UTS ePRESS

Cosmopolitan Civil Societies: An Interdisciplinary Journal

Vol. 17, No. 2
2025

ARTICLE (REFEREED)

First Nations Litigants Challenge the Hubris of Australian Gas Companies

Lily O'Neill[1,*], Rebekkah Markey-Towler[2]

[1] University of Melbourne, Level 1/ 700 Swanston St, Carlton VIC 3053, Australia, lily.oneill@unimelb.edu.au

[2] University of Melbourne, Level 1/ 700 Swanston St, Carlton VIC 3053, Australia, rebekkah.markeytowler@unimelb.edu.au

Corresponding author: Lily O'Neill, University of Melbourne, Level 1/ 700 Swanston St, Carlton VIC 3053, Australia

DOI: https://doi.org/10.5130/ccs.v17.i2.9584
Article History: Received 30/01/2025; Revised 04/03/2025; Accepted 08/03/2025; Published 26/07/2025

Citation: O'Neill, L., Markey-Towler, R. 2025. First Nations Litigants Challenge the Hubris of Australian Gas Companies. *Cosmopolitan Civil Societies: An Interdisciplinary Journal*, 17:2, 6–18. https://doi.org/10.5130/ccs.v17.i2.9584

ISSN 1837-5391 | Published by UTS ePRESS | https://epress.lib.uts.edu.au/journals/index.php/mcs

Abstract

Australian First Nations people are playing an increasingly important role in climate litigation relating to the approval of greenhouse gas emission (GHG) projects, with several important cases handed down in the last few years. Here we discuss three recent court wins for First Nations litigants against the Australian gas industry. The cases of *Tipakalippa*, *Cooper* and *Gomeroi* highlight three things: (1) the mostly-weak procedural rights First Nations people are forced to use to defend their Country, (2) the hubris of Australian gas companies Santos and Woodside in failing to meet even low procedural law requirements, and (3) the grit of First Nations litigants in fighting for their Country, a fight that all Australians benefit from.

Keywords

Climate Litigation; Native Title; Climate Change, First Nations' Rights

DECLARATION OF CONFLICTING INTEREST The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article. **FUNDING** The authors received no financial support for the research, authorship, and/or publication of this article.

Introduction

Litigation has long been a plank in First Nations' peoples fight for control over their Country, particularly to resist unwanted development, predominantly mining, and oil and gas extraction. The first of these significant cases was *Milirrpum v Nabalco Pty Ltd*[1] in 1971, brought by the Yolngu people of the Northern Territory against a bauxite lease granted on their Country without permission or consultation in the 1960s. While the case itself was not successful, it led to the Aboriginal Land Rights Commission, also known as the Woodward Royal Commission (1974), which recommended the passing of the *Aboriginal Land Rights (Northern Territory) 1976* (Cth).

The advent of native title, following the seminal case of *Mabo v Queensland (No 2)*[2] in 1992, saw this fight continue. Since the *Native Title Act* 1993 (Cth) ('Native Title Act') was enacted, native title holders have tried via the arbitral body, the National Native Title Tribunal, to prevent development, again predominately mining, on their Country on 152 occasions, with successful outcomes only three times.[3] This low success rate reflects the legislative provisions of the *Native Title Act*, which was written to allow mining to occur without the need for consent from native title holders (O'Neill, L. et al. 2021).

In recent years there has been significant climate litigation in Australia, with First Nations people playing a central role in ten important cases of recent years. Here we discuss three of these cases, that of *Tipakalippa*[4] and *Cooper*[5] (both relating to offshore gas extraction, off the Northern Territory and Western Australia) and that of *Gomeroi*[6] (relating to onshore gas extraction in the Narrabri region of New South Wales). These three cases relied on procedural, rather than substantive, legal rights, and all three demonstrate the inherently weak nature of the procedural rights on which these First Nations litigants had to rely, the hubris of Australian gas companies Woodside and Santos in their response, and the grit of the First Nations litigants in fighting to protect their Country. The *Gomeroi* decision, in particular, is likely to have significant impact on fossil fuel approvals going forward.

What are procedural legal rights?

Substantive legal rights are the rights and obligations that individuals and entities like companies have towards each other. For example, in native title law, an example of substantive legal rights are the native rights and interests that First Nations groups hold communally which can be enforced against the world, including by excluding people from certain areas.

Procedural legal rights, on the other hand, are how substantive legal rights are enforced (Bamford & Rankin 2021). Procedural law sets out the rules for how individuals or companies sue each other, for example. In native title law, procedural rights set out minimum requirements for negotiations between mining companies and native title parties, including that they must be conducted in 'good faith' and that the negotiation period cannot be shorter than six months. While procedural rights are clearly inherently weaker than substantive legal rights at ensuring substantive outcomes, they are also clearly better than nothing, and, as these cases show, are being used very effectively by First Nations litigants to ensure that their voice is heard in these matters.

