

NATIONAL NATIVE TITLE TRIBUNAL

**Santos NSW Pty Ltd and Another v Gomeroi People and Another [2025] NNTTA 12
(19 May 2025)**

Application No: NF2021/0003-0006

IN THE MATTER of an inquiry into a future act determination application

Gomeroi People (NC2011/006)

(native title party/Gomeroi)

- and -

Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd

(grantee parties/Santos)

- and -

State of New South Wales

(Government party/State)

**FUTURE ACT DETERMINATION THAT THE ACT MAY BE DONE SUBJECT TO
CONDITIONS**

Tribunal: President Smith; Member Eaton; Member Kelly

Place: Brisbane

Date: 19 May 2025

Catchwords: native title – future act – future act determination application – remittal – engagement with expert – expert evidence – s 39 criteria considered – effect of act on native title rights and interests – enjoyment of native title rights and interests – particular significance – public interest in doing of act – effects of climate change – decisions and recommendations of other bodies – cultural heritage protection under State legislation

Legislation:

[Aboriginal and Torres Strait Islander Heritage Protection Act 1984](#) (Cth)

[Biological Conservation Act 2016](#) (NSW)

[Climate Change \(Net Zero Future\) Act 2023](#) (NSW) s 3(1)

[Environmental Planning and Assessment Act 1979](#) (NSW) s 4.41

[Environmental Protection and Biodiversity Conservation Act 1999](#) (Cth)

[Environment Protection Legislation Amendment \(Stronger Regulation and Penalties\) Act 2024](#) (NSW)

[Heritage Act 1997](#) (NSW)

[National Greenhouse and Energy Reporting Act 2007](#) (Cth) ss 7, 22XJ (**GER Act**)

[National Greenhouse and Energy Reporting \(Safeguard Mechanism\) Rule 2015](#) (Cth) r 8 (**Safeguard Mechanism Rule**)

[National Parks and Wildlife Act 1974](#) (NSW) (**NPW Act**)

[National Parks and Wildlife Regulations 2019](#) (NSW)

[Native Title Act 1993](#) (Cth) ss 3(a), 29(2), 35, 36(2), 38, 39, 41, 50 (**Native Title Act**)

[Protection of the Environment Administration Act 1991](#) (NSW) s 6 (**PEA Act**)

[Protection of the Environment Operations Act 1997](#) (NSW) s 45 (**PEO Act**)

Cases:

Australian Potash Limited and Another v Kalman Murphy and Ors on behalf of Waturta [2021] NNTTA 46 (**Australian Potash**)

Bonnington Castings Ltd v Wardlaw [1956] AC 613 (**Bonnington Castings**)

Callychurn and Australian Securities and Investments Commission [2019] AATA 4600 (**Callychurn v ASIC**)

Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales [2013] NNTTA 2 (**Coalpac**)

Connell v Santos New South Wales Pty Ltd [2014] NSWLEC 1; (2014) 199 LGERA 84

Drake v Minister for Immigration and Ethnic Affairs [1979]

[AATA 179](#); (1979) 46 FLR 409

Environment Council of Central Queensland Inc v Minister for the Environment and Water [\[2024\] FCAFC 56](#) (**Living Wonders**)

Evans v Western Australia [\[1997\] FCA 741](#); (1997) 77 FCR 193

FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC [\[2014\] FCA 1335](#); (2014) 227 FCR 182 (**FMG v Yindjibarndi**)

Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd [\[2024\] FCAFC 26](#) (**principal reasons**)

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

Jagroop and Minister for Immigration and Border Protection [\[2015\] AATA 751](#); (2015) 67 AAR 288

Kanak v National Native Title Tribunal [\[1995\] FCA 1624](#); (1995) 61 FCR 103

Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia [\[2011\] NNTTA 80](#) (**Magnesium Resources**)

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [\[1986\] HCA 40](#); (1986) 162 CLR 24

Minister for Immigration and Multicultural Affairs v Wang [\[2003\] HCA 11](#); 215 CLR 518

Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC [\[2014\] NNTTA 85](#)

Minister for Mines (WA) v Evans [\[1998\] NNTTA 5](#); (1998) 163 FLR 274

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal [\[2018\] NNTTA 24](#)

Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [\[2021\] NSWLEC 110](#); (2021) 252 LGERA 221 (**Mullaley Gas v Santos**)

O'Sullivan v Farrer [\[1989\] HCA 61](#); 168 CLR 210

Re Koara People [\[1996\] NNTTA 31](#); (1996) 132 FLR 73

Santos NSW Pty Ltd and Another v Gomeroi People and

Another [\[2022\] NNTTA 74](#) (**2022 Determination**)

Shi v Migration Agents Registration Authority [\[2008\] HCA 31](#);
(2008) 235 CLR 286

Silver v Northern Territory of Australia [\[2002\] NNTTA 18](#); (2002)
169 FLR 1

Smith v Western Australia [\[2001\] FCA 19](#); (2001) 108 FCR 442

*Top End (Default PBC/CLA) Aboriginal Corporation RNTBC v
Kess Diamond Marstella & Core Uranium Pty Ltd* [\[2023\] NNTTA
25](#) (**Top End v Kess Diamond Marstella**)

*Top End (Default PBC/CLA) Aboriginal Corporation v Northern
Territory of Australia* [\[2025\] FCA 22](#)

Walley v Western Australia [\[1999\] FCA 3](#); (1999) 87 FCR 565

Watson on behalf of Nyikina & Mangala v Backreef Oil Pty Ltd
[\[2013\] FCA 1432](#) (**Watson v Backreef**)

Western Australia v Thomas [\[1996\] NNTTA 30](#); (1996) 133 FLR
124

Western Desert Lands Aboriginal Corporation v Western Australia
[\[2009\] NNTTA 49](#); (2009) 232 FLR 169 (**Western Desert Lands**)

*Wildlife Preservation Society of Queensland
Proserpine/Whitsunday Branch Inc v Minister for the Environment
and Heritage* [\[2006\] FCA 736](#); (2006) 232 ALR 510 (**Wildlife
Preservation Society**)

*Yindjibarndi Aboriginal Corporation RNTBC v FMG Pilbara Pty
Ltd and Another* [\[2014\] NNTTA 8](#) (**Yindjibarndi v FMG**)

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DETERMINATION SUMMARY

This decision is made under s 38 of the *Native Title Act* and concerns whether certain future acts, being the grant of several petroleum production leases to Santos NSW Pty and Santos NSW (Narrabri Gas) Pty Ltd, may be done.

Santos proposes to conduct a gas extraction operation on the leases, known as the Narrabri Gas Project. The proposed leases are 95,000ha in size, located to the south and west of Narrabri and overlapped entirely by the registered Gomeroi native title determination application.

In December 2022, following an initial inquiry into the grant of the leases, the National Native Title Tribunal determined the acts may be done subject to conditions.

In January 2023, Gomeroi lodged an appeal of the 2022 determination with the Federal Court of Australia. The Full Court of the Federal Court unanimously rejected Gomeroi's five grounds of appeal relating to good faith. The appeal was however allowed on Ground 3, with the Full Court finding the Tribunal erred in concluding it was prohibited from considering environmental matters except in relation to a 'particular environmental concern having particular effect on native title'. The Full Court observed that under s 39(1)(e), whether features or characteristics of the future act that might be broadly described as 'environmental' weighed for or against the public interest in the doing of the act ought to have been properly considered.

Accordingly, in April 2024 the 2022 determination was set aside, and the lease applications were remitted back to the Tribunal for hearing and determination according to law.

Approximately 70% of the total area of the leases overlap the northeastern portion of an area known as the Pilliga, an important cultural landscape of the Gomeroi people. The Pilliga is a conglomeration of forested areas that total more than 500,000 hectares, and the leases overlap approximately 13% of this cultural landscape.

The Narrabri project is the construction and operation of a gas field which includes refining facilities, gas and water processing, and associated infrastructure. Gas is to be extracted

from coal seams between 300 and 1200 metres below ground, produced from up to 850 new wells on a maximum of 425 well pads.

Given the nature of the project, its sensitive location for the Gomeroi people, and the lengthy approvals history to date, the evidence in this matter has been extensive and the panel has carefully considered and weighed up all the material before it.

The public interest criteria set out at s 39(1)(e), and consideration of environmental or climate change impacts, was a large focus of the appeal and resultingly this remittal decision.

There was broad consensus between the experts for Gomeroi and Santos regarding current climate science. This was of assistance to the panel. It is not controversial that there is more than one source of greenhouse gas emissions, and more than one cause of global warming, and it would be an error for the Tribunal to attribute every consequence of global warming to the proposed future act. Instead, the panel has taken into account, based on the evidence before it, the greenhouse gas emissions of the project and the consequential effects of those emissions, including any contribution to global warming. Gomeroi's expert and traditional owner evidence demonstrates that climate change will contribute to local and regional risks and impacts. The contribution of the project to the effects of climate change is a serious detriment to be considered.

When considering public interest, the panel placed significant weight on the project providing energy reliability if all the gas produced is made available to the domestic market as intended. The evidence in this matter has shown that if the leases are not granted, there will likely be a gap in the available supply of reliable, secure energy on Australia's east coast, which would have significant short-to-medium-term detrimental impacts upon the wider community, including Gomeroi people.

Weighing the public interest evidence, including the evidence addressing environmental matters, the panel has found the Project offers a net public benefit, particularly where conditions are imposed to address the environmental and social impacts.

The panel has also carefully undertaken the broader task set out at s 39, weighing the likely effect of the project on the matters set out in s 39(1)(a), particularly the likely effect on: the

enjoyment by Gomeroi of their registered native title rights; Gomeroi way of life, culture and traditions; freedom of access to the lease areas overlapped by the important cultural landscape and waterways of the Pilliga; and the risk to significant sites Yarrie Lake and Bohena Creek. This was considered alongside the expressed wishes of the Gomeroi people that the Project does not proceed in the absence of their consent (s 39(1)(b)), the broader economic significance of the Project (s 39(1)(c)), and all other factors required under s 39.

The panel has determined the leases may be granted, subject to various conditions to be complied with by the parties under s 38(1)(c). The imposed conditions go to three broad categories:

1. For there to be a net weighing that the project is in the public interest, all of the gas recovered must be used for domestic supply only.
2. The strengthening of Aboriginal cultural heritage protections, as the evidence demonstrated identified risks to cultural heritage, including as a result of the project's classification as a State Significant Development.
3. The implementation of a ranger program covering the Pilliga Forest, to manage Country, protect the environment, and monitor and manage ecological threats. These conditions go to the cultural concerns and obligations of Gomeroi people, but also cultural safety and environment as important matters of consideration under public interest.

This summary in no way affects or varies the detailed reasons which appear below.

REASONS FOR DETERMINATION

INTRODUCTION

- [1] This decision concerns whether the **State** of **New South Wales** may grant **Petroleum Production Lease Applications** 13, 14, 15 and 16 (**the leases**) to the **grantee parties**, **Santos** NSW Pty and Santos NSW (Narrabri Gas) Pty Ltd. Santos proposes to conduct a gas extraction operation on the leases, described as the Narrabri Gas **Project**.

- [2] President Kevin Smith, Member Lisa Eaton and Member Glen Kelly were appointed to form a **panel** and constitute the National Native Title **Tribunal** for the purpose of this remitted determination.

- [3] PPLA13 is located approximately 31 km south-west of Narrabri NSW and comprises of an area approximately 266 sq km. PPLA14 is located approximately 20 km south of Narrabri NSW and comprises of an area approximately 153 sq km. PPLA15 is located approximately 22 km west-south-west of Narrabri NSW and comprises of an area approximately 264 sq km. PPLA16 is located approximately 343 km west of Narrabri NSW and comprises an area of approximately 241 sq km. The leases cumulatively comprise an area of approximately 924 sq km and **Annexure 1** to this determination is a map showing the approved Project area as described in the **Independent Planning Commission** of NSW Development Consent.

- [4] On 30 September 2020, the IPC granted development consent for the Project, subject to 134 conditions. On 18 October 2021, that decision was upheld by the Land and Environment Court of NSW.¹

- [5] The panel has given due regard to the findings of the IPC concerning the Project. To give some context to these findings, the relevant aspects of the key impacts of the Project identified by the IPC are summarised below:²

¹*Mullaley Gas v Santos* [2021] NSWLEC 110.

- (a) *Groundwater and agriculture:* The IPC imposed conditions requiring further information to improve the groundwater impact modelling before the Project proceeds to Phase 2. The imposed conditions relating to groundwater do not permit Santos to establish the production field (Phase 2) if the revised groundwater model predicts an exceedance of the water management performance measures identified in the consent. The IPC put the burden of proof on Santos to demonstrate any adverse direct impact to water supply is not due to its activities and strengthened the obligation to supply compensatory water or provide other compensation for attributable impacts. Santos must develop a Water Management Plan to be approved by the Planning Minister addressing water management performance measures including negligible changes to groundwater level and quality, a negligible change to surface water quality in any watercourse, and implementation of all reasonable and feasible measures to minimise risk of leaks and spills.
- (b) *GHG Emissions:* The IPC acknowledged it had received submissions that the direct emissions of the Project had been underestimated, ‘which would jeopardise the expected greenhouse gas emissions advantage of CSG over coal’. As such, the IPC imposed a condition requiring that Santos ensure all reasonable and feasible avoidance and mitigation measures are employed so that greenhouse gas (**GHG**) emissions generated do not exceed certain criteria listed in its reasons. The IPC also required Santos develop cumulative maximum forecasts over the 25-year lifetime of the Project and it must monitor and publicly report on the actual GHG emissions against those cumulative forecasts and ensure that any exceedances are 100% offset within one year after the reporting periods. The IPC only considered ‘Scope 1’ and ‘Scope 2’ emissions finding that that ‘Scope 3’ emissions were outside the direct control of Santos and therefore not able to be reasonably conditioned.
- (c) *Biodiversity:* The IPC acknowledged the high biodiversity value of the Pilliga but found that the Project would take place in a portion only. The IPC considered the relevant guidelines and offsets, along with the Santos’ proposal for dealing with vegetation fragmentation, and found that with the

² Independent Planning Commission NSW, *Statement of Reasons for Decision* (30 September 2020), Ch 7 (**IPC Statement of Reasons**); Independent Planning Commission NSW, *Development Consent* (30 September 2020) (**IPC Development Consent**).

imposition of conditions it was satisfied the Project would provide for the 'appropriate management, mitigation and monitoring of the potential biodiversity impacts'. The conditions require that well pads be placed a certain distance apart, that infrastructure avoid certain identified conservation areas and water resources, and that the total area of disturbance be limited. The conditions also attempt to limit the extent of disturbance by requiring that impacts to identified ecosystems be offset through a 'biodiversity credit' system.

- (d) *Waste Management:* The IPC considered the Project's waste generation and management and imposed conditions requiring Santos develop appropriate arrangements for the disposal of waste, a waste management plan and minimise the on-site storage of waste. The IPC noted that enforceability of these conditions had been confirmed by the NSW Environment Protection Agency.
- (e) *Aboriginal Cultural Heritage:* The IPC was satisfied that the Aboriginal Cultural Heritage Assessment and consultation has been undertaken in accordance with the relevant guidelines. Several conditions were imposed, including that the Project not directly or indirectly impact heritage items identified in the consent, and providing processes surrounding the discovery of, or suspicion of, Aboriginal objects or places during the Project. The conditions also provided for the creation of an Aboriginal Cultural Heritage Advisory Group and the development of an Aboriginal Cultural Heritage Management Plan.
- (f) *Bushfire risk:* The IPC identified four bushfire risks posed by the Project, being: fire ignition risks posed from flaring activities; hazards posed by methane (**CH₄**) gas in the event of a bushfire; risks to the facility from catastrophic bushfire events; and potential increases in the frequency and severity of bushfire events due to climate change. The IPC imposed a condition requiring that the safety flare stack be 50 m in height, which along with appropriate clearance measures, and the development of Bushfire Management Plan, they found would render bushfire risks manageable.
- (g) *Economic Impacts:* On balance the IPC found the Project will provide a net economic benefit for the local community, region and State including through potentially improving gas security for Australia's east coast domestic market.

The IPC based its finding on the economic modelling found in the Environmental Impact Statement as assessed by the Department of Planning and Environment and the Department's independent expert.

- (h) *Social and health*: The IPC found that the Project was unlikely to be a source of significant physical health impacts, and that conditions could secure and enhance local community services and facilities. It imposed a condition that Santos develop and implement a Social Impact Management Plan.

- [6] On 4 June 2015, the State gave notice under s 29 of the *Native Title Act 1993* (Cth), of the relevant Minister's intention to grant to Santos, the leases on land entirely subject to a native title determination application of the **Gomeroi** People NC2011/006. Gomeroi, as the registered native title claimant, is the **native title party** in relation to the area of the leases.³ **Annexure 2** to this determination is a map of the native title claim area.
- [7] On 5 May 2021, Santos lodged an application with the Tribunal for a determination⁴ that the proposed acts may be done.⁵ On 19 December 2022, then-President Dowsett determined that the acts may be done subject to conditions (**2022 Determination**).⁶
- [8] The panel notes then-President Dowsett's summary of the procedural history set out at [1]-[77] of the 2022 Determination, excluding statements relating to the question of good faith.
- [9] On 13 January 2023, Gomeroi lodged an appeal of the 2022 Determination with the Federal Court of Australia. On 6 March 2024, the **Full Court** of the Federal Court of Australia gave *principal reasons* allowing the appeal.⁷ On 12 April 2024, the 2022 Determination was set aside and **applications** NF2021/0003, NF2021/0004,

³ *Native Title Act* s 29(2).

