FEDERAL COURT OF AUSTRALIA

Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 7) [2020] FCA 572

|  |  |
| --- | --- |
| File number: | WAD 341 of 2017 |
|  |  |
| Judge: | **MCKERRACHER J** |
|  |  |
| Date of judgment: | 30 April 2020 |
|  |  |
| Catchwords: | **NATIVE TITLE** – appointment of special administrator to aboriginal corporation under s 487-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) – application of administration provisions in Part 5.3A of the *Corporations Act 2001* (Cth) to an aboriginal corporation under ss 499-10 and 521-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)**CORPORATIONS** – interpretation of s 440D of the *Corporations Act 2001* (Cth) – whether cross-claims constitute separate proceedings ‘against a company’ or part of the principal proceeding – where cross-claims are defensive in nature **CORPORATIONS** – interpretation of s 440D of the *Corporations Act 2001* (Cth) – whether an administrator’s consent to the continuation of proceedings under s 440D(1)(a) can be withdrawn – where special administrator validly gave consent under s 440D(1)(a) – where special administrator purported to subsequently withdraw consent thereby reimposing a stay of proceedings**CORPORATIONS** – application under s 440D(1)(b) for leave to continue with proceedings against an aboriginal corporation under special administration – consideration of relevant factors for a grant of leave in *Re Senvion GmbH (No 2)* [2019] FCA 1732 **PRACTICE AND PROCEDURE** – application for a stay of proceedings – power of court to order a stay under ss 23 and 37M of the *Federal Court of Australia Act 1976* (Cth) – interests of justice – overarching purpose and case management objectives |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 439C, 440A, 440D, 440D(1), 440D(1)(a), 440D(1)(b), 440E, 442A, 471B, Divs 6, 7, 8, 9, Pt 5.3A*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ss 487-1, 499-10, 499-10(3), 521-1, 521-1(2)(a)*Federal Court of Australia Act 1976* (Cth) ss 4, 23, 37M, 37M(1)(b), 37M(2)(a), 37M(2)(b)*Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (Cth) reg 49, Sch 4 cl 1*Federal Court Rules 2011* (Cth) rr 15.09(1), 35.41*Property Law Act 1969* (WA) ss 11, 11(2) |
|  |  |
| Cases cited: | *BBC Hardware Ltd v GT Homes Pty Ltd*[1997] 2 Qd R 123*Bella Products Pty Ltd v Creative Designs International Ltd* [2009] FCA 868*Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 4)* [2019] FCA 1275*Creenaune v Work Cover Queensland* [2018] QDC 51*Foxcroft v Ink Group Pty Ltd* (1994) 12 ACLC 1063*Grassby v The Queen* (1989) 168 CLR 1*Jackson v Sterling Industries Ltd* (1987) 162 CLR 612*In the matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed) No 2* [2012] FCA 789*Matrix Group Ltd (in liq) v Oates (No 4)* [2018] FCA 22*Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 260*MG Corrosion Consultants Pty Ltd v Gilmour* [2012] FCA 383*Puttick v Tenon Ltd* (2008) 238 CLR 265*Pybar Mining Services Pty Ltd v Challenger Gold Operations Pty Ltd* [2018] SASC 156*Scharer v Giro Construction Group Pty Ltd (in liq)* [2017] NSWSC 1568*Re Senvion GmbH (No 2)* [2019] FCA 1732*Smart Company Pty Ltd (in liq) v Clipsal Australia Pty Ltd (No 6)* [2011] FCA 419*UBS AG v Tyne* (2018) 265 CLR 77*Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396*Wallera Pty Ltd v CGM Investments Pty Ltd* [2003] FCAFC 279 |
|  |  |
| Date of hearing: | 12 March 2020 and determined on the papers |
|  |  |
| Date of last written submissions: | 27 March 2020 |
|  |  |
| Registry: | Western Australia |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Native Title |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 108 |
|  |  |
| Counsel for the Buurabalayji Thalanyji Aboriginal Corporation (RNTBC): | Mr ML Bennett with Mr MJ Pullen |
|  |  |
| Solicitor for the Buurabalayji Thalanyji Aboriginal Corporation (RNTBC): | Bennett + Co |
|  |  |
| Counsel for Onslow Salt Pty Ltd (ACN 050 159 558): | Mr SK Dharmananda SC with Mr JL Southalan |
|  |  |
| Solicitor for Onslow Salt Pty Ltd (ACN 050 159 558): | Gilbert + Tobin |
|  |  |
| Counsel for the State of Western Australia: | Mr K Pettit SC with Mr E Fearis |
|  |  |
| Solicitor for State of Western Australia: | State Solicitor’s Office |
|  |  |
| Counsel for Chevron Australia Pty Ltd (ABN 29 086 197 757): | Ms PA Honey |
|  |  |
| Solicitor for Chevron Australia Pty Ltd (ABN 29 086 197 757) | Norton Rose Fulbright Australia |

ORDERS

|  |  |
| --- | --- |
|  | WAD 341 of 2017 |
|   |
| BETWEEN: | BUURABALAYJI THALANYJI ABORIGINAL CORPORATION (RNTBC)Applicant |
| AND: | ONSLOW SALT PTY LTD (ACN 050 159 558) First RespondentSTATE OF WESTERN AUSTRALIASecond Respondent |
| BETWEEN: | ONSLOW SALT PTY LTD (ACN 050 159 558)First Cross‑Claimant |
| AND: | CHEVRON AUSTRALIA PTY LTD (ABN 29 086 197 757)First Cross‑Respondent |
| BETWEEN: | CHEVRON AUSTRALIA PTY LTD (ABN 29 086 197 757)Second Cross‑Claimant |
| AND: | BUURABALAYJI THALANYJI ABORIGINAL CORPORATIONSecond Cross‑Respondent |
| BETWEEN: | STATE OF WESTERN AUSTRALIAThird Cross‑Claimant |
| AND: | BUURABALAYJI THALANYJI ABORIGINAL CORPORATION (RNTBC)Third Cross‑Respondent |
| BETWEEN: | ONSLOW SALT PTY LTD (ACN 050 159 558)Fourth Cross‑Claimant |
| AND: | BUURABALAYJI THALANYJI ABORIGINAL CORPORATION (RNTBC)Fourth Cross‑Respondent |

|  |  |
| --- | --- |
| JUDGE: | MCKERRACHER J |
| DATE OF ORDER: | 30 APRIL 2020 |

THE COURT ORDERS THAT:

1. The Buurabalayji Thalanyji Aboriginal Corporation’s application for a stay of proceedings be dismissed.
2. Leave is granted for the proceedings to continue pursuant to s 440D(1)(b) of the *Corporations Act 2001* (Cth).
3. Within 14 days of the date of these orders, the parties are to provide the Court with their available dates for a five day hearing of the cross-claims for the months of September to November 2020.
4. The matter be listed for a case management hearing by telephone on a date to be advised by the Court, but not before Thursday, 14 May 2020**.**
5. Costs of the applications be reserved.

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

REASONS FOR JUDGMENT

MCKERRACHER J:

# APPOINTMENT OF A SPECIAL ADMINISTRATOR

1. These reasons address several questions that have arisen following the appointment of a **Special Administrator** to the Buurabalayji Thalanyji Aboriginal Corporation (RNTBC) (**BTAC**) and the actions of the Special Administrator in relation to the present litigation.
2. The first is whether in the circumstances of this litigation, the Special Administrator of BTAC (which is the applicant and the second, third and fourth cross-respondent), may withdraw consent he has previously given for proceedings against BTAC to continue. The issue turns on the construction of s 440D of the *Corporations Act 2001* (Cth) (the **CA**), which has force in this context by virtue of s 499-10 and s 521-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the **CATSI Act**). The first respondent/first and fourth cross-claimant (**Onslow Salt** Pty Ltd) and the second respondent/third cross-claimant (the **State** of Western Australia), contend that the consent, once given, cannot be withdrawn. BTAC disagrees. In any event, as a second issue, BTAC applies for a stay of the litigation during the appointment of the Special Administrator. Thirdly, Onslow Salt, the State and the second cross-claimant/first cross-respondent (**Chevron** Australia Pty Ltd), seek leave to continue with their cross-claims pursuant to s 440D(1)(b) of the CA. The statutory question concerning withdrawal of consent is novel. The stay and leave questions require the Court to exercise its discretion in light of recognised principles.

# BACKGROUND

1. On 10 January 2020, a delegate of the Registrar of Aboriginal and Torres Strait Islander Corporations determined under s 487-1 of the CATSI Act that BTAC was to be under special administration from 12.01 am AWST on 13 January 2020 until 11.59 pm AWST on 17 July 2020. Mr Saunders was appointed as Special Administrator.
2. Pursuant to s 499-10 of the CATSI Act, the following relevant provisions of the CA, with necessary amendments, apply to BTAC now that it is under special administration:
	1. Div 6 of Pt 5.3A (other than s 440A);
	2. Div 7 of Pt 5.3A;
	3. Div 8 of Pt 5.3A (other than s 442A); and
	4. Div 9 of Pt 5.3A;

(Section 440D is within Div 6 of Pt 5.3A of the CA.)