1 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141

2 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 found that Australian First Nations people continued to own their Country in certain circumstances despite British colonisation.

3 See explanation below, page 11.

4 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (Bromberg J) and *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (Kenny, Mortimer and Lee) ('*Tipakalippa*')

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

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

Climate Litigation in Australia

Australia is a global 'hotspot' for climate change litigation. It is the jurisdiction with the second highest number of cases filed worldwide, second only to the United States (Setzer & Higham 2024). At the time of writing, the Australian and Pacific Climate Litigation database recorded 440 climate change cases in Australia.[7] There a few reasons why Australia has been a leading jurisdiction for climate litigation. It is a carbon intensive economy (Peel 2023). In 2022, it was the highest per capita emitter of greenhouse gases of all Organization for Economic Co-operation and Development (OECD) member countries (Tiseo 2024). Australia's second highest value export item is also coal (Austrade 2023). In addition, until recently there has been limited climate action from the Federal government. As a result, litigants have turned to the courts to seek climate action (Peel 2023).

However, defining what counts as 'climate change litigation' is not as straightforward as it seems. This is because climate change is caused by, and will affect, many (if not most) areas of modern life. For example, in its broadest sense, all litigation from contractual disputes to criminal disputes could be a climate case. As Chris Hilson put this, 'given that climate change is the consequence of billions of every human actions, personal, commercial and industrial, virtually all litigation could be conceived of as climate litigation' (Hilson 2010, p. 421). This makes distinguishing climate cases from other cases difficult (Sindico et al. 2024, p. 2).

In response to this complexity, some have adopted a narrow definition of climate litigation. Markell and Ruhl, for example, defined climate litigation as 'any piece of federal, state, tribal or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance of policy of climate change causes and impacts' (Markell & Ruhl 2012, p. 27). The annual reports produced by the Grantham Research Institute on Climate Change and the Environment on global trends in climate litigation, similarly, only focus on cases that explicitly engage with climate change matters (Setzer & Higham 2024). They define climate change litigation as 'cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law' (Setzer & Higham 2024, p. 9).

A narrow definition, however, fails to capture the larger universe of cases that do not relate primarily to climate change issues but that nevertheless have an impact on climate change governance. Peel and Osofsky, for example, conceptualise climate litigation as a series of concentric circles. Core cases are where climate change is a central issue in the litigation whereas peripheral cases 'are not explicitly tied to specific climate change arguments but which have clear implications for climate change mitigation or adaptation' (Peel & Osofsky 2015, pp. 8-9). This definition excludes 'incidental' cases which may mention climate change but only in passing or without actually engaging with the issue (Lin & Peel 2024, p. 12).

Lin and Peel have adopted a broad definition of climate litigation, including periphery cases, for their study of climate litigation in the Global South. Periphery cases have featured extensively in climate litigation in the Global South. One of the reasons for this is that climate change issues have 'lower public policy salience…in many Global South countries, compared with more pressing social and policy concerns around economic development, poverty alleviation, or public health'. This means that climate change issues are packaged with other issues, 'such as those pertaining to pollution, land use, forestry, natural resource conservation, disaster risk management, implementation of planning frameworks, or environmental justice and rights claims'. This framing 'aligns with the reality for many litigants in Global South countries' where

7 Note that the database adopts a broad definition of climate litigation. It includes disputes beyond judicial bodies. It also includes some examples of incidental climate litigation. See https://law.app.unimelb.edu.au/climate-change/

climate change 'adds a layer of complexity to, or exacerbates, existing environmental challenges rather than presenting as a self-standing environmental issue' (Lin & Peel 2024, p. 12).

We adopt a broader definition of climate litigation in this article, aligned with the definitions from Peel and Osofsky and Lin and Peel. Climate litigation includes cases where climate change is both a core and peripheral issue in the dispute. It is also worth emphasising that Australia's environmental legislation does not protect the climate (Peel 2024), requiring litigants to be creative when it comes to formulating their causes of action if their chief concern is to mitigate climate change.

As the table below demonstrates, First Nations litigation has featured climate change as both a core and peripheral issue. There are at least 10 cases of this type in the Australian and Pacific Climate Litigation database at the time of writing this article. We not only include cases filed at Australian courts and Tribunals. We also include cases filed in international forums or through internal dispute resolution mechanisms. A table summarises these cases below.

