Federal Court of Australia

District Registry: Victoria

Division: General

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 in accordance with order 4 of the orders made 15 September 2023)

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A INTRODUCTION AND SUMMARY

1. These proceedings concern a decision of a delegate of the First Respondent (**NOPSEMA**) made on 31 July 2023, purportedly pursuant to reg 10 of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) (**Environment Regulations**). The decision was 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 Seismic Survey EP was submitted to NOPSEMA by the Second and Third Respondents (collectively, **Woodside**) with respect to an activity within the meaning of the Environment Regulations, namely 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 and spiritual connections to, and responsibilities and obligations for, 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 her amended originating application lodged 7 September 2023 (**Amended Originating Application**), Ms Cooper seeks:

   (1) judicial review of the lawfulness of the Decision (**Ground 1**), and relief in the form of a declaration;[5] and/or an order quashing or setting aside the Decision;[6] and an order to prohibit or restrain Woodside from doing any act or thing pursuant to the decision;[7]

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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 the Chief Justice then was) and [157]-[158] (Lee J).

5 Amended Originating Application, Orders Sought, [1].

6 Amended Originating Application, Orders Sought, [2].

7 Amended Originating Application, Orders Sought, [3(a)].

(2) in the alternative, injunctive relief to prohibit or restrain Woodside from undertaking the Activity otherwise than after compliance with the conditions to which the Decision is subject,[8] in particular, the 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 Woodside to consult with Ms Cooper and others, with whom the required consultation had not been completed at the time of the Decision (**Ground 2**).

5. On 15 September 2023 the Court ordered that the following issues be heard on an expedited basis:

(1) **Issue 1:** whether NOPSEMA had statutory power to make the Decision where 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 so was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii) of the Environment Regulations; and

(2) **Issue 2:** whether, if Ground 1 is established, it would be open, as a matter of law, to refuse the relief sought on any discretionary basis identified by Woodside; and

(3) **Issue 3**: whether Ms Cooper has standing to seek relief in relation to Ground 2 of the Amended Originating Application.

6. The Applicant's response to these issues are as follows:

(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), which are jurisdictional preconditions to the power of NOPSEMA to accept an Environment Plan. The Decision is therefore invalid; and,

(2) if Ground 1 were upheld, although the power to refuse relief is discretionary, there would be no proper basis in law to refuse the relief sought by Ms Cooper; and

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8 Amended Originating Application, Orders Sought, [3(b)].

(3) as a person with a "special interest", being an immediate, significant and particular interest as a "relevant person" in being consulted with respect to the Activity, and restraining the Titleholders from commencing that Activity until she has been consulted, Ms Cooper has standing to seek relief in relation to Ground 2.

7. Although described as "preliminary questions", a finding in favour of the Applicant in respect of Issues 1 (Ground 1) and 2 (discretion), is sufficient to dispose of the proceedings. Should the Court be persuaded to so find, the Applicant seeks her costs of and incidental to the proceedings (including the costs of and incidental to her successful application for interim interlocutory relief).

B RELEVANT LEGISLATIVE AND REGULATORY SCHEME

8. The Environment Regulations are made pursuant to s 781 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGS Act**).

9. 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.

10. Regulation 4 relevantly defines the following terms for the purposes of the Regulations, subject to contrary intention:

> ***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.

11. 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,[9] or any limitation or condition applying to operations for the activity under these Regulations.[10]

12. Division 2.2, which is titled 'Acceptance of an environment plan', contains the provisions relevant to the power to accept an environment plan.

13. Regulation 9 requires, relevantly that before commencing an activity, a titleholder must submit an environment plan for the activity to the Regulator. The Regulator is NOPSEMA.[11] 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.

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

> **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

---

9 Regulation 7(1)(a).

10 Regulation 7(1)(b).

11 See reg 4, "*Regulator*".

(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).

15. 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.

16. 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.