1. Pursuant to s 440D(1), proceedings against BTAC cannot continue ‘during administration’, except with the written consent of the Special Administrator or by leave of the Court. By letter to the Court dated 14 January 2020, the Special Administrator, via BTAC’s solicitors, informed the Court and the parties that he ‘consented to the continuation of these proceedings’ (the **consent**).
2. However, by letter of 4 February 2020, the Special Administrator, via BTAC’s solicitors, purported to withdraw his consent to the continuation of cross-claims against BTAC (the **consent withdrawal**). For the history of the cross-claims, reference should be made to one of my previous judgments in *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 4)* [2019] FCA 1275 (***BTAC No 4***).

# THE STATUTE

1. Section 440D and s 440E of the CA provide:

**440D Stay of proceedings**

(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

(a) with the administrator’s written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

(2) Subsection (1) does not apply to:

(a) a criminal proceeding; or

(b) a prescribed proceeding.

**440E Administrator not liable in damages for refusing consent**

A company’s administrator is not liable to an action or other proceeding for damages in respect of a refusal to give an approval or consent for the purposes of this Division.

# ISSUES

1. The first question is whether so much of the cross-claims that amount to defences to the principal proceedings fall within s 440D(1)(a) of the CA, that is, whether the cross-claims constitute a ‘proceeding against [BTAC] for the purposes of s 440D’ or whether to the contrary, the cross-claims are merely part of BTAC’s proceeding against Onslow Salt and the State. The second question is whether having given consent, the Special Administrator is legally empowered to withdraw that consent. Thirdly, a question arises as to whether the Court should grant leave under s 440D(1)(b) for the cross-claims to proceed. Fourthly, and concurrently with the third question, there is a question as to whether the proceedings should be stayed on BTAC’s application. Fifthly, there is an overall issue relating to timing of the proceedings.
2. It has been difficult to arrange dates on which the preliminary questions raised by the cross-claims could be listed in order to accommodate the parties and their preferred counsel. That difficulty is likely to continue and at present, the special administration is scheduled to conclude on 17 July 2020. It is now improbable given the Coronavirus outbreak and the nature of the issues likely to arise and also public interest, that the cross-claims could be listed before that date. To the extent that the questions raised in these issues involve the exercise of discretion, the possible timing of such a listing is clearly an important pragmatic factor.

# EVIDENCE

1. In support of Onslow Salt’s contentions that the consent cannot be withdrawn, and in support of its application for leave to continue with the proceeding, reliance is placed upon an affidavit of Mr O’Leary, Onslow Salt’s solicitor, affirmed on 3 March 2020. It outlines some of the history, explaining the source of Onslow Salt’s concern about the withdrawal of consent. Discovery orders were made on 4 December 2019, with discovery to be given by 5 February 2020. In the meantime, the notice was received advising that a special administrator had been appointed to BTAC and that he consented to the continuation of the proceedings. On receipt of the consent, Onslow Salt’s solicitors continued with discovery. In between the consent and the consent withdrawal, costs incurred by Onslow Salt were some $76,000. A war of words then ensued between the protagonists. Onslow Salt challenges the withdrawal of consent.
2. Mr O’Leary also annexes a Newsletter distributed by the Special Administrator shortly after he assumed control of BTAC in which he explained that an examination of its records revealed that the directors of BTAC had ‘displayed a poor standard of corporate governance’. The Special Administrator advised that he had been appointed to replace the BTAC Board of Directors and that all BTAC’s normal business and activities would continue. He drew attention to the fact that the balance sheets showed that BTAC owed a lot more money than it had available to repay, with loans at 31 December 2019 being $12 million, with cash in the bank of only $43,272 and the income statement revealing that expenditure was ‘far in excess of what [he] consider[s] reasonable in many areas over the last two and a half years’. Examples included:
* Legal fees $3.3 million
* accommodation and meals $1.2 million
* travel $1 million
* consultants $750,000
* member welfare $600,000
* security $550,000
* accountancy $513,000 (in addition to in-house finance staff).
1. BTAC relies upon evidence from the Special Administrator who swore an affidavit on 10 March 2020 in which he confirmed his appointment on 13 January 2020 and the reasons for it as set out in the newsletter. Reference was made to theOffice of the Registrar of Indigenous Corporations(**ORIC**) and its published **Policy Statement** ‘PS-20: Special Administrations’ which provides guidance on the special administrations of CATSI bodies, the ‘role and powers of the special administrator’ and ‘stages in a special administration’.
2. The Special Administrator explains that on 14 January 2020, being the second day after the commencement of the special administration, he instructed BTAC’s solicitors to inform the Court and the other parties that he provided his consent for the proceedings to continue. At that point in time, his intention was to maintain ‘business as usual’ for BTAC as far as possible until he had such opportunity as was necessary to conduct further examinations. He considered that maintaining business as usual meant continuing the ongoing proceedings. Onslow Salt takes objection to this statement as being assertion. I treat it only as an explanation of his understanding of his role.
3. The Special Administrator points to para 12A of the Policy Statement dealing with the first stage of special administration. That is, taking control of the corporation and assessing its ongoing potential and, in particular, to para 12.4 of the Policy Statement requiring that the Special Administrator hold a meeting with BTAC members and other interested parties during the first two to three weeks of appointment to explain the special administration process and to pass on information about the progress of the special administration and determine the members’ interest in the continuing operation of the corporation. Consistent with those requirements, he convened a general meeting of BTAC which was held on 31 January 2020.
4. The Special Administrator then gives evidence of matters occurring in a settlement negotiation meeting with a representative of one of the cross-claimants on 22 January 2020. The content of this meeting is privileged in my view and save for the fact that some parties were embarking upon settlement discussions, I do not propose to go any further into the content of the affidavit as to topics discussed or the reasons for them. I can receive only the evidence that such discussions were ensuing and I infer that they may have had a bearing on what was clearly a change of mind on the part of the Special Administrator as to the continuation of the proceedings.
5. An important part of the Special Administrator’s affidavit is his observation that if the proceedings are ordered to continue and are not stayed, based on his position as Special Administrator and the sole director of BTAC and the information and knowledge he possesses he believes that:
	1. the work involved in preparing for the hearing of the cross-claims will inevitably and significantly interfere with, and detract from, other functions he is required to perform as BTAC’s Special Administrator, noting that his role as such is almost a fulltime position. That could have a detrimental impact on the progress of the special administration and could conceivably cause the end of the special administration to be delayed;
	2. BTAC will be required to dispose of assets at distressed values in order to fund the litigation; and
	3. expenditure and legal costs will detract from funds that he would otherwise have available to improve the short term financial health of BTAC in order to hand the corporation back to its members and a new board.
6. The following two paragraphs of his affidavit are the subject of further objection and I will receive them only as a submission made for BTAC:

35 An approach to settle this complex and long running case at an appropriate amount for the members may therefore be a good outcome for BTAC. Any settlement offer will need to be approved by members of BTAC as it relates to native title land. It is my view that it is prudent to stay the proceedings whilst settlement is considered.

36 It is therefore my belief, based on the matters stated above, that it is in BTAC's best interests, and the best interests of its members and the Thalanyji people, to stay the proceedings and enable the settlement negotiations that I have referred to in this affidavit to continue and be concluded without BTAC incurring the significant legal costs that will arise from preparing for the hearing of the cross-claims.

1. I can accept that there will be considerable preparation for the cross-claims, if they are to proceed. I can also accept that staying the cross-claims, as BTAC seeks, would avoid incurring that cost. There are, however, other issues to consider, not least of which is that BTAC has commenced this complex and expensive litigation and the cross-claims over which they now seek a stay address critical preliminary issues that I have directed must be determined before the litigation is taken further: *BTAC No 4* (at [68] and generally). This is because the cross-claims go to the question of whether the terms of a deed entered into by BTAC operate as a bar from it even commencing the litigation in the first place. That is the essential substance of the cross-claims which, in my view, are clearly defensive in nature. That proposition can be tested very simply by recognition that there would be no prospect of the cross-claims ever having been brought, had BTAC’s substantive claim not been commenced.
2. The statutory questions are interesting, but, for reasons indicated at the outset, may be somewhat academic. No party is ready to proceed with the cross-claims in accordance with the original timetable due to the delay in the discovery process and the need to suspend directions so that the present issues could be dealt with. If the cross-claims do proceed, it will in all probability be outside the present period of the special administration. Nonetheless, for reasons set out below, I am of the view in exercising my discretion, that the cross-claims should proceed and they should not be stayed. Further I also consider that the Special Administrator was not empowered to withdraw his consent once given to the continuation of proceedings.

# THE STATUTORY QUESTIONS

## Are the cross-claims ‘a proceeding’ for the purpose of s 440D?

1. I should refer first to a preliminary argument raised by the State that s 440D has no application, such that there is no automatic statutory stay.
2. The object of s 440D(1) of the CA is to stay proceedings against a corporation for so long as is required to assess the prospect of the corporation continuing to trade. Section 440D allows time for an administrator in that regard. It has no relevance to claims by the corporation against others. Accordingly, s 440D(1) has nothing to do with and does not prevent a defence being raised by another party to a corporation’s proceeding against that other party. Section 440D is not to be interpreted in a way which would give such a procedural advantage to a company in administration.
3. Section 440D has no engagement with the principal proceeding by BTAC or, the State says, with the defences raised by the State and Onslow Salt to that principal proceeding. A preliminary question is whether the cross-claims fall into the same category as those defences or if they should be regarded as being in the category of separate proceedings against BTAC. This is important because if these particular cross-claims are to be regarded as being in the same category as defences, then the Special Administrator’s consent was not valid in the first place. Although the term ‘proceeding’ is not relevantly defined in the CA, it is defined in s 4 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**) to mean:

a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal.

