Case notes

Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd [2024] FCAFC 26

By Tegan Barrett-McGuin

In early 2024, the Gomeroi People were successful in challenging the National Native Title Tribunal's (**Tribunal**) dismissal of evidence regarding climate change concerns in the hearing of a Future Acts Determination Application (**FADA**). In this groundbreaking decision, the Court held that the Native Title Act 1993 (Cth) (**NTA**) does allow for climate change concerns to be considered in determining a FADA. However, it remains to be seen whether the Tribunal will ultimately consider climate change implications as compelling enough to determine that mining tenements cannot be granted.

Background

On 1 May 2014, Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (together, **Santos**) applied for four petroleum production leases (**PPLs**) as part of the **Narrabri Gas Project**. The PPLs covered an area of 92,400 hectares that fell completely with the claim area of the Gomeroi People's registered native title claim in northern New South Wales.

In accordance with section 31(1) of the NTA, Santos negotiated with the Gomeroi People's native title Applicant (**Gomeroi**) with a view to obtaining their agreement to the grant of the PPLs. The **negotiation period** lasted about seven years, from 2015 until 2022. Santos made their final offer in March 2021, which was rejected by Gomeroi.

In 2020, during the negotiation period, the Independent Planning Commission of New South Wales granted development consent for the Narrabri Gas Project, subject to 134 conditions. This decision was unsuccessfully challenged by an entity known as the Mullaley Gas and Pipeline Accord in the Land and Environment Court of New South Wales. The relevant Commonwealth Minister also granted the necessary approval.

In May 2021, Santos lodged a FADA with the Tribunal seeking a determination that the PPLs could be granted, despite Gomeroi's lack of consent (per section 35(1) of the NTA). Gomeroi argued that according to section 35(2) of the NTA, the Tribunal did not have jurisdiction to make the determination because Santos had not negotiated in good faith as required by section 31(1) of the NTA.

Gas Project would make to climate change was against the public interest (**the climate change argument**). In support of this argument, Gomeroi engaged climate change and earth scientist Professor William Steffen as an expert witness. Professor Steffen gave evidence on matters such as global warming generally and methods for predicting impacts of climate change in the Narrabri region. His evidence included the assertion that in order to achieve net zero emissions by 2050 as agreed in the Paris Agreement, there must be no new oil and gas fields, no new mines and no extension of mines approved, starting immediately. This is supported by findings in peak energy body the International Energy Agency's 2021 report.

On 19 March 2022, the Tribunal made a determination that the PPLs could be granted, subject to one condition which is immaterial for the purposes of this summary. Gomeroi appealed the Tribunal's determination to the Full Court of the Federal Court of Australia (**the Court**).

The Tribunal's Decision

The Tribunal found that Santos' conduct at all times demonstrated a genuine intention to seek agreement with Gomeroi. Contrary to Gomeroi's submissions, the Tribunal considered the duty to negotiate in good faith did not require Santos to make a 'reasonable' offer. Further, the Tribunal did not consider Gomeroi's expert evidence on the market value of Santos' offer to be probative and found no evidence that Santos had not negotiated in good faith. Therefore, the Tribunal had jurisdiction to determine the FADA.

Regarding the climate change argument, the Tribunal considered the 1998 amendments to the NTA had removed environmental impacts from the list of mandatory considerations under section 39(1) of the NTA, except for where it could be shown particular environmental concerns would impact the relevant native title rights and interests in that instance. That being so, the Tribunal concluded it was not their role to 'second-guess' the state and Commonwealth agencies who had approved the project in the face of similar climate change arguments. In so finding, the Tribunal gave little weight to Professor Steffen's evidence and determined the PPLs could be granted.