Table 1. First Nations Climate Change Litigation

No.	Date & case name	Plaintiff(s)	Defendant(s)	Forum	Relevant law
1	13 May 2019 *Billy & ors v Australia*	Eight Australian nationals and six of their children, Indigenous inhabitants of the Torres Strait region	Australia	United Nations Human Rights Committee	International Covenant on Civil and Political Rights, arts 2, 6, 17, 24(1), 27
2	30 July 2020 *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors*	Waratah Coal Pty Ltd	Youth Verdict Ltd, the Bimblebox Alliance Inc and John and Susan Brinnand Chief Executive, Department of Environment and Science	Land Court of Queensland	*Minerals Resources Act 1989* (Qld) *Environmental Protection Act 1994* (Qld) *Human Rights Act 2019* (Qld) ss 8, 13, 15(2), 16, 24, 25(a), 26(2), 28, 58
3	5 May 2021 *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd*	Gomeroi People	Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd State of New South Wales	National Native Title Tribunal Federal Court of Australia	*Native Title Act 1993* (Cth)
4	22 October 2021 *Pabai Pabai v Commonwealth*	Pabai Pabai and Guy Paul Kabai (Torres Strait Islanders)	Commonwealth of Australia	Federal Court of Australia	Duty of care

Table 1. continued

No.	Date & case name	Plaintiff(s)	Defendant(s)	Forum	Relevant law
5	25 October 2021 *Youth complaints filed to UN Special Rapporteurs for Human Rights and the Environment, Rights of Indigenous Peoples and Rights of Persons with Disabilities*	Shylicia McKiernan (24 year old Kulkalaig woman from Kulkalgal Nation, Zenadth Kes (the Torres Strait)) Adrien Edward (15 year old, living with disability) Chris Black (14 year old, living with mental health issues and disability) Ethan Lyons (15 year old, Wiradjuri teen) Leila Mangos (18 year old, living with climate-induced anxiety and depression)	Australia	UN Special Rapporteurs for Human Rights and the Environment, Rights of Indigenous Peoples and Rights of Persons with Disabilities	Convention on the Rights of the Child International Covenant on Economic, Social and Cultural Rights International Covenant on Civil and Political Rights Universal Declaration of Human Rights United Nations Declaration on the Rights of Indigenous Peoples
6	3 June 2022 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority*	Dennis Murphy Tipakalippa (Traditional Owner of the Tiwi Islands)	Santos NA Barossa Pty Ltd National Offshore Petroleum Safety and Environmental Management Authority	Federal Court of Australia	*Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)
7	4 April 2023 *Traditional Owners' human rights grievance processes against banks*	7 Tiwi and Larrakia Elders and Traditional Owners	15 banks and export credit agencies	Banks' and export credit agencies internal human rights grievance processes	United Nations Guiding Principles on Business and Human Rights
8	26 April 2023 *Traditional Owners' human rights complaints against superannuation funds*	Tiwi Islander, Larrakia and Gomeroi/ Gamilaraay Traditional Owners	20 superannuation funds	Superannuation funds internal human rights grievance processes	United Nations Guiding Principles on Business and Human Rights

Table 1. continued

No.	Date & case name	Plaintiff(s)	Defendant(s)	Forum	Relevant law
9	17 August 2023 *Cooper v National Offshore Petroleum Safety and Environmental Management Authority & ors*	Raelene Cooper, Mardudhunera lore woman, elder and a traditional custodian of Murujuga	National Offshore Petroleum Safety and Environmental Management Authority Woodside Energy Scarborough Pty Ltd Woodside Energy (Australia) Pty Ltd	Federal Court of Australia	*Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)
10	30 October 2023 *Munkara v Santos NA Barossa Pty Ltd*	Simon Munkara, Carol Puruntatameri Maria Purtaninga Tipuamantumirri (from the Tiwi Islands)	Santos NA Barossa Pty Ltd	Federal Court of Australia	*Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth)

The NOPSEMA cases: *Tipakalippa* and *Cooper*

Two of these recent cases relate to interim injunctions made against environmental approvals granted by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), the Commonwealth Authority that manages offshore oil and gas exploitation. Both cases concerned whether the First Nations people who would be affected by each project's specific infrastructure or activities (seismic blasting[8] and an underwater pipeline[9]) had been consulted adequately in relation to each project.

DENNIS TIPAKALIPPA'S CASE

The case of *Tipakalippa* was brought by Munupi Senior Lawman Dennis Tipakalippa, a Traditional Owner from the Tiwi Islands, in the Northern Territory. The case concerned the construction of an offshore pipeline that would transport gas from Santos' Barossa Gas Project, located offshore in Australian Commonwealth waters in the Timor Sea. Mr Tipakalippa was successful in obtaining an interim injunction against the pipeline, arguing that Tiwi Traditional Owners had not been consulted about the impact the pipeline would have on their Sea Country[10].