17. Division 2.2A was introduced into the Environment Regulations by cl 3 and Schedule 2 of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment Regulations 2011 (No 1).* One purpose of the amendment was to "clarif[y] the role

and purpose of the consultation requirements".[12] In particular, the Explanatory Statement records:

> **Regulation 11A Consultation with relevant authorities, persons and organisations, etc**
>
> …..
>
> The operator is required to give each such person ('relevant person') sufficient information to allow the person to make an informed assessment of the possible consequences of the activity on the functions, interests or activities of the person. (Note that NOPSEMA will have to make an assessment of the sufficiency of the information in each case.)
>
> The operator will have to prepare a report on consultations that summarises each response that has been received from a relevant person, that assesses the merits of any objection or claim about adverse impacts and that states the operator's response or proposed response, if any, to each objection or claim. The report must also attach a copy of each response that the operator has received from a relevant person. NOPSEMA is required by paragraph 11(1)(f) to assess whether the measures adopted, or proposed to be adopted, by the operator are appropriate. This requires NOPSEMA to consider whether it agrees with the operator's assessment of the merits of any objection or claim, having regard to the objects of the Environment Regulations and taking into account the rights and obligations of the titleholder under the OPGGS Act.
>
> (Underlining added.)

18. 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

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12 Explanatory Statement, Select Legislative Instrument 2011 No. 251 (Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment Regulations 2011 (No 1) (Cth), p 6.

(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.

19. 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

20. On 11 October 2021, Woodside submitted an Environment Plan to NOPSEMA in accordance with reg 9(1).[13] 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,

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

NOPSEMA made four requests for further information during this timeframe pursuant to reg 9A.[14]

21. On 2 June 2023, Woodside submitted the Seismic Survey EP (identified as Revision 7, June 2023).[15]

C.2 The Activity

22. The Seismic Survey EP described the Activity. It proposes a Petroleum Activities Program that:[16]

> …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… .

23. The purpose of the Activity is described as follows:[17]

> 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.

24. The survey method of the Activity is described as follows:[18]

> 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. <u>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.</u> The reflected sound is then processed to provide 3D data about the structure and composition of geological formations below the seabed. …
>
> (Underlining added.)

25. Four project vessels (Seismic, support, chase and spotter vessel) are expected to be required for the Activity.[19]

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

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

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

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

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

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

26. An environment plan 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'.[20]

27. A history of interactions between Woodside and Save our Songlines, Ms Alec and Ms Cooper up to 1 June 2023 is 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.[21]

C.4 The Decision

28. 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.[22]

29. 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.[23]

30. 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**):[24]

> 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.

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

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

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

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

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

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

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.

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).

…

31. By 17 August 2023, the NOSPEMA website recorded that Woodside had advised NOPSEMA that activity would commence on 10 August 2023.[25] 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.[26] In other words, on the date of the Decision.

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

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

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

34. The Statement of Reasons includes the following relevant findings:[27]

[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:

…

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,

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

26 The evidence of Mr Sudintas that "On 2 August 2023, NOPSEMA emailed Woodside noting it received a Reg 29 notice of commencement under the Seismic Survey EP with a planned start date of 10 August 2023", does not identify when Woodside gave notice. However the evidence also is consistent with the inference that the notice was given on 31 July 2023: Affidavit of Cameron Sudintas affirmed 11 September 2023 at [59].

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

> 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 indicates that the titleholders considers that consultation with Save our Songlines has been completed under reg 11A, but that the titleholders is willing to continue discussions. NOPSEMA 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.
>
> (Underlining added.)

E ISSUE 1: NOPSEMA had no power to make the Decision (Ground 1)

35. 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,[28] 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.

36. 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.[29] The Environment

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

29 Save for in the circumstances described at [47](1), below.

Regulations clearly contemplate that consultation will occur, and, in most cases, conclude, *prior* to the making of a decision by NOPSEMA, and that the environment plan itself must *demonstrate* that the required consultation has been carried out. Sub-regulations 10(4) and 10(6) cannot be construed as permitting NOPSEMA to dispense with the requirement to consult "in the course of preparing an environment plan"[30] by accepting an environment plan subject to conditions that the titleholder consult *after* the decision.

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

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

38. 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'.[31]

39. As Kenny and Mortimer[32] 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'. [33]

40. 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 the requisite information on which to form a state of satisfaction about*

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30 Regulation 11A(1) (see chapeau of that regulation).

