

MPS

LAW

Case Note

Gomeroi People v Santos

NSW Pty Ltd and Santos NSW

(Narrabri Gas) Pty Ltd [2024]

FCAFC 26



Background

- This decision concerns the Gomeroi Applicant's successful appeal to the Full Federal Court from the National Native Title Tribunal's (NNTT, Tribunal) determination in Santos NSW Pty Ltd v Gomeroi People [2022] NNTTA 74.
- In the initial proceedings, Santos brought future act determination applications (FADAs), seeking the grant of four petroleum production lease applications (PPLAs) in connection with its Narrabri Gas Project. The Gomeroi Applicant opposed the granting of the PPLA's on several grounds.
- In those initial proceedings, the Tribunal determined that Santos had negotiated in good faith and the grant of the PPLAs may be done, subject to a condition that Santos complete an Additional Cultural Heritage Research Project.

The Appeal

- The Gomeroi Applicant appealed the NNTT's determination on six grounds / questions of law. Five appeal grounds related to good faith matters, and one (ground 3) challenged the way the NNTT dealt with the environmental evidence.
- Mortimer CJ and O'Bryan J allowed Ground 3 of the appeal. Rangiah J dissented and would have dismissed the appeal on all grounds.

Ground 3 - Environmental matters

- Section 39 of the Native Title Act 1993 (NTA) requires the Tribunal to consider (amongst other things) in making its determination, "any public interest in the doing of the act" and "any other matter that the arbitral body considers relevant" (see s 39(1)(e); s 39(1)(f)).
- In the Tribunal proceedings, Gomeroi called evidence from Professor Will Steffen, a climate and earth system scientist. His evidence concluded that the "evidence is exceptionally strong that the proposed Narrabri gas project must not proceed if the Paris climate goals are to be met" (as quoted at [172] of the Full Federal Court's decision).

- The Tribunal found that given the Narrabri Gas Project’s environmental impact had already been considered by the NSW Independent Planning Commission and received the relevant State approvals, it was not for the Tribunal to overturn decisions of those agencies, unless there was evidence of a particular effect on native title.
- The central issue before the Full Court was if there were any errors of law in how the Tribunal dealt with the environmental evidence.

Decision of the Court

- Chief Justice Mortimer and Justice O’Byrne each allowed Ground 3 of the appeal. Mortimer CJ agreed the Tribunal was correct in that its task was not to second guess or redo State environmental assessments, however found (see [212]) that the Tribunal ‘erred’ in:

“conflating the removal of this environmental assessment function, with the removal of any requirement for it to consider, under s 39(1)(e) of the NTA, whether features or characteristics of the future act that might be broadly described as “environmental” weighed for or against the public interest in the doing of the future act”
- Mortimer CJ noted it is well established that ‘public interest’ “confers a wide discretionary value judgment function” (see [213]) and the NTA requires the NNTT to form its own views on “where the public interest lies both as a separate consideration and as part of a holistic exercise, reflecting on all the factors in s 39(1). In performing that function it is no part of the Tribunal’s role to defer to government, state or federal.” See [221].
- Further, the Tribunal erred in finding that for it to consider such matters under s 39(1)(e) that they needed to be tied to impacts on native title. See [223].

Justice Rangiah’s commentary on the NNTT

- Rangiah J observes that a central issue between the parties in the negotiations was the amount of the production levy from the that should be paid to the native title claimants, however the NNTT does not have a power to determine this issue for the parties. The NTA provides that the NNTT must not determine a condition that has the effect that native title parties are to be entitled to payments worked out by reference to profits or production.
- Justice Rangiah comments(at [310]) that such an outcome does not seem satisfactory and that “the inefficiency and inequity involved in the outcomes may warrant some reconsideration of the legislative scheme”.
- Mortimer CJ considers that there is ‘force’ in this observation (at [240]).

Outcome

- The Court allowed the appeal and made orders requiring the parties to file proposed orders to give effect to the reasons.
- On 12 April 2024 the Court made a further decision - *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (No 2) [2024] FCAFC 49* where it noted the “tremendous amounts of time and resources which had already been deployed by the parties” in the NNTT proceedings (at [9]) and made orders:
 1. remitting the FADAs to the NNTT for a further hearing and determination;
 2. precluding any good faith arguments; and
 3. providing the matter to be determined without any further evidence, subject only to proper cause being shown for the adducing of further evidence and the Tribunal being satisfied it is appropriate to permit further evidence to be adduced.
- This means that the FADAs have been remitted to the NNTT to determine. Parties will not be permitted to file any evidence relating to good faith negotiations however may seek leave of the NNTT for any other further evidence to be adduced.