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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

VID 555 of 2022

SANTOS NA BAROSSA PTY LTD
Appellant

DENNIS MURPHY TIPAKALIPPA
First Respondent

NATIONAL OFFSHORE PETROLEUM SAFETY AND ENVIRONMENTAL MANAGEMENT AUTHORITY
Second Respondent

SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS IN REPLY

I. INTRODUCTION

1. Santos's submissions in reply to Mr Tipakalippa deal with certain issues of construction on which NOPSEMA has joined. In order to avoid duplication, NOPSEMA notes that it substantially agrees with and adopts the following parts Santos's reply submissions of 31 October 2022:

   1.1. at [1]-[6], as to the construction of the expressions "reasonably satisfied" and "demonstrates" in reg 10(1)(a), and relatedly at [9]-[10] in support of the proposition that whether an environment plan meets the criteria in reg 10A is not an objective jurisdictional fact bearing on the valid exercise of power by NOPSEMA to accept the plan under reg 10(1)(a);

   1.2. at [7]-[8], as to the construction of the expression "demonstrates" in reg 10A(g); and

   1.3. at [12]-[24] and [28], insofar as they deal with the construction of the expression "a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan" in reg 11A(1)(d).

2. NOPSEMA makes the following submissions, by way of supplementation.

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II Reg 10(1)(a): "reasonably satisfied"

3. As Santos has submitted (ARS[2]), the requirement in reg 10(1)(a) for NOPSEMA's state of satisfaction to be "reasonably" formed simply makes express what would otherwise have been implied had the word "reasonably" not been specifically included.[1] Thus, as Latham CJ stated in his seminal holding in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*:[2]

> [W]here the existence of a particular opinion is made a condition on the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts …

4. Nevertheless, it is for NOPSEMA to be satisfied of the relevant matters, not a court.[3] And significant constraints apply to judicial review of an administrative decision-maker's state of satisfaction (or non-satisfaction). Pertinently, Derrington J identified the following reasons (among others) for such constraints in a closely analogous context in *EHF17 v Minister for Immigration and Border Protection*:[4]

> Secondly, the various states of mind on which powers are frequently conditioned are concerned with matters which contain inherent value judgments or are dependent on conclusion about the existence or otherwise of matters which require an assessment of the available material. Necessarily, evaluative judgments are matters on which reasonable minds might differ and may include a not insignificant subjective element: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] UKHL 6; [1977] AC 1014; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 (*Avon Downs*). In this way the legislature impliedly recognises that there is no absolute conclusion or state of mind which might be reached in every case. Indeed, usually a range of views might be held, and the power is enlivened if the repository reaches that state of mind on which it is conditioned.
>
> Thirdly, the legislature often makes the jurisdictional fact the state of mind of a particular officer holder (and, by implication, their delegates and any tribunal or reviewer which stands in their stead). The reposing of the obligation to formulate the state of mind in a particular person (or those deriving power from them) such as a Minister of the Crown, is indicative of Parliament's intention that the person forming the opinion applies their special experience, understanding, knowledge and the resources at their disposal to the task. So it is the designated officer holder whose state

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1 See *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [90] (Gageler J), who explained that "[i]mplication of reasonableness as a condition of the exercise of a discretionary power conferred by statute is no different from implication of reasonableness as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power or performance of a statutory duty".

2 (1944) 69 CLR 407 at 430. This passage was cited by Gageler J in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [90].

3 *Ibid*. at 431 (Latham CJ). See also, e.g., *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 460 (Dixon J).

4 (2019) 272 FCR 409 at [67]. His Honour's analysis of judicial review of subjective jurisdictional facts has been cited with approval on numerous occasions. See, for example: *CAQ17 v Minister for Immigration and Border Protection* (2019) 274 FCR 477 at [70] (Derrington and Stewart JJ); *Singh v Minister for Home Affairs* (2020) 274 FCR 506 at [44] (Derrington J, Logan and Reeves JJ agreeing); *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at [42] (Collier, Reeves and Derrington JJ) (disapproved by the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 but on a different point).