As noted in ***MG Corrosion*** *Consultants Pty Ltd v Gilmour* [2012] FCA 383 per Barker J (at [6]), there is nothing in the context of the CA to suggest that the broad and ordinary meaning given in the FCA should not apply for the purposes of s 440D.

1. Rule 15.09(1) of the *Federal Court Rules 2011* (Cth) (the **FCR**) assumes that cross-claims are part of the ‘proceeding’, that is, the ‘proceeding’ in respect of which the default position is for a single hearing. ‘Principal proceeding’ is defined in the FCR as a ‘proceeding in which a cross-claim is made’. The State argues that BTAC’s principal proceedings, plus the cross-claims, together comprise a ‘proceeding’ for the purpose of s 440D and it follows that s 440D cannot operate to stay the cross-claims.
2. The State seeks to further support its argument by reference to two State Supreme Court decisions which considered the application of s 440D to discrete aspects of proceedings: ***Scharer*** *v Giro Construction Group Pty Ltd (in liq)* [2017] NSWSC 1568; ***Pybar*** *Mining Services Pty Ltd v Challenger Gold Operations Pty Ltd* [2018] SASC 156. In both cases, the courts noted a lack of settled authority on what constitutes a ‘proceeding’ for the purposes of s 440D (*Scharer* (at [36]-[39] and [59], *Pybar* (at [21]). In *Scharer*, the Supreme Court of New South Wales considered, on appeal, whether consent given by the administrator to the determination of a preliminary standing issue was valid where the consent did not allow for a costs application by the applicants if the administrator was unsuccessful. Walton J held that this ‘qualified consent’ as to costs was invalid because ‘it was not open to the administrator to selectively consent to the continuation of part of the proceedings’ and that s 440D should not be interpreted so as to give a procedural advantage to a company in administration (at [60]). In *Pybar*, a cross-claim brought by a company in administration was stayed under s 440D and the cross-respondent sought leave under s 440D(1)(b) to continue with an interlocutory application to strike out the cross-claim. Although leave was refused, Doyle J’s reasoning (at [20]-[25]) suggests that ‘defensive proceedings’ should be considered as a ‘defensive step within the proceedings’.
3. In the context of s 471B of the CA, which is similar to s 440D, but applicable in the context of winding up in insolvency or by the Court, leave is not required where ‘defensive proceedings’ are concerned: see, for example, *Matrix Group Ltd (in liq) v Oates (No 4)* [2018] FCA 22 per Gleeson J (at [69]-[70]):

***Defensive proceedings?***

69 The concept of “defensive proceedings” appears to have its origins in the following passage from the decision of Lord Davey in *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141 at 141:

It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in the action to obtain leave for any defensive proceeding on their part. The liquidator was either party or privy to the proceedings in the Court of Appeal, and the respondents, having been successful in that appeal, cannot now object to the appellants defending themselves against the consequences of the judgment by the ordinary means of an appeal to this House.

70 The concept was also invoked by Anderson J in *BPM Pty Ltd v HPM Pty Ltd* (1996) 14 ACLC 857 at 859:

In my opinion, an application for security for costs is not a proceeding against the company within the meaning of s471B. We were not referred to any authority directly in point but in my view the section is concerned with proceedings initiated against the company, not with procedural applications by defendants in an action initiated by the company. If it was intended that the section should operate to cut down the defensive procedural measures that would otherwise be available to a defendant in an action brought by the company, thereby reducing the defendant’s normal right in the litigation whilst leaving the company’s rights intact, much clearer language would have been used in the legislation.

1. It should be clarified that the only cross-claims subject to the order for a separate and preliminary hearing are those in which BTAC is a party. The first cross-claim is excluded because that relates only to a claim for indemnification by Onslow Salt against Chevron. BTAC is not a party to that cross-claim. It is clear that the first cross-claim does not fall within s 440D on any basis, nor would Chevron’s defence to it. The difficulty, however, is that the first cross-claim is directly related to the suite of subsequent cross-claims. Once in receipt of Onslow Salt’s claim for indemnification, Chevron commenced the second cross-claim against BTAC seeking a declaration that BTAC’s prosecution of the principal proceedings against Onslow Salt and against the State, breached the relevant **Native Title Agreement** between BTAC and Chevron. The relevant clause of the Native Title Agreement provides that:

BTAC and the native title parties must not make or commence or facilitate any application, action, suit, proceeding, claim or demand against Chevron, the venturers or the State in any court, tribunal or other authority for native title compensation under the Native Title Act or any other law.

1. The State argues that it follows that the second cross-claim, therefore, is also not caught by s 440D because it is central to Chevron’s defence against Onslow Salt. As a matter of statutory interpretation, the State says it is inconceivable that s 440D could be intended to allow the first cross-claim to proceed without the second cross-claim. Once aware of the Native Title Agreement, the State and Onslow Salt commenced the third and fourth cross-claims respectively essentially taking up themselves the same matters raised by Chevron in respect of the Native Title Agreement.
2. As I noted in *BTAC No 4* (at [16]):

It is evident from the terms of the pleadings that the cross-claims - the second, third and fourth cross-claims - give rise to the same relief and will invoke the determination of the same, or very similar issues.

1. The similarity of issues across the second, third and fourth cross-claims arise because all three cross-claimants seek to rely on the Native Title Agreement between Chevron and BTAC which purports to operate as a bar to BTAC’s principal claim. Not being parties themselves to the Native Title Agreement, the State and Onslow Salt rely additionally on s 11 of the ***Property Law Act*** *1969* (WA). The central reasoning for a separate hearing of these cross-claims is that should the Native Title Agreement be interpreted as the cross-claimants suggest, it would give rise to a contractual entitlement not to be sued in the first place, in addition to a defence to BTAC’s principal proceeding.
2. This is essentially a defensive assertion to the principal proceedings. As I noted, the simple proposition is that there would be no possibility of the cross-claims being pursued were the principal proceedings not issued.
3. In short, the argument is that the cross-claims, which are simply part of the principal proceedings, are purely defensive in precisely the same way that the same arguments are pleaded in the defence to the principal proceedings. The simple fact that they are to be determined on a preliminary basis has no bearing upon this characterisation of the nature of the cross-claims as defensive proceedings.
4. As interesting as this argument is, it is unnecessary, for other reasons below, to resolve it to determine the question of whether the cross-claims should continue to be resolved as preliminary issues. I intend to proceed without deciding the first statutory question of whether the cross-claims are proceedings for the purposes of s 440D but I should say that I think the difficulty in the argument is that:
	1. for good reason (as the corporate circumstances are quite different in practical terms), purely defensive proceedings are not legislatively carved out in administrations as they are by the authorities on the winding up provisions; and
	2. if cross-claims were excluded generally from s 440D, the Court would also be precluded from granting leave in respect of them for the purpose of subs (b), just as a consent would not be required for the purpose of subs (a).
	3. Absent the carving out, the better view is that a wider, more liberal view should be taken of the meaning of ‘proceedings’, so as to enable a court to grant leave if it considers it appropriate and on such terms as it considers appropriate.

## Does s 440D permit the withdrawal of consent?

1. On the second statutory question, Onslow Salt contends that it would be necessary for there to be an explicit statutory basis for the withdrawal of consent and that no such statutory basis exists. The arrangements regarding a special administrator under the CATSI Act incorporate many of the provisions of the CA as noted in *In the matter of KASH Aboriginal Corporation ICN 108 (Administrators Appointed) No 2* [2012] FCA 789 by Collier J (at [10]).
2. Section 440D of the CA applies with the substitution that references to ‘a company’ are to be read as references to ‘an Aboriginal and Torres Strait Islander corporation’ and an ‘administrator’ is read as ‘special administrator’: s 499-10(1)(a) and s 499-10(2) of the CATSI Act. Thus, the relevant statutory provision, s 440D(1) of the CA, with the special substitutions would provide:

**440D Stay of proceedings**

(1) During the administration of [an Aboriginal and Torres Strait Islander corporation], a proceeding in a court against the [Aboriginal and Torres Strait Islander corporation] or in relation to any of its property cannot be cannot be begun or proceeded with, except:

(a) with the [special] administrator’s written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

…

1. The effect of this provision is that proceedings are automatically stayed and the automatic stay remains in place unless and until a court or the administrator decides otherwise. That assistance to an administrator has been explained in many decisions, for example, as noted in *MG Corrosion*, perBarker J (at [21]-[22]).
2. Thus, it is well established that the automatic stay is to enable the administrator to assess the financial position of a corporation unhindered by the need to defend legal proceedings. An administrator is to be protected from a party wanting to pursue proceedings unless he or she consents or unless the Court approves a proceeding being pursued. The intent is to enable the administrator to formulate a rational plan for future action, while the financial circumstances of the company are frozen to permit the administrator an opportunity to devise this plan of action.
3. It is clear that s 440D does not expressly provide for a concept of ‘withdrawing’ permission for the proceedings to continue, whether by the administrator’s consent or the Court’s leave. On the other hand as Onslow Salt notes, there are other statutes which do specifically address the concept of consent and subsequent withdrawal of consent, for example:
	1. the Cooperative National Law, s 309, which deals with a different corporate structure, namely, cooperatives. There is an appendix to *Cooperatives (Adoption of National Law) Act 2012* (NSW) which expressly deals with the withdrawal of consent by an auditor; and
	2. the Federal Court has specific provisions whereby leave to appeal can be varied or revoked under r 35.41 of FCR.

