Federal Court of Australia

Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2) [2023] FCA 1158

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 28 September 2023 |
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| Catchwords: | **ADMINISTRATIVE LAW** - application for judicial review of decision of first respondent - urgent hearing of specified issues following grant of interlocutory injunction - where first respondent approved an environment plan of second and third respondents subject to conditions for a proposed seismic survey - where applicant alleges first respondent did not have statutory power to make the decision to accept environment plan subject to conditions regarding required consultation where it was not reasonably satisfied that the required consultation had occurred - where consultation required in course of preparing an environment plan - where evident purpose of consultation is to provide foundation for first respondent to form required evaluative judgment - where completion of consultation provides foundation for first respondent to evaluate whether criteria have been met - where second and third respondents claim Court should exercise discretion to refuse relief - where decision is invalid - where no basis to refuse relief - where not necessary to decide issue of standing in relation to second ground - held first respondent did not have statutory power to approve environment plan subject to conditions where it was not reasonably satisfied consultation had occurred - held decision invalid - first respondent's decision set aside |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth)  *Judiciary Act 1903* (Cth) s 39B  *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)  *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Consultation and Transparency) Regulations 2019* (Cth)  *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment Regulations 2011* (Cth)  *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) regs 6, 7, 8, 9, 9A, 9AB, 10, 10A, 11, 11A, 11B, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23  *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) |
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| Cases cited: | *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321  *Bechara v Bates* [2021] FCAFC 34; (2021) 286 FCR 166  *Cooper v National Offshore Petroleum Safety and Environmental Management Authority* [2023] FCA 1112  *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22  *Lamb v Moss & Brown* (1983) 76 FLR 296  *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193; (2022) 296 FCR 124  *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 147 CLR 297 |
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| National Practice Area: |  |
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| Date of hearing: | 26 September 2023 |
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| Counsel for the Applicant: | Ms C Harris SC with Dr L Hilly and Mr P Coleridge |
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| Solicitor for the Applicant: | Environmental Defenders Office Ltd |
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| Counsel for the First Respondent: | Mr NM Wood SC with Ms CI Taggart |
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| Solicitor for the First Respondent: | Australian Government Solicitor |
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| Counsel for the Second and Third Respondents: | Mr SK Dharmananda SC with Ms SB Nadilo |
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| Solicitor for the Second and Third Respondents: | Allens |

ORDERS

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|  | | VID 647 of 2023 |
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| BETWEEN: | RAELENE COOPER  Applicant | |
| AND: | NATIONAL OFFSHORE PETROLEUM SAFETY AND ENVIRONMENTAL MANAGEMENT AUTHORITY  First Respondent  WOODSIDE ENERGY SCARBOROUGH PTY LTD  Second Respondent  WOODSIDE ENERGY (AUSTRALIA) PTY LTD  Third Respondent | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 28 september 2023 |

THE COURT ORDERS THAT:

1. The issues reserved for determination by order 3 of the orders made on 15 September 2023 be determined as follows (adopting the terms defined in the Amended Originating Application filed 8 September 2023 (**Amended Originating Application**)):
   1. whether the first respondent had statutory power to make the Decision where the first respondent was not reasonably satisfied that the Seismic Survey EP demonstrated that the consultation required by reg 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) had been carried out, and so was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii);

**Answer**: The first respondent did not have statutory power to make the Decision.

* 1. 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 the second and third respondents;

**Answer**: No.

* 1. whether the applicant has standing to seek relief in relation to Ground 2 of the Amended Originating Application.

**Answer**: Not necessary to answer.

1. There be a declaration that the decision by the first respondent made on 31 July 2023, to accept, subject to conditions, the Scarborough 4D B1 Marine Seismic Survey Environment Plan (Revision 7, June 2023) to enable the second and third respondents to undertake a marine seismic survey on the Exmouth Plateau located in Commonwealth waters 188 km north-west of Northwest Cape, Western Australia (**Decision**) is invalid.
2. The Decision is set aside.
3. The second and third respondents do pay the costs of the applicant of and incidental to the proceedings such costs to be assessed by a registrar on a lump sum basis if not agreed.
4. There be no order as to the costs of the first respondent.
5. There be liberty to the second and third respondents to apply within 14 days to vary order 4 such liberty to be exercised by filing a written outline of submissions of no more than 3 pages setting out the alternative order as to costs and reasons why it is submitted that the order is appropriate together with any necessary affidavit.
6. There be liberty to the applicant to apply within 14 days seeking any further relief such liberty to be exercised by filing a written outline of submissions of no more than three pages setting out the terms of the further relief and reasons why it is submitted to be appropriate.
7. The expedited hearing listed for 23 and 24 October 2023 is vacated.