Under the relevant regulations, NOPSEMA was required to be 'reasonably satisfied' that Santos had 'consulted' with, among others, 'a person or organisation whose functions, interests or activities may be affected by the activities to be carried out …'.[11] The court found that Mr Tipakalippa, as a traditional owner of the Tiwi Islands and surrounding Sea Country, fell under the definition of a person who should be consulted, and that Santos had not produced any evidence that traditional owners of the Tiwi Island were identified as people to be consulted[12].

8 *Cooper v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2023] FCA 1158.
9 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121 (Bromberg J) and *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (Kenny, Mortimer and Lee)
10 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121.
11 *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, 47.
12 Ibid, 253.

Santos contended that it had sent information on three occasions via email about the project to the Tiwi Land Council, and that this was sufficient for consultation purposes. However, Justice Bromberg pointedly noted that the Tiwi Land Council 'was entirely unresponsive' to these attempts at contact, meaning that Santos could not have been satisfied that Tiwi Island traditional owners had actually received any information about the project.[13] It is also worth noting here land councils around the country are 'chronically underfunded' and often don't receive funding for many of the matters they are asked to respond to (see for example Jamie Lowe, CEO of the National Native Title Council, quoted in Mizen 2024).

Justice Bromberg found that while the regulator had expressed concerns to Santos early in the process that it had not properly identified all 'relevant persons', these concerns were not acted on by Santos and did not stop NOPSEMA issuing the approvals.[14] This consultation, the regulations state, must include giving people or organisations 'sufficient information' to allow them to 'make an informed assessment of the possible consequences', that the gas pipeline will have on their '… interests or activities'. This consultation should take 'a reasonable period' of time.[15] When reporting on the consultation it undertook, the regulations required Santos to include a 'summary of each response' to consultation, together with 'an assessment of the merits of any objection or claim about the adverse impact of each activity'.[16]

Santos appealed this decision to the full Federal Court.[17] The full Federal Court again found in Mr Tipakalippa's favour. In response to Santos' arguments that the consultation requirements were 'complex, difficult … and unworkable',[18] the court countered that the obligations were actually 'practicable and reasonable'.[19] The court said that satisfying these requirements required more than an email to the Tiwi Land Council with attached information, with a further email to follow-up, as Santos had originally done. Such an approach was tokenistic, the court said. An approach likely to satisfy the consultation requirements is through 'properly notified and conducted meetings', noting that native title jurisprudence requires 'reasonable notice to group members, but not exhaustive communications with each and every person.'[20]

The purpose of consultation, the full court said, was to ensure that Santos had:

> … ascertained, understood and addressed all the environmental [although not climate] impacts and risks that might arise from its proposed activity. Consultation facilitates this outcome because it gives the titleholder an opportunity to receive information that it might not otherwise have received from others affected by its proposed activity.[21]

The court said that this meant that Santos, following consultations, would be able to take into account Tiwi Island clan group concerns and 'refine or change the measures it proposes to address those impacts and risks'[22].

Following the later court decision in December 2022, Santos undertook multiple consultation sessions and meetings with Tiwi Island clan groups that resulted in 679 clan members attending information sessions, over an 11-month consultation period.[23] NOPSEMA re-issued the approvals in January 2024,[24]

13 Ibid, 253.
14 Ibid, 254.
15 Ibid, 48.
16 Ibid, 53.
17 *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (Kenny, Mortimer and Lee)
18 Ibid, 87.
19 Ibid, 89.
20 Ibid, 104.
21 Ibid, 89.
22 Ibid, 89.
23 NOPSEMA, 'Acceptance of Barossa Development Drilling and Completions Environment Plan – Statement of Reasons', 4 January 2024, https://docs.nopsema.gov.au/A1048236#:~:text=On%2015%20December%202023%2C%20I,and%20Greenhouse%20Gas%20Storage%20(Environment)
24 Ibid.

and other Tiwi Islander traditional owners were ultimately unsuccessful in obtaining a permanent injunction against the pipeline based on cultural heritage grounds.[25]

The Barossa pipeline is expected to be completed in 2025, and, despite the motherhood statements from the full court on the important role played by consultation, appears not to have undergone any substantial alterations in response to the later round of consultation.[26]

RAELENE COOPER'S CASE

The case of *Cooper* was brought by Mardudhunera woman and elder Raelene Cooper, a Traditional Owner from the Pilbara region in Western Australia.[27] Ms Cooper successfully sought an interim injunction against offshore seismic blasting by Woodside Energy Group for the Scarborough Gas Project. This seismic blasting had been approved by NOPSEMA, with a stipulation that further, future, consultation with First Nations people should also occur.