⁴ *Native Title Act* s 35.

⁵ *Native Title Act* s 38.

⁶ 2022 Determination [2022] NNTTA 74.

⁷ *Principal reasons* [2024] FCAFC 26.

NF2021/0005 and NF2021/0006 were remitted to the Tribunal for hearing and determination according to the law (**remittal**).⁸

[10] Importantly, the remittal judgment provided:⁹

- (a) the matter is to be determined by the Tribunal without further evidence, subject only to proper cause being shown for the adducing of further evidence and the Tribunal being satisfied it is appropriate to permit further evidence to be adduced; and
- (b) the parties are precluded from making any claim that any other party did not negotiate in good faith.

[11] On 1 May 2024, the panel were appointed. The panel convened a preliminary conference in this matter on 24 May 2024. At the preliminary conference the parties indicated they may wish to submit further contentions and evidence. As such, the Tribunal made directions allowing all parties to lodge any statement of contentions they wished to make addressing the request to submit further evidence on or by 7 June 2024. At the request of the parties, the Tribunal also convened a short hearing on 1 August 2024 for oral submissions on the issue.

[12] Following the oral hearing, and having considered all the material before it, the panel was satisfied it was appropriate to permit limited further evidence be adduced. On 9 August 2024, parties were provided with a draft of the proposed directions, with reasons for decision, and given the opportunity to comment. Final directions were then issued on 19 August 2024. Such directions provided each of the parties may concurrently lodge one expert report addressing any topic related to climate change and relevant to the matters the Tribunal must consider in this inquiry. The native title party was also directed to provide updated lay evidence of its three witnesses who gave evidence in the initial inquiry, relating to the effect of climate change impacts caused by the proposed grant of the leases.

[13] Parties were given the opportunity to make submissions outlining any basis upon which they were of the view that the remitted inquiry cannot be adequately

⁸ *Remittal* [2024] FCAFC 49.

⁹ *Ibid* OO 3 and 4.

determined on the papers per s 151 of the *Native Title Act*. On 3 December 2024, the native title party and grantee parties provided submissions. Following a case management conference on 9 December 2024, the panel made directions for a conclave of experts, further submissions and a hearing. The reasons for this decision were provided to parties on 19 December 2024.

[14] On 17 January 2025, the panel conducted a conclave of experts. The conclave was held in two parts, with Professor Karoly and Doctor Mitchell addressing the topic of climate change science, and Messrs Kelp and Mudge addressing the topic of energy markets.

[15] After consultation with parties, an oral hearing was listed on 14 February 2025. Following the oral hearing, and having regard to submissions made by the parties, the panel considered the issue of whether any additional evidence should be permitted. The panel decided that no further evidence, including any further responsive expert evidence, was required. On 21 February 2025, a letter was circulated to parties providing reasons for this decision.

[16] The evidence in this matter has been extensive. In addition to the voluminous material put before the Tribunal in the 2022 Determination, the parties lodged the following updated or further material:

(a) For Gomeroi-

- i) amended further report addressing climate change¹⁰ including chapters from Professor David Karoly,¹¹ Professor Brendan Mackey,¹² Mr

¹⁰ Native title party, *Amended further report addressing climate change*, dated 30 September 2024 (NTP **Amended Remittal Expert Report**).

¹¹ NTP Amended Remittal Expert Report, Chapter 1, *Expert Report by Professor David Karoly* (**Karoly Report**).

¹² NTP Amended Remittal Expert Report, Chapter 2, *Expert Report by Professor Brendan Mackey* (**Mackey Report**).

Evan Mudge,¹³ Associate Professor Nina Lansbury¹⁴ and Dr Karl Mallon;¹⁵

- ii) Affidavit of Jason Wilson;¹⁶
- iii) Affidavit of Steven Booby;¹⁷
- iv) Affidavit of Suellyn Tighe;¹⁸
- v) amended summary of contentions and statement of contentions;¹⁹
- vi) contentions in reply with summary;²⁰
- vii) final submissions prior to closing oral hearing;²¹
- viii) comments on conditions;²²

(b) For Santos-

- i) further expert report addressing climate change²³ including chapters from Mr Owen Kelp²⁴ and Dr David Mitchell;²⁵
- ii) summary of contentions and statement of contentions;²⁶
- iii) submissions prior to closing oral hearing;²⁷

¹³ NTP Amended Remittal Expert Report, Chapter 3, *Expert Evidence Report – Energy Market Impact*, Mr Evan Mudge (**Mudge Report**).

¹⁴ NTP Amended Remittal Expert Report, Chapter 4, *An overview of health and health-related data: Expert Report by Associate Professor Nina Lansbury* (**Lansbury Report**).

¹⁵ NTP Amended Remittal Expert Report, Chapter 5, Expert Report by Dr Karl Mallon (**Mallon Report**).

¹⁶ Affidavit of Jason Wilson, affirmed 11 October 2024 (**Wilson Remittal Affidavit**).

¹⁷ Affidavit of Steven Booby, affirmed 11 October 2024 (**Booby Remittal Affidavit**).

¹⁸ Affidavit of Suellyn Tighe, affirmed 11 October 2024 (**Tighe Remittal Affidavit**).

¹⁹ Native title party, *Amended summary of contentions and statement of contentions*, dated 25 October 2024, amended 17 February 2025 (**NTP Amended Remittal Contentions**).

²⁰ Native title party, *Contentions in reply with summary*, dated 29 November 2024, amended 17 February 2025 (**NTP Amended Remittal Reply**).

²¹ Native title party, *Final submissions prior to closing oral hearing*, dated 10 February 2025 (**NTP Remittal Closing Submissions**).

²² Native title party, *Native title party comments on conditions*, dated 11 April 2025 (**NTP Remittal Condition Comments**).

²³ Grantee parties, *Further expert report addressing climate change*, dated 30 September 2024 (**GP Remittal Expert Report**).

²⁴ GP Remittal Expert Report, Chapter 1, *Energy Market and Greenhouse Gas Emissions Expert Report of Owen Kelp* (**Kelp Report**).

²⁵ GP Remittal Expert Report, Chapter 2, *Climate Science Expert Report of Dr David Mitchell* (**Mitchell Report**).

²⁶ Grantee parties, *Summary of contentions and statement of contentions*, dated 8 November 2024 (**GP Remittal Contentions**).

²⁷ Grantee parties, *Submissions prior to closing oral hearing*, dated 10 February 2025 (**GP Remittal Closing Submissions**).

- iv) comments on conditions;²⁸
- (c) For the State-
 - i) statement of contentions;²⁹
 - ii) amended contentions of the Government party submitted in the original inquiry;³⁰
 - iii) final submissions prior to closing oral hearing;³¹
 - iv) comments on conditions.³²

[17] For the avoidance of doubt, the panel has had regard to all the material lodged in the 2022 Determination, in addition to the material set out above. A summary of some of the evidence provided in the initial inquiry can be found in the 2022 Determination, particularly at [95]–[104]. Due to the sheer volume of material before the Tribunal in this matter not all the evidence the panel has had regard to has been set out or specifically referred to.

[18] At the request of Gomeroi, and following consultation with the parties, the panel made directions prohibiting the disclosure of identified culturally sensitive parts of the statements of Ms Tighe, Mr Booby and Mr Wilson lodged in this remittal, other than to specified persons for the purposes of this inquiry or any related appeal (**restricted evidence**).³³ Nothing in those directions prevents the panel from stating any findings of fact on which this determination is based, however the Tribunal has refrained from disclosing the restricted evidence wherever possible and has particularly avoided setting out specific details of cultural matters.

²⁸ Grantee parties, *Comments on conditions*, dated 11 April 2025 (**GP Remittal Condition Comments**).

²⁹ Government party, *Statement of contentions*, dated 8 November 2024 (**GVP Remittal Contentions**).

³⁰ Government party, *Amended contentions of the Government party submitted in the original inquiry*, dated 15 December 2021, amended 8 November 2024 (**GVP Amended Contentions**).

³¹ Government party, *Final submissions prior to closing oral hearing*, dated 10 February 2025 (**GVP Remittal Closing Submissions**).

³² Government party, *Comments on conditions*, dated 11 April 2025 (**GVP Remittal Condition Comments**).

³³ Directions of the panel, dated 16 October 2024.

- [19] The affidavits of Ms Tighe, Mr Booby, Mr Wilson and Mr Kumarage lodged in the 2022 Determination were also subject to non-disclosure directions and are also restricted evidence for the purposes of this inquiry.³⁴
- [20] On 28 March 2025, the panel notified parties that it had reached the preliminary view that the act may be done subject to conditions pursuant to s 38(1)(c) of the *Native Title Act*. Before finalising any determination in this matter, the panel offered parties the opportunity to make any comments they wished to regarding the proposed condition categories. On 11 April 2025, all parties made submissions addressing the proposed conditions, which the panel had regard to in making this determination.

THE TASK OF THE PANEL

- [21] As set out above, the 2022 Determination was set aside by the Full Court and remitted to the Tribunal to be determined afresh by this panel, save that the parties are precluded from making any claim that any other party did not negotiate in good faith.
- [22] In accordance with the Orders of the Full Court, no party made any claim relating to good faith in the remittal and the panel is not prevented from making a determination on the applications per s 36(2).
- [23] The panel has had regard to all of the evidence and material put forward by the parties in the 2022 Determination, including the transcripts of oral hearings, save for any such evidence which solely related to the issue of good faith. The panel confirmed with the parties that this would be the approach adopted, and parties were invited to address their contentions to all of the evidence and material before the panel, that is; any evidence adduced in the 2022 Determination together with any additional evidence lodged over the course of this inquiry.
- [24] The panel is not bound to make the same findings made in the 2022 Determination; that depends on the view formed by this panel conducting the remitted inquiry.³⁵

³⁴ Directions of President Dowsett, dated 8 October 2021.

³⁵ *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11, [18], [45], [68].

Further, the parties on a remittal hearing are entitled to put arguments not raised on the original application and are not limited to matters raised on the appeal.³⁶ In some instances, counsel for Santos and the State appeared to suggest the panel could not disturb findings made in the 2022 Determination where such findings were not raised in appeal, however this submission is incorrect.³⁷ In respect of this remittal, the Tribunal is required to take into account all of the evidence before it relating to all the factors set out in s 39.

- [25] Further, as noted by the Full Court in the remitter, the Tribunal ought as a matter of general principle be considering what is the correct outcome on the most up to date and relevant material available to it.³⁸ The panel must make the correct and preferable decision having regard to the law and facts as it stands at the date of the remittal hearing, not as at the date of the original decision.³⁹

DETERMINATION UNDER S 38

- [26] Section 38(1) of the *Native Title Act* provides that, unless s 37 applies, the panel must make one of the following determinations:

- (a) a determination that the act must not be done;
- (b) a determination that the act may be done; or
- (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.

- [27] The exceptions set out in s 37 of the *Native Title Act* do not apply in this matter, as no agreement of the kind mentioned in s 31(1)(b) has been made, and no determination under s 36A has been made.

³⁶ *Callychurn v ASIC* [2019] AATA 4600, [62]–[65].

³⁷ Transcript of the closing submissions held 14 February 2025, Ms Parker, P-50/L32-37, Ms Webb, P-45/L30-36 (**Closing Transcript**).

³⁸ *Remittal* [2024] FCAFC 49, [14], citing *Shi v Migration Agents Registration Authority* [2008] HCA 31; 235 CLR 286, [37], [41]–[42] (Kirby J), citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24; and *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J).

³⁹ *Jagroop and Minister for Immigration and Border Protection* [2015] AATA 751, [63]; *Principal reasons* [2024] FCAFC 26, [20].

- [28] Section 39(1) of the *Native Title Act* sets out the matters that the panel must take into account in making a determination. The mandatory criteria in s 39 requires the panel weigh potentially conflicting matters,⁴⁰ with the weight to be afforded dependent on the evidence.⁴¹
- [29] In considering the effect of the acts on the matters listed in s 39(1)(a), the panel must also take into account the nature and extent of existing non-native title rights and interests in relation to the land or waters concerned and existing use by persons other than Gomeroi.⁴²
- [30] Importantly, the *Native Title Act* is a beneficial statute and the future act right to negotiate regime is an element of the protection of native title, one of the main objects of the Act. That protection is not to be narrowly construed.⁴³
- [31] As noted by Justice O’Byryan in the Full Court’s *principal reasons*, the right to negotiate was included in the *Native Title Act* as an important element of the protections afforded to native title, but which also balanced the interests of the broader Australian community.⁴⁴
- [32] Within this context, the mandatory criteria set out at s 39 of the *Native Title Act* requires the Tribunal have regard to the native title party when considering each sub-section, including when considering sub-paragraphs (1)(c), (e) and (f), depending on the evidence before it.
- [33] The Full Court referenced this requirement throughout the remittal decision itself. Justice O’Byryan observed that relevant paragraphs relating to the economic or other significance of the act, also requires the Tribunal ‘take into account the interests, proposals, opinions or wishes of the native title parties in relation to the

⁴⁰ *Principal reasons* [2024] FCAFC 26, [345].

⁴¹ See *Western Australia v Thomas* (1996) 133 FLR 124, 166.

⁴² *Native Title Act* s 39(2).

⁴³ See *Smith v Western Australia* [2001] FCA 19, [23] (French J); *Kanak v National Native Title Tribunal* (1995) 61 FCR 103, 124 (Lockhart, Lee and Sackville JJ); *Re Koara People* (1996) 132 FLR 73, 81; *Native Title Act* Preamble.

⁴⁴ *Principal reasons* [2024] FCAFC 26, [330] (O’Byryan J).

management, use or control of the lands or waters concerned'.⁴⁵ He also observed paragraph 39(1)(f) requires the Tribunal 'take into account any other matter that it considered relevant, which could be a matter relevant to the interests of Aboriginal and Torres Strait Islander peoples who hold, or might hold, native title rights and interests in land and waters affected by the future act, or the interests of the broader Australian community'.⁴⁶

- [34] In relation to 39(1)(e), the public interest criterion was a large focus of the appeal to the Full Court and resultingly this remittal decision. In the principal reasons, Justice O'Bryan observed the phrase 'any public interest in the proposed act proceeding' necessarily requires consideration of the *public benefits* and the *public detriments* arising from the proposed act in order to assess whether there is a net public interest in the act proceeding. His Honour went on to note that this net outcome must then in turn be weighed against any negative impact upon the Aboriginal and Torres Strait Islander peoples who hold, or might hold, native title rights and interests in the affected land and waters.⁴⁷ The Chief Justice also affirmed the reasoning of Justice O'Bryan in relation to the weighing exercise required under s 39.⁴⁸
- [35] Indeed, each of the mandatory considerations in s 39 must be assessed by the Tribunal as to whether it weighs for or against a determination allowing or refusing the doing of the act. As an administrative body, the Tribunal then has the discretion to attribute such weight to the evidence adduced before it as the Tribunal considers appropriate.⁴⁹
- [36] For the reasons set out below, and based on a careful consideration and weighing of all the evidence before the Tribunal, the panel has determined the act may be done subject to various conditions to be complied with by the parties.

⁴⁵ Ibid [339] (O'Bryan J).

⁴⁶ Ibid [344] (O'Bryan J).

⁴⁷ Ibid [345] (O'Bryan J).

⁴⁸ Ibid [228] (Mortimer CJ).

⁴⁹ Ibid [387] (O'Bryan J).

Project description

- [37] As noted previously at [1], the leases comprise of an area approximately 924 sq km. Approximately 70% of the total area of the leases overlap the northeastern portion of a broader area known as the Pilliga. The Pilliga is described as a conglomeration of forested areas that total more than 500,000 hectares or 5000 sq km.⁵⁰ The leases overlap approximately 13% of the Pilliga, not an insubstantial portion.
- [38] The Project is the construction, operation and subsequent decommissioning of a gas field which includes refining facilities, gas and water processing and associated infrastructure.
- [39] Gas is to be extracted from coal seams between 300 and 1200 metres below ground, depending on the formation.⁵¹ This would be produced from up to 850 new wells on a maximum of 425 well pads⁵² with a footprint that may affect up to approximately 10 sq km of native vegetation within the broader 950 sq km Project area.⁵³ This 10 sq km area is asserted by Santos to be conservative, providing an upper limit to vegetation disturbance which they say is more likely to be 27-67% of this upper limit.⁵⁴
- [40] Santos state that the general location of each well would be dependent on the location of gas reserves⁵⁵ with specific location being subject to a Field Development Protocol which considers geological, environmental, heritage, hydrological and other factors, including conditions imposed by the IPC. Santos gives evidence that location decisions would also include consideration of existing infrastructure such as roads and tracks for co-location.⁵⁶ Santos contend that

⁵⁰ Native title party, *Statement of Contentions (revised)*, dated 26 November 2021, [188] (**NTP Contentions**).

⁵¹ Affidavit of Todd Dunn, signed 9 December 2021, affirmed 1 March 2022, [79] (**Dunn Affidavit**); Dunn Affidavit, Exhibit TD-2, Department of Planning, Industry and Environment, *Narrabri Gas Project – State Significant Development SSD 6367* (June 2020), [20]–[22] (**SSD 6367 Assessment Report**).

⁵² Dunn Affidavit [19].

⁵³ Dunn Affidavit [20].

⁵⁴ Grantee parties, *Statement of Contentions*, dated 9 December 2021 [39] (**GP Contentions**); Dunn Affidavit [170(b)].