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

REASONS FOR JUDGMENT

COLVIN J:

1. Two subsidiaries of Woodside Energy Group Ltd (together, **Woodside**) plan to undertake a seismic survey in waters off the coast of the Pilbara region in Western Australia. To do so, they must have obtained approval from the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) of an environment plan. On 31 July 2023, they obtained approval for a plan subject to conditions. Relevantly for present purposes, the conditions require Woodside to undertake further consultation with representatives of Aboriginal and Torres Strait Islander bodies prior to the commencement of the seismic survey.
2. Ms Raelene Cooper is a Mardudhunera lore woman, elder and a traditional custodian of Murujuga. Ms Cooper was a person who, under the terms of the conditions, was required to be consulted. Ms Cooper has commenced proceedings in this Court seeking judicial review on the basis that NOPSEMA did not have statutory power to make the decision to approve the environment plan for the proposed seismic survey (**Ground 1**). In the alternative, Ms Cooper claims that Woodside has not complied with the conditions requiring Woodside to consult with her and others and that she has standing to seek a permanent injunction restraining Woodside from undertaking the seismic survey (**Ground 2**).
3. The Court has granted an interlocutory injunction restraining Woodside from undertaking any activity described in the environment plan pending the urgent determination of three preliminary issues, namely:
4. whether NOPSEMA had statutory power to make the decision to accept the environment plan where it was not reasonably satisfied that the consultation required by reg 11A of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) had been carried out, and so was not reasonably satisfied of the criteria in reg 10A(g)(i) and reg 10A(g)(ii);
5. whether, if (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
6. whether Ms Cooper has standing to seek relief in relation to Ground 2 of her application.

## Outcome

1. For reasons which follow, NOPSEMA did not have statutory power to make the decision to accept the environment plan on the stated conditions in circumstances where it was not reasonably satisfied that the consultation required by reg 11A(g) of the Regulations had not been undertaken. Further, the basis identified by Woodside for refusal of the relief in the exercise of the Court's discretion has not been demonstrated to be a basis upon which the Court, acting in accordance with law, should refuse relief. It follows that Ms Cooper is entitled to the relief that she seeks based upon ground 1. It is not necessary to determine the question of standing in relation to ground 2.

## Relevant provisions of the Regulations

1. In my reasons for granting the interlocutory injunction I described the statutory context in which the Regulations have been enacted: *Cooper v National Offshore Petroleum Safety and Environmental Management Authority* [2023] FCA 1112 at [1], [30]-[34]. As there explained, the Regulations have been enacted to address 'environmental impacts and risks' by requiring any relevant activity to be carried out in a manner by which those impacts and risks will be both reduced to as low as reasonably practicable and be of an acceptable level, and consistent with principles of ecologically sustainable development. The term 'environment' is defined to encompass the social and cultural features of ecosystems and of locations, places and areas. It also includes the heritage value of places and their cultural features.
2. Amongst others, the Regulations apply to the activities of titleholders, being those who have been granted a permit, lease or licence under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Each of the Woodside entities is a titleholder.
3. The Regulations make it an offence for a titleholder to undertake any 'activity' without an environment plan being in force for the activity: reg 6. The term activity is broadly defined. It encompasses the separately defined terms of petroleum activity and green house gas activity. Each of those terms is defined as 'operations or works in an offshore area undertaken for the purpose of [exercising a right conferred or an obligation imposed upon a titleholder]'.
4. The Regulations require an environment plan to be submitted to NOPSEMA by a titleholder before commencing a relevant activity: reg 9(1). It must be an activity in respect of which the Regulator has accepted an 'offshore project proposal' that includes the activity: reg 9(3)(a). There are separate provisions in the Regulations concerning such proposals.
5. If NOPSEMA makes a provisional decision that the environmental plan as submitted includes the material required by the Regulations then it must publish the plan on its website as soon as practicable (with sensitive parts removed): reg 9AB.
6. The Regulations specify in some detail what must be included in an environment plan: see reg 12 to reg 16 inclusive. Significantly for present purposes, the plan must contain a report on all consultations under reg 11A. The requirements under reg 11A as to the nature and extent of the consultations are addressed below, as are the matters that must be included in the report on all consultations that is to form part of the environment plan. These requirements have significance for understanding the legislative scheme.
7. The environment plan must also contain a comprehensive description of the 'activity' including an outline of the 'operational details of the activity': reg 13(1). It must describe the environment that may be affected by the activity: reg 13(2). As has been explained, the environment includes its social, economic and cultural features. It must also include details of the environmental impacts and risks for the activity: reg 13(5)(a). Obviously, those details cannot be ascertained unless the environment that may be affected by the activity is known. That is to say, the requirement to include details of the environmental impacts and risks could not be met without an understanding of the social, economic and cultural features of the environment. As will emerge, the regulatory requirements as to consultation are directed to ensuring that all those with a relevant interest are given a reasonable opportunity to provide details that enable that understanding to be formed. The plan must also include 'an evaluation of all the impacts and risks' and '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': reg 13(5)(b) and (c).
8. Then there is an avoidance of doubt provision which makes clear that the evaluation of the plan 'must evaluate all the environmental impacts and risks arising directly or indirectly from … all operations of the activity [and] potential emergency conditions, whether from accident or any other reason': reg 13(6). So, the evaluation is concerned with all operations of the activity. As has been mentioned 'activity' is itself defined as 'operation or works in an offshore area'. The activity itself may have associated operations. The aspect to be noted at this point is that the notion of operations of the activity as expressed in reg 13(6) which concerns the nature of the evaluative task to be undertaken by NOPSEMA when deciding whether to accept an environment plan is concerned with that which is to be undertaken by the titleholder, not with the process of preparing an environment plan, including undertaking the required consultation. They are not operations of the activity in any relevant sense.
9. NOPSEMA may require a titleholder to provide further written information about any matter that is required to be included in an environment plan. If that occurs the titleholder must resubmit the environment plan with the information incorporated: reg 9A. Obviously, that may include the matters that must be included in the report on all consultations.
10. There are criteria set out in the Regulations for acceptance of an environment plan (reg 10A). They are as follows:

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.

