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SANTOS' PIPE(LINE) DREAM: *SANTOS NA BAROSSA PTY LTD V TIPAKALIPPA* (2022) 296 FCR 124

I Introduction

Consultation with affected First Nations people is often viewed as a mere procedural speed bump on the path towards project approval. However, a landmark ruling by the Full Court of the Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* ('*Santos*')[1] unanimously demonstrated that this perception is far from accurate — as stated by Kenny and Mortimer JJ, 'conduct that is superficial or token will not be enough'.[2] To fulfil the criteria outlined in reg 11A(1)(d) of the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) ('*Offshore Environment Regulations*'), and ultimately obtain project approval, consultation must be 'genuine' and allow affected individuals to communicate how the project impacts their interests.[3] Justices Kenny and Mortimer effectively warned against superficial consultation practices that have likely become the industry norm, by asserting that '[a]n email may be inappropriate, but properly notified and conducted meetings may well suffice'.[4]

The decision carries profound implications for future projects, serving as a stark warning to developers that their consultation efforts will undergo close scrutiny. Failure to genuinely engage in consultation requirements will not only result in legal consequences, but could also lead to project delays, reputational damage, and a loss

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1 (2022) 296 FCR 124 ('*Santos*').

2 Ibid 157 [104].

3 Ibid 147 [56]. On 10 January 2024, the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (Cth) ('*2023 Regulations*') commenced, replacing the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) ('*Offshore Environment Regulations*'). The *2023 Regulations* 'retain the same substance and form' as the *Offshore Environment Regulations*, and therefore this case note's commentary concerning the *Offshore Environment Regulations* is equally applicable to the *2023 Regulations*: see 'Remade Offshore Petroleum and Greenhouse Gas Storage Regulations Are in Force', *Australian Government Department of Industry, Science and Resources* (Web Page, 8 March 2024) <https://www.industry.gov.au/news/remade-offshore-petroleum-and-greenhouse-gas-storage-regulations-are-force>.

4 *Santos* (n 1) 157 [104].

in investor confidence. This case note delves into the inherent tension between the industry's prevailing consultation practices and what was intended by the *Offshore Environment Regulations*. Ultimately, it concludes that a project's ability to fulfill its consultation requirements is intrinsically tied to its overall success and should not be reduced to a mere checkbox exercise.

II Background

A *Facts*

Santos involved a legal challenge to the decision of the National Offshore Petroleum Safety and Environmental Management Authority ('NOPSEMA') to approve a drilling environment plan ('EP') submitted by Santos NA Barossa Pty Ltd ('Santos'), in relation to an area of the Timor Sea, north of the Tiwi Islands.[5] The purpose of the drilling EP was to allow Santos to produce eight production wells as part of its offshore drilling project known as the Barossa Gas Project.[6] The traditional owners of the Tiwi Islands comprise various clans, one of which is the Munupi clan.[7] The applicant, Dennis Murphy Tipakalippa, is 'an elder, senior law man and traditional owner of the Munupi clan' who sought judicial review of NOPSEMA's decision on the basis that his clan, and other traditional owners, were not sufficiently consulted.[8] Under the *Offshore Environment Regulations*, NOPSEMA could only accept an EP if it was satisfied that the plan meets certain criteria, including the requirement to consult with 'a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environmental plan'.[9] The fundamental issue for the Court was whether NOPSEMA could have been 'reasonably satisfied' that Santos had 'carried out the consultations' required to approve the drilling EP.[10]

B *Regulatory Framework*

The provisions in issue were regs 10(1), 10A(g)(i) and 11A of the *Offshore Environment Regulations*, as made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth). Regulation 10A(g)(i) provided that for an EP to be accepted by NOPSEMA under reg 10(1), it must demonstrate that the proponent has undertaken consultation in accordance with reg 11A. Regulations 10(1), 10A(g)(i) and 11A are reproduced below:[11]

5 Ibid 127–8 [5].

6 Ibid 128–9 [8].

7 Ibid 127–8 [5].

8 Ibid.

9 *Offshore Environment Regulations* (n 3) regs 10A(g), 11A(1)(d).

10 *Santos* (n 1) 128 [6].

11 For the provisions as currently in force, see regs 25(1)(d), 33 and 34 of the *2023 Regulations* (n 3).

10 Making decision on submitted environment plan

(1) Within 30 days after the day described in subregulation (1A) for an environment plan submitted by a titleholder:

(a) if the Regulator is reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must accept the plan; or

(b) if the Regulator is not reasonably satisfied that the environment plan meets the criteria set out in regulation 10A, the Regulator must give the titleholder notice in writing under subregulation (2); or

(c) if the Regulator is unable to make a decision on the environment plan within the 30 day period, the Regulator must give the titleholder notice in writing and set out a proposed timetable for consideration of the plan.