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

33 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193, [54]; see also [89].

> *the environmental impacts and risks of the activity*, being the principal subject matter of the criteria in reg 10A.

41. Their Honours further elaborated upon the purpose of the obligation imposed by reg 11A at [89]:

> Regulation 11A, like most statutory consultation provisions, imposes an obligation that must be capable of practicable and reasonable discharge by the person upon whom it is imposed. Consultation is a "real world" activity, with specific purposes. Here, its purpose is to ensure that the titleholder has ascertained, understood and addressed all the environmental impacts and risks that might arise from its proposed activity. Consultation facilitates this outcome because it gives the titleholder an opportunity to receive information that it might not otherwise have received from others affected by its proposed activity. Consultation enables the titleholder to better understand how others with an objective state in the environment in which it proposes to pursue the activity perceive those environmental impacts and risks. As the Regulations expressly contemplate, it enables the titleholder to refine or change the measures It proposes to address those impacts and risks by taking into account the information acquired through the consultations. Objectively, the scheme intends that this is likely to improve the minimisation of environmental impacts and risks from the activity.

42. 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*'.[34]

43. 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) the requirement in reg 10A(g) that the environment plan "demonstrates that" the consultation has been carried out (reg 10A(g)(i)) and that the measures that the titleholder has adopted or proposes to adopt because of the consultations are appropriate (reg 10A(g)(i)) means that the plan itself must contain all information showing or demonstrating that these criteria have been met;

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

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

(4) 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

44. 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.

45. 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 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.

46. Plainly, reg 10(4)(b)(iii) and reg 10(6)(b) read together have the consequence that NOPSEMA may be able, in a situation where NOPSEMA is not reasonably satisfied that the environment plan meets the criteria in reg 10A, to accept an environment plan subject to limitations or conditions. However, those limitations or conditions must be of a kind which are consistent with the criteria for acceptance of the environment plan. 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 environment plan must, according to reg 10A(g) "demonstrate" that the titleholder has carried out the consultations required by reg 11A, and that the measures adopted or to be adopted because of the consultations are appropriate;

(c) 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 [38]-[42] above, because "relevant persons" could be denied the opportunity to "*participate* in decision-making" by deferring consultation with them until after a decision has been made. Such deferral would also undermine transparency objectives inherent in the Environment Regulations, discussed further at [50(3)] below.

47. 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, 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 being met 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 paragraph of reg 10(6)); or

(2) accept the plan subject to limitations or conditions applying to operations for the activity under reg 10(6)(b).

48. This latter power under reg 10(6)(b) would 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. This approach is in substance the one taken by NOPSEMA in the Decision with respect to reg 10A(b) and whether the Seismic Survey EP demonstrated that the impacts of the Activity on threatened and migratory whales had been reduced as low as possible. The Delegate noted an inconsistency between the way the Environment Plan described the use of a spotter vessel with marine fauna observers (**MFOs**) to enhance whale detection.[35] The delegate was:

> …not reasonably satisfied that the Environment Plan met reg 10A(b) because [the delegate] believed that the inconsistency meant that the Environment Plan was unable to demonstrate that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable. However, if the spotter vessel with 2 MFOs was, in fact, present for the full duration of the seismic survey I considered that the Environment Plan could be accepted. Therefore, I considered it would be appropriate to impose a condition in relation to such (see [133] below).[36]

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35 Statement of Reasons [44](c), [46]-[47].

36 Statement of Reasons [48].

49. 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 is unlikely that there could be any 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.

50. A contrary interpretation, which would permit acceptance of the environment plan subject to a condition that the reg 10A(g) criteria are either not to be met, or to be addressed by the titleholder in the course of conducting the activity to which it relates, has several implications which contradict the statutory scheme established by the regulations.

    (1) First, it would not promote the objects of the Environment 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.

