Federal Court of Australia

 Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (No 2) [2024] FCAFC 49

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| Appeal from: | *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74 |
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| File number: | QUD 13 of 2023 |
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| Judgment of: | **MORTIMER CJ, RANGIAH AND O'BRYAN JJ** |
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| Date of judgment: | 12 April 2024 |
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| Catchwords: | **NATIONAL NATIVE TITLE TRIBUNAL** – appeal – appropriate orders for remittal of proceeding where appeal allowed on one ground only – s 169(7) *Native Title Act 1993* (Cth) – order made remitting matter to heard by the National Native Title **Tribunal** without further evidence, subject only to proper cause being shown and the Tribunal being satisfied it is appropriate to permit further evidence to be adduced**COSTS** – where parties agree there should be no order as to costs  |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 44(4), 44(5)*Native Title Act 1993* (Cth) ss 31(1)(b), 36(2), 38(1), 39(1)(e), 39(1)(f), 109, 169(7) |
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| Cases cited: | *Attorney General (NSW) v Quin* [1990] HCA 21; 170 CLR 1*Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137; 179 FCR 554*Charles v Sheffield Resources Limited* [2017] FCAFC 218; 257 FCR 29*Drake v Minister for Immigration and Ethnic* *Affairs* (1979) 24 ALR 577*Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26*Negri v Secretary, Department of Social Services (No 2)* [2016] FCA 1125; 70 AAR 238*Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Native Title |
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| Number of paragraphs: | 23 |
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| Date of last submissions: | 20 March 2024 |
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| Date of hearing: | 9-11 August 2023 |
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| Counsel for the Applicant: | Mr A McAvoy SC with Ms N Case  |
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| Solicitor for the Applicant: | NTSCORP Limited |
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| Counsel for the First Respondent: | Ms R Webb KC with Mr M McKechnie |
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| Solicitor for the First Respondent: | Ashurst Australia |
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| Counsel for the Second Respondent: | Mr H El-Hage SC |
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| Solicitor for the Second Respondent: | Crown Solicitor’s Office |

ORDERS

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|  | QUD 13 of 2023 |
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| BETWEEN: | GOMEROI PEOPLEApplicant |
| AND: | SANTOS NSW PTY LTD AND SANTOS NSW (NARRABRI GAS) PTY LTD (FORMERLY KNOWN AS ENERGYAUSTRALIA NARRABRI GAS PTY LTD)First RespondentSTATE OF NEW SOUTH WALESSecond Respondent |

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| order made by: | MORTIMER CJ, RANGIAH AND O'BRYAN JJ |
| DATE OF ORDER: | 12 April 2024 |

THE COURT ORDERS THAT:

1. Further to the orders of the Full Court made on 6 March 2024, the determination of the National Native Title **Tribunal** in *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2022] NNTTA 74 (19 December 2022) be set aside on and from the date of these orders.
2. Applications NF2021/0003; NF2021/0004; NF2021/0005; NF2021/0006 be remitted to the Tribunal for hearing and determination according to law.
3. Before the Tribunal on remitter the parties are precluded from making any claim that any other party did not negotiate in good faith as mentioned in s 31(1)(b) of the *Native Title Act 1993* (Cth).
4. The matter is to be determined by the Tribunal without 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.
5. There be no order as to the costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER CJ AND O’BRYAN J:

1. On 6 March 2024, the Full Court made orders allowing an appeal from a determination made by the National Native Title **Tribunal** on 19 December 2022 that the proposed future acts, being the grants of four petroleum production lease applications to the first respondent, **Santos** NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd (formerly known as EnergyAustralia Narrabri Gas Pty Ltd), may be done, subject, in each case, to one condition (which was not material to the appeal). The production lease applications lie within country claimed by the Gomeroi People. See *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26 (**principal reasons**).
2. The appeal consisted of six questions of law. Questions of law 1, 2, 4, 5 and 6 related to the requirement to negotiate in good faith with a view to obtaining the agreement of the native title party to the doing of the future act pursuant to s 31(1)(b) and Part 2 Division 3 of the ***N****ative* ***T****itle* ***A****ct 1993* (Cth). The Full Court did not accept the contentions of the native title party, being the registered native title claimant, which we refer to as the **Gomeroi applicant**, on these five questions of law relating to good faith.
3. Question of law 3 related to an error of a different kind and concerned the construction of paras 39(1)(e) and (f) of the NTA. A majority of the Full Court answered this question in favour of the Gomeroi applicant’s submissions.
4. Aside from the orders allowing the appeal, the Full Court made the following **Orders**:

2. On or before 4 pm on 13 March 2024, the parties file any agreed proposed orders to give effect to these reasons, including any agreed proposed orders as to costs.

3. In the absence of any agreement as to appropriate orders, on or before 4 pm on 20 March 2024 the parties file and serve any written submissions (limited to 5 pages) on an appropriate form of order including any proposed costs orders.

4. Any proposed orders or any submissions in accordance with orders 2 and 3 of these orders will be determined on the papers.