⁵⁵ Dunn Affidavit [84].

⁵⁶ Dunn Affidavit [89].

existing access tracks are extensive due to previous timber harvesting and gas exploration occurring since the 1960s.⁵⁷

- [41] Following the identification of well pad location, Santos describe a process labelled ‘micrositing’ whereby detailed site surveys are undertaken to minimise the risk to ecological and heritage features. It is said that this process provides flexibility to relocate infrastructure in the event Aboriginal sites or sensitive areas are identified.⁵⁸

- [42] Santos gives evidence that each new drill pad requires the clearing of approximately 1 ha of land (100 by 100 metres) for installation,⁵⁹ this cleared area is reduced to approximately 50 by 50 metres six months following installation and then the area is fenced.⁶⁰

- [43] Water is proposed to be extracted from each well reducing pressure and allowing the liberation of gas. The water located in the Project area has a salinity approximately 40% that of ocean water.⁶¹ This water and gas is intended to be transported via field pipelines to either the Leewood central gas processing facility or if from the southern portion of the field, to the Bibblewindi infield compressor station, which located within PPLA13 in the Pilliga forest, before then being piped to the Leewood facility for final processing.⁶² The Leewood facility is located outside of, but contiguous to, the Pilliga forest.

- [44] Santos gives evidence that pipelines will be placed a minimum of 750 mm underground and ‘where practical’ will be co-located along existing roads and access tracks⁶³ indicating some clearing for pipeline purposes will also be necessary.

⁵⁷ Dunn Affidavit [92].

⁵⁸ Dunn Affidavit [93].

⁵⁹ Dunn Affidavit [103].

⁶⁰ Dunn Affidavit [128]–[129].

⁶¹ SSD 6367 Assessment Report [46].

⁶² SSD 6367 Assessment Report [41].

⁶³ Dunn Affidavit [82].

- [45] Prior to the installation of gas field infrastructure, a Field Development Plan is required to be developed⁶⁴ to be approved by the Planning Secretary of the Department of Planning, Housing and Infrastructure.⁶⁵ According to Condition D8 of the IPC Development Consent, Santos is required to submit an annual review of environmental performance and be audited for environmental performance after one year and then every subsequent three years.⁶⁶
- [46] The Project is said to occur over four phases where Phase 1 is final planning, further exploration and appraisal activities and installation of ancillary infrastructure, Phase 2 is developing the field itself (drilling, infrastructure development), Phase 3 is operation and Phase 4 is decommissioning.⁶⁷
- [47] When wells are decommissioned, Santos gives evidence that they are to be plugged and isolated through the use of cement as the sealing material by filling the total depth of the well.⁶⁸ This, Santos asserts, ensures protection of groundwater resources and isolation of coal seam formations from other formations.⁶⁹ Further rehabilitation work is required consistent with development consent conditions set out by the IPC.⁷⁰
- [48] Due to the nature of the Project, emissions are a key component of both its operation and this consideration. In accordance with Australian and international standards, emissions are expressed as scope 1, 2 or 3. Scope 1 emissions are those that are released directly from or by the operations of a project, scope 2 are indirect emissions generated from the operation of a project through the consumption of energy from external sources and scope 3 are indirect emissions that occur outside

⁶⁴ Dunn Affidavit [95].

⁶⁵ Dunn Affidavit [95].

⁶⁶ Dunn Affidavit [98]–[99].

⁶⁷ SSD 6367 Assessment Report [60]–[63].

⁶⁸ Dunn Affidavit [144].

⁶⁹ Ibid.

⁷⁰ Dunn Affidavit [173]–[175].

of the boundary of a project or organisation that are a result of the actions of that organisation or project.⁷¹

- [49] Emissions estimates are provided in the EIS. At the outset the panel notes that the figures referred to in the EIS in relation to the GHG emissions estimates appear at Appendix R, which is dated August 2016 and based on data from 2013–2014. Unfortunately, no updated evidence on emissions estimates was led, nor sought to be led, by Santos in relation to the Project so the evidence available to the panel is now approximately 10 years old.
- [50] The scope 1 figures contained in the EIS provide emissions broken into three stages of the Project being construction, operation and decommissioning and across six categories of emissions in each of these stages being fuel combustion for electricity generation, flaring, venting, carbon dioxide (CO₂) venting, fugitive emissions and vegetation clearing. These are further expressed in two options, option 1 where electricity is self-generated or option 2 where electricity is sourced from the national grid.⁷²
- [51] Across these stages and categories, estimated annual scope 1 emissions for option 1 is 0.96 million tonnes (Mt) of carbon dioxide equivalent (CO₂-e) per annum, totalling a cumulative 26.3 Mt over the life of the project. For option 2, the estimated annual scope 1 emissions is 0.53 Mt CO₂-e per annum or a cumulative 15.5 Mt over the life of the project.⁷³
- [52] If option 2 is preferred, scope 2 emissions for the project are estimated at 0.72 Mt CO₂-e per annum amounting to 18 Mt over the life of the project. Based on these figures, option 2 would have combined scope 1 and 2 emissions of 33.5 Mt CO₂-e over the life of the Project. There are no scope 2 emissions generated for option 1 given the internal generation of electricity.⁷⁴

⁷¹ Department of Climate Change, Energy, the Environment and Water, *Australian National Greenhouse Accounts Factors 2024*, 5, 6.

⁷² Dunn Affidavit, Exhibit TD-25, *Environmental Impact Statement – Appendix R*, 18 (EIS Appendix R).

⁷³ Ibid.

⁷⁴ EIS Appendix R, 19.

- [53] The EIS also provides an estimate for scope 3 emissions, which would arise from customers combusting purchased CH₄ for electricity generation or other industrial purposes. These are provided to be 3.77 Mt CO₂-e per year⁷⁵ which equates to a cumulative amount of 94.25 Mt over the course of the Project. Based on the EIS, the total emissions from the Project over its entire operation would be approximately 121 Mt CO₂-e for option 1 or approximately 128 Mt for option 2.
- [54] In considering emissions, and the regulatory framework for the Project, it important to consider the state and federal emissions regimes. The relevant emission regimes formed part of the panel's consideration of both s 39(1)(a) and s 39(1)(e), however it was particularly relevant to the consideration of public interest and is considered in greater detail from [347] to [351] below.

The Aboriginal cultural heritage protection regime in NSW

- [55] As noted by the parties, Aboriginal cultural heritage in NSW is primarily protected by the *NPW Act* but also a network of other pieces of legislation at both the State and Commonwealth levels. This network involves the following legislation: ⁷⁶
- (a) *NPW Act*;
 - (b) *National Parks and Wildlife Regulations 2019* (NSW);
 - (c) *Heritage Act 1997* (NSW);
 - (d) *Environmental Planning and Assessment Act 1979* (NSW);
 - (e) *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth);
 - and
 - (f) *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).
- [56] Section 85 of the *NPW Act* provides that the Chief Executive is responsible for the protection of Aboriginal places and objects with s 86 of the *NPW Act* setting out offences for harming or desecrating Aboriginal objects or places. Gomeroi contend that under the *NPW Act* there is little protection of intangible Aboriginal cultural heritage and that it does not function to allow Aboriginal people to enforce the

⁷⁵ Ibid.

⁷⁶ NTP Contentions [224]; GP Contentions [59].

protections of culture and heritage.⁷⁷ The Gomeroi contentions describe how the regime functions in a way that appears to be similar to other heritage protection regimes around the country; that is by relying on deterrence by operating punitively following the occurrence of harm rather than identifying and protecting intangible cultural heritage before damage occurs.⁷⁸

[57] Santos also notes the *NPW Act* provides a general regime for the protection of Aboriginal cultural heritage in NSW principally by establishing offences for harm to Aboriginal objects and places as well as establishing the **Aboriginal Heritage Information Management System** database to record Aboriginal objects and places.⁷⁹ Similar databases are in existence in other states and territories across Australia. Santos also explains that Aboriginal places and objects may also be separately listed on the State Heritage Register established under the *Heritage Act 1977* (NSW).⁸⁰ Gomeroi contend that AHIMS may not include certain sites of importance to them for various reasons and Santos does appear to acknowledge this.⁸¹

[58] Santos contends that the Project is also subject to extensive conditions under the IPC Development Consent pertaining to the protection of Aboriginal cultural heritage, which are all reflected in the ACHMP which has been developed by Santos in consultation with Gomeroi people.⁸² The State also points to the conditions under the IPC Development Consent as mitigating risk to Aboriginal cultural heritage by the Project.⁸³

[59] While the State initially made contentions about its cultural heritage protection regime within GVP Amended Contentions at [30] to [36], strangely the State resiled from those statement (amongst many others from the GVP Amended

⁷⁷ NTP Contentions [230].

⁷⁸ Ibid.

⁷⁹ GP Contentions [60].

⁸⁰ GP Contentions [62].

⁸¹ NTP Contentions [237]; GP Contentions [73].

⁸² GP Contentions [65].

⁸³ GVP Contentions [36].

Contentions) and stated they should not be taken into account.⁸⁴ In fact, in the updated version of the GVP Amended Contentions lodged on 8 November 2024, those paragraphs were redacted from the document. It is unclear to the panel why this choice was made by the State, but it appears that State has resiled from the statements made in those redacted paragraphs and the panel has not taken them into account.

[60] Relevantly, s 5 of the *NPW Act* states:

Aboriginal object means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

[61] Section 84 of the *NPW Act* states:

The Minister may, by order published in the Gazette, declare any place specified or described in the order, being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act.

[62] The definition of ‘Aboriginal object’ speaks of ‘...any deposit, object or material evidence...’. Any commonsense reading of this definition points to physical, tangible aspects of cultural heritage. The term ‘object’ itself denotes something physical and tangible. On the other hand, the definition of ‘Aboriginal place’ set out in s 84 of the *NPW Act* appears to be broader in terms of the potential to consider intangible heritage, giving discretion to the Minister to take into account places of special significance with respect to Aboriginal culture. This wording appears to encompass both tangible and intangible aspects of cultural heritage.

[63] The panel also notes that, as the Project is classified as a State Significant Development by the State, an **Aboriginal Heritage Impact Permit** is not required and the offences relating to the desecration and harm of Aboriginal objects and

⁸⁴ GVP Remittal Contentions [2].

places do not apply.⁸⁵ This exclusion could have serious consequences for the Gomeroi people and their cultural heritage.

- [64] The mechanics of the Aboriginal cultural heritage protection regime and the IPC conditions appear to function through the ACHMP and the processes contained within that document. As noted from [230] to [237] below, the panel has identified various issues with the ACHMP, many of which were raised by the native title party, which do not give the panel faith in its ability to properly protect Gomeroi cultural heritage in the lease areas. For these reasons the panel has decided to impose conditions to augment and supplement the ACHMP in order to strengthen the protection of Gomeroi cultural heritage in the lease areas.

Consideration of section 39(1)(a)

- [65] Section s 39(1)(a) of the *Native Title Act* expressly requires the Tribunal to consider the effect of the act on the matters listed in s 39(1)(a)(i)–(v). The Tribunal must form a view as to the activities proposed to be undertaken by a grantee party, and considering the evidence before it, determine the impact on the mandatory considerations of s 39(1)(a).⁸⁶
- [66] The evidence provided as to the s 39(1)(a) criteria is extensive. While it is treated *de novo* in this determination, the original evidence provided by the parties is set out in the 2022 Determination from [563] onwards.
- [67] The updated affidavit evidence of the Gomeroi claimants focuses on the effects of the Project in terms of contended climate change impacts. Given much of the evidence addressing s 39(1)(a) is restricted, these reasons avoid specificity or locations where possible.
- [68] Relevant to this criterion, the evidence from Gomeroi covers two broad areas of focus. The first is the direct physical impact of the construction and operation of the proposed gas field which includes concern regarding a range of environmental

⁸⁵ NTP Remittal Condition Comments [22], referencing section 4.41 of the *Environmental Planning and Assessment Act 1979* (NSW).

⁸⁶ *Watson v Backreef* [2013] FCA 1432, [59].

impacts and how this relates to the s 39(1)(a) criteria. The second relates to indirect impacts and is focused on the impact of climate change as a result of the emissions of the Project, and by extension, the impact on factors that relate to the s 39(1)(a) criteria. Both broad focus areas require examination in each of the criteria.

[69] The relevant evidence can be broadly grouped into four themes:

- (a) the broader cosmological view possessed by the Gomeroi people, including the relationship of this view to the Pilliga;
- (b) Gomeroi culture and cultural values relating to both people and land;
- (c) water and the cultural values surrounding water, waterways and water sources; and
- (d) the way Gomeroi contend the act, both directly and indirectly, will impact upon the physical environment and the flora and fauna of the area.

Cosmology

[70] The evidence relating to cosmological matters effectively provides the foundation from which the other types of information from Gomeroi is cast. It is difficult to paint a full picture of this information due to evidence restrictions however it can be said this topic traverses a broad range of information that relates to the broader Gomeroi group. This includes astronomical, cultural and cosmological information, information on ancestor and spiritual beings and the manner in which they are embedded or otherwise manifest in the landscape, ideas of layered realms in land and above including the interconnectedness between them, the manner in which these things generate cultural views and practices such as respect and avoidance and the knowledges that are given rise to.

[71] While the evidence provides a broader Gomeroi view, it also specifically addresses the Pilliga region and Project area, and includes a range of cultural and traditional information and knowledge that is related to the Pilliga. The native title party has also provided evidence in relation to the exercise of native title in the relevant area and its vicinity, and the way of life of the Gomeroi people and how it relates to the Pilliga.

[72] Much of the evidence in this topic relates to the Pilliga more broadly, an important area which encompasses the lease areas. Gomeroi also provide evidence as to ideas of interconnectedness relating to cosmological matters and incorporating Country. Arising from this view, Gomeroi assert that from a cultural perspective, the Pilliga is viewed as an indivisible whole rather than being able to be reduced for consideration into smaller divisible parts.⁸⁷ The panel accepts this contention. This perspective was also noted by the Full Court in its *principal reasons*. Whilst acknowledging the unique relationship between native title claimants or holders and the lands in which they hold rights and interests, Justice O'Bryan referenced Justice Blackburn in the matter of *Milirrpum v Nabalco* who observed:⁸⁸

... the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. This was not in dispute. It is a particular instance of the generalization upon which I ventured before, that the physical and spiritual universes are not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.

[73] It is reasonable to accept that the evidence provided as to cosmology, tradition and values regarding the entire Pilliga is also applicable to the particular portion of the Pilliga that is directly impacted by the future acts. In any event, Gomeroi give evidence of a number of features and factors that apply specifically to the area overlapped by the Project, with evidence also specifically mentioning the linkage between cosmology, the landscape and people.

Culture

[74] Significant effort is also taken by each of the Gomeroi witnesses to provide evidence and information on cultural matters and values and how these things provide the basis for their views addressing the s 39(1)(a) criteria. There is a broad suite of matters that Gomeroi provide evidence on including:

- (a) cosmological and spiritual matters;

⁸⁷ NTP Amended Remittal Contentions [5]; Tighe Remittal Affidavit [11]–[14].

⁸⁸ *Principal reasons* [2024] FCAFC 26, [340] quoting *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167.

- (b) matters surrounding Gomeroi society and people and the way people relate to Country in a spiritual and physical sense;
- (c) the exercise of native title rights, including traditional knowledge practices, the collection and use of bush tucker and bush medicine, the collection of materials for the manufacture of traditional implements such as boomerangs, shields, clap sticks, spears and coolamons;⁸⁹
- (d) the transmission of traditional and cultural knowledge and the activities that support this;
- (e) caring for Country as a cultural activity and the cultural obligations that give rise to this; and
- (f) restrictions and/or prohibitions on certain activities or places, including gender restricted places and stories.⁹⁰

[75] The main observation to make is that cultural focus and interest runs through all components of the Gomeroi evidence, whether it concerns the direct or indirect effect of the proposed future act. Further or more specific detail is provided within consideration of each criteria below.

Water

[76] A clear theme in the Gomeroi evidence is that surrounding water, which each of the Gomeroi witnesses dedicate significant portions of their material to. Submitted material regarding water covers a range of topics which includes but is not limited to:

- (a) traditional knowledge of water resources as it relates to water courses and the broader landscape;
- (b) cosmological and spiritual matters relating to water;
- (c) water quality and its physical impact on Country as well as on cultural values associated with Country;

⁸⁹ Affidavit of Steven Booby, signed 7 October 2021, affirmed 21 February 2022, [35] (**Booby Affidavit**); Tighe Remittal Affidavit [19].

⁹⁰ Affidavit of Suellyn Tighe signed 8 October 2021, affirmed 21 February 2022 [25], [28], [33], [34], [53] (**Tighe Affidavit**).

- (d) the impact of extreme weather events caused by climate change, including flooding or drought; and
- (e) concern regarding subsurface water systems.

[77] This theme alone gives rise to a significant body of evidence addressing both the direct and indirect impacts of the proposed future acts.

[78] Mr Booby describes springs and river systems in a way which highlights their vital role in the carriage of water to sustain the natural ecosystem.⁹¹ This evidence also shows that the native title party associates a component of the cultural significance of the Pilliga itself to the fact that the area contains so many waterways.⁹² This notion was addressed in the affidavits lodged in the 2022 Determination and in this remittal.⁹³

[79] Within this theme, a significant body of information is provided surrounding the importance of Bohena Creek. This is a seasonal waterway that runs from south to north through the entirety of PPLA13 and a significant portion of PPLA15. It is understood that most, if not all, of the remainder of the leases, that is PPLA14 and PPLA16, are within the catchment of Bohena Creek, which runs into the Namoi River near Narrabri, which then flows into the Barwon River at Walgett and ultimately into the Darling River near Bourke.