    (2) Second, it impermissibly would defer to the titleholder the statutory function to be satisfied that the titleholder has carried out the consultations required by Division 2.2A, which is, under the Environment Regulations, entrusted to NOPSEMA. While a titleholder must not undertake an activity in a way that is contrary to any condition applying to the operations for the activity,[37] the Consultation Conditions are open textured and subjective, and would appear to depend upon the *titleholder's,* rather than NOPSEMA's, satisfaction as to sufficiency of consultation. There is no express statutory obligation upon NOPSEMA to review satisfaction of the conditions. As has been stated by NOPSEMA, "it is a matter for Woodside to consider and satisfy itself as to whether it is meeting the conditions on acceptance of the [Seismic Survey] EP."[38] Such a delegation of function is contrary to the terms and intention of the statutory scheme as it is for "NOPSEMA to consider whether it agrees with the operator's assessment of the merits of any objection or claim, having regard to

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37 Reg 7(1)(b).

38 Email from NOPSEMA to Woodside, 5 September 2023, 11:08am, at AJL-7 to the affidavit of Andrew James Lobb, affirmed 11 September 2023 at p 136.

the objects of the Environment Regulations and taking into account the rights and obligations of the titleholder under the OPGGS Act",[39] not the titleholder, prior to the commencement of activity.

(3) Third, it would evade transparency objectives evident in the Environment Regulations. Consultations undertaken pursuant to Consultation Conditions are not subject to public disclosure and reporting in the same manner as those required by 10A(g) and Div 2.2A. For example, the requirement in reg 16(b)(iv) for a plan to contain a copy of the full text of any response by a relevant person to consult under reg 11A in the course of a preparation of the plan (subject to reg 9(8)), and for that plan, including the consultation responses to be published on NOPSEMA's website (reg 9AB and reg 11(4) and 11(5)) would not apply in respect of any consultation occurring subject to the Consultation Conditions.

F ISSUE 2: No basis to refuse relief

51. In oral submissions at the hearing of the interlocutory application, Woodside foreshadowed that if Ground 1 is upheld, it may contend that relief should be refused on a discretionary basis.[40] In its concise statement filed on 18 September 2023 at [18.2], it articulated this possible contention as follows:

> Woodside may contend at the final hearing that the Court should refuse to grant the relief sought by Ground 1 on a discretionary basis by reason of any failure of the Applicant to provide to Woodside, by the time of the final hearing, all information about the effects of the activity the subject to the Seismic EP on her functions, interests or activities that she would wish to provide.

52. Although it may be accepted that public law relief is 'discretionary', if Ground 1 were upheld, this faintly alleged (and firmly denied) conduct on the part of the Applicant could not reasonably justify refusing the relief sought in the Amended Originating Application. There are at least three reasons for this:

(1) First, Ground 1 is concerned with NOPSEMA's state of reasonable satisfaction as to consultation at the time of the Decision.[41] The Applicant's actual conduct, with respect to consultation after the Decision, is irrelevant to the ground, and there is no reason why it should disentitle her to the relief sought. Equally, any allegation about inadequacy of the Applicant's engagement in consultation prior

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39 Explanatory Statement, Select Legislative Instrument 2011 No. 251 (Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment Regulations 2011 (No 1) (Cth), 6.

40 Transcript of Proceeding on 14 August 2023, p 31, lines 17 – 25; p 36, lines 33 – 41.

41 *Tipakalippa v National Offshore Petroleum Safety and Environment Management Authority (No 2)* [2022] FCA 1121 at [268] (Bromberg J).

to the Decision, if not included in the Seismic Survey EP itself is also irrelevant, given that it is the environment plan which must, under the Environment Regulations, contain the consultation report[42] and also demonstrate that the required consultation has occurred.[43]

(2) Second, if Ground 1 is allowed, the Court will have concluded that NOPSEMA purported to make an administrative decision that it did not have power to make. An administrative "decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, is no decision at all."[44] That is significant, because there is "no reason in principle why the general law should treat [such] decisions … as binding or having legal effect unless and until set aside."[45] Hence, if Ground 1 were upheld, the reasons themselves would establish the invalidity of the Seismic Survey EP, and the refusal of relief could only serve to confuse the true state of legal affairs (as between the parties, and as regards the world at large). Such a consequence and the attendant uncertainty would be particularly acute and undesirable in circumstances where to conduct activity in the absence of a valid environment plan is an offence.