1. It is reg 10A(g) that assumes significance for present purposes. It requires that the plan itself demonstrates that the titleholder has carried out the consultations required by the Regulations.
2. Division 2.2A comprises a single provision, namely reg 11A. It is expressed in the following terms:

(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.

1. It may be observed that the obligation to undertake the consultation is one to be discharged '[i]n the course of preparing an environment plan'. The reason for requiring consultation 'in the course' of preparing the plan is self-evident. It is to enable the contents of the plan to be informed by the information that is provided in the course of the consultation.
2. Further, the requirement as to consultation is extensive. It must include each person or organisation who may be affected by the activities to be carried out under the environment plan and any other person or organisation that the titleholder considers relevant.
3. Significantly, the consultation must be undertaken by the titleholder, in the present case Woodside. It is to be properly informed by sufficient information to allow the person being consulted to make an informed assessment of the consequences of the activity on the person's functions, interests or activities. There must also be a 'reasonable period' for the consultation. Finally, as explained below, the environment plan is to be assessed against criteria that require the titleholder to demonstrate that the titleholder has carried out the consultation.
4. In addition to the above provisions, the Regulations require NOPSEMA to invite comments from the public when it publishes a 'seismic or exploratory drilling environment plan' that it has provisionally determined includes material apparently addressing the requirements as to the contents of such a plan: reg 11B(1). There are dates as to when responses may be received and provision for modification by the titleholder. Consequently, there are some specific provisions that deal with the way those dates apply in the case of a revision to an environment plan that is 'a seismic or exploratory drilling environment plan' but they do not alter the overall operation of the regulatory scheme. No issue is raised as to this separate aspect of the public consultation required by the Regulations.
5. NOPSEMA must respond within 30 days of an environment plan being submitted by a titleholder: reg 10(1). If NOPSEMA is reasonably satisfied that the environment plan meets the criteria then it 'must accept the plan': reg 10(1)(a). If it is not reasonably satisfied then it must give the titleholder a notice to that effect specifying the criteria about which it is not reasonably satisfied and setting a date by which the titleholder may resubmit: reg 10(1)(b) and 10(2). If it is unable to make a decision within the 30 days it must set out a proposed timetable for reaching a decision: reg 10(1)(c).
6. The term 'reasonably satisfied' must contemplate an evaluative judgment being formed by NOPSEMA as to whether each of the criteria has been met. They include whether the required consultation has been undertaken. Hence, there is a statutory duty imposed upon NOPSEMA to form a judgment as to whether or not the criteria have been met to its reasonable satisfaction. If an affirmative judgment to that effect is formed by NOPSEMA then the plan must be accepted.
7. If a notice is given that NOPSEMA is not reasonably satisfied with the environment plan and a revised plan is submitted and NOPSEMA 'is still not reasonably satisfied that the environment plan meets the criteria' then it must do one of three things, namely:

(i) give the titleholder a further notice under subregulation (2); or

(ii) refuse to accept the plan; or

(iii) act under subregulation (6)…

1. The above provisions are contained in reg 10(4)(b). There are similar provisions concerning NOPSEMA's power if the party does not resubmit by the required date (reg 10(5)).
2. Regulation 10(6) provides:

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.

1. It is the language of reg 10(6)(b) that assumes particular significance for present purposes. It authorises the acceptance of a plan even though NOPSEMA is still not reasonably satisfied (that is, after affording the titleholder an opportunity to resubmit the plan with changes) that the plan meets the statutory criteria. In the present case, NOPSEMA concluded that it was not reasonably satisfied that the requirement for consultation had been met as to 'all First Nations persons who may have cultural interests that may be affected by the activities that have been identified': see my reasons on the injunction at [21]-[26]. Conditions were imposed that required further consultation: reasons at [27]. The issue is whether a condition of that kind was within power.
2. Although reg 10(4)(b) and reg 10(5) each expresses a duty which arises if NOPSEMA is not reasonably satisfied that the environment plan meet the criteria in reg 10A, it is *not* a duty to do one of the things in reg 10(6). There are other possibilities, notably a decision to refuse to accept the plan. Therefore, it does not follow from the language about NOPSEMA not being reasonably satisfied that the power to accept the plan subject to conditions is enlivened irrespective of the basis for NOPSEMA not being reasonably satisfied. That is especially so where the power to accept the plan subject to conditions is not expressed in unqualified terms but rather is confined to conditions 'applying to operations for the activity'. Those words suggest a qualification to the nature and extent of any limitations or conditions that may form part of a limited or conditional acceptance of an environment plan. If the power to accept subject to limitations or conditions (or to accept the plan for a particular stage of the activity) is not enlivened then the Regulator is required to refuse the plan (or give the titleholder a further opportunity to resubmit in a case where the plan under consideration by NOPSEMA had been resubmitted).
3. NOPSEMA must give the titleholder notice in writing of a decision to (a) accept the plan; (b) refuse to accept the plan; or (c) accept the plan in part for a particular stage of the activity, or subject to limitations or conditions: reg 11(1). The notice must set out the terms of the decision and the reasons for it and 'any limitations or conditions that are to apply to operations for the activity': reg 11(2).
4. As to the contents of the environment plan, there is an express requirement stated in reg 16(b) that it must contain:

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;

1. Therefore, the environment plant to be submitted must itself contain considerable detail as to what was elicited from the required consultations.
2. Regulation 7(1) provides:

A titleholder must not undertake an activity in a way that is contrary to:

(a) the environment plan in force for the activity; or

(b) any limitation or condition applying to operations for the activity under these Regulations.

It does not apply where the titleholder has the consent of NOPSEMA to undertake the activity in that way: reg 7(2). NOPSEMA must not give such a consent 'unless there are reasonable grounds for believing that the way in which the activity is to be carried out will not result in the occurrence of any new environmental impact or risk, or significant increase in any existing environmental impact or risk': reg 7(3). Therefore, there is a limited means for NOPSEMA to allow a titleholder to 'undertake an activity' in a manner that departs from the plan. In order to exercise a power of that kind NOPSEMA would need to understand the nature and extent of the environmental impact or risk of the activity for which its consent is sought. Given the legislative scheme, it would be dependent upon the consultation undertaken by the titleholder and included in the plan to form that understanding.

1. Regulation 8(1) provides that a titleholder commits an offence if the titleholder undertakes an activity after any significant new or significant increase in an environmental impact or risk 'arising from the activity'. The offence provision does not apply if a proposed revision for the environment plan in force has been submitted in accordance with reg 17(6) and NOPSEMA 'has not refused to accept the revision': reg 8(2).
2. Regulation 17(1) provides for the titleholder, with the Regulator's approval, to be able to submit a proposed revision of an environment plan 'before the commencement of a new activity'. Further, there is a requirement to submit a proposed revision of the environment plan 'before the commencement of any significant modification or new stage of the activity that is not provided for in the environment plan as currently in force': reg 17(5).
3. Regulation 17(6) provides as follows:

A titleholder must submit a proposed revision of the environment plan for an activity before, or as soon as practicable after:

(a) the occurrence of any significant new environmental impact or risk, or significant increase in an existing environmental impact or risk, not provided for in the environment plan in force for the activity; or

(b) the occurrence of a series of new environmental impacts or risks, or a series of increases in existing environmental impacts or risks, which, taken together, amount to the occurrence of:

(i) a significant new environmental impact or risk; or

(ii) a significant increase in an existing environmental impact or risk;

that is not provided for in the environment plan in force for the activity.

1. Further, a titleholder must submit to NOPSEMA a proposed revision of the environment plan for an activity if requested to do so: reg 18(1). There is a similar power in respect of any plan accepted by the 'Designated Authority' before a nominated date. It deals with the consequences of transition to NOPSEMA as the Regulator.
2. Significantly, a proposed revision must itself be the subject of consultation and assessment according to the criteria in reg 10(a): reg 21(1). Therefore, the provisions concerning revision contemplate a new consultation in compliance with reg 11A.
3. Three matters may be noted about these provisions that allow for revision of the environment plan. First, these powers appear to assume that all relevant environmental impacts and risks were identified at the time of the approval of the environment plan and the provisions about revisions are directed to instances where, after acceptance of an environment plan, it is necessary to deal with significant new or increased impacts or risks. Second, they trigger a new consultation. Third, there is no relief from the obligation to comply with the environment plan in force that arises from the submission of a revision: see reg 22.
4. NOPSEMA may withdraw the acceptance of an environment plan on various grounds, including that the titleholder has not complied with reg 7 (or as NOPSEMA has refused to accept a proposed revision of an environment plan): see reg 23. As has been noted, reg 7(1) provides that a titleholder must not undertake an activity in any way contrary to an environment plan or any limitation or condition applying to operations for the activity.
5. The Regulations contemplate ongoing consultation after the plan is accepted in accordance with an implementation strategy that is required to be contained in the environment plan: reg 14. However, there is no suggestion that the requirement for ongoing consultation qualifies the criteria for consultation before the environment plan is accepted. It is explicable on the basis that there is a need to continue consultation and address issues that may arise in the future. It is not expressed as a mechanism by which to redress failure to meet the criteria nor is it expressed in a way that indicates a deferral of some part of the statutory task to be discharged by NOPSEMA when forming the required state of reasonable satisfaction as to whether the environment plan as submitted meets the criteria in reg 10A, including the requirement to undertake the consultation provided for in reg 11A.