10A Criteria for acceptance of environment plan

For regulation 10, the criteria for acceptance of an environment plan are that the plan:

…

(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

…

11A Consultation with relevant authorities, persons and organisations, etc

(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*):

…

(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;

…

C *Issues*

Mr Tipakalippa first sought judicial review of NOPSEMA's acceptance of the EP before Bromberg J at the Federal Court of Australia in August 2022.[12] Mr Tipakalippa sought review under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) on the grounds that: (1) NOPSEMA did not have jurisdiction to accept the EP 'because it could not have been reasonably satisfied that the [d]rilling EP demonstrated that the consultation required' by regs 10A and 11A of the *Offshore Environment Regulations* was carried out ('Ground One');[13] and (2) Santos submitted the drilling EP without conducting the consultation required by regs 10A and 11A ('Ground Two').[14]

Justice Bromberg rejected Ground Two on the basis that Santos' 'non-compliance [did] not have the consequence of invalidating the decision made by NOPSEMA' under the *Offshore Environment Regulations*.[15] Accordingly, provided NOPSEMA was 'reasonably satisfied' that the consultation required by regs 10A and 11A had occurred, any actual non-compliance by Santos did not invalidate NOPSEMA's decision.[16] However, by adopting a tailored approach guided by the circumstances of the parties to the proceedings, Ground One was upheld by Bromberg J. His Honour considered that the EP did not reflect Santos' methodology of identifying all 'relevant persons' who required consultation in accordance with reg 11A,[17] such that NOPSEMA was not in a position to be '"reasonably satisfied" that the required consultation had occurred' (labelled the 'methodological flaw').[18] Given this legal error,[19] Bromberg J dismissed NOPSEMA's decision to accept the drilling EP and required Santos to shut down drilling operations and remove the rig within two weeks.[20]

Following the shut-down of Santos' drilling operations in the Timor Sea, Santos sought an appeal of Bromberg J's decision before the Full Court of the Federal Court.

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12 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* (2022) 406 ALR 41 ('*Primary Decision*').

13 Ibid 45–6 [11]. Ground One was said to enliven ss 5(1)(c), (d) and (f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*'): at 48 [26].

14 *Primary Decision* (n 12) 46 [16]. Ground Two was said to enliven s 5(1)(b) of the *AD(JR) Act* (n 13): at 48 [26].

15 *Primary Decision* (n 12) 104 [268].

16 Ibid.

17 Ibid 77 [144]–[145].

18 Ibid 74 [126], 84 [183].

19 Note that Bromberg J also considered, in the alternative to the methodological flaw, that NOPSEMA's failure to be on notice that relevant persons had not been consulted was an error (labelled a 'failure to consider flaw'): ibid 74 [126]. This was given that the EP identified that environment containing 'significant sea country for traditional owners' would be affected, despite those traditional owners not being consulted: at 84 [183].

20 Ibid 108 [290]–[292].

The 'real issues' of the appeal were: (1) whether Mr Tipakalippa and the Munupi clan, as traditional owners of the Tiwi Islands, were 'relevant persons' requiring consultation under reg 11A(1)(d), such that they had 'functions, interests or activities' that may be affected by the drilling EP;[21] and (2) if so, whether NOPSEMA was 'reasonably satisfied' under reg 10 that the drilling EP demonstrated Santos had consulted all 'relevant persons' as required by reg 11A.[22]

A central issue for the Full Court was the 'proper construction' of 'functions, interests or activities' for the purposes of reg 11A(1)(d) — a matter not expressly considered by Bromberg J in the primary decision.[23] The Full Court did not adopt Bromberg J's tailored approach of analysing any 'methodological flaw' or 'failure to consider flaw', instead agreeing with Santos' submissions that the validity of Bromberg J's approach and consequent findings depended on the proper construction of reg 11A.[24]

III Decision

Justices Kenny and Mortimer, with Lee J concurring, held that Santos wrongly proceeded on the basis that Mr Tipakalippa and the Munupi clan did not have 'functions, interests or activities'[25] that could be affected by Santos' activities under the EP, and therefore, were not consulted. For this reason, their Honours held that NOPSEMA should not have approved the EP as Santos did not carry out the necessary consultation required by the *Offshore Environment Regulations*.[26]

A *Definitional Issues*

The judgments of Kenny, Mortimer and Lee JJ resolved critical definitional disputes embedded throughout the *Offshore Environment Regulations*, to determine whether the primary judge had erred in his initial decision. Their Honours agreed that for NOPSEMA to be 'reasonably satisfied' that the EP had complied with reg 10A, it must possess 'evident and intelligible justification' on an objective basis.[27] Similarly, it was also agreed that the Munupi clan had sufficient cultural or spiritual interests in the Tiwi Islands as traditional owners, as evident in the material before NOPSEMA.[28] However, the Court grappled with the fundamental issue of interpreting reg 11A and the requirement to consult with 'relevant persons' whose 'functions,

21 *Santos* (n 1) 139 [23]–[25] (Kenny and Mortimer JJ), 159 [115] (Lee J).