(3) Third, Ground 1 seeks the review of a decision that affects interests well beyond those particular to the Applicant. These interests extend to the preservation of the natural environment and the cultural heritage of Mardudhunera Traditional Custodians.[46] Even if the Applicant had engaged in some kind of disentitling conduct (which is denied), this could not justify denying the public the benefit of the public law remedies she seeks. Indeed, if Ground 1 were upheld, but relief refused on a discretionary basis, any other person with standing under the ADJR Act, or otherwise, could commence proceedings seeking relief in the same terms sought in the Applicant's Amended Originating Application.

53. Finally, it is notable that Woodside does not yet know whether it will contend that relief should be refused on a discretionary basis. This appears to be because, even if

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42 Regulation 16(b).

43 Regulation 10A(g).

44 *Minister for Immigration and Multicultural Affairs and Bhardwaj* (2002) 209 CLR 597,614-5 (Gaudron and Gummow JJ), cited with approval in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476, 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

45 *Minister for Immigration and Multicultural Affairs and Bhardwaj* (2002) 209 CLR 597, 614 (Gaudron and Gummow JJ).

46 See also *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 [89] (Kenny and Mortimer JJ) where the Court expressly recognises the interests of "others with an objective stake in the environment".

open as a matter of law, Woodside's arguments on the discretion would depend on things done or not done by the Applicant between now and the 'final hearing'. If upheld, however, Ground 1 would without more justify the final relief sought in the Amended Originating Application. In those circumstances, unless it is to be alleged that the Applicant has *already* done something that would disentitle her from the relief she seeks, it is neither necessary nor appropriate to delay granting the relief until the final hearing.

G ISSUE 3: Applicant's standing to bring Ground 2

54. Woodside contends that the Applicant does not have standing to bring Ground 2, because "the remedy sought by Ground 2 is to enforce compliance with the Regulations which is not a public law remedy".[47] This contention should be rejected.

55. The Applicant seeks, with respect to Ground 2, an injunction to restrain the Second and Third Respondents from undertaking the Activity otherwise than after compliance with the conditions to which the Decision is subject",[48] that is, an injunction to restrain conduct in breach of the law. The Applicant therefore seeks a remedy to vindicate a public interest, and has standing as a person with a special interest in the subject matter of the litigation:

(1) It is well established that an injunction is available as a public law remedy to restrain an apprehended breach of statute.[49]

(2) At least since *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[50] the question, for the purpose of determining standing for declaratory and injunctive relief, is not whether the statute confers a public 'right', but rather whether the relief would affect a public interest.[51] In this context, "for an interest, duty, wrong or obligation to be 'public' it must directly affect or benefit a large number of people."[52]

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47 Third and Fourth Respondent's Concise Statement filed 18 September 2023, [17].

48 Amended Originating Application, Orders sought at [3(b)].

49 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157-8 [56]-[57] (Gaudron J).

50 (1998) 194 CLR 247, 260 [32] (Gaudron, Gummow and Kirby JJ); 275 [80] and fn 153 (McHugh J).

51 Aaronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022), [19.120].

52 Aaronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022), [19.130].

(3) The Applicant will have standing if she has a "special interest" in the subject matter of the litigation.[53] This requires only a "sufficient interest, not one which is a unique interest or the strongest interest compared with others who may have an interest."[54]

56. As a Mardudhunera woman, Traditional Custodian of Murujuga, and a "relevant person" under the Seismic Survey EP, the Applicant has 'an interest in the subject matter of the present action which is greater than that of other members of the public and indeed greater than that of other persons of aboriginal descent who are not members of the'[55] Mardudhunera people or Traditional Custodians of Murujuga. She has standing to bring Ground 2, and the Court, pursuant to ss 21, 22 and 23 of the *Federal Court of Australia Act 1976* (Cth), has power to grant the relief sought by the Applicant in respect of Ground 2.

Claire Harris

Laura Hilly

Patrick Coleridge

19 September 2023

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53 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 531 (Gibbs J).

54 *Animals' Angels e.V. v Secretary, Department of Agriculture* [2014] FCAFC 173, [121] (Kenny, Robertson and Pagone JJ).

55 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 36 (Gibbs CJ).