## The significance of the consultation

1. Significantly, the statutory process requires the titleholder to undertake the consultation and then to include in the environment plan material to show that the consultations have been carried out and the information garnered from those consultations as to environmental impacts and risks, as well as details of the measures that have been adopted because of the consultations and that the measures are 'appropriate'. NOPSEMA does not conduct the consultation. Rather, it depends upon the titleholder undertaking a consultation of the requisite kind and then including the outcomes and measures that have been adopted in the environment plan.
2. In consequence, the information obtained from the consultation that the titleholder is obliged to provide to NOPSEMA will '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, as expansively defined': *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193; (2022) 296 FCR 124 at [54] (Kenny and Mortimer JJ). Further, as stated by their Honours at [89], the purpose of the consultation:

… 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 stake 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.

1. Regard to the overall scheme of the Regulations as described above reveals that the effectiveness of the regulatory oversight established by the requirement for NOPSEMA to *accept* any environment plan before a regulated activity can be undertaken depends materially upon NOPSEMA having before it, at the time of its deliberation as to whether to accept the plan, the outcome of the consultation that the titleholder is required to undertake. A deficient consultation process will result in NOPSEMA being unable to make its own assessment as to whether the environment plan meets the other criteria for acceptance.

## The principles of statutory construction

1. The relevant principles were not in dispute. They were most recently stated by Kiefel CJ, Gageler, Gleeson and Jagot JJ in *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22 at [14]-[15] in terms which included the following propositions:
2. 'The general principles relating to the interpretation of primary legislation are equally applicable to the interpretation of subordinate legislation'.
3. The task of construing regulations involves attributing legal meaning to the legislative text, read in context: expounding the meaning of the text and not seeking 'to remedy perceived legislative inattention'.
4. 'A purposive approach to the interpretative task is required'.
5. 'Any meaning must be consist with the language in fact used' and the court 'may not rewrite legislation in the light of its purposes'.
6. Although the task of construction may involve recognising aspects of meaning that are implicit in the words used and may even extend to reading in additional words, it is always to be confined by text as the legislative command. There is a constitutional aspect to the requirement that the court adhere to established common law and statutory rules concerning the meaning to be given to the legislature's text. It is fundamental that the court does not begin by positing a possible purpose and then construing the text to conform to that purpose. It is not for the Court to determine for itself the policy to be given effect by legislation and thereby usurp the Parliamentary function. Rather, purpose must be discerned from the text as a whole and relevant contextual materials.
7. Finally, the constructional task does not involve singular focus upon particular words or phrases isolated from an understanding of their immediate and wider context. Legislative instruments speak as a whole. It is for that reason that I have undertaken a consideration of the scheme that is evident from regard to the whole of the language of the Regulations and the manner in which its provisions interconnect.

## Contextual materials

1. Ms Cooper and Woodside referred to an earlier version of regulations which provided for 'the operator of an activity to submit an environment plan for the activity' to the then regulator, namely *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) (**Former Regulations**). It was submitted for Woodside that it was appropriate to have regard to the explanatory statement for those regulations in order to understand their purpose. Reliance was placed upon the description in the explanatory statement of the Former Regulations as providing for an 'objective based regime for the management of environmental performance' with the following objectives:

- encouraging industry to continuously improve its environmental performance;

- to adopt best practice to achieve agreed environment protection standards in industry operations; and

- to ensure operations are carried out in a way that is consistent with the principles of ecologically sustainable development.

1. The explanatory statement referred to the requirement that the operator submit an environment plan before commencing any activity as a 'key feature' of the scheme. Reliance was placed upon references in the statement to the significance of the 'implementation strategy' that was to be included in the plan. For example, the explanatory statement said:

The implementation strategy will identify specific systems, practices and procedures to be used to ensure that the environmental effects and risks of the activity are kept as low as reasonably practicable, and that the environment performance objectives and standards in the environment plan are met. The implementation strategy will also: establish clear chains of command; provide for the monitoring, auditing and review of environmental performance, including the monitoring of emissions and discharges; and provide for the maintenance of an up-to-date emergency response manual, including an oil spill contingency plan.

1. The submission characterised the role of the plan as the basis for ongoing supervision and audits.
2. The explanatory statement did not focus upon consultation. It did state that: 'Provisions for appropriate community consultation in the development and assessment of proposals would be included'. As explained below, it was changes to the Regulations in 2019 that introduced the current provisions in relation to consultation.
3. Notably, the criteria to be applied under the Former Regulations by the then regulator in determining whether to accept the plan did not include any provision as to whether there had been adequate consultation. However, the Former Regulations did include provisions for resubmission of the environment plan of the kind that are now to be found in the Regulations. It included a provision whereby the then regulator, despite still not being reasonably satisfied that the plan meets the criteria, may:

(a) accept the plan in part for a particular stage of the activity;

(b) impose limitations or conditions applying to operations for the activity.