1. The parties filed submissions in accordance with those Orders. On 13 March 2024, the legal representative of Santos confirmed that, in accordance with order 2 of the Orders, the parties had reached agreement on the question of proposed orders as to costs but had not been able to reach agreement on appropriate remittal orders to the Tribunal. Accordingly, the costs part of the Court’s orders made today is by the agreement of the parties.

# RESOLUTION

1. The issue in dispute is whether the Court’s order under s 169(7) should or should not preclude the parties from adducing further evidence before the Tribunal on any remitter.
2. Section 169(7) of the NTA provides:

*Orders*

(7) Without limiting subsection (6), the orders that may be made by the Court on an appeal include:

(a) an order affirming or setting aside the decision or determination of the Tribunal; or

(b) an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

1. As Santos’ submissions explain, most of the authorities on remitter come from the operation of the relevantly identical provisions in the ***A****dministrative* ***A****ppeals* ***T****ribunal* ***Act*** *1975* (Cth) (s 44(4) and (5) of the AAT Act). We agree that the AAT Act authorities are appropriate to consider. The only authority touching on s 169(7) of the NTA is ***Charles*** *v Sheffield Resources Limited* [2017] FCAFC 218; 257 FCR 29 and that decision did not concern the issue now facing the Court. However, as with the remitter power in s 44 of the AAT Act, there was no debate between the parties to this appeal that, as a discretionary power, the way in which the power is exercised is likely to be dependent on the facts and circumstances of each individual case: see *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137; 179 FCR 554 at [55] (Bennett, Flick and McKerracher JJ).
2. In the present appeal, all members of the Full Court made observations about the tremendous amounts of time and resources which had already been deployed by the parties in the first Tribunal hearing and determination process: see principal reasons at [241] (Mortimer CJ), [310] (Rangiah J), [318] and [395] (O’Bryan J). It is in that agreed factual context that we consider whether the remitter should be constrained.
3. In our opinion, the respondents’ submissions to the effect that there should be some express limits placed in the Court’s orders on the claims and evidence to be determined by the Tribunal have force. However, we do not agree with all the limits the respondents propose.
4. The Gomeroi applicant proposed orders to the effect that the parties be able to adduce further evidence. It contended there have been further reports and data, and new or updated analytical tools, in respect of the impacts of climate change which were not available to the Gomeroi applicant at the time it was preparing its evidence, bearing in mind the evidence before the Tribunal closed on 11 October 2021. In [4]-[7] of its written submissions, it set out the kinds of material to which it referred:

The IPCC has subsequently published:

1. AR6 Working Group II: Climate Change 2022: *Impacts, Adaptation and Vulnerability* (27 February 2022);
2. AR6 Working Group III *Climate Change 2022: Mitigation of Climate Change* (April 2022), and
3. AR6 *Synthesis Report: Climate Change 2023* (March 2023).

The following resources have been produced by governments:

1. *National Climate Risk Assessment: First pass assessment* report (12 March 2024, Department of Climate Change, Energy the Environment and Water, Australia) https://www.dcceew.gov.au/climate-change/publications/ncra-first-pass-riskassessment;
2. AdaptNSW has produced an Interactive climate change projections map which generates climate projections for change in temperature, rainfall, cold nights under 2 degrees C, hot days over 35 degrees, and high fire danger days, for 2020-39 and 2060-79 www.climatechange.environment.nsw.gov.au/projections-map.
3. the ABS and CSIRO have jointly produced a projection tool that demonstrates what climate models are projecting for Australia’s future: www.climatechangeinaustralia.gov.au/en/projections-tools/;
4. Internationally, the Coupled Model Intercomparison Project (a project of the World Climate Research Program, based in the United States) has produced the Coupled Model Intercomparison Project Phase 6 - https://pcmdi.llnl.gov/CMIP6/ - comprising over 20 new climate models, from which specific analysis can be generated.

The private sector has improved data analysis to provide more detailed insights into climate change impacts. For example XDI (“Cross Dependency Initiative”, a private company and part of the Climate Risk Group which quantifies and communicates the costs of climate change) produced data sets to calculate Gross Domestic Climate Risk (2023) https://archive.xdi.systems/gross-domestic-risk-dataset/. Additional computational capacity is also available (see, for example, Climate Valuation’s Property Risk Portal https://climatevaluation.com/resources/climate-insight-tool/).

Finally, the Non-Governmental Organisation (**NGO**) sector has also produced climate change effect prediction tools including the Climate Council which has produced the Climate Risk Map of Australia (2 May 2022) www.climatecouncil.org.au/resources/climate-risk-map.

(Original italics and emphasis, footnotes omitted.)