Not a great deal can be drawn from these comparisons but it is clear enough that Parliament could have specifically stated, if it was intended, that an administrator has the power to withdraw consent once given.

1. Onslow Salt argues that it should not be inferred that withdrawal is within the statutory purview of s 440D. For example, s 440E of the CA explicitly states that an administrator has no liability ‘in respect of a refusal to give an approval or consent’. It does not specify withdrawal of consent. That provision gives further statutory protection to an administrator to assess the company’s future, unhindered by legal proceedings. If the CA had envisaged that an administrator could give and withdraw consent, it might be expected that both of those options would feature in s 440E. The fact that the protection of s 440E extends only to a refusal to give an approval may suggest that the statute does not contemplate the withdrawal of consent, which is certainly nowhere expressly the subject of s 440D.
2. The State also stresses that there is nothing in the text of the statute to contemplate that a consent previously given can be retrospectively erased so as to render action taken in the meantime contrary to statute. It cannot be the case, the State argues, that the Special Administrator can give a written consent, which is operative, and allow the proceedings to be advanced, but only until he changes his mind. There is nothing in the text, context or purpose of the statute which would support that approach. The way the section is structured suggests to the contrary. Section 440D does not say that a proceeding against a corporation can proceed unless the administrator says it cannot. Rather, the structure is the reverse, that no proceeding can be continued unless the administrator says it can. The purpose of that form of expression is to instantly give reprieve from any current suits and pre-emptively limits future suits until such time as the administrator has conducted his review and determines whether or not this reprieve from legal action is needed. The notion however, that these sections permit the administrator to stop and start proceedings at will by giving and withdrawing consent produces a chaotic result that subverts the statutory purpose.
3. The State in its additional submissions on this topic filed on 19 March 2020 sought to raise further arguments to which BTAC took objection on procedural grounds. I will disregard paras 13-35 of that material.
4. BTAC, however, stresses that this is not an ordinary administration of an ordinary company. It is a special administration of an Aboriginal corporation which has special responsibilities to the Thalanyji people. It suggests that Onslow Salt and the State gloss over that essential context, appealing to authorities concerning administrations of for-profit entities. I am not persuaded that this is a relevant distinction. The CATSI Act has expressly incorporated the provisions of the CA. If it wished to make some exception or qualification referrable to CATSI corporations, it could easily have done so.
5. BTAC also argues that the withdrawal of consent is permitted under s 440D because:
6. The special administration of BTAC is extant and so the primary issue arises ‘during the administration of the company’.
7. The cross-claims constitute ‘a proceeding in a court against the company’. The cross-claims are also part of a ‘broader proceeding’ which also includes BTAC’s claims: s 4 of the FCA. By withdrawing consent, the Special Administrator sought to stay the whole proceeding, including the principal proceedings commenced by BTAC.
8. The proceeding ‘cannot be begun or proceeded with’ unless certain conditions are satisfied. As the proceeding was already on foot before the commencement of the administration, the former part of the disjunction is inapplicable. It follows that this proceeding ‘cannot be proceeded with’ unless certain conditions are satisfied.

The term ‘proceeded with’ is not defined in the CA. Read in context, it is not a term of art. The tense of ‘proceeded with’ parallels that of ‘begun’, in the way that the tense of the verb ‘proceed’ parallels that of ‘begin’. In its ordinary meaning ‘proceed’ means ‘carry on or continue’. Application of the plain meaning of this part of the section provides that the proceeding (and hence the cross-claims), cannot continue unless certain conditions are satisfied.

1. In the absence of leave, the proceeding cannot continue without ‘the administrator’s written consent’. The identity of that consent is paramount to the resolution of the primary issue. BTAC argues that ‘consent’ is a relative concept. A person consents to something. Consent is meaningless without a subject. Here, it is said that the subject of the Special Administrator’s consent is ‘the continuation of the proceedings’. Although there was no condition or qualification to the Special Administrator’s consent, there is an inherent conditionality as to the subject of that consent. A person may consent to something continuing for a time, then change their mind. For example, the law recognises in the criminal context that a person may initially consent to certain physical activity, then withdraw consent, transforming what would otherwise be legal into something illegal. Initial consent to continuation of a process does not entail that the consent was to the process continuing unconditionally. The context suggests that the primary purpose of the stay is to preserve the affairs of the corporation so as to enable its affairs to be regularised. A special administrator’s role in this regard differs sharply from the role of an administration under the CA. An appreciation of this very different role and function suggests that consent may need to be reconsidered or revoked. Construed against the backdrop of the automatic stay to which Onslow Salt refers, the true subject of the Special Administrator’s consent was the cessation of an automatic stay. ‘The Special Administrator effectively consented to pressing a button that restarted the machinery of litigation, but did not consent to that machine continuing to run in any circumstances’.
2. Regard should be had to the heading of s 440D ‘Stay of proceedings’. As has been recognised, the consequence of the satisfaction of the criteria of s 440D(1) is that the proceeding cannot be proceeded with and is thus stayed. Even so-called permanent stays are not truly permanent in that a party to a stay proceeding may apply to have the stay lifted and the Court may then lift the stay as an aspect of its general power to control its own proceedings.
3. The sum of these five textual indicators, BTAC argues, is that the proceeding, including the cross-claims may only continue so long as the Special Administrator consents to its continuation. There is no need for an express provision regarding the withdrawal of the special administrator’s consent in s 440D for the prospect of a cessation of consent is inherent in the ‘continuation’ the subject of the special administrator’s consent. The prospect of withdrawal of consent is inherent in the express words of the section. It is significant, BTAC argues, that the stay does not deprive the cross-claimants of their rights, nor prejudice the substratum of the claims, but merely operates to defer their claims.
4. As to the context, BTAC stresses that even if the Special Administrator has withdrawn consent, the proceeding may continue with the Court’s leave under s 440D(1)(b) so that the Court’s power to maintain control of the proceedings is protected by this subsection. The fact that subs (b) is present undermines any argument that BTAC’s contextual construction places unfair control in the hands of administrators to decide the terms on which litigation is fought or otherwise. Secondly, it is important that s 521-1(2)(a) of the CATSI Act explicitly provides that the CA administration provisions apply only to CATSI bodies to the extent that they are capable of so applying. The special characteristics of a special administration alter the purpose of s 440D of the CA for present purposes. As foreshadowed above, I am not persuaded by this argument. Were it necessary to spell out the possibility of withdrawal of a special administrator’s consent in the case of a CATSI corporation, this possibility would be articulated in the statute.
5. BTAC notes that the appointment of the special administrator is governed by the objectives of the CATSI Act and the conduct of the special administration is regulated by ORIC, which promulgates policy statements, including the suggested three stage approach. During the first stage, the special administrator takes control of assets and assesses the ongoing potential of the corporation, somewhat analogously to an ‘ordinary’ administration. Significantly, during ‘the first two to three weeks of appointment’, the special administrator will meet with members and determine their interests in the continuing operation of the corporation. That consultation process is important to achieving a key purpose of BTAC in advancing the wellbeing of the Thalanyji People in the region. That includes the realisation of the right to self-determination as one possibility. At the second stage, a special administrator begins to restore the corporation to ‘good operational order’. There is a review and resolution of contractual arrangements and attendance to the financial or other issues that led to the corporation’s placement under administration in the first place. As at the date of the consent, the Special Administrator had not held a community meeting and could not have come to a concluded position, BTAC argues, on the financial standing of BTAC or what would be in the members’ best interests. To the extent that subjective intent should factor into resolution of the primary issue, the Special Administrator could not have intended for the unconditional continuation of the proceeding. To treat consent as irrevocable in circumstances where the Special Administrator had not yet met with the Aboriginal people whose interests the Special Administrator would serve, would undermine the objectives of the CATSI Act. BTAC argues this purposive construction is supported by the objectives of BTAC and its Rule Book, which include numerous typical objectives of CATSI corporations to advance and promote the wellbeing of Aboriginal people in the region in numerous possible respects.