Justice Colvin, citing the *Tipakalippa* appeal decision, said that NOPSEMA did not have the legal power to approve Woodside's environmental plan without being reasonably satisfied that all required consultation had taken place, which clearly it could not be given it had ordered further consultations to take place. The judge granted an interim injunction against the seismic blasting on 28 September 2023.[28]

Further consultations were undertaken by Wooside, and by August 2024, the company reported that it had obtained all environmental approvals and therefore its Scarborough project could go ahead (Chatterjee 2024).

GAS LOBBYISTS TRY GASLIGHTING

The litigation and interim injunctions that were granted against the projects clearly caused significant delays to the Scarborough and Barossa gas projects. However, while the court decisions forced each company to carry out further and better consultation processes, both projects appear ultimately able to go ahead largely as planned.

Rather than accepting the need for more thorough consultation processes following these decisions, however, the gas industry instead launched a lobbying campaign (for further details see AACR 2023) aimed at the Commonwealth government to 'fix' what Meg O'Neill, CEO of Woodside, termed a 'broken offshore environmental regulation system' (O'Neill, M. 2023). Samantha McCullough, the CEO of the oil and gas industry body Australian Energy Producers, even had the temerity to suggest that these decisions were 'threatening the country's economy and climate change targets' (McCullough 2023), no doubt a reference to the false narrative of gas as a 'transition' fuel on the way to Net Zero targets (see for example Gürsan & de Gooyert 2021).

GOMEROI PEOPLE

The Gomeroi People's win against Santos was handed down by Justices Mortimer, Rangiah and O'Bryan of the Federal Court on 6 March 2024,[29] and considered native title approvals made by the National Native Title Tribunal (NNTT) in 2022 for Santos to extract gas from forest and farmland around Narrabri, in northern New South Wales.

25 *Munkara v Santos NA Barossa Pty Ltd* (No 3) [2024] FCA 9.
26 Santos, 'Barossa Gas Development – gas export pipeline installation', October 2023, https://www.santos.com/wp-content/uploads/2023/10/Barossa-GEP-Fact-Sheet-October-2023.pdf.
27 *Cooper v NOPSEMA (No 2)* [2023] FCA 1158
28 Ibid, 4.
29 *Gomeroi People v Santos NSW Pty Ltd and Santos NSW* (Narrabri Gas) Pty Ltd [2024] FCAFC 26

The applicants in this matter, the Gomeroi People, have a registered native title claim area over some 100,000 square kilometres in northern New South Wales, and therefore the 'right to negotiate' over these applications pursuant to the *Native Title Act 1993* (Cth) (Native Title Act) (ss23, 29 and 30).[30]

It is worth highlighting that the lawyers in this case worked for a First Nations organisation, NTSCORP Limited (the Native Title Service Provider for Aboriginal Traditional Owners in New South Wales and the Australian Capital Territory), and the case was led by Tony McAvoy, SC, a Wirdi man. In the other cases discussed legal representation was provided by environmental legal centres.

Relevant Provisions of the Native Title Act

The Native Title Act provides a process through which any development or activity that may impact on native title rights can be approved. In the jargon of the Act, these developments or activities are called 'future acts', and First Nations people who have either registered (i.e., their claim is yet to be determined by the court) or determined native title claims are accorded differing procedural rights depending on the type of future act proposed for their Country.[31] For example, for future acts that are deemed to be of low impact to native title rights, native title holders are afforded the right to be notified of, and the right to comment on, the proposed future act.

When the extraction of minerals, oil or gas is proposed, the 'right to negotiate' applies. The Act says that resource extraction proponent must either enter into a voluntary and legally binding agreement with native title holders, or must negotiate with native title holders, in good faith, for at least 6 months.[32] As the judgment makes clear, the 'right to negotiate' is not a veto to prevent that resource extraction.[33] If no agreement can be reached, either party can apply to the arbitral body, the National Native Title Tribunal (NNTT), for a determination as to whether or not the resource extraction can go ahead. Yet, as of 25 March 2025, the NNTT has said that a future act must not be done **just three times**, and allowed a future act to occur despite native title holder opposition 153 times, including 60 of which had conditions imposed.[34] There is no doubt that these low odds of winning at the NNTT discourage native title holders from pursuing applications to prevent resource extraction on their Country (see for example Ritter 2009, p. 34).

What can be considered as part of the 'public interest'?