22 Ibid (Kenny and Mortimer JJ).

23 Ibid 139 [24].

24 Ibid.

25 *Offshore Environment Regulations* (n 3) reg 11A(1)(d).

26 *Santos* (n 1) 158 [111] (Kenny and Mortimer JJ), 168 [163] (Lee J).

27 Ibid 140 [31].

28 Ibid 141 [38] (Kenny and Mortimer JJ), 167 [158] (Lee J).

interests or activities may be affected'.[29] Justices Kenny and Mortimer held that 'relevant persons' not only accommodates natural persons, but also bodies, groups and organisations.[30] This interpretation requires titleholders to exercise 'some decisional choice' in determining which natural person to approach in that group and how to sufficiently distribute information to the relevant person.[31] Importing this element of discretion countered Santos' criticism in their outline of submissions[32] that consulting with all persons with a spiritual connection would render it practically impossible to undertake sufficient consultation within a reasonable timeframe.[33] Understanding the meaning of 'relevant persons' provides the crucial foundation to interpret 'functions, interests or activities' under reg 11A.

B *Functions, Interests or Activities*

Justices Kenny and Mortimer, and Lee J agreed that 'functions, interests or activities' should be construed broadly, with slightly differing reasons. For Kenny and Mortimer JJ, the phrase must uphold the objects of the *Offshore Environment Regulations* to ensure that any 'offshore petroleum or greenhouse gas storage activity' is consistent with the 'principles of ecologically sustainable development', 'environmental, social and equitable considerations', and 'the potential effect … on people and communities'.[34] For this reason, their Honours rejected Santos' notion that 'activities' should be interpreted by reference to reg 4, which states that an 'activity means a petroleum activity or greenhouse gas activity'.[35] This interpretation would incorrectly suggest that only operators who engaged in activities like Santos would need to be consulted.[36] Justices Kenny and Mortimer were 'of the clear view that to construe "activities" … in this way would defeat the evident object of reg 11A and, more broadly, the objects of the Regulations'.[37] Justice Lee similarly adopted a broad interpretation of 'activity' as 'a thing that a person or group does'.[38] It was also unanimously agreed that the concept of 'functions' should be construed broadly.[39] This meant that Mr Tipakalippa and the Munupi clan could have relevant 'functions', although this aspect was addressed as an aside to the issue of 'interests'.[40]

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29 *Offshore Environment Regulations* (n 3) reg 11A.

30 *Santos* (n 1) 145 [46]–[48].

31 Ibid 145 [47].

32 Santos NA Barossa Pty Ltd, 'Outline of Submissions of the Appellant', Submission in *Santos NA Barossa Pty Ltd v Tipakalippa*, VID555/2022, 9 November 2022, [63].

33 *Santos* (n 1) 162 [136] (Lee J).

34 Ibid 145–6 [51]–[52] (Kenny and Mortimer JJ); *Offshore Environment Regulations* (n 3) reg 3(a).

35 *Santos* (n 1) 147 [58]; *Offshore Environment Regulations* (n 3) reg 4.

36 *Santos* (n 1) 147 [58].

37 Ibid 147–8 [59].

38 Ibid 164 [146].

39 Ibid 148 [60] (Kenny and Mortimer JJ), 164 [143]–[144] (Lee J).

40 Ibid.

Justices Kenny and Mortimer, and Lee J, differed in opinion when interpreting 'interests'. For Kenny and Mortimer JJ, Mr Tipakalippa and the Tiwi Islanders were able to seek judicial review because their cultural and spiritual interests were impacted by the proposed EP.[41] This was particularly relevant given that cultural and spiritual interests, despite not being recognised native title interests, are 'well known to contemporary Australian law' and acknowledged in federal legislation, and therefore have a legal basis.[42] For Lee J, 'interests' referred to 'an existing interest over and above a member of the public at large'.[43] Whilst there may be administrative law reasoning supporting this approach, Lee J did not refer to such and, rather, emphasised that a legal or proprietary basis is not necessary to form an interest.[44] It appears that Kenny and Mortimer JJ held a slightly narrower interpretation of 'interests' by relating it to judicial review; however, this had no operative effect on the outcome of the case. It was unanimously held that for the purpose of reg 11A of the *Offshore Environment Regulations*, Mr Tipakalippa and the Munupi clan held — at minimum[45] — interests that may have been affected by the EP which warranted consultation.