> of mind is key to enlivening power. It is not any person's state of mind, nor is it the courts' opinion as to whether the state of mind should have been formed ...

5. Similarly, as Allsop CJ explained in *Minister for Immigration and Border Protection v Stretton*, in a cognate context concerning the implied condition of reasonableness in the exercise of a discretionary power,[5] the concept of reasonableness "does not provide a vehicle for the Court to make the decision according to its view as to reasonableness (by implication therefore finding a contrary view unreasonable)". "Parliament has conferred the power on the decision-maker".[6]

6. It is also important for the Court faithfully to apply principles of onus in determining whether an administrative decision-maker, here being a delegate of NOPSEMA, has erred in forming a state of satisfaction. Thus, in the present context, and noting the appropriately narrow scope of the application for judicial review below (see 2RS at [3]-[4]; ARS at [39]), Mr Tipakalippa needed to demonstrate that the delegate's state of satisfaction that the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A was erroneous, on the basis that on a proper construction of reg 11A and on the material before him the delegate was not or could not lawfully have been so satisfied.

7. In this way, the proper construction of reg 11A(1)(d) is critical. That is because if, on a proper construction of the statutory expression, it would have been open to the delegate *not* to consider that each and every traditional owner or (claimed traditional owner) of land in the Tiwi Islands such as Mr Tipakalippa[7] was themselves a "relevant person", despite the "sea country" material, then Mr Tipakalippa would not discharge his onus of proving that the delegate made a material legal error.

8. Put another way, to adapt the language of Dixon J in *Avon Downs*, if the result (i.e., that the delegate was satisfied the Drilling EP demonstrated that Santos had carried out the consultations required by reg 11A, despite being aware that Santos has not consulted with each individual traditional owner in relation to "sea country") appears reasonable on the supposition that the delegate correctly construed reg 11A(1)(d) in the way that NOPSEMA contends, then Mr Tipakalippa will not have discharged his onus of demonstrating error.

III Reg 10(1)(a): "demonstrates"

9. NOPSEMA agrees with Santos that the word "demonstrates" "makes clear that the foundation for the requisite state of satisfaction formed by NOPSEMA must be set out in the Drilling EP itself" (ARS [7]).

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5 (2016) 237 FCR 1 at [8].

6 *Ibid*.

7 Though, of course, Mr Tipakalippa's name and identity, and that of the hundreds or thousands of other such persons in this class of persons was not known to NOPSEMA.

10. Little assistance is gained by ascribing to that word the qualities of being "strong" or "muscular" (cf. R1S [54]). Mr Tipakalippa emphasises that "demonstrate" can be understood as being concerned with logic and reasoning (R1S [53]). However, the Shorter Oxford gives as its first definition of "demonstrate" "*point out, indicate, show*", compared to the third meaning "*establish by logical reasoning or argument, or by practical proof; prove beyond doubt, prove the existence or reality of...*". As Santos submits, the word in the Regulations is used in its ordinary meaning of "to show".

11. In any event, as Santos also acknowledges (ARS [31]), the requirement that NOPSEMA must be satisfied that an environment plan "demonstrates" that the titleholder carried out the requisite consultations does *not* mean NOPSEMA (or its delegate) is precluded from drawing on its knowledge and expertise in assessing whether the environment plan "demonstrates" that the titleholder has carried out the requisite consultations. As NOPSEMA has previously explained, it would give rise to impossibility or absurdity were NOPSEMA so precluded (R2S [33]).

12. The analysis of Derrington J in *EHF17*, set out above at [4], supports this conclusion. Parliament's decision to repose in NOPSEMA the function of assessing whether *it* is reasonably satisfied that an environment plan demonstrates that a titleholder has carried out the requisite consultations – rather than making that demonstration an objective jurisdictional fact bearing on the exercise of NOPSEMA's power to approve – is "indicative of Parliament's intention that the person forming the opinion applies their special experience, understanding, knowledge and the resources at their disposal to the task".