In 1998, as part of the suite of amendments to the Act, the explicit requirement to consider the natural environment when considering future act applications was removed. The NNTT appears to have interpreted the removal of this requirement as meaning that the natural environmental should not be considered: since, it has not imposed any environmental conditions on a future act approval beyond mere notification of relevant state authorities (Bartlett 2020, p. 636). Indeed, the Tribunal noted in its decision that these 1998 amendments meant that it believed it was required to consider the environment as far as it was 'concerned with the effect of the proposed grants on the Santos project area.'[35]

This has been the accepted legal position until now. In *Northern Territory v Risk* [1998] NNTTA 11, the NNTT put what it thought was its balancing act in stark terms:

30 Ibid, para 6.
31 See generally Division 3–Future acts etc. and native title, Native Title Act.
32 Native Title Act, s35
33 *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74, at 12.
34 http://www.nntt.gov.au/searchRegApps/FutureActs/Pages/default.aspx. These three decisions are shown when you input 'future act determinations' into Search, and 'Future Act – Must not be done' into Decision/determination type. The cases are: Weld Range Metals Limited and The State of Western Australia v Ike Simpson and Others on behalf of Wajarri Yamatji (WC04/10), WF 10/26) 21 September 2011; Seven Star Investments Group Pty Ltd and The State of Western Australia v Wilma Freddie and Others on behalf of Wiluna (WC99/24) 24 March 2011; and Holocene Pty Ltd and the State of Western Australia v Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu), WF08/27, 27 May 2009.
35 *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74, at para 970.

> 'It is clear, in my view, that the proposed act will have a significant adverse impact upon the native title parties. It is equally clear that the proposed act, if it leads to the envisaged developments, will result in very substantial economic benefits and public benefits. When all consideration are put in the balance, the result points very strongly to a determination that the act may proceed.'[36]

The Federal Court has a different opinion

At the NNTT, the Gomeroi People had argued, among other legal arguments, that greenhouse gas emissions from the Santos project would cause unacceptable damage to their Country, and the world, and that therefore the project was not in 'the public interest'.[37] The Gomeroi's climate expert, the late and highly respected climate scientist Professor Will Steffen, told the Tribunal that the project was expected to result in a further 109.75 to 120.55 million tonnes of extra carbon dioxide equivalents into the atmosphere.[38] The continued expansion of the fossil fuel industry, Steffen said, would result in the Narrabri region experiencing 'more extreme heat, further and more intense droughts, harsher fire danger weather, and heavier rainfall when it occurs, all of which will continue to increase in frequency and intensity'.[39]

The question before the court was the scope of s39(1) of the Native Title Act, which sets out what NNTT must consider when deciding whether or not the 'future act' may be done. These considerations are extremely wide and include the effect of the 'future act' on 'the enjoyment by the native title parties of their registered native title rights and interests'[40] and also 'any public interest in the doing of the act'.[41]

Despite the evidence on the impact of climate change on the region, the NNTT had said that the applicants had 'no identified "particular environmental concern" having "particular effect" on native title, presumably, in this case, the Gomeroi applicant's native title.'[42] The concerns that the Gomeroi had raised, the NNTT said, were 'world-wide concerns, to be resolved by governments.'[43] Any environmental or ecological matters must have a 'particular effect on native title' to be able to be considered, the reasoning went.[44]

The then-President of the Tribunal, the Honourable John Dowsett KC, decided that it was not in his remit to consider climate change when looking at 'the public interest'. Rather, he said, he had to consider factors including whether the project was of 'economic significance to Australia, the State and the region, as well as Aboriginal people.'[45] It was, he decided.

Dowsett said that Professor Steffen should have been more deferential to the New South Wales environment authority's views that project would have an acceptable impact on climate. Dowsett then turned to climatesplaining, saying that Steffen was just 'one scientist',[46] and it was 'disturbing' that he should dismiss the state environment authority's views.[47] Dowsett even referred to the classic climate fallacy about there being two sides to the argument: 'there are conflicting views concerning climate change and knowledge is rapidly expanding.'[48]

---

36 *Northern Territory v Risk* [1998] NNTTA 11, p.25 (Williamson)

37 Please note that parts of the following discussion were originally published in Lily O'Neill and Rebekkah Markey-Towler, 'The Gomeroi win puts native title holders in a stronger position to fight fossil fuel projects on their land', The Conversation, 8 March 2024, https://theconversation.com/the-gomeroi-win-puts-native-title-holders-in-a-stronger-position-to-fight-fossil-fuel-projects-on-their-land-225284.

38 *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74, at para 173.

39 Ibid, at para 227.

40 NTA s39(1()(a)(i).

41 NTA (s39(1()(a)(e).

42 *Santos NSW Pty Ltd v Gomeroi People* [2022] NNTTA 74, at para 970.