[80] While Bohena Creek is seasonal and is for a large part of the year a dry bed, it is not an inconsequential waterway. While the width of the bed looks to generally be around 30–40 metres, it also looks to reach in excess of double this in parts of PPLA13 and PPLA15. Additionally, according to Gomeroi evidence, although it may be dry for significant parts of the year, the creek retains water which can be accessed through digging.⁹⁴

⁹¹ Booby Affidavit [27], [29].

⁹² Booby Affidavit [30].

⁹³ Wilson Remittal Affidavit [4].

⁹⁴ Tighe Affidavit [38].

- [81] This phenomenon is described as the waterway being an ‘upside-down’ river⁹⁵ or an underground river,⁹⁶ although this term is also used to refer to springs and aquifers.⁹⁷ Ms Tighe describes the origin of this in cultural terms and in doing so, makes a culturally based point about respect for water which underscores the evidence provided by all the Gomeroi witnesses on this topic.⁹⁸
- [82] Ms Tighe also points to important cultural responsibilities for water and water sources in and for one’s own country, and for those peoples who are downstream and receive water from Gomeroi land.⁹⁹
- [83] In the 2022 contentions, Gomeroi contended that ‘[w]ater, both above and below ground is of great cultural and spiritual significance to the Gomeroi people.’¹⁰⁰ Summarising the evidence, the native title party points to evidence deposing that water, water courses and water bodies have spiritual significance and value, ceremonial association, and provide drinking water while accessing the area.¹⁰¹ Gomeroi also submit that the exercise of their native title rights and interests ‘such as practicing ceremony, hunting, fishing and gathering natural resources, flora and fauna is dependent on the health of the river systems and waterways’.¹⁰²
- [84] It is clear from the evidence provided that the Gomeroi place great value in water and the water resources of the Pilliga and Project area, and the panel accepts such evidence.

⁹⁵ Tighe Affidavit [35] - [37].

⁹⁶ Booby Affidavit [30].

⁹⁷ Booby Affidavit [18].

⁹⁸ Tighe Affidavit [38].

⁹⁹ Tighe Affidavit [39]–[43].

¹⁰⁰ NTP Contentions [204].

¹⁰¹ NTP Contentions [204]; Booby Affidavit [15]–[16], [26]–[30], [39]; Tighe Affidavit [17]–[19], [36]–[38], [40], [46], [52], [54].

¹⁰² NTP Contentions [205]; Booby Affidavit [27]; Tighe Affidavit [82].

Climate change

- [85] A strong focus of the remittal has been the impact of climate change, particularly in relation to s 39(1)(e) addressing any public interest in the doing of the act however, climate change evidence is also relevant for consideration of s 39(1)(a), which directs the panel to consider the effects of the act. The summary of evidence here focuses on the updated material submitted by Gomeroi going to the effects of the act relevant for consideration under s 39(1)(a) as it relates to GHG emissions and climate change.
- [86] Climate change expert for Gomeroi, Professor David Karoly, provides a comprehensive outline of the science of climate change and its impacts, including discussion on the analytical and calculation tools used by authorities such as the **Intergovernmental Panel on Climate Change**. A metric of significance in Professor Karoly's reporting is one adopted by the IPCC known as the transient climate response to cumulative carbon dioxide emissions, or **TCRE**. This observes that the increase in the Earth's temperature has an almost linear relationship with CO₂ emissions with the IPCC estimating there is an increase in global temperature of 0.45°C (plus or minus 0.18°C) for every 1000 gigatonnes of additional CO₂ emissions.¹⁰³
- [87] Using the TCRE, and based on the total estimated cumulative GHG emissions of the proposed future act over the course of 25 years, Professor Karoly states that this would 'lead to a best estimate increase of global temperature ... of about 0.00005°C ... if the Project proceeds'.¹⁰⁴ The panel also notes that during the expert conclave the expert for Santos confirmed he agreed with Professor Karoly's evidence on this point whilst noting the accepted figure was, in his opinion, in any event extremely low.¹⁰⁵

¹⁰³ Karoly Report [111].

¹⁰⁴ Karoly Report [112].

¹⁰⁵ Transcript of the Expert Conclave held 17 January 2025, Dr Mitchell, P-13/L7-23 (**Expert Conclave Transcript**).

[88] Professor Karoly outlines the broader impact of climate change on Australia, drawing from the Australia's State of the Environment 2021 report. In doing so, Professor Karoly summarises that:¹⁰⁶

- (a) Climate change is continuing and is increasing the impacts of other pressures on our environment;
- (b) In the past decade, climate change in the form of more severe drought, extreme weather events, fire and habitat modification is becoming a new driver for habitat change and species loss in terrestrial ecosystems;
- (c) Coupled with more gradual climate change shifts, extreme events have resulted in lifecycle shifts, changing species abundances, and range expansions and contractions;
- (d) Approximately two-thirds of threatened species in Australia are threatened by changing fire regimes (usually in concert with other pressures); and
- (e) Range shifts and extensions can be complicated as different species have different abilities to shift their location and range in order to cope with habitat.

[89] Professor Karoly also makes specific observations regarding the Narrabri region encompassing the lease areas and sets out, in summary, that due to climate change:¹⁰⁷

- (a) Average maximum temperature in the Narrabri region increased by about 1.4°C from 1951-60 to the most recent decade 2011–2020;
- (b) The number of hot days (maximum temperatures greater than 35°C) at Gunnedah has increased statistically significantly from 18.8 days per year in 1951–1980 to 26.0 days per year in 1991–2020;
- (c) The number of very hot days in Gunnedah (maximum temperatures greater than 40°C) had increased significantly from 0.9 days per year in 1951–1980 to 2.3 days per year in 1991–2020; and
- (d) The average number of heavy rain days (> 25 mm per day) each year in Narrabri has increased substantially from an average of 4.9 days per year in

¹⁰⁶ Karoly Report [73].

¹⁰⁷ Karoly Report [75]–[77].

1966–1990 to 6.7 days per year in the most recent period available 1991–2012.

- [90] What is evident from Professor Karoly’s expert report is that there is a real and measurable increase in extreme weather events linked to climate change, both in the number of days of extreme temperatures per year, as well as an increase in days of heavy rain in the Narrabri region. Offset from this are periods of drier than usual weather. This paints a picture of a landscape that is likely to be placed under stress through increasing extremes in weather patterns, with increased risk of both wildfires during dry and extreme hot weather, as well as floods during increased periods of heavy rainfall.
- [91] Only portions of Professor Karoly’s evidence were contested by the other parties. There was a broad consensus between the experts for Gomeroi and Santos during the conclave regarding the current climate science. The State did not lodge its own evidence on this issue or contest these aspects of the evidence. Santos however did lodge written contentions pointing to the lack of scientific consensus in relation to the use of IPCC models at a project specific level, and suggested the Tribunal should place limited weight on it.¹⁰⁸
- [92] Professor Brendan Mackey provided expert evidence for Gomeroi concerning the ecological risks posed to the Pilliga by the impacts of climate change. Professor Mackey provides a useful characterisation of these impacts as acute and chronic, where acute impacts are those that involve extreme events such as bushfire, floods, heatwaves and storms, while chronic are those which arise slowly through impacts such as temperature increases and shifting patterns in rainfall seasonality. Professor Mackey states that these acute and chronic impacts are related in that chronic impacts, otherwise known as climate trends, drive an increase in the frequency, severity and duration of severe acts.¹⁰⁹
- [93] Professor Mackey notes that the climate risks to biodiversity are a function of the climate hazards themselves, the extent of exposure to these hazards and the vulnerability of the species or system. Professor Mackey further states that this

¹⁰⁸ GP Remittal Statement of Contentions [135].

¹⁰⁹ Mackey Report [4].

vulnerability is a function of current conservation status and condition of habitat, relative to the extent it has been degraded.¹¹⁰

[94] With this framework, Professor Mackey's evidence focuses on threatened species and communities, and gives evidence that there are 107 species and ecological communities that are listed as threatened under the *Biological Conservation Act 2016* (NSW), 53 of which are similarly listed in the *Environmental Protection and Biodiversity Conservation Act (1999)* (Cth) that are found within the Pilliga region.¹¹¹ Given climate hazards and other types of environmental degradation, Professor Mackey concludes these species and communities are highly vulnerable and are at high risk from climate change impacts.¹¹²

[95] Professor Mackey also provides evidence on water, stating that in his expert opinion the Project will to some extent, directly and indirectly impact on the region's water resources and therefore impact on biodiversity. This, Professor Mackey states, will be due to:¹¹³

[t]he observed climate impacts and projected climate risks for the region which include ongoing reduction in winter rainfall, higher temperatures, increase in extreme climate events including droughts, bushfires and heat waves, will increase stresses on the Narrabri region's water resources through reducing winter flows, increasing evaporation especially in summer, disrupting continuity of supply, and impacting on water quality.

[96] Professor Mackey then concludes it is entirely feasible the proposed future act will potentially impact on the region's hydrology.¹¹⁴

[97] None of Professor Mackey's evidence was contested by the other parties.

[98] Associate Professor Nina Lansbury provided evidence relating to health and wellbeing impacts of climate change. Drawing from the most recent IPCC report (AR6), Associate Professor Lansbury describes direct and indirect pathways of

¹¹⁰ Mackey Report [8].

¹¹¹ Mackey Report [10].

¹¹² Mackey Report [11].

¹¹³ Mackey Report [13].

¹¹⁴ Mackey Report [14].

climate sensitive diseases and health outcomes. Direct pathways are those that have an effect on people directly such as through extreme heat, bushfire deaths and cyclone damage, whereas indirect are:¹¹⁵

those that are mediated through natural systems, such as air and water pollution and changing conditions for infectious disease, and those mediated through social systems, such as mental health conditions, disrupted food supply chains, and climate-forced migration.

- [99] Associate Professor Lansbury cites work which notes the close relationship between the condition of the physical environment with cultural health¹¹⁶ and explains that this interconnectedness of Aboriginal people, community and Country makes them uniquely vulnerable to the social, cultural, spiritual and environmental impacts of climate change.¹¹⁷ Associate Professor Lansbury further explains that Aboriginal people, including the Gomeroi people, are more vulnerable than other Australians to the impacts of climate change due to an existing and significantly greater ‘burden of disease’ paired with lower financial resources.¹¹⁸
- [100] Ultimately Associate Professor Lansbury concludes that Aboriginal people ‘are likely to be more negatively impacted as compared to the general Australian population for three reasons that will be detailed below: more closely reliant and connected to Country and thus more affected by changes; lower general physical health and wellbeing status and thus greater vulnerability; and the ‘compounding and cascading’ nature of climate change impacts that exacerbates existing vulnerabilities’.¹¹⁹
- [101] None of Associate Professor Lansbury’s evidence was contested by the other parties.

¹¹⁵ Lansbury Report [34].

¹¹⁶ Lansbury Report [23].

¹¹⁷ Lansbury Report [39]–[47], [49]–[53].

¹¹⁸ Lansbury Report [12]–[14], [38].].

¹¹⁹ Lansbury Report [58].

[102] An extensive set of new information was also provided by Gomeroi witnesses addressing climate change. In summary, citing the expert and Gomeroi witnesses, Gomeroi contend that climate change will have some of the following effects:¹²⁰

- (a) The reduction in winter rainfall, higher temperatures and increase in extreme climate events such as droughts, bushfires and heat waves will increase stress on the Narrabri region's water resources through reducing winter flows, increasing evaporation in summer, disrupting continuity of supply, impacting on water quality and increasing variability in the flow of the ephemeral rivers and streams. This may impact on the region's hydrology, including the Pilliga region recharge zones for the Great Artesian Basin and the Pilliga Sandstone (which underlies the Pilliga forest), an intake area for aquifers that are utilised for irrigation.
- (b) There is a large number of listed threatened species and ecological communities in the Pilliga region that are vulnerable to the observed and projected climate impacts of severe drought, extreme weather and fire events leading to habitat change and species loss. Extreme heat events may trigger the mass death of wildlife populations.
- (c) Climate change has direct physical human health impacts via increased drought, flooding and heat exposure. Aboriginal people living in the Narrabri region have a higher burden of disease, and lower financial resources, than the general Australian population which increases vulnerability to health impacts from climate change. In addition, climate change impacts mental health and wellbeing, particularly for Indigenous peoples. It also impacts cultural health and wellbeing, as it can lead to loss of sacred sites, reduced ability to live on country. and impacts on food gathering and ceremony, and spiritual health and wellbeing, with impacts being felt as a result of reduced river flows.

¹²⁰ NTP Amended Remittal Contentions [49]; Karoly Report [75]–[77]; Mackey Report [6], [10], [12]–[14], [16]; Lansbury Report [36], [38], [39], [41], [47], [51], [53], [60].

Section 39(1)(a)(i) – the effect of the acts on the enjoyment of Gomeroi of their native title rights and interests

- [103] Consideration of this criterion is focused on the effect of the act on the enjoyment of the registered native title rights and interests through examination of the evidence relating to the enjoyment of these rights in the area, and considering the characteristics of the future act and the effect these may have. The Tribunal is directly concerned with the effect of the future act, but this effect must be considered in the context of the whole Project.¹²¹
- [104] While the parties make various remarks on what the Tribunal should assume regarding the exercise of native title rights and interests, the panel makes no assumptions about whether particular rights and interests are or are not practiced, or whether there will or will not be particular effects. Rather the assessment of the effects is determined on the evidence before the Tribunal in each case.¹²²
- [105] Gomeroi refer to the list of rights and interests that are within the Register of Native Title Claims and contend they are currently exercised and enjoyed in the lease areas.¹²³ Gomeroi also contend that it may be assumed that these rights are practiced throughout the claim area as they have been established on a *prima facie* basis when claim registration occurred.¹²⁴
- [106] Much of the evidence from Gomeroi regarding the enjoyment of native title rights and interests relates to the broader Pilliga. Nonetheless, while the portion of the overall Pilliga overlapped by the leases is relatively contained, being around 13% it is not insubstantial. Further, the registered Gomeroi claim area overlaps the leases entirely.
- [107] In the statements provided, Gomeroi witnesses provide evidence as to visitation to the Pilliga for the teaching of cultural knowledge and the collection of bush

¹²¹ See for example *Coalpac* [2013] NNTTA 2, [66] and *Western Desert Lands* [2009] NNTTA 49, [64].

¹²² *Western Australia v Thomas* [1996] 133 FLR 124, 167.

¹²³ NTP Contentions [184].

¹²⁴ NTP Contentions [187].

foods,¹²⁵ to collect materials for and to manufacture traditional tools,¹²⁶ and to collect ochre.¹²⁷ Some of the descriptions of the collection of bush foods are from the western side of the Pilliga, some 50 km from the areas overlapped by the leases.¹²⁸

- [108] Gomeroi contend there are two main areas of impact on the enjoyment of registered native title rights and interests, the physical impact of the construction and operation of the Project, and the impacts of climate change as a result of the operation of the Project.
- [109] In regard to physical impact, Gomeroi contend that the exercise of native title rights and interests is predicated on the ability to access country and sites.¹²⁹ Referring to the evidence of Mr Kumarage, Gomeroi contend that infrastructure associated with the Project will permanently affect landscape values and entirely prevent Gomeroi people's access to parts of the Project area due to the fencing that is proposed to be erected around facilities.¹³⁰ Gomeroi further argue that, while some areas will remain accessible, the dispersed nature of the Project Santos have outlined will have effects on the entire landscape.¹³¹
- [110] In addition, Gomeroi contend the Project will have a permanent effect on the area due to above and below ground infrastructure that will remain *in situ* permanently,¹³² including well caps that would remain in place 1.5 m below the ground, and likely also piping infrastructure.¹³³ Gomeroi further contend that

¹²⁵ Tighe Affidavit [59]–[63]; Affidavit of Jason Wilson signed 8 October 2021, affirmed 22 February 2022, [50] (**Wilson Affidavit**).

¹²⁶ Booby Affidavit [35].

¹²⁷ Booby Affidavit [36].

¹²⁸ Wilson Affidavit [51].

¹²⁹ NTP Contentions [210]; Kumarage Report [27]; Booby Affidavit [15], [22], [35], [36], [39], [41]; Tighe Affidavit [20], [21], [25], [40], [46], [59]–[64], [66]–[68], [72]; Wilson Affidavit [50], [51], [59].

¹³⁰ NTP Contentions [213]; Dunn Affidavit, Exhibit TD-12, *Environmental Impact Statement – Chapter 6 – Project description*, 6.3.3, 6.4.2 (**EIS Ch 6**); Kumarage Report [198]; Booby Affidavit [42].

¹³¹ *Ibid.*

¹³² NTP Contentions [220]; EIS Ch 6 6.7.3; Booby Affidavit [19].