13. As to Mr Tipakalippa's argument that the consultation obligation is "beneficial" and should be construed to be "more demanding of NOPSEMA" (R1S [54(g)], see also [74]),[8] it may be doubted that the provision is "beneficial" (or "remedial") in the sense for which he contends. The explanation given for the inclusion, in 2005, of the requirement that NOPSEMA have reasonable grounds for believing that the plan demonstrates that there has been an appropriate level of consultation was that "[t]he process of requiring companies to conduct consultation with interested parties means that approval of projects may be easier as much of the preparatory work would have been completed prior to the EP being submitted for assessment."[9] That is, the requirement for NOSPEMA to be satisfied that an appropriate level of consultation has taken place serves as an incentive for titleholders to engage in such consultation, so as to make the decision-making process more efficient.

14. And even if the consultation obligation were to be understood as beneficial, that does not assist Mr Tipakalippa's argument as to the construction of the word "demonstrates".

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8 See also R1S [74].

9 *Explanatory Statement for the Petroleum (Submerged Lands) (Management of Environment) Amendment Regulations 2005 (No 1) (Cth),* p 3.

III Reg 11A(1)(d): definition of "relevant person"

15. Mr Tipakalippa submits that NOPSEMA has made an "unwarranted a priori assumption that interests should be readily ascertainable" (R1S [77]). However:

    15.1. It is an orthodox principle of statutory construction that "[i]t is not to be inferred that [a] provision [is] intended to require something which may prove to be impossible or impracticable".[10]

    15.2. Various features of the Regulations point to the need for "relevant persons" to be ascertainable (and contactable), including the requirement that each and every relevant person be consulted, and also in a context where the Regulations envisage NOPSEMA, within a standard time frame of 30 days, to form a state of satisfaction as to whether all relevant persons have been consulted.

16. Mr Tipakalippa's answer to the workability problem (R1S [82]-[84]) is based on somewhat opaque submissions as to the flexibility of the consultation process that, as Santos has noted (ARS [22]), are difficult to reconcile with Mr Tipakalippa's complaints as to the deficiencies in the consultation with the Tiwi Land Council.

17. In particular, Mr Tipakalippa's submissions that consultation with each relevant person need not be "direct", and that there is "latitude" as to how information may be "given" to each relevant person, is opaque. Of course, information may be "given" by various modes of communication (email or ordinary post, for example). And, obviously, a person may be "told" information by a written mode of communication, rather than orally (cf. R1S [84]). But merely to advert to these kinds of flexibility does not address the real workability issues.

18. As Santos notes (ARS [23]), one critical workability problem here is how "each" member of a class of persons (especially if large, variable or indeterminate), holding in common (rather than distinctly) a putative "interest", could actually be *identified*? Further, even if names could be identified, how could "each" such person be *located* so that they might be "given" information etc. It is precisely these kinds of concerns that have driven the well-established case law, addressed by NOPSEMA in its outline of submissions dated 17 October 2022, as to the extent of an obligation (express or implied into a statute) to hear

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[10] See *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [100] (Nettle J), and the cases referred to therein. See also Herzfeld, *Interpretation* (2nd ed., 2020) at [9.30], as to the proposition that what may be compendiously described as "unreasonable consequences" should be avoided when a provision is susceptible to alternative constructions "is a longstanding principle both in England and Australia".

from or consult a person whose "interests" may be affected by a particular decision or conduct.

19. Insofar as Mr Tipakalippa should be understood as submitting that consultation could be "adapted" to such circumstances, by merely requiring the titleholder to give some public notice of the environment plan (e.g., by placing an advertisement in a newspaper), that should be rejected. Placing an advertisement in a newspaper in the hope that it comes to the attention of each member of a class of persons could not sensibly be regarded as discharging the titleholder's unqualified obligation to "give" "each" relevant person the requisite information; *a fortiori*, if Mr Tipakalippa's submissions as to the intensity of the consultation process (as involving "some form of dialogue" etc) are accepted.