43 Ibid.

44 Ibid, 967.

45 Ibid, at para 1014.

46 Ibid, at para 969.

47 Ibid, at para 968 – 969.

48 Ibid, at para 987.

The court was clearly unimpressed with this reasoning, delivering the Tribunal a hard judicial whack. The Court said that the definition of what was in 'the public interest' was wide, and that, in this case, consideration of climate change impacts clearly fell within that definition.[49] The court wrote that: '[i]t was a task for the Tribunal to evaluate the harms outlined by Professor Steffen as part of its consideration of whether there was "any" public interest in the doing of the future act'.[50] Professor Steffen, they wrote, was not 'just one scientist', he was on a panel of experts of the Intergovernmental Panel on Climate Change, representing the world's leading climate scientists.[51]

The matter has been sent back to the Tribunal with instructions to look again at this matter. It is possible that the decision will be sent back to the Tribunal to a different decision maker, who will consider climate change impacts, and still arrive at the same decision.

However, the broader impacts of the decision are highly significant, and very likely mean that the Tribunal will be asked to assess the climate impacts of many fossil fuel approvals where there is also a native title claim or determination.

Discussion and Conclusion

The NOPSEMA cases have attracted headlines that attempt to paint them alternatively as a sign that 'stakeholder consultation grows teeth' (Denholder et al. 2023) or, from the gas lobby, that 'a broken offshore environmental regulation system … is threatening the country's economy' (McCullough 2023). However, a closer reading of the cases, together with an analysis of what occurred post-litigation, shows not only that both companies' consultation procedures were completely inadequate prior to this litigation, but that offshore consultation requirements, even when done according to law, are merely a fig leaf over the environmental destruction caused by these developments. Ultimately the NOPSEMA cases show that the law is not fit for purpose for protecting First Nations' peoples' Sea Country: the pipeline proceeds apace, and the seismic blasting has occurred.

Nevertheless, the cost, delay, uncertainty and reputational harm that the litigation caused Santos and Woodside is likely to have been significant. The cases aptly demonstrate several things: firstly, First Nations litigants have much grit, particularly in the face of often-weak legal rights; secondly, that the broader community who wants action on halting fossil fuel approvals owes these litigants a large debt; thirdly, that the gas industry is unwilling to meet procedural requirements for consultation that have not overly impacted their projects in any case.

On this latter point, it is worth noting that Santos has been identified in previous research as having a particularly bad reputation, even within the gas industry, in relation to the First Nations peoples on whose Country they operate. For example, O'Neill writes in relation to the Gladstone LNG Indigenous Land Use Agreements, that:

> **Santos was a company known for negotiating inadequate land access negotiations, as well as having a bad reputation in the industry more generally. [One interviewee] on hearing what Santos had likely paid in the agreements said: '[T]hat doesn't surprise me … Santos' reputation, it's not very nice, it hasn't been for 25 years' (O'Neill, L. 2016, p. 173).**

It therefore appears likely that Santos may feature as a party in similar litigation going forward.

As discussed, the *Gomeroi* decision is currently before the National Native Title Tribunal (NNTT) awaiting a further determination. However, notwithstanding what the NNTT ultimately decides, the case

49 *Gomeroi People v Santos NSW Pty Ltd and Santos NSW* (Narrabri Gas) Pty Ltd [2024] FCAFC 26, at 173.
50 Ibid, at 229.
51 Ibid, at 224.

UTS ePRESS

is likely to be of real significance in slowing future fossil fuel approvals in areas where there are native title registered claims or determinations. It is also an astonishing win for the Gomeroi people given the very bleak history of arbitral decisions that have clearly favoured the resource extraction industry. These dogged litigants deserve our thanks. One key implication of the decision by Dowsett in *Gomeroi* is that better judicial education is needed, through, in this case, the Federal Judicial Commission, particularly on the issue of climate change.

It is likely that First Nations climate litigation will continue to be of great importance into the future. The cases discussed here show the limitations inherent in existing procedural rights, while also exemplifying how these extraordinary litigants have used these limited rights to delay fossil fuel projects and progress climate action.

Acknowledgements

The authors thank the two blind reviewers for their thoughtful and kind comments on this paper. The authors live and work on the lands of the Wurundjeri and Taungurung Peoples, whose connection is enduring, and land was never ceded. We pay our respects to their Elders, both past and present.

References

Australasian Centre for Corporate Responsibility (ACCR) 2023, 'Investor Bulletin: Muddying the Waters - Industry Lobbying on Offshore Oil and Gas Regulation', *ACCR*, 15 November 2023. https://www.accr.org.au/insights/investor-bulletin-muddying-the-waters-industry-lobbying-on-offshore-oil-and-gas-regulation/

Australia. Aboriginal Land Rights Commission, 1974, *Second Report*, April 1974, Australian Government Publishing Service, Canberra.

Australia. Austrade, 2023, Annual Report 2022-23. https://www.austrade.gov.au/content/dam/austrade-assets/global/wip/austrade/documents-about-us/austrade-annual-report-2022-23.pdf.

Bartlett, R. 2020, *Native Title in Australia*, 4th ed. LexisNexis, Sydney.