C *Duty to Consult*

Santos sought to rely on two arguments to establish that it did not have a duty to consult with Mr Tipakalippa and the Munupi clan, being: (1) the analogous context of procedural fairness did not support a duty to consult with 'the public at large';[46] and (2) a requirement to consult with persons such as Mr Tipakalippa and the Munupi clan would be 'unworkable'.[47]

1 *Procedural Fairness*

In relation to the former argument, Santos contended that, consistent with the duty of procedural fairness, a requirement to consult with 'the public at large' whose interests are only 'indiscriminately' affected under the EP could not attract a consultation obligation.[48] This argument was promptly dismissed by Kenny and Mortimer JJ who stated that, 'it cannot seriously be suggested that the interests of Mr Tipakalippa and the Munupi clan are analogous to those of the public at large'.[49]

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41 See ibid 148–9 [61]–[68].

42 Ibid 149 [68].

43 Ibid 166 [154].

44 See ibid 165 [149]–[151].

45 Justices Kenny and Mortimer stated that it was 'unnecessary' to determine whether Mr Tipakalippa and the Munupi clan had 'functions' within the meaning of reg 11A(1)(d), because their Honours were 'of the view that they have "interests"': ibid 148 [60].

46 See ibid 152 [82] (Kenny and Mortimer JJ).

47 Ibid 153 [86].

48 Ibid 152 [83].

49 Ibid 152–3 [84].

Further, their Honours highlighted the distinction between an 'express statutory obligation' to consult persons whose 'interests may be affected' under reg 11A,[50] and an 'unexpressed implication arising from common law' to accord procedural fairness when exercising a statutory power.[51] Justices Kenny and Mortimer concluded that, in the context of an obligation that is 'express and irrefutable', attempting to interpret by analogy to procedural fairness was unconvincing.[52]

2 *Workability*

Regarding the workability argument, Santos asserted that interpreting 'interests' in a way that required consultation with relevant First Nations peoples would render reg 11A(1) unworkable.[53] According to Santos, this unworkability stemmed from the 'complex, difficult, and indeterminate' nature of identifying, and then consulting, 'each and every' First Nations person who may have a traditional connection to the environment under the EP.[54]

In this respect, Lee J agreed that the requirement to identify and consult with all First Nations peoples would only be workable if each person 'holding an interest … could be identified, and there [was] a practical means or mode by which they might be "given" information and told things'.[55] However, his Honour also emphasised 'the important qualifier' that it is only persons with 'readily ascertainable' interests that must be consulted, and thus the argument that reg 11A was unworkable was 'unpersuasive' to the Court.[56] As noted by Kenny and Mortimer JJ, Santos 'was well aware' of the presence of the Tiwi Islanders and their traditional connection to their islands, waters and marine resources — Santos had simply formed a view that the Tiwi Islanders did not require consultation.[57] Additionally, their Honours noted that even if Santos was unable to determine whether any First Nations clans had connections to the environment the subject of the EP, '[i]n contemporary Australia, there are a myriad of ways of contacting groups of First Nations peoples'.[58] This suggests that even in the face of difficulty in discerning relevant interests, Santos was under a positive duty to proactively seek out and identify those interests that were 'readily ascertainable'.[59]

Regarding the practicalities of consulting with 'each and every' First Nations person, Kenny and Mortimer JJ acknowledged that where interests are communally,

50 Ibid.

51 Ibid.

52 Ibid (emphasis omitted).

53 Ibid 153 [86].

54 Ibid 153 [86]–[87].

55 Ibid 165–6 [152].

56 Ibid 166 [153].

57 Ibid 154 [93].

58 Ibid 154 [92].

59 Ibid 166 [153] (Lee J).

as opposed to individually, held, a different approach to consultation would be required.[60] Drawing on the approach under the *Native Title Act 1993* (Cth) ('*NTA*'), their Honours considered that consulting with a 'sufficiently representative section' of the relevant native title claim group would suffice.[61] Their Honours considered that this approach was applicable, notwithstanding that reg 11A was not qualified by a term such as 'reasonable efforts' as apparent in the *NTA*.[62] Further, the Court acknowledged the long-standing need for 'practical and pragmatic approaches to provisions dealing with group decision-making', driven by considerations of reasonableness and workability.[63] As for what 'consultation' with a communal group would entail, Kenny and Mortimer JJ, and Lee J, reiterated that it must be 'appropriate and adapted to the nature of the interests of the relevant persons'.[64]

D *Decision and Consequences*

For the reasons outlined above, Kenny, Mortimer and Lee JJ held that Santos 'proceeded on an incorrect understanding' of reg 11A(1)(d) and could not have demonstrated to NOPSEMA that it properly undertook the consultations required by reg 11A.[65] On this basis, the orders of the primary judge were upheld and the appeal dismissed.