## Consideration

1. In my view, the fundamental difficulty with these arguments is that they may well support a conclusion that consent to the continuation of proceedings should not be given until a special administrator has satisfied himself or herself as to so many of those matter which are capable of bearing upon the question of whether or not consent should be given. But the simple fact in this case is that the consent was given, whether or not before such matters were known. None of the objectives of the CATSI Act or the BTAC Rules provides support for a contention that s 440D of the CA should be construed in a way that a consent once given, and whenever given, can then be withdrawn at any time it suits the special administrator. Nor could such considerations usurp the statute. Relevantly, s 440D and s 440E do not impose any limit or constraint on the time within which an administrator must make such a decision as to proceedings against the company. It is perfectly legitimate for an administrator to refuse consent for the duration of the administration and such as course does not require any positive action on his part. Were withdrawal permitted, the consequence would be that those with whom a corporation was engaged in litigation would be self-evidently prejudiced in the practical sense of costs incurred in pursuing litigation. Further, the withdrawal of consent would have the effect that acts taken between the consent and its withdrawal were in contravention of s 440D of the CA.
2. It should also be made clear that, contrary to BTAC’s claim in its written submissions that ‘by withdrawing consent the special administrator sought to stay the whole proceeding, including the principal proceeding commenced by BTAC’ (at [42(2)] above), BTAC’s letter of 4 February refers only to a stay of the cross-claims. Such a claim is also inconsistent with statements made to the Court by counsel for BTAC on 25 February 2020 that the principal proceeding would continue.
3. The relationship between CATSI corporations and the CA is clear. The statutory provisions are explicit and are reinforced by the Explanatory Memorandum and Regulation. First, s 499-10(3) and s 521-1(2) of the CATSI Act apply specified CA sections, including s 440D, to an Aboriginal and Torres Strait Islander corporation that is under special administration:
	1. only to the extent to which they are capable of applying to an Aboriginal and Torres Strait Islander corporation; and
	2. with the modifications specified in the Regulations (s 499-10(3) of the CATSI Act).
4. Secondly, the Explanatory Memorandum of the *Corporations (Aboriginal and Torres Strait Islander)* ***Bill*** *2005* explains the relationship between the laws:

***Chapter 11 External administration***

4.47. Chapter 11 of the Bill provides for CATSI corporations to be placed under ‘special administration’ and a ‘special administrator’ appointed. The chapter also applies parts of the Corporations Act that relate to administration and winding up. The chapter makes it clear how the provisions of the [CA] and the CATSI Bill interact in relation to administration.

1. Thirdly, the application of s 440D of the CA is reinforced in the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (Cth):

**49 Modification of Corporations Act special administration provisions**

For the purposes of paragraph 499-10(3)(b) of the [CA], the provisions mentioned in subsection 499-10(1) of the [CA including s 440D of the CA]:

(a) apply to [CATSI] corporation that is under special administration as if a reference to ASIC were a reference to the Registrar; and

(b) are modified as set out in the table in clause 1 of Schedule 4.

1. Various modifications appear in Sch 4, none of them being applicable to s 440D of the CA.
2. As set out at [34], the only rewording of s 440D is the substitution of the word ‘administration’ for the phrase ‘special administration’ and substitution of the word ‘company’ for the phrase ‘Aboriginal and Torres Strait Islander Corporation’. The remainder of the section applies. It would be inappropriate to read in further inferences as the BTAC arguments seek to do when the Parliament and the Executive have clearly considered the section and explicitly indicated the extent to which it should be modified and applied.
3. There is no doubt in this instance that the Special Administrator had formed a view as to the difficulties in the running of a corporation at the time of his appointment. But regardless of this and whether he had or not, the Court and other litigants are entitled to assume that when an administrator consents to proceedings continuing, thereby ending the statutory moratorium, the consent occurs after due consideration of the relevant factors. Numerous decisions have suggested the factors to be taken into account in determining whether proceedings should continue during administration through the Court granting leave under s 440D(1)(b). Such cases reveal what an administrator ought consider before giving consent. Such factors were recently summarised in *Re* ***Senvion GmbH (No 2)***[2019] FCA 1732 per Anastassiou J (at [48]).
4. For all these reasons, I consider that it was not open to the Special Administrator to withdraw his consent once given.

# STAY OF THE PROCEEDINGS OR LEAVE TO PROCEED UNDER s 440D(1)(b)

1. Similar evidence supported each of these applications, being BTAC’s application for a stay of the litigation and Onslow Salt’s and the State’s applications for leave to proceed under s 440D(1)(b).
2. On the stay application, Onslow Salt objected to BTAC informally seeking a stay of the proceedings. BTAC then filed an application in formal terms together with supporting materials. Of course, BTAC acknowledged that its stay application was necessary only if the withdrawal of the consent by the Special Administrator was invalid as I have ruled it to be.
3. BTAC observes, correctly, that as a creature of statute, the Court by its statutory jurisdiction has the implied or incidental power to stay the proceeding: s 23 of the FCA; *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J (at [16]); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612. It also contends correctly that the Court can exercise its power to stay proceedings to facilitate the attainment of justice and case management objectives: s 37M of the FCA; *UBS AG v Tyne* (2018) 265 CLR 77. Nothing in s 440D of the CA ousts that power. To the contrary, by enabling the proceedings to continue with leave under s 440D(1)(b), BTAC contends that the section tacitly preserves the Court’s power to determine whether the proceedings should be stayed in the interests of justice.
4. It must be observed, however, that to seek to stay one’s own cause of action is not commonplace.
5. By BTAC’s stay application, it seeks orders that all current procedural orders in the cross-claims and principal proceedings be vacated, that the cross-claims and the principal proceedings be stayed *sine die* and, alternatively, until 31 July 2020, there be liberty to apply and BTAC have its costs of the application ‘to be assessed, if not agreed, then paid forthwith’.
6. BTAC stresses, correctly, that the ultimate issue, which should determine the applications for leave or the application for a stay, is what is in the interests of justice in this particular case: *Puttick v Tenon Ltd* (2008) 238 CLR 265 per French CJ, Gummow, Hayne and Kiefel JJ (at [29] and [43]). In short, BTAC argues that if leave to proceed were given, then the cross-claimants would be progressing complex litigation against an Aboriginal corporation under special administration, facing considerable financial pressure in the midst of an unprecedented pandemic and recession.
7. The main focus, BTAC argues, should be on the current position of the Special Administrator and the interests of the members of BTAC. BTAC’s position is that it has not received adequate compensation for the deprivation of its members’ native title rights and interests, that is, the deprivation of its members’ human rights. It is now seeking a stay because its very existence will be in jeopardy if it is forced to proceed at this stage. If forced to proceed, it may not be in a position to adequately defend itself against cross-claims which would effectively deny BTAC’s members their human rights. For these reasons, BTAC contends that a stay is necessary for the Special Administrator to properly fulfil the statutory functions of his appointment. It is necessary to advance the interests of the Thalanyji people.
8. In approaching the issue of discretion, BTAC argues that these factors should weigh more heavily than costs incurred by Onslow Salt in relation to discovery in the three weeks before the withdrawal of consent during which the special administration was still in its first stage. It asserts that practical considerations based on common sense and fairness should dictate whether this kind of stay is warranted in this case: *Bella Products Pty Ltd v Creative Designs International Ltd* [2009] FCA 868 per Finkelstein J (at [23]). Onslow Salt’s costs in relation to discovery are not wasted. They may be used at a later time when the proceedings are recommenced or may be the subject of some other application. As the special administration may be extended, BTAC says the stay should operate without a time limit or at the very least until 31 July. Even if it did operate without a time limit, the cross-respondents would have the opportunity to apply to have the stay lifted should circumstances of the special administration change: see, for example, *Mayfield Development Corporation Pty Ltd v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 260 per Jagot J (at [24]). For the same reasons, BTAC says, if the Court accepts this argument, the Court should not grant leave for the proceeding to continue under s 440D(1)(b).
9. BTAC also argues that the Court should take judicial notice of the fact that Australia is in the midst of the ‘most significant crisis of our lifetime’ with the COVID-19 pandemic and the economic crisis it has caused. BTAC cites *Wallera Pty Ltd v CGM Investments Pty Ltd* [2003] FCAFC 279. I do not consider this case to be of assistance. It also stresses the fact that the health and wellbeing of BTAC’s Aboriginal members are in jeopardy in a way that is distinguishable from that of many other Australians. In addition to this fact, the Court should also take judicial notice of the proposition that the Special Administrator, even with the use of remote access technology, would have a more difficult time in carrying out the areas of his role in the current environment just as each of us must adapt to performing amidst a global crisis.
10. BTAC says that the stay it seeks would have the same practical consequences of the adjournment that ought to be required by the Court’s ‘Special Measures in Response to COVID-19’ (SMIN-1) Practice Note of 23 March 2020 and as a matter of practical justice, this proceeding ought not proceed so that the special administration may be completed at which point the respondents could exercise their liberty to apply.
11. BTAC also stresses that its stay application would save the resources of the Court and the parties and would advance the overarching purpose of s 37M of the FCA. Its effect, it says, on the respondents’ applications would also save the resources of the Court and the parties. BTAC takes the contention further however, by asserting that the immediate continuation of this proceeding would amount to an ‘abuse of process’ as it would run contrary to the overarching purpose in s 37M. It makes this claim on the basis that:
	1. the proceedings would not be resolved as inexpensively as possible, contrary to s 37M(1)(b) of the FCA;
	2. continuation would deny or hinder the Special Administrator’s ability to implement the government mandated multi-stage process of the special administration of an Aboriginal corporation contrary to a just determination of the proceeding: s 37M(2)(a) of the FCA; and
	3. it would mean that an Aboriginal corporation being managed by a single individual in the midst of the greatest crisis of this century must defend significant litigation whilst also seeking to achieve the various other purposes of his appointment as a Special Administrator. This would be a circumstance contrary to s 37M(2)(a) and s 37M(2)(b) of the FCA.

It is a significant leap to suggest that the cross-respondents’ applications for leave to continue amount to an abuse of the processes of this Court. As will be further explained below, the salient practical consideration is to set a hearing date for the cross-claims. The delays caused by the resolution of present matters and COVID-19 restrictions mean that it is unlikely the cross-claims will be heard until the last quarter of this year and certainly after the Special Administrator’s six-month appointment expires in mid-July.

