simply a manifestation of the more general principle that all legislation is to be construed purposively (see **1RS [72]**).

18. Santos's further submission that "even if a consultation provision is intended to benefit the class of persons to be consulted, it does not necessarily follow that the class of persons to be consulted should itself be broadly construed" (**ASR [14]**) is simply contrary to authority.[17]

19. *Third*, there is no tension between the first respondent's submissions that the consultation requirement permits a range of ways of communicating, and the proposition that consultation cannot be treated as a mere formality (cf **ASR [22]**). The fact that there are different *ways* in which the regulatory scheme permits consultation does not mean that consultation can be *merely* perfunctory or tokenistic,[18] or is intended to be limited to a narrow, confined cohort.

20. *Fourth*, Santos's submission that there is no cogent explanation as to why the meaning of "functions, interests or activities" in reg 11A(1)(d) should be governed by the definition of the "environment" (**ASR [20]**) is artificial, and easily answered. At a general level, it is not "governed" but, rather, interpreted in the context of the Regulation as a whole. At a more specific level, the "functions, interests or activities" are those which may be affected by activities carried

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[13] See, eg, *Environment Protection Authority v Du Pont (Australia) Ltd* [2013] NSWLEC 98 at [110], referring to the beneficial nature of the *Protection of the Environment Operations Act 1997* (NSW) and the appropriateness of promoting that "beneficial operation" by an expansive interpretation of the definition of "land pollution"; *DEM (Australia) Pty Ltd v Pittwater Council* (2004) 136 LGERA 187 at [47], where McColl JA (with whom Giles and Santow JJA agreed) held that the State Environmental Planning Policy No 5 was "in the category of remedial or beneficial provisions which should be construed to afford the 'fullest relief which the fair meaning of its language would allow'"; *Fox v North Sydney Council* [2020] NSWLEC 1056 at [36] where the New South Wales Land and Environment Court construed cl 5.10(10) of the North Sydney Local Environmental Plan 2013 as falling within the same category. In addition, public participation regimes in environment and planning legislation have been held to serve the public interest: see, eg, *Simpson v Wakool Shire Council* (2012) 190 LGERA 143 at [83]-[86] (Preston J). The public interest served by reg 11A(1)(d) further supports a liberal construction.

[14] Cf **ARS [14]**, **fn 11**. All that Pearce, *Statutory Interpretation in Australia* (9th edn) at [9.5] does is provide a list of examples of cases in which a beneficial interpretation approach has been taken. The learned author does not say that the examples present a closed list of categories (and such a statement would be incorrect).

[15] (1976) 9 ALR 245.

[16] (1976) 9 ALR 245 at 258.

[17] For example, in *ABC v Victims of Crime Assistance Tribunal* [2021] VSC 730 at [17], [34], [83]-[84], [103], the Supreme Court of Victoria adopted a broad and beneficial construction of the *Victims of Crime Assistance Act Assistance Act 1996* (Vic) to identify those persons entitled to receive the benefits of assistance under that Act.

[18] In this respect, the first respondent notes that the example given at **1RS [85]** of how consultation might occur erroneously refers to s 42 of the *Aboriginal Land Rights Act 1983* (NSW). This was in error and the correct reference is to s 42 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

out under an "environment plan" (reg 11A(1)(d)); the consultation must occur in the course of preparing an "environment plan" (reg 11A(1)); and the very purpose of the consultation in respect of the environment plan must be to advance the objects in reg 3, that is, to ensure that any activity is carried out in a manner consistent with the principles of ecologically sustainable development, by which the "*environmental* impacts" and risks are reduced to as low as reasonably practicable and will be of an acceptable level.

D CONTENTION GROUND 1(a): "THE UNIVERSE OF RELEVANT PERSONS" AND "METHODOLOGY"

21. The submission at **ARS[25]** fails to recognise that *One Key* can be understood as a case about legal unreasonableness. The error in the Fair Work Commission's decision was in being satisfied of something that "was not open" to it.[19]

22. The submission at **ARS [26]** does not explain how NOPSEMA can be (reasonably) satisfied that each relevant person — within the meaning of reg 11A(1)(d) — was consulted, without asking itself whether all of those relevant persons have been first identified for the purpose of consultation. The Regulations do not speak expressly of an anterior identification question, but it is necessarily implied in the statutory task.

23. Santos's submission that NOPSEMA's finding that the Drilling EP included "a method for identification" which was "consistent with the definition of relevant person" is a "complete answer" to primary judge's criticisms of the method in the Drilling EP (**ASR [30]**) is wrong for several reasons. *First*, read in the context of the decision-making process (see **J[164]-[171], Pt A, Tab 7, 107-109**) NOPSEMA's finding was not that the "method for identification" was apt to identify all relevant persons, but merely that the persons identified by that method were consistent with the definition of relevant persons. *Second,* in the context of unreasonableness review, such statements are relevant but by no means determinative.[20] NOPSEMA stated that, but the question is whether the materials show that its conclusion here was unreasonable. *Third*, in the context of reasonableness review, it is for the Court to determine for itself whether the facts were sufficient to induce the requisite state of mind in a reasonable person, regardless of what NOPSEMA thought.[21]

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[19] (2018) 262 FCR 527 at [113].