Following the decision, Santos engaged in extensive and protracted consultation with the Tiwi Islanders in accordance with the Court's findings.[66] On 15 December 2023, NOPSEMA approved Santos' revised EP,[67] paving the way for the commencement of the relevant drilling activities. Although the revised EP implemented measures such as mandated cultural training for Santos' employees and contractors,[68] it did not fundamentally alter the contents of the original EP. This underscores a crucial point: despite the importance of the decision in *Santos*, the obligations under reg 11A(1)(d) of the *Offshore Environment Regulations* do not confer First Nations' people with a substantive right to refuse consent to a given project. Rather, reg 11A(1)(d) provides a procedural right for First Nations' people to be consulted. This is evident as although the revised EP addressed the concerns of the Tiwi Islanders raised during consultation, the project largely proceeded as planned.

60 Ibid 154 [95].

61 Ibid 156 [102], citing *Anderson v Western Australia* [2007] FCA 1733, [36] (French J).

62 Ibid 156 [103].

63 Ibid.

64 Ibid 157 [104] (Kenny and Mortimer JJ), 166 [153] (Lee J).

65 Ibid 158 [111] (Kenny and Mortimer JJ), 168 [163] (Lee J).

66 NOPSEMA, *Acceptance of Barossa Development Drilling and Completions Environment Plan* (Doc No: A1036721, 4 January 2024) 33 [103].

67 Ibid 1 [1].

68 Ibid 39–40 [111(d)(ii)(A)].

IV Comment

A *Social Licence to Operate*

Santos has not only faced significant legal consequences for failing to properly consult with the Tiwi Islanders, but the decision also brings into question Santos' social licence to operate ('SLO'). A SLO refers to companies who conduct their business practices in accordance with 'stakeholder expectations and social norms', distinct from the grant of any legal or regulatory licence.[69] Achieving this standard often operates in parallel with meeting a company's broader international obligations, such as those outlined in the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[70] This Part IV explores: (1) the requisite standard for project proponents to adhere to *UNDRIP*; and (2) the reputational consequences of companies who fail to meet their SLO.

1 *Free, Prior and Informed Consent*

UNDRIP sets out, most crucially, the requirement to obtain free, prior and informed consent ('FPIC') before the development of any project which may impact upon the lands or territories of Indigenous Peoples.[71] Whilst Santos' failure to uphold the principles of *UNDRIP* has no direct legal ramifications,[72] *Santos* demonstrates that domestic courts are increasingly willing to engage with FPIC principles. Such principles are founded on the fundamental and collective rights of Indigenous Peoples to participate in 'a qualitative process of dialogue and negotiation, with consent as the objective'.[73]

For example, Kenny and Mortimer JJ emphasised that consultation is a 'real world activity' which requires gathering information and using this information to actively assist in minimising environmental impacts and risk.[74] Sending an email with information, and even a follow up, does not mean that proper consultation has occurred, or that reg 11A is satisfied.[75] Further, Kenny and Mortimer JJ state that consultation must be 'genuine', by ensuring affected communities are given a reasonable period to understand the effect of any proposed activity on their interests and provide

69 Basak Baglayan et al, *Good Business: The Economic Case for Protecting Human Rights* (Report, December 2018) 26. See also Anne Matthew, 'Trust, Social Licence and Regulation: Lessons from the Hayne Royal Commission' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 103, 104.

70 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*').

71 Ibid art 32(2). See also arts 10, 11(2) and 29(2).

72 *UNDRIP* has not been incorporated into domestic law to be legally binding.

73 Human Rights Council, *Free, Prior and Informed Consent: A Human Rights-Based Approach — Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/39/62 (10 August 2018) 5 [15].

74 *Santos* (n 1) 153 [89].

75 Ibid 154 [94] (Kenny and Mortimer JJ).

a response with their concerns.[76] This is largely consistent with the principles of 'prior and informed consent', which implies that consent is achieved prior to the commencement of any operation works, on the basis of sufficient information, consultation and participation.[77] Under FPIC, and as recognised by their Honours in *Santos*, participation requires that individuals are consulted in a way which is accessible and appropriate.[78] Specifically, Lee J acknowledged that the 'appropriate discharge of the prescriptive consultation step' should be tailored to the nature of the interest and the relevant person holding that interest.[79] The Justices' emphasis on ensuring the proper discharge of the consultative process underscores how 'consultation' entails a rigorous standard, consistent with FPIC principles.