1. BTAC takes exception to the objection raised to disclosure of the existence of settlement negotiations. I am not satisfied that the content of those negotiations, even if it were revealed by BTAC, should be disclosed, but the existence of the negotiations is admissible. It goes to steps being taken by the Special Administrator. It accords with statements made in court that the parties have attempted to resolve the litigation. No doubt such attempts will continue.
2. BTAC’s application is supported by an affidavit from Mr Pullen, solicitor employed by BTAC’s solicitors, which goes to Chevron’s applications and orders as to costs. In opposition to an order that BTAC pay Chevron’s costs and those of the other cross-claimants’ applications for leave, he produces an email from Chevron’s solicitors, which appears to suggest that Chevron would consent to a stay of the proceedings. Reference to orders sought by Chevron appear at the end of these reasons, but BTAC signals that it consents to the first two of Chevron’s orders in its interlocutory application. As Chevron did no more than ‘sit on the fence’, it should not be awarded its costs, especially in circumstances where it had already consented to the stay, according to BTAC.
3. The cross-respondents also rely upon additional evidence and arguments, both against BTAC’s application for a stay and in support of their applications for leave to proceed. Much of the material is applicable to both applications. I address it at this point.
4. As will be recalled, the withdrawal of the consent was only in relation to the cross-claims. In other words, the Special Administrator was not saying that BTAC’s own claims would not continue, but that the cross-claims could no longer be pursued. For reasons I have discussed, that withdrawal of consent was invalid. However, the withdrawal is consistent with statements made by counsel for BTAC to the Court to the effect that the principal proceedings will go ahead. As I have made clear in these reasons, and more fully in *BTAC No 4*, the principal proceedings cannot go ahead without the preliminary issue being heard and determined first and so the only practical issue is the setting down of dates for the hearing of the cross-claims.
5. As the parties agree, the objective of s 440D is to permit breathing space for an administrator, in this case the Special Administrator, to assess and best manage the circumstances he assumes from the corporation. In this instance, the Special Administrator has had, since 13 January 2020, to assess BTAC’s ability to continue with proceedings. By the time these reasons are published and by the time any fresh hearing date is fixed for the preliminary issues, the Special Administrator’s term of appointment will have progressed considerably towards its six-month expiry date meaning he will have had ample time to make the necessary assessment of BTAC’s position. Even if the period of special administration is extended, the cross-claims should, subject to COVID-19 considerations, still proceed to be heard as soon as possible after expiry of the first six months for which the Special Administrator was appointed, being 17 July 2020.
6. In support of this argument, Onslow Salt and the State rely on a number of authorities that have suggested the relevant factors to be taken into account in determining whether proceedings should continue during an administration through the Court granting leave under s 440D(1)(b). These factors were recently set out in *Senvion GmbH (No 2)* per Anastassiou J (at [48]):

In *Hopkins v AECOM Australia Pty Ltd & Ors* [2012] FCA 1204; 91 ACSR 391 Nicholas J adopted some factors, or indicia, that might commonly be considered in the exercise of the discretion under s 440D, which had been helpfully distilled from earlier authorities by Tobias JA (with whom Beazley and Giles JJA agreed) in *Attard v James Legal Pty Ltd* [2010] NSWCA 311; 80 ACSR 585. Justice Nicholas stated at [20]:

“In A*ttard v James Legal Pty Ltd* [2010] NSWCA 311 the New South Wales Court of Appeal identified a number of factors relevant to the question of whether leave to proceed should be granted under s 440D. In that case Tobias JA (with whom Beazley and Giles JJA agreed) said (at para [146]-[147]):

[146] More recently, Rein AJ (as his Honour then was) summarised in *J F Keir Pty Ltd v Priority Management Systems Pty Ltd (admin apptd)* [2007] NSWSC 748 at [8] the factors to be taken into account in respect of an application for leave under s 444E(3):

* whether the claim has a solid foundation and gives rise to a serious dispute: *Vagrand Pty Ltd (in liq) v Fielding* (1993) 41 FCR 550;
* whether the administrator would be unreasonably distracted from his or her statutory duties and be obliged unnecessarily to incur substantial legal costs: *Foxcroft v Ink Group Pty Ltd* (1994) 12 ACLC 1063; *J & B Records v Brashs Pty Ltd* (1994) 12 ACLC 534; *Pioneer Water Tanks (Aust 94) Pty Ltd v Delat Pty Ltd* (1998) 16 ACLC 36; *Slater v Global Finance Group Pty Ltd* (1999) 150 FLR 264;
* whether the company is insured against the liability that is the subject of the proceedings: *Foxcroft v The Ink Group Pty Ltd* (1994) 12 ACLC 1063;
* who appointed the administrator: *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396;
* whether the applicant will suffer any disadvantage if leave is not granted: *J & B Records v Brashs Pty Ltd* (1994) 12 ACLC 534; *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396;
* whether there are good reasons for allowing a creditor to depart from the general intention of Pt 5.3A, which is that a creditor ought not be able to take action against the company in such circumstances: *Foxcroft v The Ink Group Pty Ltd* (1994) 12 ACLC 1063; *Re Grenadier Constructions No 2*; Pty Ltd (1994) 12 ACLC 460.

[147] To these factors may be added the following:

* who is applying for leave: *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396; *BBC Hardware Ltd v GT Homes Pty Ltd* [1997] 2 Qd R 123;
* what funds the company has available to defend against litigation: *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396.”
1. Similarly, in *Pybar*, Doyle J said (at [16]):

In any event, the authorities identify a number of circumstances that will be relevant in the exercise of the discretion. The relevant circumstances include, but are not confined to, the following:

* whether the proceedings have a solid foundation and give rise to a serious dispute;
* whether, and the extent to which, the administrator would be distracted by the proceedings from his or her own duties and obliged to incur legal costs;
* the stage which the proceedings have reached;
* who appointed the administrator and the circumstances of that appointment;
* who is applying for leave to proceed;
* whether the claim is a monetary one;
* whether the claim is one in respect of which the company is insured;
* any disadvantage to the applicant in not being granted leave to proceed; and
* whether there are otherwise good reasons for allowing a creditor to depart from the general intention of Pt 5.3A which is that a creditor ought not be able to take action against the company.

(Citations omitted.)

1. Onslow Salt also relies on a further affidavit of Mr O’Leary, solicitor for Onslow Salt, who speaks of litigation searches conducted in the Supreme Court of Western Australia, the District Court of Western Australia, the Federal Court of Australia and the **Federal Circuit Court** of Australia to identify any other proceedings to which BTAC is or was a party in the period since 1 July 2019 from which it is apparent that there is only one other proceeding, being a proceeding in the Federal Circuit Court of a relatively minor nature that was finalised on 19 August 2019.
2. Mr O’Leary makes the points that:
	1. from 2008 until the commencement of the proceedings, Onslow Salt has employed at least 27 members of the Thalanyji people in its Onslow Salt operations, including at least three traineeship positions and a community liaison officer;
	2. the number of Thalanyji members employed currently by Onslow Salt at its Onslow operations has declined since the commencement of these proceedings and there are now only three employees who are Thalanyji members and there were no trainees and no community liaison officer; and
	3. the decline in employees is because of these proceedings, according to the view of **Mr** Andrew **Bohnen**, General Manager, Commercial and Human Resources of Onslow Salt.
3. I can accept that Mr Bohnen may hold that view, but absent any expressed reasoning behind it, or other admissible evidence, it is difficult to make more of the expression of view than simply that. I give it very little weight. No affidavit is needed however to make good the point that further unnecessary delay in hearing this matter is clearly undesirable for all.
4. The State also relies on an affidavit of Ms Seen, a solicitor with the State Solicitors Office, who produces formally, the documents referred to elsewhere in these reasons.

## Consideration

1. It is important not to overlook the distinction between seeking leave to proceed against a company in liquidation on the one hand, and against a company in administration on the other. In *Foxcroft v Ink Group Pty Ltd* (1994) 12 ACLC 1063 per Young J (at [1065]), it was noted that the administration provisions, provide that there shall be a complete freeze of proceedings against the company during the administration so that the administrator can have time to assess the situation and the company’s creditors have an opportunity to work out the net position and adopt an attitude under s 439C of the CA, which will be in their common interests. It was observed that to allow one creditor or potential creditor to proceed would not only take the administrator’s attention from what he needs to do under the Division in a relatively short period of time, but it would also involve costs in running the legal action, as well as, perhaps, giving the claimants some advantages over other creditors. The view was expressed in that case that an application under s 440D would only rarely be granted. However it must be stressed that fundamental to that reasoning was the concept that the proposed claim was by a creditor. The width of the views there expressed has been doubted in some subsequent decisions. More recently in *Creenaune v Work Cover Queensland* [2018] QDC 51, Chowdhury DCJ helpfully summarised much of the development, saying (at [14]-[16]):

[14] There is considerable authority about when a court should give leave to a party to bring proceedings under this section. In Slater & Anor v Global Finance Group Pty Ltd (1999) 30 ACSR 519, Wheeler J said this at 522:

“A review of the law in relation to s 440 D of the corporations law was undertaken by Carr J in Pioneer Water Tanks (Australia 94) Pty Ltd v Delat Pty Ltd (Admin Apptd) (1997) 27 ACSR 757. His Honour noted the reluctance generally displayed towards the grant of leave. The cases to which his Honour referred established two broad themes, they being first that it is inappropriate to grant leave so that a creditor may seek to advance his own individual interest in respect of some disputed matters; the existence of s 447B assists in protection of those interests to the appropriate extent. The other theme is the undesirability of an administrator being distracted from his or her statutory duties and obliged unnecessarily to incur legal costs. Neither of those principles is strictly applicable here.”