¹³³ *Ibid.*

physical impacts may include a loss of flora and fauna due to habitat loss and the promotion of feral pests and predators.¹³⁴

[111] Further risks related to potential contamination or spills are also raised, addressed in the statements of Gomeroi witnesses surrounding a saltwater spill that occurred in 2011.¹³⁵ This evidence focuses on water and water health, and reinforces the strongly held belief that the ability to practice native title rights and interests for the Gomeroi is dependent on the health of the river systems and waterways.¹³⁶

[112] The submissions going to climate change largely address the effect of the act on the exercise of native title in the broader native title claim area.¹³⁷ Although consideration in this criterion is generally taken to be within the footprint of the future act, the *Native Title Act* itself makes no restriction on geographical area. While other parts of s 39 and s 38 of the *Native Title Act* refer to the lands and waters affected, s 39(1)(a)(i) simply states the Tribunal must consider ‘the effect of the act on the enjoyment by the native title parties of their registered native title rights and interests’. The contended effects do, however, need to be properly substantiated with evidence.¹³⁸

[113] The effects of climate change contended by Gomeroi include several phenomena cause by climate change itself, as referred to in the previous summary of submissions on climate change. These include fire, drought, flash flooding due to heavy rain events and increased temperature bringing increased fire risk, amongst other events. This is contended to bring about landscape change including a reduction of important plant and animal species, change in the flowering and fruiting behaviour of bush food limiting opportunities for gathering, change to trees and plants used for raw cultural materials, and totemic trees plants and animals

¹³⁴ NTP Contentions [217]; Booby Affidavit [21]; Tighe Affidavit [79]; Wilson Affidavit [52].

¹³⁵ NTP Contentions [218]; Booby Affidavit [38]–[45]; Tighe Affidavit [84]–[85]; Wilson Affidavit [54]–[55].

¹³⁶ NTP Contentions [205]; Booby Affidavit [27]; Tighe Affidavit [82].

¹³⁷ NTP Amended Remittal Contentions [55]; Tighe Remittal Affidavit [16]–[19], [21], [22]–[29], [32]–[35], [37]–[39], [40]–[47], [49]–[52], [53], [60]–[66]; Wilson Affidavit [52], [53], [55], [61]; Wilson Remittal Affidavit [6]–[9], [12], [20]–[25], [28]–[31], [34]–[38], [40]–[43]; Booby Affidavit [15], [34], [35], [41], [43]; Booby Remittal Affidavit [4]–[9], [23]–[25], [43], [56]–[58], [61], [62], [64], [69], [70], [73], [74]; Lansbury Report [45].

¹³⁸ *Silver v Northern Territory* [2002] NNTA 18, [35].

being reduced and removed from the landscape.¹³⁹ This, Gomeroi contend, will limit the ability of their native title rights and interests being exercised.¹⁴⁰

[114] The contentions of Santos mainly focus on the area that is directly overlapped by the lease areas and, citing previous Tribunal determinations, focus on the requirement for there to be sufficient material to demonstrate the enjoyment of the native title rights and interests by Gomeroi and then how this enjoyment will be affected if the act is done.¹⁴¹

[115] Both Santos and the State contend the statement by Gomeroi that it should be assumed by the Tribunal that all registered rights are practiced throughout the claim area as they have been accepted *prima facie* should not be accepted.¹⁴² Rather, Santos says the exercise of native title rights is a matter of evidence to be provided by the native title party, with evidence to have probative force.¹⁴³

[116] Based on this notion, Santos contend the evidence presented by Gomeroi does not demonstrate the exercise of native title rights within the area of the future acts.¹⁴⁴ The inference here is that the Tribunal cannot find there is an extensive effect on the exercise of native title as there is little or no evidence of this enjoyment in the first instance.

[117] In any event, Santos contends the Project will have an impact that is limited, manageable and acceptable,¹⁴⁵ and that the physical impact of the Project would be minimal due to the relatively small portion of the area that would be impacted by vegetation clearing.¹⁴⁶

¹³⁹ NTP Amended Remittal Contentions [73]–[82].

¹⁴⁰ NTP Amended Remittal Contentions [57]; Booby Affidavit [22]; Booby Remittal Affidavit [29]–[32].

¹⁴¹ GP Remittal Contentions [21].

¹⁴² GP Contentions [35]; GVP Amended Contentions [25]; GP Remittal Contentions [42].

¹⁴³ GP Remittal Contentions [20];

¹⁴⁴ GP Remittal Contentions [45].

¹⁴⁵ GP Contentions [37].

¹⁴⁶ GP Contentions [38], drawing from the Dunn Affidavit [170].

- [118] Further, Santos contend that any access restrictions that may be in place at any one time would be considerably smaller than this as a result of the progressive nature of the development of the Project.¹⁴⁷ Santos also contend that other than the immediate operation area of each well pad, and presumably other infrastructure, no fencing will be erected.¹⁴⁸ These contentions are repeated by Santos in its 2024 contentions.¹⁴⁹
- [119] Santos also contend the Project is designed to minimise impacts on native title through its flexibility of well locations and use of micro-siting, to either avoid or minimise impacts on heritage.¹⁵⁰ They give evidence of further available mitigation measures including minimising surface disturbance by having multiple wells on a well pad, maximising use of previously cleared areas, locating major infrastructure in the Leewood facility outside the Pilliga, and locating pipelines along existing tracks and roads.¹⁵¹
- [120] The State initially made contentions which, in effect, mirrored the contentions made by Santos, however in the remitter the State stated those parts of their earlier contentions should not be taken into account for reasons unclear to the panel.
- [121] The assessment of the impact of the grant of the leases on Gomeroi's native title rights and interests must be based on evidence before the panel. The evidence before the panel must also be considered in the context of the evidence as a whole. Some of the evidence before the panel, whilst not directly contended under s 39(1)(a)(i), has nonetheless assisted the Tribunal in its task. This includes evidence of the collection of wood to make shields and weapons for hunting, the gathering

¹⁴⁷ GP Contentions [40].

¹⁴⁸ GP Contentions [42]; Dunn Affidavit [114].

¹⁴⁹ GP Remittal Contentions [47]–[55]; Affidavit of Haydn Kreicbergs, dated 9 December 2021, [164] (**Kreicbergs Affidavit**); Dunn Affidavit [20], [114], [170], [471]; Transcript 13 April 2022, Mr McKechnie, P-223/L21, P-226/L-24-27.

¹⁵⁰ GP Contentions [45]–[46], GP Remittal Contentions [56]–[57]; Dunn Affidavit [45]–[50], [84]–[100].

¹⁵¹ GP Contentions [51]; Dunn Affidavit [87].

and use of natural resources, managing natural resources, conducting ceremonies and rituals, and the transmitting of traditional knowledge.¹⁵²

- [122] Considering all the evidence before the panel, we are satisfied that the leases will affect the enjoyment by Gomeroi of their registered native title right and interests. However, we are also satisfied that the manner in which the Project is to be constructed and operated as discussed above, together with conditions imposed in this determination, will mitigate these effects to a sufficient level.

Section 39(1)(a)(ii) – the effect of the acts on Gomeroi way of life, culture and traditions

- [123] Gomeroi have provided a more extensive body of evidence to address their way of life, culture and traditions and of the effect of the proposed act on them, particularly relating to the three areas of focus examined previously: cosmology, culture and water.
- [124] Strong emphasis is placed upon cosmological information within the Gomeroi evidence. This includes evidence surrounding celestial bodies and the way these are connected to the Country in question, including in relation to totemic structures, plants and animals. It also includes information regarding the cultural aspects of lands and waters in addition to descriptions of spiritual beings and phenomena.¹⁵³
- [125] Evidence is also provided around more specific activities such as teaching and passing on of culture, law and custom,¹⁵⁴ the gathering of food,¹⁵⁵ traditional woodworking and the collection of raw materials for this purpose¹⁵⁶ and information pertaining to ceremony and birthing trees.¹⁵⁷

¹⁵² See for example Booby Affidavit [33]–[35]; Tighe Affidavit [36]–[39], [54]–[57]; Wilson Affidavit [55]; Booby Remittal Affidavit [61]–[64]; Tighe Remittal Affidavit [15]–[19], [44], [46].

¹⁵³ Tighe Affidavit [12]–[24]; Booby Affidavit [17]–[29]; Wilson Affidavit [52]–[53]; Wilson Remittal Affidavit [34]–[36].

¹⁵⁴ Tighe Affidavit [59]–[64]; Booby Remittal Affidavit [25], [31].

¹⁵⁵ Tighe Affidavit [61]–[64]; Tighe Remittal Affidavit [20]–[25]; Wilson Affidavit [50]–[51].

¹⁵⁶ Booby Affidavit [33]–[35].

¹⁵⁷ Tighe Affidavit [52]–[54]; Tighe Remittal Affidavit [46]–[47], [67]–[71].

- [126] As in the previous criteria, evidence is focused on the Pilliga more broadly rather than specifically on the lease areas however as already addressed, the Gomeroi contend that from a cultural perspective, the Pilliga is viewed as an indivisible whole¹⁵⁸ and that an effect in one area has an effect to the whole area.
- [127] The general contentions of Santos and the State here again focus on the need for Gomeroi to adduce evidence of way of life, culture and traditions and the effect of the act upon these things.¹⁵⁹ The contentions of Santos again point to a lack of focus on effects within the lease areas specifically, whereas Gomeroi argue that effects of the act impact the entire, indivisible, Pilliga, and will be more broadly felt because of the disbursed physical infrastructure and operations, and due to the nature of climate change effects arising the future act.¹⁶⁰
- [128] Similarly to s 39(1)(a)(i), s 39(1)(a)(ii) does not restrict consideration of the effect to the footprint of the future act. Rather, it provides that the Tribunal must consider the effect of the act on the way of life, culture and traditions of the native title party. Due to the nature of the future acts that come before the Tribunal, this consideration has generally focused on the area of the physical footprint of a project given this is where most, if not all, of any effect is both generated and felt. This is not determinative however, rather, it is the contended effect of the act and whether this can be substantiated that is.
- [129] The topics addressed in this category of evidence deal with culture, tradition and ways of life, each of which encompass notions broader than simple physical phenomena, leading Gomeroi to describe the Pilliga through a cultural lens. Within the statutory framework of s 39(1)(a)(ii), the panel accepts that evidence provided as to cosmology, tradition and values regarding the entire Pilliga also apply to the portion of the Pilliga directly impacted by the future acts. Importantly, the evidence provided must be read in the context of all the evidence provided, and in the context of the statutory framework.

¹⁵⁸ NTP Amended Remittal Contentions [10]; Tighe Remittal Affidavit [11]–[14].

¹⁵⁹ GVP Amended Contentions [27]; GP Remittal Contentions [39]–[76], [79].

¹⁶⁰ NTP Amended Remittal Contentions [72]–[73], [87].

- [130] Gomeroi contend two types of effects, direct and indirect. In terms of direct effects, Gomeroi again contend that the physical infrastructure and operation of the Project will affect the ability of the Gomeroi people to move around, use and enjoy the area for cultural activities, impair access to water resources, inhibit the ability to gather natural resources and undertake ceremony, protect places of cultural significance, to share cultural knowledge and more generally, practice cultural and spiritual activities.¹⁶¹
- [131] Relevant also to this criterion are contentions regarding access. As previously outlined at [109] to [110], Gomeroi contend that infrastructure associated with the Project will permanently affect landscape values and entirely prevent Gomeroi people's access to parts of the Project area and the Pilliga due to required fencing. Additionally, Gomeroi assert that while some areas will remain accessible, the dispersed nature of the Project effects the entire landscape.¹⁶²
- [132] Gomeroi further contend that the future act poses a threat to native flora and fauna caused by the direct loss of habitat and the promotion of feral pests and predators.¹⁶³ This, Gomeroi say, will have social effects on the Gomeroi due to them being unable to fulfil their caring for Country responsibilities.¹⁶⁴ Additionally, Gomeroi contend the loss of habitat as well as damage to the physical and cultural landscape will impact upon the spiritual beings which occupy the Pilliga, beings that form an important part of Gomeroi culture.¹⁶⁵
- [133] Matters of direct impact are also raised by Gomeroi in relation to the effect of the Project on water and waterways and the way these affect their ways of life, culture and tradition. The evidence addresses both the immediate physical impact upon waterways and the way this will impact on the cosmological, cultural and traditional aspects and values surrounding water and waterways. Further evidence

¹⁶¹ NTP Contentions [210]; Kumarage Report [27]; Booby Affidavit [15], [22], [35], [36], [39], [41]; Tighe Affidavit [20], [21], [25], [40], [46], [59]–[64], [66]–[68], [72]; Wilson Affidavit [50], [51], [59].

¹⁶² NTP Contentions [213]; EIS Ch 6 6.3.3, 6.4.2; Kumarage Report [198]; Booby Affidavit [42].

¹⁶³ NTP Contentions [217]; Booby Affidavit [21]; Tighe Affidavit [79]; Wilson Affidavit [52].

¹⁶⁴ Ibid.

¹⁶⁵ NTP Contentions [219]; Kumarage Report [20], [35]–[42], [54], [58]; Booby Affidavit [20], [21]; Tighe Affidavit [30], [74], [76], [79], [83]; Wilson Affidavit [56], [60].

addresses the more medium and long-term effects of climate change impacts to water and waterways.

[134] While some concern in the evidence is raised about subsurface waters,¹⁶⁶ the Great Artesian Basin¹⁶⁷ and springs, to a larger extent the Gomeroi evidence focuses on waterways and surface waters. Chief amongst the concerns raised in this area are potential pollution impacts, degradation of water quality in waterways and siltation due to clearing and the general operation of the Project. To summarise the concerns of the Gomeroi, should these impacts come to pass, the effect on culture and traditions will be significant due to the central role that water, waterways and rivers play within their tradition, culture and way of life.

[135] In their 2022 evidence, all of the Gomeroi witnesses refer to a spill that occurred in 2011 when exploration was being conducted by Eastern Star Gas in the Project area. The panel notes the spill appears to have occurred in the area covered by the petroleum assessment licence, PAL2, now the area comprising PPLA13 and the assessment lease held by Santos.¹⁶⁸ This incident involved a spill of saline water from a test well into the surrounding area. Each of the Gomeroi witnesses attest to this spill killing surrounding vegetation, with rehabilitation efforts having limited or no success. Gomeroi witnesses give evidence of this damage to Country bringing up strong feelings of hurt, sadness and disgust and raising concern about the risk of potential contamination or future spills.¹⁶⁹

[136] Much of the concern regarding water, particularly surface water, run off, pollution and water quality degradation focuses on Bohena Creek in the Project area. As set out from [78] to [80] above, Bohena Creek is the main waterway in the area and runs through PPLA13 and PPLA15 with most, if not all, the remaining lease areas being within the Bohena Creek catchment.¹⁷⁰ It is a strong and visible feature of the

¹⁶⁶ NTP Contentions [221]; Booby Affidavit [38]–[45].

¹⁶⁷ NTP Amended Remittal Contentions [49]; Karoly Report [75]–[77]; Mackey Report [6], [10], [12]–[14], [16]; Lansbury Report [36], [38], [39], [41], [47], [51], [53], [60].

¹⁶⁸ See *Connell v Santos NSW Pty Limited* [2014] NSWLEC 1.

¹⁶⁹ NTP Contentions [217]–[218]; Booby Affidavit [21], [38]–[45]; Tighe Affidavit [79], [84]–[85]; Wilson Affidavit [52], [54]–[55].

¹⁷⁰ SSD 6367 Assessment Report [91], Fig 2.

area of the proposed future act and given the extent of the evidence provided regarding the cultural and traditional features and values of water and waterways, it is no surprise that Gomeroi place heavy emphasis on this main waterway which traverses the lease areas.

[137] The overarching contention of Santos in respect of s 39(1)(a)(ii), is again that the impact will be minimal as the leases cover only 0.85% of the overall Gomeroi native title claim area and the physical footprint of the Project would only impact up to approximately 1% of the lease areas.¹⁷¹ Santos also contend the areas where access would be restricted are limited as a result of the progressive nature of the development of the Project, and any fencing required will only exist for a temporary 25 year period.¹⁷²

[138] Santos again points to the fact that the location of the wells is sufficiently flexible to avoid or minimise effects, referring to micrositings.¹⁷³ Santos provide that in addition to this, a further suite of mitigation measures have been included in the design of the Project aimed to minimise potential impacts including:¹⁷⁴

- (a) minimising surface disturbance through lateral well stacking;
- (b) maximising use of previously cleared areas;
- (c) co-locating linear infrastructure (essentially, gas and water pipelines);
- (d) positioning field infrastructure away from sensitive biodiversity values where possible;
- (e) progressive partial rehabilitation of cleared areas; and
- (f) implementation of a protocol for the control of pest plants and animals.

[139] Santos contend the regulatory environment is a further mitigating factor on the effect of the future act, which includes State heritage, environmental and planning laws in addition to Commonwealth statutes. This contention also includes reference to the body of conditions that have been placed on the Project within the State

¹⁷¹ GP Remittal Contentions [47]–[51]; Kreicbergs Affidavit [164]; Dunn Affidavit [20], [170], [471]; Transcript 13 April 2022, Mr McKechnie, P-226/L-24–27.

¹⁷² GP Remittal Contentions [52]–[54]; Dunn Affidavit [114]; Transcript 13 April 2022, Mr McKechnie, P-223/L-21.

¹⁷³ GP Remittal Contentions [56]–[61]; Dunn Affidavit [84]–[100].

¹⁷⁴ GP Remittal Contentions [63]; Dunn Affidavit [87], Fig 1.

approvals processes, which includes a variety of environmental and heritage-based conditions.¹⁷⁵

[140] Overall, Santos contend, the effect of the Project on the way of life, culture and traditions of Gomeroi would be limited, manageable and acceptable.¹⁷⁶

[141] The State initially made contentions which noted the Project would be subject to the State's regulatory regime and the requirements of the IPC Development Consent. The State has since resiled from those statements and stated they should not be taken into account for reasons unclear to the panel.

[142] The evidence of the Gomeroi witnesses in relation to climate change is pertinent due to the emissions generated by the Project. Their evidence focuses on the impacts of change to Country brought about by climate change, with a strong emphasis on the effect of change to waterways.