Despite a growing body of case law concerning consultation with affected First Nations people,[80] ambiguity persists regarding how to effectively meet the standards of FPIC. Such uncertainty was explored during the Australian Senate's 'Inquiry into the Application of UNDRIP in Australia' ('Senate Inquiry'), which aimed to improve adherence to *UNDRIP* in Australian legislation.[81] Submissions from mining companies and other stakeholders were notably critical about the exercise of FPIC obligations, citing instances of 'non-observance in practice and undue qualification or limitation'.[82] Further concerns were raised in the 'additional comments' section of the final report by Senator Lidia Thorpe.[83] Senator Thorpe emphasised that FPIC is 'one of UNDRIP's most disregarded principles. [Australia] has a shocking record of decision-making for and often to the detriment of First Peoples,

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76 Ibid 147 [56].

77 United Nations Office of the High Commissioner for Human Rights, *Free Prior and Informed Consent of Indigenous Peoples* (Issues Paper, September 2013) 2.

78 *Santos* (n 1) 147 [56]–[57].

79 Ibid 166 [153].

80 See, eg: *Barngarla Determination Aboriginal Corporation RNTBC v Minister for Resources* (2023) 299 FCR 50; *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.

81 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Terms of Reference, 2 August 2022). Note that the inquiry initially commenced in the Senate and was then referred to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs ('JSCATSIA'). All public submissions accepted by the Senate were also accepted by JSCATSIA.

82 Environmental Justice Australia, Submission No 46 to Senate Legal and Consultation Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (16 June 2022) 16 [78]. See also Woodside Energy Group Ltd, Submission No 24 to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (25 October 2022) 2.

83 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (Final Report, November 2023) 103–70 ('*Inquiry into the Application of UNDRIP*').

completely ignoring the principle of FPIC.'[84] Senator Thorpe recommended that the Government enshrine *UNDRIP* into domestic law 'to clarify and establish a framework for contested areas such as FPIC, in particular with regard to resource extraction'.[85] Despite such appeals, the recommendations of the Senate Inquiry notably fell short in addressing the procedural necessities for achieving FPIC. Rather, recommendations included developing a National Action Plan to outline the approach to implementing *UNDRIP*.[86] This recommendation has been made to the Government numerous times by multiple international bodies including the Committee on the Elimination of Racial Discrimination,[87] the World Conference on Indigenous Peoples,[88] and by member States during the United Nations Human Rights Council's Periodic Review of Australia,[89] to no avail. Whilst the Government is yet to respond to the Senate Inquiry, precedent suggests that there is unlikely to be legislative enshrinement of *UNDRIP* in the near future.

Clarity regarding compliance with FPIC principles, however, does not solely depend on the enshrinement of *UNDRIP*. For example, in response to *Santos*, NOPSEMA issued guidelines titled *Consultation in the Course of Preparing an Environment Plan*, which discuss FPIC principles.[90] The Guidelines assist proponents in understanding how to meet consultation obligations under the *Offshore Environment Regulations* based on transparency, inclusiveness and collaboration.[91] However, if stakeholder views are any indication, merely issuing broad guidelines is fundamentally inadequate.[92] Legislative amendments are therefore necessary to not only explicitly mandate consultation, but also to provide project proponents with a framework which reconciles societal expectations with the realities of business

84 Ibid 109 [1.35].

85 Ibid 147 [1.265].

86 Ibid 81–4.

87 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia*, UN Doc CERD/C/AUS/CO/18–20 (26 December 2017) 5 [22].

88 *Inquiry into the Application of UNDRIP* (n 83) 81 [4.38]; *Outcome Document of the High-Level Plenary Meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, UN Doc A/RES/69/2 (25 September 2014, adopted 22 September 2014) 2 [8].

89 *Inquiry into the Application of UNDRIP* (n 83) 42–3 [2.81]–[2.82]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (24 March 2021) 23 [146.272], 23 [146.285] and Add.1 (2 June 2021) 3 [19].

90 NOPSEMA, *Consultation in the Course of Preparing an Environment Plan* (Guidelines, 12 May 2023).

91 Ibid 7.

92 The *Independent Review* of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*') was critical of non-binding consultation guidelines which lacked sufficient resources to be properly implemented and did not necessarily have practical implications: Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) ch 2.2. See also above nn 82, 84, 85.

needs. In this respect, the Department of Industry, Science and Resources' ('DISR') consultation paper titled '*Clarifying Consultation Requirements for Offshore Oil and Gas Storage Regulatory Approvals*' suggests a potential shift towards legislative enforcement of FPIC principles.[93] The consultation paper acknowledges that irrespective of *Santos*, 'uncertainty remains' regarding how to ensure that 'targeted, effective, meaningful and genuine consultation occurs'.[94] Following public consultation, the DISR will consider implementing new policies, or more significantly, amending the *Offshore Environment Regulations* to establish precise consultation requirements.[95] This should alert project proponents that the incorporation of FPIC principles into the *Offshore Environment Regulations* is likely forthcoming.