Unsuccessful arguments on appeal

Gomeroi appealed on six questions of law. The Court dismissed five of these issues, finding:

1. The Tribunal had correctly identified and applied the existing law on what constituted 'good faith negotiations'.
2. The Tribunal's reasons did not suggest they had conflated the terms 'payment' and 'compensation' under the NTA.
3. Gomeroi was not denied procedural fairness by the Tribunal considering the definition of 'market' under the Competition and Consumer Act 2010 (Cth) in their reasons, without the parties' submissions on that definition. The Tribunal is entitled to undertake their own research for the purpose of performing their functions (per section 108(2) of the NTA), so long as they act fairly (section 109(1) of the NTA), and by doing so the Tribunal had not denied Gomeroi a reasonable opportunity to present its case or address information relied on by the Tribunal.
4. It was legally reasonable for the Tribunal to prefer Santos' expert evidence on the good faith question over Gomeroi's, because the Tribunal had found Gomeroi's expert evidence on that point lacked probative value.
5. The Tribunal was correct to conclude that Santos was not acting in 'bad faith' by negotiating with the Applicant whose name appeared on **the Register** of Native Title Claims, despite knowing that a new Applicant had been authorised. The Court considered where the authorised Applicant had not yet been confirmed by the Court under section 66B of the NTA, the former Applicant (whose name is on the Register) is still the relevant Applicant.

Successful argument on appeal: the climate change argument

Regarding the Climate Change Argument, Gomeroi claimed the Tribunal had erred by incorrectly interpreting section 39(1)(e) of the NTA – that the Tribunal must consider 'any public interest in the doing of the act' – as excluding general environmental matters and requiring particular evidence of the impact on native title rights. Consequently, Gomeroi argued, the Tribunal made an error by declining to consider Professor Steffen's evidence. The Court upheld Gomeroi's appeal on this point, by a 2:1 majority.

Mortimer CJ and O'Bryan J found the Tribunal had misconstrued the effect of the 1998 amendments. Their Honours agreed the 1998 amendments removed from section 39(1)(a) and (b) of the NTA a mandatory requirement for the Tribunal to consider environmental impacts on native title in every FADA. However, they did not consider this prevented the Tribunal considering environmental matters, if and when they were relevant, under section 39(1)(e).

Mortimer CJ (O'Bryan J concurring) further pointed out that section 39(1)(e) was not changed by the 1998 amendments and there was nothing in the 1998 explanatory memorandum to suggest the scope of this subsection was to be limited. On this point, Mortimer CJ highlighted that the existing authority is clear that use of the phrase 'any public interest' confers wide discretion as to the subject matters that may be included. Their Honours considered that the discretion afforded by section 39(1)(e) (as well as section 39(1)(f) – 'any other matter that the arbitral body considers relevant') was wide enough to include consideration of relevant environmental concerns that were a matter of public interest.

Rangiah J reached a different conclusion. By preferring a strictly grammatical interpretation of section 39(1)(e), his Honour considered that the phrasing of the subsection 'any public interest in the doing of the Act' limited the Tribunal's considerations to public interest that favoured the act. It did not permit consideration of public interest in the act not being done. O'Bryan J agreed with Rangiah J's construction of section 39(1)(e) but concluded that the Tribunal could not reasonably

have considered that there was any public interest in the act being done if the public harm outweighed the public good. In this case, O'Bryan J considered Professor Steffen's evidence was relevant to that balancing exercise and should have been considered.

The majority of the Court found that the Tribunal's reasons indicated the Tribunal had clearly chosen not to consider Professor Steffen's evidence based on the mistaken conclusion that climate change concerns are not within the Tribunal's remit. Therefore, the Tribunal's decision to allow the PPLs to be granted was affected by an error of law in that they did not consider relevant evidence presented by Gomeroi.

Relief

The usual course would be to refer the matter back to the Tribunal to reconsider the original determination having regard to Professor Steffen's evidence. However, in this instance, the Court invited the parties to make submissions as to the preferred orders for next steps. At the time of writing, the Court has yet to make their final orders.

Archer Point, Yuku-Baja-Muliku Country, Queensland