[20] See, eg, *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [287] (Bathurst CJ); *Minister for Immigration and Border Protection v Haq* (2019) 267 FCR 513 at 535-536 (Colvin J); *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [36(f)] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

[21] See *Prior v Mole* (2017) 261 CLR 265 at [27] (Gageler J). See also *Brown v Tasmania* (2017) 261 CLR 328 at [406] (Gordon J).

E. "SEA COUNTRY MATERIAL"

24. The sea country material was a mandatory relevant consideration in this way. It is well-established that a decision-maker can be required to consider a particular body of information or a particular subject matter. Here, the sea country material was a mandatory source of information.

25. Plainly enough, the Drilling EP must be considered. By way of analogy, under the Migration Act a former visa holder can make representations to the Minister for him or her to revoke the cancellation of that former visa holder's visa, and it has been held that those representations must be considered.[22]

26. The extent to which NOPSEMA must engage with the Drilling EP "will necessarily depend on the nature, form and content of" what is said.[23] "The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of" what is said in the application or material received.[24] NOPSEMA "is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before" it,[25] but what NOPSEMA must avoid doing is ignore, overlook or misunderstand relevant facts or materials or a substantial and clearly articulated argument or misunderstand the case being propounded.[26]

27. Here, the sea country material was included in the Drilling EP in the context of describing the environment that might be affected by the activity,[27] a description which an environment plan must contain: reg 13(2)(a). It was also included in the context of the unplanned events risks and environmental impact assessment,[28] as required by reg13(5); and in the context of the values and sensitivities of the environment that may be affected by the activity,[29] as required by reg 13(2)(b). The references to sea country were clear and important to express regulatory criteria, which criteria in turn were relevant to the criterion of demonstrating consultation with relevant persons. A failure to grapple with that material in these circumstances shows a lack of engagement with the Drilling EP as a whole (and relevantly, the sea country material in

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[22] See, eg, *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 (***Plaintiff M1/2021***) at [22]-[23] (Kiefel CJ, Keane, Gordon and Steward JJ).
[23] *Plaintiff M1/2021* at [25] (Kiefel CJ, Keane, Gordon and Steward JJ).
[24] *Plaintiff M1/2021* at [25].
[25] *Plaintiff M1/*at [25].
[26] *Plaintiff M1/2021* at [27].
[27] See Drilling EP, Appeal Book, Pt C, Tab 18, 34; see **J[205(i)], Appeal Book, Pt A, Tab 7, 117.** See also Drilling EP, Pt C, Tab 21, 36-37; **J[206(iii)], Pt A, Tab 7, 120.**
[28] See Drilling EP, Pt C, Tab 18, 276-278, Table 7-15 in Chapter 7 *Unplanned events risk and impact assessment***; J[205-(vi) - (ix), Pt A, Tab 7, 117-118]** and at Pt C, Tab 18, 296; **J[205(x)], Pt A, Tab 7, 118.**
[29] See Drilling EP Appendix C, Pt C, Tab 21, 111, 119, and section 14.5.1; **J[205 (xi)-(xiii)], Pt A, Tab 7, 118-120.**

particular). The primary judge was correct to conclude that that material was not considered when it should have been.

F. CONTENTION GROUND 2

28. Santos explains its reference to the consultation with the TLC as not constituting an argument that this discharged any obligation to consult with traditional owners of the Tiwi Islands, but to say it was "consulted as a relevant person in its own right": **ASR [38]**. To the extent that the issue arises on the appeal, for the reasons given at **1RS [98]**, the "consultation" with the TLC was no consultation in any relevant sense, as it did not comply with reg 11A(2) (cf **ASR [39]**). It also does not follow from the proposition that one party cannot complain about a denial of procedural fairness to some other party that a party cannot contend that a decision-maker has not complied with an express statutory requirement which happens to be framed by reference to what must be done with respect to others.[30] The application of standing principles is closely tied to the grounds of review propounded. Here, the grounds are reasonableness, legal unreasonableness and a failure to take account of a mandatory consideration. To the extent that the relevance of the submission at **AS [97]** is intended to provide an answer to how sea country interests were noted, and relevant persons with those interests consulted, there is no impediment to a submission that not only does consultation with the TLC not constitute consultation with the traditional owners of the Tiwi Islands for this purpose, but also that this consultation was in fact no consultation at all.

Date: 4 November 2022

C M Harris
C Tran
C Mintz
N J Baum

[30] Again, the cases relied on by Santos in this context, at **ARS [39]**, **fn 27** as with the concepts of "interests" (**AS [64]**), are in the context of procedural fairness, and do not provide an answer to whether a person with standing may raise a statutory non-compliance affecting another person as giving rise to jurisdictional error.

SCHEDULE

Federal Court of Australia
District Registry: Victoria
Division: General

No. VID 555 of 2022

Respondents

Second Respondent: National Offshore Petroleum Safety and Environment Management Authority

Date: 4 November 2022