[15] In Foxcroft v The Ink Group Pty Ltd (1994) 15 ACSR 203, Young J in the Supreme Court of New South Wales said this at 204 – 205:

“*There is, however, quite a big difference between a company in administration and a company in liquidation. A company in administration is seeking to continue to trade and is, in accordance with s 435A, seeking to maximise the chance of it remaining in business. A company in liquidation is one where the liquidator is seeking not to trade but to realise the company’s assets as soon as possible for the best price, in order to be able to distribute the net available funds to the creditors and in some circumstances, the members.*

*The provisions of Pt 5.3A, as exemplified in sections such as 437C, 437F, 44C and 440D, provide that there shall be a complete freeze of proceedings against the company during administration so that the administrator can have time to assess the situation, and the company’s creditors have an opportunity to work out the net position and adopt an attitude under s 439C which will be in their common interest. To allow one creditor or potential creditor to proceed will not only take the administrator’s attention from what he needs to do under the division in a relatively short period of time, but it would also involve costs in running the legal action on behalf of the administrator, as well as perhaps giving the claimant some advantage over the other creditors or potential creditors.*

*Accordingly, it seems to me that an application under s 440D will rarely be granted. It may be that where the company is insured against a liability the subject of the proceedings, the administrator will ordinarily consent or the court will give conditional leave, but outside this field it is hard to see situation where it would be proper to grant leave, though doubt less there are such situations.”*

[16] In Modcol Pty ltd v National Build Plan Group Pty Ltd (2013) 93 ACSR 598, McDougall J in the Supreme Court of New South Wales considered the approach of Young J in Foxcroft v The Ink Group Pty Ltd, (supra), as well as a different approach from another Judge of the Supreme Court of New South Wales. His Honour said this at 601 – 602:

“[15] *Clearly enough, the discretion given by s 440D, to grant leave to commence or continue proceedings, is one to be exercised having regard to the objects of Pt 5.3A as a whole and the importance, to the achievement of those objects, of protecting the company’s property during administration…*

*[17] There has been some debate as to whether the statutory discretion given by s 440D is (as Young J suggested in* Foxcroft *at 205) something to be exercised with great caution, and whether good reasons are necessary before the court should grant leave.*

*[18] Young J said in* Foxcroft *at 205 that applications under s 440D ‘will rarely be granted’. His Honour referred to instances of insurance and the like but said that ‘outside this field it is hard to see situations where it will be proper to grant leave, though doubtless there are such situations.’*

*[19] The question of circumscription of the discretion, was considered by Hammerschlag J in* Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd (2011) 285 ALR 207; [2011] NSWSC 1305.

*[20] After referring to what Young J had said* Foxcroft*, and to other authorities, Hammerschlag J said (at [36]) that one should not approach an application under s 440D ‘with an assumption that leave will only rarely be granted or that the court must approach this type of application with a degree of caution greater than that with which it would approach the exercise of any other discretion within a particular statutory context’.*

*[21]* ***His Honour said that to impose some higher standard than the wording of the statute required was to place on the exercise of the discretion ‘an unwarranted confinement’****.*

*[22]* ***It does seem to me that there is a lot to be said for the proposition that the language of s 440D speaks for itself, and that the discretion is one to be exercised, as I’ve said, giving proper weight not only to the particular facts in respect of which exercise is sought or resisted but, more generally, to the object of Pt 5.3A and the role that Div 6 plays****.*

*[23] It may be accepted that the general position is that stated: namely, that proceedings are not to be commenced or continued with, as the case may be, against a company in administration. But that general position is subject to the express statutory exceptions, of administrators’ written consent or leave of the court (on terms if appropriate).*

(Emphasis added.)

1. There is no realistic prospect of even the preliminary applications being listed before completion of the special administration. I accept, however, as against that, even if a hearing date is fixed for late in the year, there will necessarily be preparatory work which will clearly incur expense and, further, there is at least a possibility of an extension of the special administration. I put the latter consideration, which is pure speculation, to one side.
2. I cannot accept the contention that the appointment of a special administrator is particularly unusual in the context presently under consideration. Of course, this Special Administrator has to take into account matters referrable to advancing the interests of the BTAC members. But for reasons already expressed, as a matter of statutory construction, the legislature has been quite specific about any changes it wishes to make from the normal position under the CA to any position applicable to bodies covered under the CATSI Act. To the extent the CA has been modified, the legislature has been specific as to how the CA should be modified. The Explanatory Memorandum to the Bill explained (at [3.35]) that specific provisions for regulations to be made concerning Registered Native Title Body Corporates (RNTBCs) ensures that future modifications to the Bill made by regulations do not conflict with native title legislation and that specific guidance can be given in regulations to cater for appropriate functions and duties of external administrators that may be appointed to an RNTBC. No modification in those regulations of s 440D of the CA is articulated. The statute and regulations have specified how the CA special administration provisions apply, being the two changes to the wording to which reference has been made above (at [34] and [52]).
3. Reference has been made above to *Senvion GmbH (No 2)* and *Pybar* and the criteria relevant to the granting of leave. Those authorities were not directly relevant to the statutory question of whether consent could be withdrawn beyond indicating what a special administrator could take into account, but they are clearly applicable to the leave/stay question. I deal with the considerations in the order they are raised:

### (1) Whether the claim has a solid foundation and gives rise to a serious dispute

1. I have already examined and ruled on the cross-respondents’ ‘claims’ (in the cross-claims) and determined that they are of such foundation and significance that they should be heard as a preliminary question: see *BTAC No 4*. This was against strenuous opposition, although that opposition was primarily directed to practical considerations, namely, that the preliminary questions would embrace a great deal of the substantive issues in BTAC’s claim in any event. A significant part of my reasoning, as referred to above, was that the cross-claimants would be completely deprived of any contractual benefit of the promise not to sue them at all, as distinct from the capacity to raise the content of the agreement as a bar by way of a defence. There is no doubt that the cross-claims give rise to a serious dispute.

### (2) Whether the Special Administrator would be unreasonably distracted from statutory duties and be obliged unnecessarily to incur substantial legal costs

1. This is undoubtedly an important question which the Special Administrator has stressed. The matters to be examined and prepared for the preliminary issue claim, primarily by virtue of the defence raised to the cross-claim by BTAC go to the actions of BTAC, Chevron and their representatives around 2009 to 2010. I refer to these matters in *BTAC No 4* (at [11]-[18]). Of course, while those matters have no connection with the Special Administrator’s activities and doubtless investigations into them would be carried out by BTAC’s solicitors, nonetheless clearly they will occasion some element of distraction and some element of cost. However, at this stage, one would expect, as Onslow Salt contends, that BTAC’s solicitors would presumably have done most of the work to advise and prepare for hearing by reason of the following matters:
	1. BTAC’s lawyers pleaded in May 2019 that the representations claimed to estop or preclude (as misleading or deceptive conduct) the 2010 Native Title Agreement. On this basis, BTAC’s solicitors must have already taken “comprehensive instruction from clients and only [be] pleading according to those instructions’ and have ‘use[d] reasonable endeavours to ensure that a claim or a defence has a rational basis on which it might succeed’;
	2. the Special Administrator’s consent was purportedly withdrawn the day before the provision of discovery by the parties, so that much of the work should have already been completed; and
	3. the legal fees for BTAC in June to December 2019 were $696,154 by reference to p 3 of the Newsletter. Given that the only other legal proceeding in which BTAC was involved was the finalisation of a bankruptcy proceeding in the Federal Circuit Court where BTAC’s petition was withdrawn, it is clear that the bulk of that amount would have been incurred in relation to the no doubt substantial work undertaken by BTAC’s solicitors in that period for the cross-claims. I observe that one difficulty at least in this analysis is that it is possible that some of this expenditure could have related to advice, negotiations or drafting in relation to entirely different matters other that this or other litigation. But it must be observed that no attempt has been made by BTAC to seek leave to file any material which may support or establish that possibility. The absence of any such attempt or evidence may tend to add weight to the contention for Onslow Salt.
2. In other words, according to the objective facts, most of the work should have been carried out by BTAC’s solicitors. In any event it will be the solicitors more than the Special Administrator who will be completing the preparation. These factors would militate against the prospect of the Special Administrator being unreasonably distracted from his statutory duties or being required to incur substantial further legal costs in preparation for the cross**-**claim.

### (3) Whether there is insurance for the company against the liability the subject of the proceedings

1. This is not a relevant consideration in these circumstances. As previously indicated, the cross-claims are defensive in nature and do not seek financial relief. The only liability that could possibly arise would be an adverse costs judgment.

### (4) Who appointed the Special Administrator and the circumstances of that appointment

1. The evidence makes it clear that the Special Administrator was appointed by the Registrar of Indigenous Corporations because of concerns about governance. The consideration of who made the appointment is particularly applicable in circumstances where an administrator was appointed by a party seeking to circumvent the stay or by directors attempting to forestall action: see, for example, *Wallabah Pty Ltd v Navillo Pty Ltd* (1997) 15 ACLC 396 per Olney J (at [398]). There is nothing in the cross-respondents’ conduct in the present circumstances which would suggest that leave should be precluded on the basis of their conduct or other tactical actions.