20. By way of comparison, in *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd*,[11] the legislation required the Minister to "consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned".[21] The Minister sought to do so by publishing a press release and circulating copies of the proposed decision to a large number of addresses. It later emerged that the plaintiff had never received a copy of the proposed decision. Donaldson J held that no consultation had occurred: "If the invitation is once received, it matters not that it is not accepted and no advice is proffered. … But without communication and the consequent opportunity of responding, there can be no consultation."

21. Mr Tipakalippa's reliance on processes in other statutory schemes (R1S [85]) is misplaced. Indeed, consideration of those quite different regimes, if anything, tends to support NOPSEMA's construction of reg 11A.

    21.1. Section 42 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) provides for Land Councils to consent or refuse to consent to the grant of an exploration licence in respect of particular land. Section 42(2) requires a Land Council, before consenting the grant of licence, "to the extent practicable" to consult "traditional Aboriginal owners"[12] and any "Aboriginal community or group that may be affected by the grant". That qualifying language does <u>not</u> appear in reg 11A at issue here.

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11 [1972] 1 WLR 191 at 194-195.

12 A "traditional Aboriginal owner" is defined as: "*in relation to land, a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land*".

21.2. The statutory provisions at issue in *McGlade v South West Aboriginal Land & Sea Corporation (No 2)*[13] concerned the registration of indigenous land use agreements under the *Native Title Act 1993* (Cth) (**NTA**) and the process under that Act for persons who hold or may hold native title in relation to the area covered by the agreement to authorise the making of the agreement. One of the provisions of the NTA (s 24G(3)) requires that an application for registration must be certified by all representative Aboriginal/Torres Strait Islander bodies or be accompanied by a statement to the effect that "all reasonable efforts have been made" to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified and that "all of the persons so identified" have authorised the making of the agreement. Cases have established[14] that the expression "all" in s 24G(3)(b)(ii) cannot be taken literally because of the process for collective decision-making permitted by s 251A.

22. Thus, these two schemes illustrate how statutes are crafted where consultation is intended to extend to large groups: accommodation is made to reflect the practical reality that it may not be possible to identify and consult with each individual member. In the case of the ALRA, that is done by specifying the categories of consultees and calibrating the consultation obligation by the phrase "to the extent practicable". In the case of the provisions of the NTA considered in *McGlade*, that is done by recognising processes of collective decision-making such that "the key question will be whether a reasonable opportunity to participate in the decision-making process has been afforded by the notice for a relevant meeting".[15]

23. The contrast with reg 11A, with its unqualified and prescriptive obligations to consult with "each" relevant person, is stark. The consultation obligation in reg 11A is not qualified by any phrase like "to the extent practicable". Nor does reg 11A establish a regime for collective consultation (cf. the public consultation process under Part 1A in relation to an OPP), or a means by which collective consultation would be deemed to satisfy the "requirement to consult with each and every relevant person" (PJ [81]).

24. That NOPSEMA must be reasonably satisfied that a titleholder has consulted each and every relevant person in accordance with the prescriptions of reg 11A, without any statutory accommodation of the obvious practical difficulties of consulting with each member of a

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13 (2019) 374 ALR 329.

14 See *McGlade v South West Aboriginal Land & Sea Corporation (No 2)* (2019) 374 ALR 329 at [33]-[36] and the cases there cited.

15 *McGlade v South West Aboriginal Land & Sea Corporation (No 2)* (2019) 374 ALR 329 at [36].

group holding interests in common (such as "reasonable efforts" etc) points strongly towards application of the well-recognised legal meaning of "interests" in this context.

25. Consistent with Santos's submissions, NOPSEMA's construction does not involve "reading in" words of limitation (ARS [17]; cf. R1S [76]). Rather, NOPSEMA's construction involves no more than according the word "interest" its well-established *legal* meaning in cognate statutory contexts concerning consultation and hearing obligations, to the effect that an "interest" apt to engage a right to be consulted or heard must be one particular to the person rather than one held in common with a class of individuals, especially where that class is large, variable and/or indeterminate (cf. R1S [82]).

Dated: 4 November 2022

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