1. Santos and the **State** of New South Wales both submit it is appropriate for this Court to limit the parties, and therefore the Tribunal, on remitter to the evidence that was before the Tribunal on the last occasion.
2. We do not agree with the respondents’ principal submission. The Tribunal engages in a merits decision-making process. The Parliament has reposed in the Tribunal the function of deciding, on the material before it, what is the correct outcome for the application by a negotiation party for a determination under s 38(1) of the NTA, there being three possible and discrete outcomes under that provision.
3. While the Tribunal is required to take into account the factors set out in s 39(1) of the NTA, the weight it affords to various factors, and to material before it that is relevant to those various factors, is a matter for it. There will be evaluative processes involved: see principal reasons at [338] (O’Bryan J). A decision-maker such as the Tribunal ought as a matter of general principle to be considering what is the correct outcome on the most up to date and relevant material available: see *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286 at [37], [41] and [42] (Kirby J), citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24; and *Drake v Minister for Immigration and Ethnic* *Affairs* (1979) 24 ALR 577 at 589 (Bowen CJ and Deane J).
4. While Santos is correct to submit that the error identified by the majority in the principal reasons was one of statutory construction, that error having been identified and the correct construction pronounced, the task of *applying* that construction to the evidence and material is not a function for the Court, but for the Tribunal. Like other aspects of its function, the Tribunal should be in full control of the exercise of all powers necessary to perform that function, including the power to receive evidence and other material, unless sound justification is shown on any appeal for restricting the powers of the Tribunal which Parliament contemplated would otherwise be available to it.
5. In considering whether sound justification has been shown, the importance of the constitutional separation of the judicial from the non-judicial functions, described by Brennan J in *Attorney General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-36, must be steadily borne in mind in considering how to exercise the s 169(7) discretion. An order of this Court confining the Tribunal on remitter to the evidence before it on a previous hearing or review, where the Tribunal’s decision has now been set aside, substantively affects the way the Tribunal can perform its functions. While s 169(7) expressly confers such a power on the Court, in our view, it is a power to be exercised cautiously.
6. We consider therefore that the nature and importance of the Tribunal’s function in deciding on which of the three outcomes in s 38(1) is the correct outcome outweighs giving absolute primacy to considerations of cost-effectiveness and time-saving which might be apprehended to flow from this Court constraining the Tribunal to the evidence before it on the last occasion. Properly, neither respondent has contended it does not have the resources to meet any further evidence which the Tribunal may permit to be adduced nor did they point to any prejudice in terms of being able to adduce or respond to new evidence or material. The Court can and should assume that the Tribunal will be conscious of the context in which this further hearing is occurring, and of the time and resources already spent on this matter.
7. For that reason, we reject the respondents’ submissions that the order should be in terms confining the Tribunal to the evidence and material before it at the first hearing. Nevertheless, Santos did make an alternative submission, which we have found persuasive.
8. The submission was that orders should be made in a form which cast a persuasive burden on any moving party before the Tribunal to demonstrate adequate justification for the receipt of new evidence and material by the Tribunal. An order of this kind was made in ***Negri*** *v Secretary, Department of Social Services (No 2)* [2016] FCA 1125; 70 AAR 238 at [7] (Bromberg J).
9. By the time the matter returns to the Tribunal, more than two and a half years will have passed. We accept the Gomeroi applicant’s submission that climate science has undergone considerable changes in this period, including a different objective identification of what might, in 2024, be considered the most relevant, up to date and authoritative material. As we have said, any merits Tribunal should as a matter of general principle (and subject to any contrary legislative restrictions) strive to make its decision on the most complete and up to date evidence and material available to it.
10. However in the particular circumstances of this case, we consider there should be a clear persuasive burden on all parties, beyond the usual test of relevance that might be applied by a Tribunal, noting the Tribunal is not bound by the rules of evidence in any strict sense: see s 109(3) of the NTA. Before the Tribunal at the first hearing, the parties had made forensic decisions that the material and evidence they relied on was sufficient to advance their respective cases. Specifically, the Gomeroi applicant had made forensic decisions that its material was sufficient to advance its case about the impacts on emissions and climate change from the Narrabri gas project. As the respondents pointed out in submissions, all parties to the s 38(1) application were agreed on a construction about s 39(1)(e) which is consistent with the construction favoured by a majority of this Court, and the Court can therefore assume the parties’ cases at the first hearing were prepared in accordance with that construction.
11. In the present circumstances, to make an order for an unconfined remitter would be in our opinion to pay insufficient heed to the forensic decisions already made, by well represented parties. Instead, the present form of order balances the important general principles attaching to the Tribunal’s performance of its function against the realities of the size and complexity of the first hearing before the Tribunal. The present order makes it plain to the Tribunal that some appropriate justification should be shown before it permits any party to add to the already voluminous existing material, not only for reasons related to time, resources and cost, but also reasons related to fairness.

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| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Mortimer and the Honourable Justice O'Bryan. |

Associate:

Dated: 12 April 2024

REASONS FOR JUDGMENT

RANGIAH J:

1. I have concluded that the appeal should be dismissed, dissenting from the majority’s view that the appeal should be allowed. The orders that flow from the appeal being allowed is a matter for only the majority.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Rangiah. |

Associate:

Dated: 12 April 2024