[143] Ms Tighe speaks of cultural activities that occur in the Pilliga such as visitation for the transmission of knowledge about Country, sharing of stories and traditional knowledge, the physical aspects of caring for Country, and stating that not being able to go to a place and see it in its natural state would represent a cultural loss.¹⁷⁷ Ms Tighe gives evidence that climate change will impact the ability of Gomeroi people to do these things because of the impact it will have on Country, the availability of bush foods and medicines and material for tool manufacture due to more frequent extreme weather events.¹⁷⁸

[144] Ms Tighe also gives evidence addressing how climate change resulting from GHG emissions will affect vegetation changes in the Project area, induced by drought and acute events such as fire. She states this will impact the vegetation mix and reduce

¹⁷⁵ GP Remittal Contentions [68]–[71]; Dunn Affidavit [50], [65], IPC Development Consent Conditions B1–B6, B51, B53–B59.

¹⁷⁶ GP Remittal Contentions [77].

¹⁷⁷ Tighe Remittal Affidavit [15].

¹⁷⁸ Tighe Remittal Affidavit [16].

the number of these key plants used by the Gomeroi people.¹⁷⁹ Providing an example, Ms Tighe discusses a bush food ‘Five Corners’, stating:¹⁸⁰

[t]he impact of bushfires will be that there will be less of them; we won’t be able to access it as easily. When I was growing up you’d spend the whole day eating Five Corners; now you spend the majority of your day finding Five Corners.

[145] Mr Wilson also gives evidence addressing changes to Country as a result of climate change. He discusses changes to plant fruiting behaviour due to increased temperature,¹⁸¹ concerns regarding changes to species abundance within a changing environment,¹⁸² and the impact on flora and fauna species in general.

[146] Uncontrolled or wildfire is raised as a particular topic of concern by Mr Wilson, noting the impact of uncontrolled fires on trees of importance to Gomeroi people.¹⁸³ Mr Wilson gives evidence of regular cultural burning, remarking on the impact of traditional land management on the landscape.¹⁸⁴

[147] Mr Wilson’s evidence regarding the management of land, both today and traditionally, makes it clear that Mr Wilson holds the view the re-establishment of traditional land management practices of the Gomeroi people is an important step to mitigate the effects of climate change and to overcome, or minimise, the effects on culture, tradition and ways of life. The panel accepts this evidence and has determined conditions should be imposed to address this and various other matters raised in evidence.

[148] Mr Booby also gives evidence going to the issue of landscape and environmental change as a result of climate change and the effect of this on tradition, culture and way of life for the Gomeroi people. He discusses the impact and risk of uncontrolled or wildfire as well as the impact of drought due to increased rainfall

¹⁷⁹ Tighe Remittal Affidavit [16]–[24].

¹⁸⁰ Tighe Remittal Affidavit [22].

¹⁸¹ Wilson Remittal Affidavit [7].

¹⁸² Wilson Remittal Affidavit [28].

¹⁸³ Wilson Remittal Affidavit [20].

¹⁸⁴ Wilson Remittal Affidavit [11].

variability. His evidence includes extensive testimony on how this would impact upon cultural values, practice and knowledge and Gomeroi traditions and ways of life.

[149] In making submissions regarding climate change in the remittal process, considerable focus is placed by each of the Gomeroi witnesses on water, waterways and water quality. This reflects notions previously discussed surrounding the cultural values and traditions linked to water and waterways, including broad scale cosmological and spiritual components, as well as the physical environment itself. The evidence makes the importance of these issue to the Gomeroi people clear to the panel.

[150] In both the original and remittal evidence, the Gomeroi witnesses also make statements regarding caring for Country and the management of land. While this is a physical activity that occurs on land, Gomeroi present evidence that it is based on obligations that exist within culture and is therefore a cultural activity as much as a physical one. This is perhaps best summarised in the 2022 affidavit of Ms Tighe who sets out the importance of the ongoing generational obligation to care for and protect Country and underscores the relationship between Gomeroi and the natural environment.¹⁸⁵

[151] Information regarding caring for Country is dispersed throughout the statements of the Gomeroi witnesses, both in the original and remittal materials, making the emphasis on this notion, its cultural basis and its significance for the practice and transmission of traditional and cultural knowledge in addition to the health of the Country, clear.

[152] From a culture and traditions perspective, Mr Booby provides a useful summary of this effect in stating that:¹⁸⁶

If we start talking about our native title rights to hunt or fish ... that's just one aspect of it. If I don't have the opportunity to care for Country, and act as the keeper or whatever else, then I've lost control. I've lost control of that balance, I've lost

¹⁸⁵ Tighe Affidavit [20]–[21].

¹⁸⁶ Booby Remittal Affidavit [31].

control of my ability to disseminate this information, to share it, to renew it, to redo it.

- [153] Some of the evidence asserted by Gomeroi under s 39(1)(a)(i) go to health and wellbeing and are of relevance in considering (ii). The contention chiefly made is that impacts of climate change, including changes to Country and environmental degradation, will have an adverse impact on the health and wellbeing of the Gomeroi people due to the interrelationship between Country, culture, tradition and ways of life.¹⁸⁷
- [154] These contentions draw heavily from the reporting provided by Associate Professor Lansbury contained within the Gomeroi expert report. Lansbury cites the State of the Environment 2021 report which explains the close relationship between the condition of the physical environment on a group's traditional lands and the cultural health of traditional owners of such lands. She gives evidence that there is a positive link between caring for Country activities and the physical health and wellbeing indicators of the traditional owners.¹⁸⁸ Lansbury reports similar findings in relation to spiritual health and wellbeing.¹⁸⁹
- [155] Associate Professor Lansbury also makes note of the IPCC's recognition of the health of the physical environment being recognised as a contributor to human health by the IPCC, stating that the most recent IPCC assessment report notes in its health-focused chapters that environmental health is a contributor to subjective wellbeing. Lansbury further reports the IPCC recognises this contribution is further enhanced in Indigenous populations over the general population, noting that an Indigenous perspective on wellbeing typically incorporates a relationship with the natural world.¹⁹⁰ In her evidence, Lansbury draws attention to a number of components within the Gomeroi witness affidavits that outline positive health and wellbeing outcomes from maintaining culture, connection to Country and caring for

¹⁸⁷ NTP Amended Remittal Contentions [83]–[84]; Lansbury Report [36], [38], [39], [41], [53], [60]; Tighe Remittal Affidavit [71]; Booby Affidavit [42]; Booby Remittal Affidavit [71], [72]; Wilson Remittal Affidavit [27].

¹⁸⁸ Lansbury Report [23].

¹⁸⁹ Lansbury Report [26].

¹⁹⁰ Lansbury Report [31].

Country activities that are relevant to the assessment of this criteria and the imposition of conditions.¹⁹¹

[156] The evidence of Associate Professor Lansbury was not disputed by Santos or the State.

[157] In summary, the evidence of Gomeroi states the effects of the act are:¹⁹²

- (a) they will not be able to exercise their cultural obligations, including to feed their Elders, if fruit are not available at the expected time. Traditional dietary options will be limited;
- (b) tree loss due to environmental change will mean less opportunity to do traditional woodwork and make traditional tools and weapons;
- (c) climate change will impact totemic trees, plants and animals, reducing their numbers and removing them from the landscape, which will affect the culture, identity and sense of being of Gomeroi people;
- (d) climate change and reduced access will take the opportunity from Gomeroi people to build relationships with each other, with their Country and to continue to do their cultural practices, including by telling stories in the Pilliga;
- (e) impacts on the Pilliga will throw the moiety system out of balance, disrupting Gomeroi roles and responsibilities under that system. Climate change will disrupt the balance between people and Country, which will mean that Gomeroi people will lose control of their ability to look after Country;
- (f) more droughts will break Gomeroi connections to stories and watercourses, as landscape and stories are connected to Gomeroi. Changes in the availability of surface water and of shallow and deeper groundwater will affect important stories of connection to Country. If there is no water, Gomeroi cannot tell the stories for places associated with water; and
- (g) Gomeroi people will not get the chance to use the tools they used to use to manage Country to manage the effects of climate change.

¹⁹¹ Lansbury Report [25], [28], [32], [45].

¹⁹² NTP Amended Remittal Contentions [87]; Wilson Affidavit [52], [53]; Wilson Remittal Affidavit [7], [9], [34]–[36], [40]–[43], [49]–[49]; Booby Affidavit [21], [22], [34], [35]; Booby Remittal Affidavit [19]–[22], [29]–[32], [61], [62], [64]; Tighe Affidavit [22], [37]–[39]; Lansbury Report [45].

[158] Santos do not challenge the evidence about the harmful effects of climate change.¹⁹³ Instead, it contends that, given an assessment in s 39(1)(a) concerns the effect of the act, unless it can be established that the impacts can be caused by the grant of the leases then this evidence should be given little weight.¹⁹⁴ Related to this point, Santos contended that the impacts of climate change cannot be causally linked to the Project as they pre-date it¹⁹⁵ and that it would be an error to ‘weigh all of the impacts of climate change on the assumption that all of those impacts are caused by the Project’.¹⁹⁶

[159] Instead, Santos contend that the impact of the Project on climate change is so small as to be insignificant, and that in any event, on the evidence of Santos it will lead to a net reduction in emissions based on a counterfactual scenario.¹⁹⁷ This counterfactual concept is discussed in more detail later in these reasons.

[160] Put another way, Santos contends that when the effect of the future act is weighed, the actual impact on climate change is either zero, if the counterfactual is accepted and it is further accepted the Project will lead to a net emission reduction, or is immeasurably small.¹⁹⁸ The inference here is that there will be no effect on the way of life, culture and traditions of the Gomeroi in the way contended.

[161] The State’s contentions regarding public interest matters address climate change and are worth briefly mentioning here. In summary, they contend it is not controversial that there is more than one source of GHG emissions and more than one cause of global warming, but that it would be an error for the Tribunal to attribute every consequence of global warming to the proposed future act. Instead, the State contends the Tribunal must take into account, based on the evidence before it, the GHG emissions of the Project and the consequential effects of those

¹⁹³ GP Remittal Contentions [30].

¹⁹⁴ GP Remittal Contentions [28]–[30].

¹⁹⁵ GP Remittal Contentions [48]; Kreichbergs Affidavit [164].

¹⁹⁶ GP Remittal Contentions [33]; *Wildlife Preservation Society* [2006] FCA 736, [55].

¹⁹⁷ GP Remittal Contentions [122].

¹⁹⁸ GP Remittal Contentions [147].

emissions, including any contribution to global warming.¹⁹⁹ The panel agrees with this general proposition, as reflected in these reasons.

- [162] Climate change impacts, and the impacts of the regulatory regimes surrounding climate change, is discussed in more detail from [334] to [351] below.
- [163] In summary, the evidence presented by the Gomeroi witnesses is robust and thorough for the purposes of s 39(1)(ii). The panel has taken into account the large body of information that was submitted both in the original inquiry and this remittal, from all parties. This includes, but is not limited to, the IPC determination and conditions, the reporting produced by the Water Expert Panel established by the Department of Planning, Industry and Environment, the environmental impact assessment, and the lay and expert evidence presented by Gomeroi. The Project is subject to a large number of conditions imposed through various approvals processes.
- [164] Based on the evidence before it, the panel accepts there will be a direct impact of the proposed future acts on the way of life, culture and traditions of the Gomeroi within the area of the leases. The panel is however satisfied that the manner in which the Project is to be constructed and operated, coupled with the conditions placed upon the Project through the approvals process, together with conditions imposed in this determination by the Tribunal, will mitigate these effects to a sufficient level.
- [165] The panel notes that although a limited amount of clearing is allowed to occur, that the level of clearing is not inconsequential, even though the area has been previously impacted by forestry and other activities. The impact of this clearing and the siting of well pads is dispersed through the landscape, which Gomeroi contend leads to an impact on the entire landscape. The dispersed nature of the infrastructure does mean there will be impacts and effects felt over a broader area. However, given that it is only the area immediately surrounding each well site that is to be fenced, and an overall 50 by 50 metre area that remains cleared during the operation of the gas field, the effect is mitigated. On the evidence, Gomeroi will not

¹⁹⁹ GVP Remittal Closing Submissions [14].

be prevented from accessing most of the area of the leases and access should be completely restored following the rehabilitation of each well pad upon the closure of the Project.²⁰⁰

- [166] Further, given the evidence surrounding the previous pollution event, and the particular significance of water and Bohena Creek to the Gomeroi people, the panel has determined that further measures, in the forms of conditions, are required to protect Bohena Creek and other important areas. The panel is imposing a condition that Santos will not undertake any future ground or surface disturbing work on or within 500 metres of Bohena Creek.²⁰¹
- [167] The potential impacts of climate change are not contested, and having considered the materials before us, the Tribunal broadly accepts the predicted impacts of climate change set out by the Gomeroi expert witnesses and the Gomeroi witnesses themselves.
- [168] The Tribunal note there remains imprecision within the predictive modelling available regarding climate change, however we accept the confidence levels for temperature rise and impacts set out by the IPCC as being more than sufficient to justify consideration of GHG emissions and climate change as a key component in decision making considerations.
- [169] In this regard, the central contention of both Santos and the State is, in effect, that the cumulative impacts of climate change cannot be attributed to this Project as any emission and impact that has occurred to date has been in the absence of it. This is a logical point to make, however it must be acknowledged that the cumulative impact of climate change was not contested by any of the parties and must be taken into account when considering the direct and indirect effects of the act.
- [170] The panel accepts that new emissions of GHG will contribute to climate change. It would however be an error to attribute all the consequences of climate change to the doing of a single project. Rather, the panel has focused on the demonstrated effects on the matters to be considered under s 39(1)(a)(ii).

²⁰⁰Dunn Affidavit [44], [122]–[132]; Kreicbergs Affidavit [164].

²⁰¹ See Condition 9 of this determination.

[171] As discussed in relation to s 39(1)(a)(i), there is persuasive evidence before the panel surrounding the management of Country and how this might mitigate impacts. Having considered this evidence, the panel has formed the view there is strong utility in having increased engagement of Gomeroi people in the management of the Pilliga to assist to mitigate effects from the proposed future act, including climate change. Given this, the panel determined a condition should be applied requiring the resourcing of a Ranger Program development by the Gomeroi people to manage Country, protect the environment, and monitor and manage ecological threats. See [417] and conditions 13 to 18 below.

Section 39(1)(a)(iii) – the effect of the acts on the development of Gomeroi social, cultural and economic structures

[172] The Gomeroi contentions for this criterion have similar themes to s 39(1)(a)(i) and (ii) above, with the central notion being that Gomeroi societal structure and culture are, in particular, linked to place and Country.²⁰²

[173] Gomeroi build a picture of society being expressed through the practice of culture and native title rights and interests, outlining the cosmological and spiritual aspects of their society, and through a cultural obligation to care for Country.²⁰³ This is woven through the evidence of the Gomeroi witnesses and it is clear the natural environment of the Pilliga is integral to the Gomeroi totemic structure of their society and culture.

[174] Mr Booby speaks of the connection between Gomeroi people and animals and nature, and how this creates responsibilities to them and ties into the Gomeroi totemic structure and moiety system that underpin Gomeroi society. He goes on to explain how impacts on one plant or animal have consequential impacts that affect other aspects of the ecosystem as well as Gomeroi people.²⁰⁴

²⁰² NTP Contentions [198]; Booby Affidavit [17], [20]–[30]; Tighe Affidavit [12], [50], [64], [66]; Kumarage Report [50]–[51].

²⁰³ NTP Contentions [199]–[205]; Booby Affidavit [15]–[22], [26]–[30], [39]; Tighe Affidavit [12], [14]–[21], [23], [25]–[34], [36]–[38], [40], [44]–[47], [50], [52], [54], [58], [64], [70], [78], [82]; Wilson Affidavit [52], [53], [60]; Kumarage Report [50], [51], [61]–[73], [82]–[88], [100]–[114].

²⁰⁴ Booby Affidavit [20]–[25].

- [175] The Gomeroi evidence focuses on the interconnectedness of society, culture and the landscape and environment. Witnesses depose that stories and connection to place cannot be relocated, and destruction and damage to the landscape and ecology has a direct negative effect on the wellbeing of the Gomeroi people. The witnesses also give evidence that the proposed Project area is of particular significance as it is one of the last, and one of the largest, remaining areas of undeveloped land in the Gomeroi claim area.²⁰⁵
- [176] As in the previous criteria, the native title party addresses things that directly impact Country and the environment, in addition to indirect impacts of the proposed future acts which Gomeroi contend will result in various types of environmental change and degradation, thereby affecting the culture and society.
- [177] In the remittal contentions, Gomeroi outline several effects they contend will be brought about by the effects of climate change including financial, health and wellbeing and cultural distresses. This is contended to result from direct effects of increased temperatures in addition to indirect effects, that is, the effect of secondary phenomena brought about by climate change such as drought, flood and environmental change.²⁰⁶
- [178] Mr Booby explains how changes to weather systems and the impacts to the natural environment affect the Gomeroi totem and moiety systems. He details how the moiety system relates to balance of all things and that climate change is impacting this balance, upsetting Gomeroi moiety systems and cultural responsibilities.²⁰⁷
- [179] On the other hand, Santos contends that the act has the potential to have a positive impact on the development of social, cultural and economic structures.²⁰⁸ Santos says micro-siting and Aboriginal Cultural Heritage Advisory Group processes can facilitate a return to Country. They also point to the additional heritage research

²⁰⁵ NTP Contentions [210]–[221]; Kumarage Report [27], [127], [193]–[205]; Booby Affidavit [15], [20]–[22], [27], [34], [35], [36], [38]–[45]; Tighe Affidavit [20], [21], [25], [30], [40], [46], [59]–[68], [72], [74], [76], [79], [82]–[85]; Wilson Affidavit [50]–[52], [54]–[56], [59], [60].