2 *Reputational Damage*

The failure to undertake proper consultation and obtain a SLO carries significant implications for Santos, affecting both its reputation and financial standing. This failure serves as a sign of challenges looming over offshore petroleum and gas projects more generally. For example, on the day their Honours delivered their judgment, the *Australian Financial Review* published an article titled 'Santos Bungles Oil Approvals', stating '[i]t is hard to have sympathy for the gas and oil giant after its second successive court loss over its failure to consult Indigenous people'.[96] Further, Lee J was particularly critical in his analysis, emphasising that Santos' approach to identifying the Tiwi Islanders interests and carrying out its consultation obligations was 'misconceived', with 'an immediate flaw' and 'unpersuasive'.[97] It is well recognised that a poor reputation is a distinct source of financial risk, often arising from highly publicised litigious battles.[98] Santos itself acknowledge that the decision had negative implications for investor confidence in Australia,[99] signalling broader implications for similar projects facing approval delays.

The case of *Munkara v Santos NA Barossa Pty Ltd (No 3)* ('*Munkara*')[100] further highlights the impact of legal proceedings on the industry at large. *Munkara* concerned a permanent injunction application initiated by Aboriginal people from the Tiwi Islands regarding the Barossa Gas Project.[101] The applicants argued that Santos was obligated to submit a revised environmental plan due to the risk of the

93 DISR, *Clarifying Consultation Requirements for Offshore Oil and Gas Storage Regulatory Approvals* (Consultation Paper, January 2024).

94 Ibid 3, 6.

95 Ibid 11.

96 Tony Boyd, 'Santos Bungles Oil Approvals', *Australian Financial Review* (online, 2 December 2022) <https://www.afr.com/chanticleer/santos-bungles-oil-approvals-20221202-p5c38g>.

97 *Santos* (n 1) 162 [138], 163 [140], 165 [149].

98 See generally Baglayan et al (n 69).

99 Santos, 'Federal Court Decision' (Announcement, 21 September 2022).

100 [2024] FCA 9 ('*Munkara*').

101 Ibid 6 [1]. *Munkara* explicitly did not consider, or weaken, the consultation requirements outlined in *Santos*: at 293 [1318].

pipeline on their cultural heritage.[102] Justice Charlesworth's ruling in favour of Santos was heavily critical of the Environmental Defenders Office for confecting evidence and engaging in a 'form of subtle coaching' of consultees to establish their interest in the pipeline site.[103] The ruling may have 'cleared this particular obstacle'[104] for Santos. However, *Munkara* does not necessarily restore confidence in the viability of similar projects. Investors industry wide are likely to continue approaching offshore petroleum and gas projects with caution given the growing uncertainty that approved EPs equate to project success.[105] For example, Santos estimates that the ramifications of *Munkara* alone will require an additional $200–$300 million in capital expenditure to complete the project.[106] Furthermore, the Australasian Centre for Corporate Responsibility noted that the effects of *Munkara* leave a 'colossal haemorrhage of shareholder money in its wake'.[107] Santos' legal challenges serve as a stark reminder that the ramifications of court proceedings, whether adverse or otherwise, extend far beyond the confines of the legal domain.

B *Future Implications*

Whilst the Full Court's findings regarding the requirement for considered and genuine stakeholder consultation are limited to offshore petroleum and gas projects under the *Offshore Environment Regulations*, the implications of *Santos* could be wide-reaching. The decision not only aligns consultation expectations for offshore petroleum and gas project proponents with those imposed on many onshore developers,[108] but serves as a broader alert to project proponents in other offshore sectors. Stakeholder consultation should no longer be regarded as a perfunctory checkbox exercise. Instead, there is a heightened expectation for genuine, targeted dialogue to be actively demonstrated.

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102 Ibid 7 [4].

103 Ibid 220–1 [994].

104 Hannah Wootton and Ben Potter, '"Made Up": Judge Slams Green Activists in Santos Gas Case', *Australian Financial Review* (online, 15 January 2024) <https://www.afr.com/companies/energy/santos-finally-gets-green-light-for-barossa-oil-field-pipeline-20240115-p5ex90>.

105 Samantha Dick, 'Gas Sector Demands Regulatory Reform Following Santos Court Battle with Elders from Tiwi Islands', *ABC News* (online, 17 January 2024) <https://www.abc.net.au/news/2024-01-17/santos-nt-barossa-project-court-decision-industry-react/103323524>.

106 Santos, *Fourth Quarter Report for the Period Ending 31 December 2023* (Report, 25 January 2024) 5.

107 Australasian Centre for Corporate Responsibility, 'Federal Court Ruling on Barossa Pipeline Gets Santos out of Hot Water: For Now' (Media Release, 15 January 2024).