Bamford, D. & Rankin, M. 2021, *Principles of Civil Litigation*, 4th ed. Lawbook Co., Sydney.

Chatterjee, R. 2024, 'Woodside gets environmental go-ahead for Scarborough Project; Key Green group backs down', *Reuters*, 19 August 2024. https://www.reuters.com/markets/commodities/woodside-agrees-with-green-group-dismiss-challenge-scarborough-approval-2024-08-19/.

Denholder, T., Gay, A., Lawrence, C. & Hall, J. 2023, 'Full Court Tipakalippa Decision – Stakeholder consultation grows teeth', *Ashurst*, 25 July 2023. https://www.ashurst.com/en/insights/full-court-tipakalippa-decision-stakeholder-consultation-grows-teeth/.

Gürsan, C. & de Gooyert, V. 2021, 'The systemic impact of a transition fuel: Does natural gas help or hinder the energy transition?' *Renewable and Sustainable Energy Reviews*, vol. 138, article 110552. https://doi.org/10.1016/j.rser.2020.110552

Hilson, C. 2010, 'Climate change litigation in the UK: An explanatory approach (or bringing grievance back in)' in Fracchia, F. & Occhiena, M. (eds.), *Climate Change: La Risposta del Diritto*, Editoriale Scientifica, Naples, pp. 421-436.

Lin, J. & Peel, J. 2024, *Litigation Climate Change in the Global South*, Oxford University Press, Oxford. https://doi.org/10.1093/9780191926525.001.0001

McCulloch, S. 2023, 'Energy future at mercy of regulatory grey zone', *The Australian*, 2 October 2023. https://www.theaustralian.com.au/commentary/energy-future-at-mercy-of-regulatory-grey-zone/news-story/8c0ee79b3fe66feccf56238327abef2c

Markell, D. and Ruhl, J.B. 2012, 'An empirical assessment of climate change in the courts: A new jurisprudence or business as usual?', *Florida Law Review*, vol. 64, no.1, pp. 15-72. https://doi.org/10.2139/ssrn.1762886

Mizen, R. 2024, 'Labor urged to fund native title groups, stop 'divisive' activists', *Australian Financial Review*, 6 June 2024. https://www.afr.com/politics/federal/labor-urged-to-fund-native-title-groups-stop-divisive-activists-20240606-p5jjuw

O'Neill, L. 2016, A Tale of Two Agreements: Negotiating Aboriginal Land Access Agreements in Australia's Natural Gas Industry, PhD Thesis, University of Melbourne. http://hdl.handle.net/11343/111978.

O'Neill, L. & Markey-Towler R. 2024, 'The Gomeroi win puts native title holders in a stronger position to fight fossil fuel projects on their land', *The Conversation*, 8 March 2024, https://theconversation.com/the-gomeroi-win-puts-native-title-holders-in-a-stronger-position-to-fight-fossil-fuel-projects-on-their-land-225284.

O'Neill, L. Thorburn, K., Riley, B., Maynard, G., Shirlow, E. & Hunt, J. 2021, 'Renewable energy development on the Indigenous Estate: Free, prior and informed consent and best practice in agreement-making in Australia', *Energy Research & Social Science*, vol. 81, article 102252. https://doi.org/10.1016/j.erss.2021.102252

O'Neill, M. 2023, 'Approvals chaos threatens WA jobs and energy security', *The West Australian*, 20 October 2023. https://thewest.com.au/opinion/meg-oneill-approvals-logjam-threatens-wa-jobs-and-energy-security-c-12254183

Peel, J. 2023, 'Climate litigation is on the rise around the world and Australia is at the head of the pack' *The Conversation*, 27 July 2023. https://theconversation.com/climate-litigation-is-on-the-rise-around-the-world-and-australia-is-at-the-head-of-the-pack-210375.

Peel, J. & Osofsky, H. 2015, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, Cambridge University Press, Cambridge. https://doi.org/10.1017/CBO9781139565851

Ritter, D. 2009, *The Native Title Market*, University of Western Australia Press, Crawley, WA.

Sindico, F., McKenzie, K., Medici-Colombo, G. & Wegener, L. 2024. 'Climate change litigation: one definition to rule them all…?' in Sindico, F., McKenzie, K., Medici-Colombo, G. & Wegener, L. (eds.), *Research Handbook on Climate Change Litigation*, Edward Elgar, Cheltenham, pp. 1-16. https://doi.org/10.4337/9781800889781.00006

Tiseo, I. 2024, 'Global per capita greenhouse gas emissions 2022, by select OECD country' *Statista*, 19 April 2024. https://www.statista.com/statistics/478783/leading-countries-based-on-per-capita-greenhouse-gas-emissions/