²⁰⁶ NTP Amended Remittal Contentions [88]–[89]; Booby Affidavit [42]; Booby Remittal Affidavit [17], [18], [41], [53], [59], [60], [71], [72]; Tighe Remittal Affidavit [48], [71]; Wilson Remittal Affidavit [37], [38], [46]–[49].

²⁰⁷ Booby Remittal Affidavit [19]–[22].

²⁰⁸ GP Contentions [81]; Dunn Affidavit [69], [93].

project, and Gomeroi people potentially benefiting from training and employment opportunities, in addition the broader economic and public benefit which Santos contends will arise from the Project.²⁰⁹

[180] As already discussed at [163][163], the panel has taken into account the large body of information that was submitted both in the original proceedings and this remittal. The panel repeats its considerations at [163][163] to [171][170] as the same considerations in relation to s 39(1)(a)(ii) apply here.

[181] Based on the evidence before us, the panel accepts that the Project will have an effect on the social, cultural and economic structures of the native title party. However, having regard to the applicable regulatory regimes, the conditions imposed by the IPC, and the conditions set out in this determination, the effect of the act on the development is unlikely to be substantial and can be mitigated to a satisfactory extent.

Section 39(1)(a)(iv) – the effect of the acts on Gomeroi freedom of access to the land and waters, and freedom to carry out rites, ceremonies or other activities of cultural significance

[182] The evidence provided by Gomeroi has provided the panel with a strong account of the types of rites, ceremonies and culturally significant activities that Gomeroi access the land for and provides a useful account of that access for the purposes of this assessment.

[183] In terms of contentions, these understandably also bear strong commonality with previous criteria falling under the broad umbrella of s 39(1)(a). In summary, Gomeroi contend the Pilliga, including the lease areas, are accessed for a variety of cultural activities,²¹⁰ that the exercise of native title rights and interests is predicated on access to sites and Country,²¹¹ and that fencing would prevent access to cultural heritage.²¹²

²⁰⁹ Ibid. See also GP Remittal Contentions [80].

²¹⁰ NTP Contentions [207]; Booby Affidavit [35]; Tighe Affidavit [59]; Wilson Affidavit [50], [51].

²¹¹ NTP Contentions [210]; Kumarage Report [27]; Booby Affidavit [15], [22], [35], [36], [39], [41]; Tighe Affidavit [20], [21], [25], [40], [46], [59]–[64], [66]–[68], [72]; Wilson Affidavit [50], [51], [59].

²¹² NTP Contentions [241]; Kumarage Report [165]; Tighe Affidavit [69].

- [184] Gomeroi repeat that the dispersed nature of the infrastructure of the Project will have effects across the whole landscape of the Pilliga and lease areas, thereby having an impact on access across that landscape impacting the ability to maintain culture.²¹³
- [185] In the remittal evidence, Gomeroi also make the contention that more hot summer days due to climate change impacts will further limit the ability for people to access Country for health and safety reasons. The impact of this is contended to be less opportunity for ceremony and to impart cultural knowledge, in particular for Elders, who are more vulnerable to heat.²¹⁴
- [186] Santos repeat their contentions made for s 39(1)(a)(i)²¹⁵ stating that any effect will be limited, manageable and acceptable due to the limited area of the Gomeroi claim affected, the limited area approved for clearing and the limited access restrictions at any one time due to the progressive nature of the development of the Project. Critically, Santos contend, there will be no fences preventing access to the Pilliga other than operational areas.²¹⁶
- [187] The State contend similarly to Santos and say that any access restrictions will be to particular parts of the leases and for limited periods of time.²¹⁷
- [188] Based on all the evidence before us, the panel accepts there will be a direct effect on the freedom of Gomeroi to access to the lease areas, and their freedom to carry out rites, ceremonies and other cultural activities on the land and waters, however we also accept that this will be mitigated by some of the factors outlined by Santos, such as the staged nature of the Project's development and the limited and relatively temporary nature of the fencing required.

²¹³ NTP Contentions [213]; EIS Ch 6 6.3.3, 6.4.2; Kumarage Report [198]; Booby Affidavit [42].

²¹⁴ NTP Amended Remittal Contentions [76], [90]–[91], [93]; Tighe Remittal Affidavit, [45]–[47]; Wilson Remittal Affidavit, [6], [8], [12], [39]; Booby Remittal Affidavit, [23]–[25], [46]–[51].

²¹⁵ GP Contentions [83].

²¹⁶ GP Contentions [37]–[42]; Kreicbergs Affidavit [159]–[164]; Dunn Affidavit [43]; IPC Development Consent [1014]; See also GP Remittal Contentions [82]–[84].

²¹⁷ GVP Contentions [29].

[189] As such, Gomeroi people should be able to maintain access to almost the entirety of the lease areas, excepting those portions where infrastructure such as well pads, processing plants, water tanks and the like may be fenced. Importantly, impact on access to significant places will be further mitigated by the conditions set in this determination, including the condition that Santos will not undertake any future ground or surface disturbing work on or within 500 metres of identified sites of significance without their prior written consent, and any right of the native title party to access or use the lands is not to be restricted except in relation to those parts used for productive operations or for safety or security reasons related to those activities.

[190] The panel also accepts there is likely to be access limitations brought about by environmental factors, such as an increase in very hot days as contended by Gomeroi. As discussed throughout these reasons, the panel accepts the Project will produce GHG emissions which will contribute to climate change, resulting in various indirect effects that must be considered in the weighing of all the evidence. Similarly to the direct physical effects considered above, having regard to the applicable regulatory regimes, the conditions imposed by the IPC, and the conditions set out in this determination, the effect is unlikely to be substantial and can be mitigated to a satisfactory extent.

Section 39(1)(a)(v) – the effect of the acts on any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions

[191] The expression ‘particular significance’ when considering areas or sites is also used in s 237(b) of the *Native Title Act* when making an inquiry into the application of the expedited procedure statement, and the meaning of the terms has been considered extensively in such inquiries.

[192] If an area or site is of particular significance, it must be known, must be able to be located and the nature of its significance must be explained to the Tribunal. An explanation of a site’s particular significance need not be lengthy; however, it does

need to go beyond mere claim and the nature of the significance in accordance with the native title party's traditions must be explained.²¹⁸

- [193] The meaning of 'particular significance' was also recently considered by the Federal Court in the matter of *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22. Importantly, Justice Moshinsky noted:²¹⁹

[t]he legislation does not in terms require the native title holders to provide an *explanation* of the particular significance (in accordance with their traditions) of the site. Nor does it implicitly require this. The relevant provision (s 237(b)) needs to be read in context... That a site is of particular significance (in accordance with the traditions of the native title holders) may be established in a variety of ways. Those ways do not necessarily require an explanation of the particular significance of the site. For example, it may be sufficient to show (with cogent evidence) that the site is considered to be of special or more than ordinary significance (in accordance with the traditions of the native title holders), without providing an explanation of why the site is so regarded. Indeed, it may be very difficult to explain why the site is so regarded

- [194] The evidence presented by the Gomeroi witnesses generally, particularly in relation to s 39(1)(a)(ii), is replete with relevant information in relation also to areas or sites of particular significance. It is from this evidence the panel has been able to extract information as to important sites or areas on or in the vicinity of the leases which are considered below.

Pilliga as a place of significance

- [195] The native title party has submitted compelling evidence regarding the importance of the Pilliga in accordance with their laws and traditions. The evidence paints a picture of the Pilliga as a cultural landscape where Gomeroi cosmology is alive and the celestial bodies, animals, plants, lands and waters interact with Gomeroi people. Gomeroi totemic structures are linked to this landscape, and it is evident the place

²¹⁸ *Yindjibarndi v FMG* [2014] NNTTA 8, [17].

²¹⁹ *Top End (Default PBC/CLA) Aboriginal Corporation v Northern Territory of Australia* [2025] FCA 22, [80].

the Pilliga holds in the hearts of Gomeroi people as one of the last relatively untouched places they can practice their culture.²²⁰

[196] Ms Tighe speaks of the Pilliga as a place of ceremony for both men and women, with connection to some of the most important aspects of Gomeroi life. She speaks of Gomeroi stories that are archived in the landscape of the Pilliga and that, while those stories may be told elsewhere, they only make sense and have purpose when told in the landscape of the Pilliga.²²¹ Ms Tighe emphasises the importance of the Pilliga as a whole to Gomeroi people, not just parts of the forest.²²²

[197] Mr Booby speaks of the Pilliga as a living, breathing landscape that provides health and nourishment not only to Gomeroi people but also those who live downstream from it.²²³ It is evident to the panel from Mr Booby's evidence that the interconnected natural systems of the Pilliga are deeply connected to Gomeroi people and their cosmology.

[198] Ms Tighe speaks of birth-associated places being located throughout the Pilliga and the importance of these to Gomeroi people and their identity.²²⁴ Other places within the Pilliga are also spoken about as being particularly important, such as Yarrie Lake and Wombat Rock.

[199] From the evidence it is clear to the panel that within the Pilliga's overarching cultural landscape lie various places of importance to the Gomeroi people. The Pilliga also appears to be a place of important cultural protocols and potential danger as the evidence speaks of the presence of creatures and phenomena, areas that people must not go, and designated areas where it is safe to camp overnight.²²⁵ All of this evidence paints the picture of a rich cultural landscape.

²²⁰ Tighe Affidavit [83].

²²¹ Tighe Affidavit [76].

²²² Tighe Remittal Affidavit [11]–[12].

²²³ Booby Remittal Affidavit [8]–[10].

²²⁴ Tighe Affidavit [54].

²²⁵ Tighe Affidavit [25], Tighe Remittal Affidavit [40]–[42].

- [200] The Tribunal has previously found that cultural landscapes are of particular significance to the native title party.²²⁶ As set out in *Top End v Kess Diamond Marstella*, the term cultural landscape appears in *The Burra Charter: The Australia ICOMOS Charter for the Conservation of Places of Cultural Significance, 2013 (The Burra Charter)*. The Burra Charter defines place to mean a geographically defined area that may include elements, objects, spaces and views, having tangible and intangible dimensions. The explanatory notes give further context, and detail that place has a broad scope and includes natural and cultural features for example; a cultural landscape, a road or travel route, a community meeting place, and sites with spiritual or religious connections.
- [201] The evidence demonstrates the Pilliga is a cultural landscape where important places and things reside; a place where the cosmology, culture and law of the Gomeroi can be seen to operate. While the Pilliga is clearly an important cultural landscape, this does not necessarily mean the Tribunal can find it is of particular significance for the purpose of s 39(1)(a)(v).
- [202] Approximately 500,000 hectares in size, the Pilliga is an enormously large area to be found to be of particular significance in its entirety. On the evidence before the Tribunal, it is clear the Pilliga is an important cultural landscape which is likely to contain numerous sites or areas of particular significance.
- [203] The evidence put before the Tribunal speaks deeply of a place where the way of life, culture and traditions of the Gomeroi people is very much alive. While this is important for the purposes of s 39(1)(a)(ii), this does not make the entire Pilliga a place of particular significance but rather an important cultural landscape in which the world of the Gomeroi is able to operate.

Yarrie Lake

- [204] Yarrie Lake is located in the very northern tip of the lease areas. Ms Tighe notes it as an important place for both men and women and associated with both men's business and women's business.²²⁷ She acknowledges she cannot speak about the

²²⁶ *Top End v Kess Diamond Marstella* [2023] NNTTA 25.

²²⁷ Tighe Affidavit [55]–[56].

men's business due to gender protocols around knowledge and responsibilities but confirms that those places exist at Yarrie Lake.

[205] Ms Tighe is able to give more information regarding the importance of Yarrie Lake in the context of women's business and the activities that make Yarrie Lake a place of clear importance to Gomeroi people and Gomeroi women in particular.²²⁸ It is clear that the women's activities at Yarrie Lake make the area stand out in terms of its significance to Gomeroi people, being associated with birth and related women's business.

[206] Santos does not appear to dispute the significance of Yarrie Lake. Mr Haydn Kreicbergs notes that the grantee parties have designated a 200 m buffer zone around the Yarrie Lake Reserve.²²⁹ Mr Todd Dunn also refers to this buffer zone around Yarrie Lake in his affidavit and notes it as an identified site.²³⁰

[207] Based on the evidence before us, the panel accepts that Yarrie Lake is a place of particular significance to the Gomeroi people in accordance with their traditions.

Bohena Creek

[208] As previously discussed from [79] to [81] [80] above, Bohena Creek runs from south to north through the Project area and is a seasonal waterway. The Gomeroi people refer to it as an important 'upside down river' within the rich cultural landscape of the Pilliga. When Bohena Creek is not flowing, Gomeroi people still access its water by digging in the creek bed.

[209] Ms Tighe refers to Bohena Creek as important in relation to Gomeroi creation stories as well as the cultural knowledge that is passed on *in situ*. She also refers to the importance of Bohena Creek in relation to men's activities occurring along it relating to the crafting of cultural objects.²³¹

²²⁸ Tighe Affidavit [55].

²²⁹ Kreicbergs Affidavit [155].

²³⁰ Dunn Affidavit [88]–[89].

²³¹ Tighe Remittal Affidavit [16]–[19].

[210] Mr Kumarage, informed by a Gomeroi elder, also highlights the importance of Bohena Creek in his evidence, referring to several important story lines for the moiety system that travel along the creek.²³²

[211] It is evident that water and waterways are incredibly important to Gomeroi people in relation to their way of life, culture and traditions as has previously been discussed. Bohena Creek itself has particular significance to Gomeroi people in accordance with their traditions.

[212] Because of this, the panel is imposing a condition in regard to Bohena Creek to ensure a level of protection that is more to the satisfaction of the panel.

Wombat Rock and Yaminbah

[213] Mr Booby refers to a place called Wombat Rock as being an important site within the Pilliga associated with emu and kangaroo stories.²³³ It is described as a Gomeroi art site associated with men's law. Mr Booby speaks of Wombat Rock as a place associated with the conduct of men's business and the passing on of Gomeroi law.²³⁴ Mr Booby also associates Wombat Rock with a story related to kinship laws.

[214] Mr Booby identifies Wombat Rock as being located within the Pilliga, however it is not clear from the evidence whether it is located on the lease areas. His evidence described that it is found by following waterways. The panel accepts it is known and able to be located by the Gomeroi people, however under s 39(1)(a)(v) we must find determinately that it is located on the leases.

[215] As a place of men's business and associated with the passing on of cultural law, the panel accepts Wombat Rock is an important place to Gomeroi people. The nature of the site and the evidence provided by Mr Booby does make Wombat Rock stand out as a site of particular significance located within the important cultural landscape of the Pilliga.

²³² Kumarage Affidavit at [84]–[86].

²³³ Booby Affidavit [37].

²³⁴ Booby Remittal Affidavit [26]–[27].

- [216] Mr Booby also mentions a place called *Yaminbah* that is located near Wombat Rock. Mr Booby associates *Yaminbah* with the Gomeroi creator *Baiame* and as a ceremonial ground associated with totems and Gomeroi-made features.²³⁵ Mr Booby locates *Yaminbah* along Yaminbah Creek, which is a sandy creek line. Based on mapping prepared by the Tribunal's geospatial team, Yaminbah Creek appears to be located within the Pilliga but outside the lease areas.
- [217] There is little information given by Mr Booby in relation to the significance of *Yaminbah*. While there is clearly some importance with it being a ceremonial ground associated with *Baiame*, the native title party has provided little information that would allow the panel to be satisfied it is a site of particular significance.
- [218] Another key issue in relation to both Wombat Rock and *Yaminbah* relates to the requirement of s 39(1)(a)(v) that the site or area be located on the lands or waters of the proposed future act.
- [219] Based on the evidence before it, the panel is unable to be satisfied that either Wombat Rock or *Yaminbah* are located within the lease areas. On this basis, we are unable to find that Wombat Rock or *Yaminbah* are places of particular significance for the purposes of s 39(1)(a)(v) of the *Native Title Act*.
- [220] However, based on the evidence before us, the panel is satisfied that these important places should be included in some of the protections afforded by the conditions imposed in this determination. Importantly, the panel accepts both Wombat Rock and *Yaminbah* are known and able to be located by the Gomeroi people. If they are not located within the lease areas then their inclusion in the conditions will be of no impact to Santos in respect of the Project.

Effect of the proposed future acts on Yarrie Lake and Bohena Creek

- [221] The work Santos expect to undertake on the lease areas has been outlined from [37] to [53]. The panel must now consider the effect of the proposed act on Yarrie Lake and Bohena Creek found to be sites of particular significance to Gomeroi.

²³⁵ Booby Remittal Affidavit [28].