108 For example, the *Electricity Infrastructure Investment Act 2020* (NSW) s 4(1) requires the Minister to 'issue guidelines about consultation and negotiation with the local Aboriginal community in relation to relevant projects'. Consequently, the Minister issued the *First Nations Guidelines* which place an expectation on project proponents to engage in 'best practice engagement': Office of Energy and Climate Change, *First Nations Guidelines* (Guidelines, August 2022).

There are further implications for *Santos* in the context of offshore wind and non-petroleum projects, under the *Offshore Electricity Infrastructure Act 2021* (Cth) ('*OEI Act*'). Similar to the *Offshore Environment Regulations*, the *OEI Act* requires that proponents seeking a licence for the construction and operation of an offshore renewable energy or electricity infrastructure project submit a management plan.[109] This plan is assessed by the Offshore Infrastructure Regulator within NOPSEMA.[110]

Section 115(2) of the *OEI Act* states that the licensing scheme under the *Offshore Electricity Infrastructure Regulations 2022* (Cth) ('*OEI Regulations*') may require submitted management plans to demonstrate consultation with 'any person that may be affected by the activities' has been carried out. *Santos* has provided clarity on who may fall under the scope of 'affected' persons for this purpose. In contrast to the *OEI Act*, reg 11A of the *Offshore Environment Regulations* qualifies a person's right to consultation by requiring that such person must have an established 'function, interest or activity' that would be affected by the activities outlined in the EP.[111] Accordingly, following *Santos*, if First Nations groups are recognised to have an established 'interest', by virtue of their 'traditional connection to the sea, and to the marine resources [they] hold',[112] they would also fall under the broader category of persons 'that may be affected', thus requiring consultation under the *OEI Act*. As such, the *OEI Act* authorises the *OEI Regulations* to impose consultation requirements on licensing activities that affect First Nations people.

Currently, however, the *OEI Regulations* do not mandate such consultation. This may be subject to change, following statements from the Department of Climate Change, Energy and the Environment and Water ('DCCEEW') that it is developing the *OEI Regulations* through a phased approach.[113] Notably, the DCCEEW's exposure draft of the Offshore Electricity Infrastructure Amendment Regulations 2024 (Cth) proposes additional requirements that are currently subject to consultation.[114] The proposed s 57(1)(b) states that licence holders must make 'reasonable efforts' to identify and consult with First Nations groups that may have native title rights and interests, or sea country, in the licence area. Further, the proposed s 58(1)(b) mandates that licence holders provide affected First Nations groups with sufficient information regarding any 'foreseeable effects' of the licenced activities. These developments align with broader industry trends towards increased consultation for project proponents, such as legislative reforms to the *Environment Protection*

109 *Offshore Electricity Infrastructure Act 2021* (Cth) s 114(1).

110 Ibid s 175(1).

111 *Offshore Environment Regulations* (n 3) reg 11A(1)(d).

112 *Santos* (n 1) 153 [90] (Kenny and Mortimer JJ).

113 'Legislation and Regulations', *Department of Climate Change, Energy, the Environment and Water* (Web Page, 9 February 2024) <https://www.dcceew.gov.au/energy/renewable/offshore-wind/legislation-regulations>.

114 See DCCEEW, *Regulations under the Offshore Electricity Infrastructure Act 2021* (Consultation Paper, 2024) 8–11.

and Biodiversity Conservation Act 1999 (Cth).[115] *Santos* will undoubtedly play a significant role in shaping these requirements by setting a precedent for genuine engagement with First Nations people.

The impact of *Santos* on development of the *OEI Act* is therefore two-fold: (1) it removes any ambiguity on whether a traditional connection to land is sufficient to meet the threshold of 'affected' persons; and (2) it increases the normative demand for legislative enshrinement of consultation requirements.

V Conclusion

Santos has set a new industry standard for the level of consultation expected of offshore petroleum and gas project proponents. While the decision itself does not create a substantive right for First Nations' people to refuse consent, the far-reaching policy implications will likely influence the success of similar projects. The Full Court's pointed critique of Santos' actions suggest that proponents operating under the *Offshore Regulations* will find it increasingly difficult to plead ignorance when it comes to identifying who to consult and understanding the necessary steps in the consultative process. Overtime, this heightened threshold will likely extend to offshore wind and non-petroleum projects, reflecting an industry-wide shift in support of First Nations' participation. For now, *Santos* serves as a cautionary tale — in the face of multi-million-dollar delays, reputational damage and continuing legal battles, not only is proper consultation with First Nations people the right thing to do, but the success of future projects may depend on it.

115 In response to the *Independent Review of the EPBC Act* (see above n 92), the DCCEEW announced it is developing National Environmental Standards which will prioritise the protection of First Nations cultural heritage: at DCCEEW, *Nature Positive Plan: Better for the Environment, Better for Business* (Report, December 2022) 2.