1. As the criteria did not include any requirement to consult, it is clear that the reference to 'operations for the activity' that might be the subject of limitations or conditions was concerned with actual operations for the activity the subject of the plan that were to be undertaken by the operator. At least in that context, it was concerned with those operations which were functionally connected to undertaking the offshore activity.
2. As to consultation, there was a general requirement that the environment plan must contain 'a report on all consultations between the operator and relevant authorities, interested persons and organisations in the course of developing the environment plan'.
3. Thereafter, the Regulations were enacted in 2009.
4. The Regulations were amended in 2011 by the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment Regulations 2011 (No 1)* (Cth). Those regulations introduced the current consultation provisions.
5. The amendment to introduce reg 11A was explained in the following terms:

Regulation 11A requires an operator to consult with a range of Commonwealth, State or Northern Territory Departments and agencies to which the activities to be carried out under the environment plan, or revision of the environment plan, may be relevant. Also to be consulted are persons or organisations whose functions, interests or activities may be affected by the activities. In addition, the operator is required to consult the Department of the responsible State Minister or responsible Northern Territory Minister, as applicable, and any other person or organisation that the operator considers relevant. 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 amendment to reg 16] replaces the existing reporting requirement in paragraph 16(b) in relation to consultations with an expanded version that clarifies the role and purpose of the consultation requirements in new regulation 11A. 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 a titleholder under the OPGGS Act.

1. It can be seen that the purpose of the new consultation requirement was expressed in terms that indicated that the report as to the consultation was to be used to assess whether the measures adopted or proposed to be adopted by the titleholder are appropriate.
2. In 2019, amendments were made 'to implement the outcomes of a review of consultation and transparency requirements for offshore petroleum and greenhouse gas activities': explanatory statement for *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Consultation and Transparency) Regulations 2019* (Cth). Those amendments introduced the additional requirement for public comment in the case of a 'seismic or exploratory drilling environment plan'. The explanatory memorandum stated that the introduction of a public comment period was 'in addition to the ongoing requirement for consultation with relevant persons during development of an environment plan'. It describes the existing process in the following terms:

The Environment Regulations already include a formal process for consultation with 'relevant persons' (persons or organisations whose functions, interests or activities may be affected by the activities to be carried out under an environment plan) *during development of the plan*.

(emphasis added)

1. The amendments made at that time included an amendment to the heading to Division 2.2A (which contains reg 11A concerning consultation). The reason for the amendment was explained in the following terms:

This item amends the heading to Division 2.2A of the Principal Regulations *to reflect that the requirement for consultation with relevant person in Division 2.2A applies during preparation of an environment plan, prior to submission to the Regulator*. This is to clearly differentiate Division 2.2A from requirements for public comment on a submitted seismic or exploratory drilling environment plan in new Div 2.2B, inserted by item 14.

(emphasis added)

## Issue 1: Whether NOPSEMA had statutory power to make the decision to accept the environment plan where it was not reasonably satisfied that the consultation required by reg 11A had been carried out?