### (5) Whether the cross-claimants applying for leave will suffer any disadvantage if leave is not granted

1. In BTAC’s written submissions it is asserted that the stay would not deprive the cross-claimants of their rights, but merely operate to defer their claims. I accept the submission for the cross-claimants that such a deferral is (depending on how long it lasts) in itself, a deprivation of their rights to have the claims heard and adjudicated. Plainly these corporations and the State suffer a disadvantage for as long as this significant litigation remains on foot.

### (6) Whether there are good reasons for allowing a creditor to depart from the general intention of Pt 5.3A, which is that a creditor ought not be able to take action against the company in such circumstances

1. It is a matter of fundamental significance in the present deliberations that the cross-claimants are not seeking to recover funds. Rather they are seeking to stop the litigation. They are not seeking to gain a benefit as against other creditors of BTAC. They do not assert any interest as creditors.

### (7) The identity of the applicant for leave

1. Under a statutory moratorium, unsecured creditors are normally refused leave because their claims must be considered along with all others once the administrator has had an opportunity to properly understand the circumstances surrounding the state of affairs in which the company finds itself. Again, it is relevant that the cross-claimants do not seek financial benefit as creditors. They are seeking to bring to an end this litigation and the principal claim brought by BTAC.

### (8) What funds the company has available to defend litigation

1. The Special Administrator has not revealed what funds BTAC has to defend the litigation, but has raised concerns about legal fees generally. He has described them and other expenses as ‘far in excess of what [he] consider[s] reasonable … over the last two and a half years’. The Special Administrator’s Newsletter indicates those fees were $3,238,915 comprising:
* $1,440,395 for the financial year 2017-2018;
* $1,102,366 for the financial year 2018-2019; and as mentioned
* $696,154 for the six months to December 2019.
1. There is no evidence as to the specific purposes of such expenditure. I will not speculate.
2. The Newsletter also indicates that BTAC’s revenue has declined somewhat recently from a net income in the 2017/2018 financial year of more than $2 million to a net loss of $800,000 the year after and a net loss of $1.4 million in the six months to December 2019. This said, it is important to note that the reasons given for the Special Administrator’s appointment appear to focus on issues of corporate governance and failings by the company directors regarding engagement with BTAC’s members. Having regard to these facts in the context of the advanced stage of this litigation and that much of the preparatory work, including discovery must be well progressed, there is no adequate or proper basis to infer that BTAC will be unable to bear the remaining costs associated with preparing for the cross-claims. There will be costs in the conducting of the actual hearing but that was always to be the case.

### (9) The stage at which the proceedings have reached

1. The stage at which the litigation is advanced and the prospects of success of litigation have been factors taken into account in previous instances. In ***BBC Hardware*** *Ltd v GT Homes Pty Ltd*[1997] 2 Qd R 123 per Thomas J, the Supreme Court of Queensland granted leave to a party which had previously been litigating against the company and was close to obtaining judgment when the company went into voluntary administration. His Honour went on to say (at 125) that:

the defendants were stalling and that their financial situation and no doubt other factors have induced them to seek the appointment of an administrator. However, the question is whether that circumstance should be allowed to frustrate the position of the plaintiff which … was on the brink of an entitlement to obtain judgment

1. I do not suggest either that BTAC has been stalling or that the cross-claimants are on the brink of obtaining a judgment as in *BBC Hardware*, but certainly the respondents were in receipt of orders that their cross-claims should be determined before other matters in the litigation and hearing dates had been set for that purpose in September 2019. Onslow Salt has given evidence that it continued preparations because of the Special Administrator’s consent. This is a further factor to take into account in weighing up whether a stay should be granted or leave given to proceed permitted.

### (10) Whether the claim was a monetary claim

1. The cross-claim cannot result in BTAC being required to pay damages or compensation. BTAC might be exposed to costs were the cross-claims to succeed. All these factors are relevant also to the question of whether BTAC’s application for a stay should be permitted. BTAC contends that the Court should stay the proceedings under its general powers. Any discretion exercised in relation to that topic should take into account the overarching purpose in s 37M of the FCA, meaning that:

All parties to a proceeding in this Court must conduct the proceeding as quickly, inexpensively and efficiently as possible … [and] The parties’ lawyers must assist the parties to comply with that duty.

See *Smart Company Pty Ltd (in liq) v Clipsal Australia Pty Ltd (No 6)* [2011] FCA 419 per Lander J (at [567]).

1. In my view, the consideration of the criteria for leave to proceed must focus importantly on the fact that the cross-claims do not involve any claim for any amount of money. The cross-claimants are not claiming as creditors and an order has already been made that the cross-claims should be heard before the principal proceeding. Those cross-claims are purely defensive in nature. They would not have been raised had the original proceedings not been raised.
2. The Special Administrator does raise the fact that there have been settlement negotiations. That is to be strongly encouraged. However, there are no factors explaining why the cross-claims need to be stayed while the Special Administrator continues with such negotiations. No estimate is given of the likely period of negotiation. Nor is not possible to guess whether a settlement is necessary for BTAC to survive financially.
3. For all these reasons, I am of the view that the application for stay should be refused and the cross-claimants should have leave to proceed with their cross-claims. I have particular regard to the fact that the cross-claims are not claims for money, but claims to, in effect, stop the litigation. I have regard to the fact that the parties are well advanced in their preparations for a claim which was listed for a specific date, which has now fallen away due to the consequences of the appointment of the Special Administrator. I do not consider there are any other factors which support the grant of a stay or negate the desirability of leave being granted.
4. I do of course take into account the limitations imposed on normal working capacity by reason of the COVID-19 restrictions currently in place. However this is best managed by the fixing of hearing dates which should be no later than the last quarter of this year and if necessary by a video platform as with many other hearings being conducted by the Court at present. Fixing the date for hearing the preliminary questions at that time will enable ample opportunity for both negotiations, which are to be encouraged, and completion of such additional preparation as may be necessary. But I do not consider that granting a stay is at all appropriate for reasons stated.

# CHEVRON’S APPLICATIONS

1. Against the background of the other applications, evidence and rulings, Chevron seeks orders that:
	1. if BTAC’s application is successful and orders are made staying the second, third and fourth cross-claims, orders should be made by the Court staying the principal proceedings and the first cross-claim; and
	2. alternatively, if Onslow Salt and the State’s application for leave to continue the cross-claims is successful, Chevron should be granted leave to continue its cross-claim.
2. Against the multiplicity of pleadings, it is necessary to reiterate in simple terms what it is that Chevron is cross-claiming. Chevron cross-claims, relevantly, a final injunction permanently restraining BTAC from continuing the principal proceedings against Onslow Salt.
3. The basis of the second cross-claim is that BTAC’s conduct in commencing the principal proceedings breaches cl 19.3 of the Native Title Agreement dated 22 December 2010 between Chevron, BTAC and the native title claimants. That provision is a covenant not to sue and is set out at [26] above.
4. The provision does not expressly refer to Onslow Salt. The second cross-claim pleads that by commencing proceedings against Onslow Salt, BTAC has facilitated a proceeding for native title compensation in breach of cl 19.3 of the Native Title Agreement.
5. By cl 19.2 of the Native Title Agreement, BTAC agreed that the State and Chevron may plead the Native Title Agreement as an absolute bar against any action being prosecuted for native title compensation as defined in cl 1.1 of the Native Title Agreement. Chevron argues that cl 19.2 and cl 19.3 cover the claims made by BTAC in the principal proceedings against Onslow Salt and the State. As noted above, the third cross-claim commenced by the State and the fourth cross-claim commenced by Onslow Salt similarly rely on those provisions and seek substantially similar relief. The State and Onslow Salt are not parties to the Native Title Agreement, so the State and Onslow Salt rely upon s 11(2) of the *Property Law Act*.
6. The defences pleaded by BTAC to the second, third and fourth cross-claims are in substantially similar terms, pleading substantive defences of estoppel and misleading or deceptive conduct. BTAC’s estoppel and misleading or deceptive conduct defences across the three claims are based on the same factual circumstances, being alleged statements made by representatives of Chevron in November 2010.
7. The second, third and fourth cross-claims will involve the determination of the same, or at least very similar factual and legal issues and give rise to the same relief. The second, third and fourth cross-claims should be heard and determined together, if they are to be heard at all.
8. The applications by Chevron need little consideration. The first application falls away in accordance with my rulings above in relation to BTAC’s application for a stay.
9. My reasoning granting leave to Onslow Salt and the State for leave to continue the cross-claims is directly applicable also to Chevron and, accordingly, the same ruling should be made in favour of Chevron.

# CONCLUSION

1. In summary, the withdrawal of consent was invalid. There should be leave to proceed with the cross-claims. The proceeding should not be stayed. That said, life as we have always known it is now very different in the circumstances of the Coronavirus outbreak. The cross-claims will be heard in the last quarter of this year. In my view, while the cross-claimants have largely succeeded in their applications, costs should be reserved.

|  |
| --- |
| I certify that the preceding one hundred-eight (108) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice McKerracher. |

Associate:

Dated: 30 April 2020