1. As was explained in *Tipakalippa*, the nature of the regulatory scheme is such that NOPSEMA is materially dependent upon the consultation undertaken by the titleholder in order to identify all environmental impacts and risks. The fundamental importance of the consultation is reflected in the requirement for the inclusion of the report as to the consultation in the environment plan that is submitted for acceptance by NOPSEMA. The separate opportunity in the case of a seismic or exploratory drilling plan for public submission is addressing a different concern. Further, that separate requirement does not apply to all activities and there is no basis for a different approach as to the significance of the consultation criteria in the case of seismic or exploratory drilling compared to other activities. Only upon completion of the consultation as required by criteria in reg 10A(g) and the provision of a report of that complete consultation does NOPSEMA have the foundation to evaluate whether the other criteria have been met. Regard to the other criteria in reg 10A reveals that, amongst other things, they require an understanding of the environmental impacts and risks in order to apply them. Those impacts and risks must be demonstrated to be as low as reasonably practicable and of an acceptable level. In addition, there must be appropriate environmental performance outcomes, environmental performance standards and measurement criteria. An evaluative judgment could not be formed as to those matters without knowing the environmental impacts and risks. Likewise, whether the implementation strategy and monitoring, recording and reporting arrangements are appropriate.
2. Although the Regulations have their origin in a simpler scheme in which completion of consultation was not part of the criteria that had to be met, a change was made to require that to occur before the environment plan was submitted to NOPSEMA. Further, the 'objective based' framework for the Former Regulations which may be seen to be maintained in the Regulations still requires the regulator to have a foundation for being able to undertake the assessment whether to accept the plan. The evident purpose of the introduction of the provisions for detailed consultation and the preparation of the report of that consultation (to be included in the plan) is to ensure that the titleholder provides to NOPSEMA the relevant information about the environmental impacts and risks.
3. There is further support for the conclusion that the scheme contemplates that the consultation will be completed before any consideration by NOPSEMA as to whether to accept the environment plan. Regulation 10A(g) requires that the titleholder demonstrates that it 'has carried out' the required consultations. This is also the way in which the scheme in relation to consultation was described in the explanatory statement for the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Amendment (Consultation and Transparency) Regulations 2019* (Cth). The consultation is to be completed before the plan is submitted (or in the language of reg 11A, in the course of preparing an environment plan) in order that the contents of the plan may be informed by the consultation.
4. Much was made by Woodside of the aspects of the regulatory scheme that provide for consultation after an environment plan has been accepted by NOPSEMA irrespective of whether there may be conditions to that effect. Reference has already been made to the implementation plan. The submissions for Woodside also referred to the extent of the powers available to NOPSEMA by way of ongoing oversight. However, these aspects of the scheme are explained by the need to have a mechanism by which to deal with future developments as they unfold and ensure that the objectives of the plan are met. The activities are closely regulated by the detailed scheme for preparation and acceptance of an environment plan before any activity may be undertaken. Consistently with that detail it may be expected that there are provisions that deal with matters in an ongoing way. It is not an indicator that NOPSEMA has power to defer that assessment.
5. As has been explained, if there were significant new or increased environmental impacts or risks then there was a requirement for a revision to the environment plan and a new consultation. This reflects the important role of the consultation to be conducted by the titleholder and then made the subject of a report to which regard may be had by the regulator in determining whether to accept the revision. It is a requirement that is inconsistent with any notion that those aspects of the scheme that require ongoing consultation can fulfil that role as providing foundational material for NOPSEMA to undertake the required evaluative judgment as to whether it is reasonably satisfied that the environment plan meets the criteria.
6. The above aspects of context must be brought to bear in considering whether the language of reg 10(6) concerning limitations or conditions 'applying to operations for the activity' was intended to include a condition that concerned subsequent completion of the consultation.
7. Three main reasons stand against such a construction. First, the fact that there are qualifying words. If indeed it was intended, as was contended for NOPSEMA, that the implied requirement for reasonableness as to any conditions was the extent of qualification to the power to accept the plan with limitations or conditions then there would have been no need for the additional words. The appropriate way of expressing that intention would be to simply provide that NOPSEMA could accept the plan subject to limitations or conditions. Provisions of that kind are commonplace. They are construed to mean that the conditions must be reasonable and be relevant to the subject matter of the regulation. However, that is not the form of the provision in the present case. The addition of the words 'applying to operations for the activity' suggests that some form of limitation was contemplated.
8. Second, the words used are not apt to include a process of consultation that does not form part of the 'operations for the activity'. The activity is the seismic survey. The term 'operations' is one of considerable semantic breadth. However, it must take its meaning from that to which it refers, namely operations for an activity (being operations or works in an offshore area undertaken to exercise a right or discharge an obligation of a titleholder). They are directed to what is needed functionally or operatively to undertake those offshore operations and works. It may be accepted that the operations for such activities include that which must be done by way of preparation. However, the consultations that must be undertaken and included in a report as part of an environment plan that must be accepted by a regulator are not part of those functional activities. They are not part of the acts, process or method required to undertake the offshore operations or works. The language of operations for an activity direct attention to what is needed for the activity irrespective of what may be required by way of compliance with the Regulations themselves.
9. Further, other aspects of the Regulations indicate that the terminology 'operations for the activity' is used in the sense just described. As has been mentioned, reg 13(1) requires the environment plan to specify an outline of the operational details of the activities. Expression of the requirement in those terms is instructive. It is using the term 'operational details' to describe what must be described in the plan. It is indicating those things that are to be done in carrying out the activity to which the plan relates (not the requirements of the Regulations themselves, such as consultation). Regulation reg 13(6) requires the environment plan to evaluate environmental risks and assessments arising from 'all operations of the activity'. Whilst operations *for* the activity may be accepted to be broader than operations *of* the activity and encompass matters that are operationally preparative, the notion of operations may be expected to be the same in each case and reflect the usage of operational in reg 13(1). Further, the provision as to limitations or conditions has its origins in the terms of the Former Regulations. Those regulations did not have a criteria that was concerned with consultation. They operated with respect to operations in the sense which I have explained.
10. Third, there is the matter of the evident purpose of the consultation as providing the foundation upon which NOPSEMA is to form the required evaluative judgment (as described above).
11. There is a further difficulty posed by the construction advanced by NOPSEMA and Woodside. It is exposed by the terms in which the conditions in the present case operate. They delegate part of NOPSEMA's statutory task to Woodside. They require further consultation and then state that if at any time prior to the activity (they also refer to during the activity) new cultural features or heritage values are identified that are not described in the environment plan then Woodside must:

a) Ensure the environmental impacts and risks of the activity continue to be managed to as low as reasonably practicable and an acceptable level.

b) Notify NOPSEMA in writing within 7 days of these cultural features and/or heritage values of places and the potential environmental impacts and risks.

1. There is a further requirement that Woodside confirm the control measures that have been adopted 'to ensure that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable and an acceptable level'.
2. In consequence, instead of NOPSEMA being told of the relevant aspect of the environment that may be the subject of impacts or risks in the report of the consultation included in the environment plan submitted for its acceptance and then forming an evaluative judgment as to whether the criteria are met, Woodside is entrusted with undertaking that evaluation and reporting what it has done to NOPSEMA. The only way of avoiding that form of condition would be for the condition, in effect, to require the consultation to be undertaken and then reported by way of amendment to the report of the consultation. A condition of that kind would be the same as requiring Woodside to resubmit the environment plan.
3. For those reasons, Issue 1 should be determined in favour of Ms Cooper and Ground 1 of the application must be held unless there is some discretionary reason to refuse relief.

## Issue 2: Whether, it would be open, as a matter of law, to refuse the relief sought on any discretionary basis identified by Woodside?

1. Woodside identified only one matter that it said would be a discretionary reason for refusing relief if established as a matter of fact. It was expressed in the following way in its concise statement in response:

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.

1. Though expressed as a possibility both as to whether it might be raised and as to whether there was any such failure, at the hearing of the preliminary issues Woodside made clear that the matters that it said went to discretion were alleged delay by Ms Cooper in providing to Woodside all of the information about the effects of the activity the subject of the environment plan on her functions, interests or activities. In other words, alleged delay by Ms Cooper in taking steps that would allow Woodside to meet the requirements of the condition.
2. As a matter of fact those allegations were refuted by Ms Cooper. However, in order to deal with Issue 2 it must be assumed that they have been established.
3. In support of its contentions as to Issue 2, Woodside made reference to authorities concerned with the extent to which a finding of jurisdictional error as to an administrative decision might have consequences for the validity or operative effect of the decision. However, we are not here concerned with the type of instance where legislation may provide for a decision to have operative effect despite some particular failure to comply with a statutory requirement or an instance where the legislation may provide that a decision takes effect unless or until set aside.
4. There is an example of such a provision in reg 10(7) of the Regulations which provides: '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)'. There is no such provision in relation to a decision to accept an environment plan on conditions.
5. It was not suggested that the consequence of upholding Ground 1 would be anything other than a lack of authority for the making of the decision by NOPSEMA to accept the environment plan in the present case. Rather, it was said that both under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)and in a case where the jurisdiction of the Court under s 39B of the *Judiciary Act 1903* (Cth) was being exercised (being the alternative basis upon which Ms Cooper put her claim), the Court had a discretion whether to grant relief. So much may be accepted: *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; (2007) 147 CLR 297 at [28] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); and *Lamb v Moss & Brown* (1983) 76 FLR 296 at 312‑313 (Bowen CJ, Sheppard and Fitzgerald JJ); approved by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 338‑339.
6. This is not a case where it is said that the relief would lack utility or the issue has been overtaken by events. Nor is it a case where it is said that there has been unwarranted delay in seeking relief. Nor is it said that there has been some form of acquiescence. Nor that there is some more appropriate form of remedy. Examples of the circumstances that may give rise to the discretion were listed in *Bechara v Bates* [2021] FCAFC 34; (2021) 286 FCR 166 at [164] (Allsop CJ, Markovic and Colvin JJ). They do not include a delay which is said to have the consequence that a party has been unable to satisfy the condition of an invalid exercise of statutory power.
7. I am not persuaded that the matters relied upon by Woodside, if established, would provide a basis as a matter of law for the Court to exercise its discretion to refuse the relief sought consequent upon the finding that Issue 1 should be determined in favour of Ms Cooper.
8. On the contrary, the present is a case of excess of authority of a kind which would ordinarily result in relief.

## Issue 3: Whether Ms Cooper has standing to seek relief in relation to Ground 2 of her application?

1. Woodside contended that Ms Cooper did not have standing to seek injunctive relief in relation to Ground 2. The application the subject of Ground 2, though initially addressed to both NOPSEMA and Woodside was amended to be expressed as a claim that Woodside had breached certain aspects of the conditions insofar as they concerned consultation with Ms Cooper. It was tolerably clear that what was sought was an injunction against Woodside. Relief was not sought against NOPSEMA based upon Ground 2 as amended.
2. Woodside pointed to a number of reasons why Ms Cooper was said to lack standing. One of those was the existence of NOPSEMA as a regulator with authority to bring action for any failure to conform to the conditions, including proceedings for an offence.
3. Ms Cooper pointed to her particular interest as a person who was required to be consulted. Although Woodside submitted that she was not identified by name in the conditions, she was plainly one of the persons the subject of the conditions and Woodside has been dealing with Ms Cooper on that basis. That may be thought to be enough to establish standing. However, given the conclusion that I have reached as to Issues 1 and 2, it is not necessary to determine the question of standing. As the proceedings are urgent and the question is a legal one, I do not propose to delay the publication of these reasons in order to resolve the point.

## Orders

1. For the reasons that have been given, Issues 1 and 2 are determined favourably to Ms Cooper. It follows that she is entitled to the declaratory relief that she seeks and an order setting aside the decision to accept the environment plan subject to conditions.
2. Ms Cooper also sought costs. NOPSEMA only participated in the proceedings to make limited submissions as to the question of construction in accordance with established principles as to the role of a decision maker in cases like the present. In those circumstances, as submitted by NOPSEMA, there should be no order as to its costs. Otherwise, as Ms Cooper has been successful against Woodside, as matters presently appear, costs should follow the event. I will make an order to that effect reserving liberty to Woodside to apply to vary the costs order. I will also reserve liberty to the applicant to seek further orders by way of relief if she contends that further relief is appropriate. If either liberty is exercised I will make further directions for the determination of any further matter that arises.

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| I certify that the preceding eighty-six (86) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 28 September 2023