- [222] When considering the effect, interference that may appear trivial to a person not a member of a native title party, may be substantial having regard to the native title party's traditions.²³⁶
- [223] Yarrie Lake is a ceremonial site associated with sacred men's and women's business and involving cultural aspects of Gomeroi life. As demonstrated in the evidence, the lake is subject to important cultural restrictions based around gender, as well as knowledge and practices that are culturally integral to Gomeroi women and men and is an important part of the cultural structure and ties of Gomeroi people.
- [224] Ms Tighe's description of the importance of Yarrie Lake to women and the identity of Gomeroi people, and the activities that occur there, means that any ground disturbance in the area of Yarrie Lake is likely to cause interference that would greatly distress Gomeroi people. Further, intrusion by non-Gomeroi people on both men's and women's practices at Yarrie Lake constitutes serious interference through the wrong people gaining access to cultural knowledge that is restricted to certain people based on Gomeroi law and culture.
- [225] The establishment of any infrastructure around Yarrie Lake will involve ground disturbance, including the removal of trees which are linked to the women's business that is conducted there.
- [226] As already noted, under current approvals Santos must establish a 200 m buffer zone around the Yarrie Lake Reserve which will prevent the grantee parties from installing any surface infrastructure within this area.²³⁷ On the facts before us, it would be possible for the grantee parties to place a well pad or other related infrastructure right up to the boundary of this buffer zone. When considering a map of the area, including Yarrie Lake and the buffer zone, it seems entirely likely that there will be trees and other parts of the area that are likely to be of significance as part of the women's business, that extend past the buffer zone. Nor does the

²³⁶ *FMG v Yindjibarndi* [2014 FCA 1335, [75].

²³⁷ Dunn Affidavit [89]; Dunn Affidavit, Exhibit TD-5, Santos, *Narrabri Gas Project – Field Development Protocol*, 12.

currently proposed buffer zone seem sufficient to provide privacy to Gomeroi women and men engaged in their cultural business at Yarrie Lake.

[227] Given the nature of the culturally sensitive activities at Yarrie Lake, and the importance the trees and other features in the area hold, the panel does not consider the 200 m buffer zone sufficient to mitigate the risk of interference with Yarrie Lake.

[228] Similarly, Gomeroi witnesses identify Bohena Creek as significant due its connection to Gomeroi creation stories and the men's ceremonial activities that occur along it, including relating to the crafting of cultural objects. Any ground disturbance in the area of Bohena Creek is likely to cause interference that would greatly distress Gomeroi people. Further, intrusion by non-Gomeroi people on the men's practices occurring there would constitute serious interference.

[229] For these reasons, the panel has imposed a condition that Santos will not undertake any future ground or surface disturbing work on or within 500 metres of Yarrie Lake or Bohena Creek without the prior written consent of the native title party.²³⁸

Comments in relation to the Aboriginal Cultural Heritage Management Plan

[230] The purpose of the ACHMP is to assist Santos to manage Aboriginal cultural heritage in the lease areas so as to meet the requirements of the NSW cultural heritage protection regime. The NSW cultural heritage protection regime is discussed from [55] to [64] above.

[231] The guiding principles underlying the ACHMP are the avoidance principle and the precautionary principle. The ACHMP defines these as:²³⁹

Avoidance Principle:

Project Activities will be designed such that, to the greatest extent possible, there is no impact on Aboriginal cultural heritage. Where impact cannot be avoided then the Project Activity will be designed to minimise impact on Aboriginal cultural heritage,

²³⁸ See Condition 9 of this determination.

²³⁹ Dunn Affidavit, Exhibit TD-8, *Aboriginal Cultural Heritage Management Plan Revision F* (October 2021) cl 5.1 (ACHMP).

and other reasonable and feasible management measures, as appropriate, are to be implemented to minimise or mitigate harm.

Precautionary Principle:

- (i) the implementation of actions that are reasonable and practicable to minimise causing harm to known Aboriginal objects; and/or
- (ii) identifying Aboriginal cultural heritage so they can be managed in accordance with the provisions of relevant legislation and regulations; and implementing reasonable and practicable management measures for these Aboriginal cultural heritage items.

[232] The focus of the ACHMP appears to be on tangible cultural heritage rather than intangible cultural heritage. It breaks down the lease areas into different zones with only some zones considered as requiring heritage clearance surveys (called ‘pre-clearance surveys’).²⁴⁰ It also provides that pre-clearance surveys to do not need to be conducted in areas where the grantee parties will not be undertaking ground disturbing work, on areas where there has already been significant disturbance, or on areas where previous surveys have been conducted.²⁴¹ This is problematic for a number of reasons.

[233] At its heart, this exemplifies the focus on tangible cultural heritage rather than intangible cultural heritage and assumes that only ground disturbance can cause interference with Aboriginal cultural heritage. As demonstrated in relation to Yarrie Lake, there are both tangible and intangible elements of Aboriginal cultural heritage that contribute to the particular significance. For Yarrie Lake, intrusion by culturally unauthorised people into sensitive men’s and women’s business constitutes interference and affects Gomeroi people.

[234] The panel has received evidence from Gomeroi of different places of significance within the Pilliga. It is acknowledged by the parties that there are likely to be many more places and items that are culturally significant to Gomeroi people, noting the important cultural landscape that is the Pilliga, which the Project sits entirely within. For this reason, the ACHMP must include provision for the conducting of pre-clearance surveys.

²⁴⁰ ACHMP cl 4.1–4.4.

²⁴¹ ACHMP cl 5.8.4.

- [235] Further, excluding areas where surveys have previously been carried out is short-sighted. Surveys can be carried out for a number of different reasons in anticipation of various types of activities. This can affect how the survey is approached and conducted as well as what information is reported. There is also no guarantee that Gomeroi people or people with the right knowledge for that Country were involved in conducting any previous surveys. To rely on these without appropriate consideration of their circumstances risks failure to identify and protect Aboriginal cultural heritage that may exist in previously surveyed areas.
- [236] Under the provisions of the ACHMP an Aboriginal Cultural Heritage Working Group is to be established with responsibility for assisting with the implementation of the ACHMP.²⁴² Despite the importance of this working group in protecting the cultural heritage of the Gomeroi people, there is provision for only four members of the ten-person group to be Gomeroi people. This means that, as currently proposed, the majority of the people comprising the Aboriginal Cultural Heritage Working Group are not required to be people with traditional cultural responsibility and knowledge for the Project area.
- [237] It is clear to the panel that there are significant issues with the ACHMP that inhibit its ability to effectively protect Aboriginal cultural heritage in the Project area. The conditions set out in this determination seek to address these issues having due regard to the evidence before the panel.

Consideration of section 39(1)(b) – the interests, proposals or wishes of the native title party in relation to the in relation to the management, use or control of land or waters that will be affected by the act

- [238] The clear and consistent position of the native title party throughout their lengthy engagement with Santos in relation to the Project, is that the Project should not proceed, or in the event it does, it should only proceed with the full free, prior and informed consent of the Gomeroi native title claim group.²⁴³

²⁴² ACHMP cl 5.3, sch 5.

²⁴³ NTP Contentions [252]–[253]; Wilson Affidavit [42]; NTP Amended Remittal Contentions [95].

- [239] The contentions of Santos note this position of the native title party, and note that in the context of negotiations, Gomeroi had previously indicated in-principle agreement subject to final negotiations regarding a production levy. Santos concede an agreement would be preferable.²⁴⁴
- [240] The State contends similarly, noting that an agreement would be a desirable outcome, however agreement from the Gomeroi people is not a precondition for the Tribunal to make a determination that the acts may be done.²⁴⁵
- [241] This position is correct, the Tribunal is not prevented from making a determination that the act may be done in the absence of agreement from the native title party. However, under s 39(1)(b), the panel must take into account the interests, proposals or wishes of the native title party in relation to the in relation to the management, use or control of land or waters that will be affected by the act.
- [242] As discussed at [407] below, the Tribunal must give a full and final determination of the matters before it and cannot impose a condition that defers or delegates the determination of any issues to the parties. As such, the Tribunal cannot make a blanket condition that an agreement must be reached in accordance with the wishes of the native title party.
- [243] In considering this criterion more generally, the panel have taken an overall view of the evidence and contentions provided by the native title party, including where such evidence was not directed to the panel for consideration of s 39(1)(b) but is relevant in considering its proposals, opinions and wishes, and assists the Tribunal in its task.
- [244] In doing so, we note that the Gomeroi witnesses express strong interest in the management of Country and provide testimony as to the obligation to care for Country, maintain sites, preserve flora and fauna and undertake spiritual practices,²⁴⁶ expressed as cultural obligations. The Gomeroi witnesses also give

²⁴⁴ GP Contentions [94], [95]; Kreicbergs Affidavit [115]; GP Remittal Contentions [90], [91]; Kreicbergs Affidavit [31]; *Remittal* [2024] FCAFC 49, [309]–[310] and [399(c)-(e)].

²⁴⁵ GVP Contentions [46].

²⁴⁶ NTP Contentions [203]; Booby Affidavit [21]; Tighe Affidavit [20], [21]; Wilson Affidavit [52], [53].

evidence that the inability of Gomeroi to protect Country creates a feeling of despair and hopelessness among the Gomeroi people.²⁴⁷

- [245] The panel also notes the extensive contentions and evidence before it from Gomeroi in relation to water and water resources, as described above in these reasons. This evidence demonstrates Gomeroi have a clear wish to protect key water courses and water resources, expressed for cultural and cosmological reasons in addition to being a component of the responsibility to care for Country.
- [246] The panel has given due regard to this evidence and considered it in the context of the proposed operations of the Project.
- [247] Considering this evidence, the panel has imposed conditions aimed at addressing the key expressed wishes and concerns of the native title party, focusing on enhancing the protections for important places, provide support for caring for Country activities through the development of a Ranger Program, and enhanced heritage protection measures.
- [248] The conditions which arise from our consideration of the mandatory criteria set out at s 39(1)(b) are discussed extensively at [403] to [418] below.

Consideration of section 39(1)(c) – the economic or other significance of the act to Australia, the State, the area where the Project is located, and Aboriginal peoples and Torres Strait Islanders who live in that area

- [249] Under s 39(1)(c) the panel is required to take into account the economic or other significance of the leases to Australia, the State, the areas in which the leases are located and to the Aboriginal peoples and Torres Strait Islanders who live in those areas. This requires an evaluation of the economic or other significance of the leases, rather than consideration of the significance of exploration or mining generally.²⁴⁸

²⁴⁷ NTP Contentions [217]; Booby Affidavit [21]; Tighe Affidavit [79]; Wilson Affidavit [52]; NTP Amended Remittal Contentions [71], [78], [81]; Booby Affidavit [15], [34], [41], [43]; Booby Remittal Affidavit [4]–[9], [61], [62], [69], [70], [73], [74]; Tighe Remittal Affidavit [37]–[39]; Wilson Remittal Affidavit [24], [25], [34]–[36]; Lansbury Report [45].

²⁴⁸ *Western Australia v Thomas* [1996] 133 FLR 124, 175–176.

- [250] As set out in the background to this decision, following the remittal of this matter from the Full Court the parties were invited to lodge any statement of contentions they wished to make addressing any request to submit further evidence. At the request of the parties, the Tribunal also convened a short oral hearing on the issue, following which the panel provided written reasons for their decision.
- [251] Importantly, no party sought the opportunity to provide updated economic evidence going to the matters to be considered under s 39(1)(c) particularly, despite some of the key evidence being approximately 10 years old by the time it needed to be considered again by this panel.
- [252] Having regard to the full context of this matter, the panel has not drawn an unfavourable inference in relation to the failure to update this evidence, however the age of the evidence is a relevant consideration as to its weight.
- [253] Despite no party directly updating evidence going to the economic or other significance of the act, Santos and Gomeroi each made contentions against the other, suggesting, in effect, that aspects of the expert evidence of Mr Mudge and Mr Kelp went to this category and/or went outside of the scope of directions, and therefore required the opportunity for further responsive evidence.
- [254] In particular, the native title party pressed that the evidence of Mr Kelp went to the criteria set out in s 39(1)(c) and was outside the scope of the directions issued on 19 August 2024. During the oral hearing held on 14 February 2025 counsel for Santos confirmed that they only sought to rely on Mr Kelp's evidence in relation to s 39(1)(e).²⁴⁹ This concession and clarification removed the need for further procedural processes.
- [255] The parties have made forensic decisions about how they wish to conduct the remittal. The panel will consider the expert evidence of Mr Mudge and Mr Kelp lodged in the remittal in relation to s 39(1)(e).
- [256] ACIL Allen, of which Mr Kelp is an employee, had a role in preparing the EIS, particularly the macroeconomic modelling, forming a part of the economic

²⁴⁹ Closing Transcript, Mr McKechnie, P-56/L12-18.

evidence before the Tribunal in the 2022 Determination and considered by this panel under s 39(1)(c). The economic assessments of the EIS were the subject of further examination by an independent economist engaged by the NSW Government as part of the IPC inquiry and was the subject of subsequent findings on the economic impact.²⁵⁰

Contentions and evidence

[257] While this remittal is *de novo*, the summary of then-President Dowsett is useful in understanding the evidence that was before him and considered by this panel again. Then-President Dowsett’s summary of the s 39(1)(c) material can be found from [934] to [942] of the 2022 Determination.

[258] The grantee parties contend the Project will generate an estimated \$5.4 billion (net present value) in revenue which will flow through to the Narrabri community through payment of royalties to the Gas Community Benefit Fund, and to Santos shareholders through payment of dividends.²⁵¹ A further \$3.1 billion is expected to go to the NSW Government through royalties and tax revenue.²⁵² The Project is expected to create approximately 1300 temporary jobs during the construction phase and sustain a further 200 ‘direct and indirect’ jobs during the operational phase.²⁵³ Santos submit that the Project will likely stimulate the local Narrabri economy and that compensation agreements will offset any potential loss of income on agricultural properties.²⁵⁴ The grantee parties suggest that any attempt to attribute the economic costs of climate change are ‘entirely unrealistic’ as to do so would attributes all the negative impacts of climate change to the Project rather than working out which impacts are actually caused by it.²⁵⁵

²⁵⁰ SSD 6367 Assessment Report [541]–[555]; IPC Statement of Reasons [337]–[350].

²⁵¹ GP Remittal Contentions [94].

²⁵² GP Remittal Contentions [95].

²⁵³ GP Remittal Contentions [96].

²⁵⁴ GP Remittal Contentions [97].

²⁵⁵ GP Remittal Contentions [98].

[259] Gomeroi contend the Project will be less economically significant than suggested by Santos for several reasons summarised below:²⁵⁶

- (a) the economic reports which the grantee parties rely on date from 2020 noting there has been ‘transformational change in the Australian energy market’ since then;
- (b) the jobs figures provided have not been updated since the EIS was prepared in 2014;
- (c) even if the now outdated figures are accepted, the real economic output will have a *de minimis* impact, with only 200 ‘long term’ jobs created and the majority being retained by Santos or limited to shareholders;
- (d) examining the NSW Treasury **Gross Domestic Product** figures for 2023, Gomeroi notes the Project will only contribute 0.07% of the State’s annual GDP;
- (e) the Commonwealth’s Safeguard Mechanism will capture the Project, requiring Santos offset emissions above a certain ‘baseline’. The Safeguard Mechanism is considered in more detail in relation to the panel’s consideration of the public interest below;
- (f) any effect that the Project would have on gas prices is uncertain and if there is any impact it is likely to be limited in duration;
- (g) any economic benefit remains contingent on receiving approval for the construction of two third-party pipelines, approvals which have not yet been received; and
- (h) the application of the **Interim Value of Emissions Reduction** results in an entirely different cost-benefit analysis. This contention is linked to expert evidence received in the remittal and the panel has considered this evidence only in the context of s 39(1)(e) for reasons set out above. In any event, for reasons explained from [318] to [321] below, the panel is not convinced the IVER is the correct tool through which the Project should be evaluated.

[260] The State contentions addressing s 39(1)(c) were brief and largely focused on the panel accepting the findings of the IPC and the evidence contained in the EIS. In effect, the State contends the panel should accept, as the IPC did, that on balance,

²⁵⁶ NTP Amended Remittal Contentions [38]–[39], [67].

the Project will provide a significant net economic benefit for the local community, the region and the State through increased investment and economic activity, as well as securing existing and future industries through the provision of a local gas supply and increased gas supply to the East Australian market.²⁵⁷

- [261] The panel also notes that the EIS provides an Aboriginal Engagement Strategy will be implemented to maximise employment opportunities for Aboriginal and Torres Strait Islander peoples, in addition to the economic benefits they are entitled to access as members of the wider community.²⁵⁸

Consideration

- [262] Based on the evidence before us, the panel accepts the high level of uncertainty associated with the energy market, specifically gas prices,²⁵⁹ leading conversely to an uncertainty of economic benefits going to market pricing.

- [263] However, while the panel acknowledges that the economic evidence set out in the IPC reasons and contained in the EIS is relatively old, which must be considered when weighing such evidence, we agree with the contentions of the State that this evidence is persuasive and should be accepted.

- [264] The panel also notes it must consider the effect of the act on the matters set out in s 39(1)(c), not the effect of the Hunter Gas Pipeline and the Narrabri Lateral Pipeline which will need to undergo their own approvals processes including as future acts under the *Native Title Act*.

- [265] On balance, and having regard to all the evidence and contentions made by the parties, the panel is satisfied the Project will provide an economic benefit to the local community, including the Aboriginal peoples and Torres Strait Islanders who live in those areas, Australia, and the State, for similar reasons found by the IPC, that is; through increased investment and activity in the area, the generation of some employment, and increased gas supply to the East Australian market.

²⁵⁷ GP Contentions [48]–[49].

²⁵⁸ EIS Table 26-8.

²⁵⁹ Dunn Affidavit, Exhibit TD-27, ACIL Allen Consulting, *Narrabri Gas Project, Update of the economics* (6 August 2020), 12-13, 19-20; IPC Statement of Reasons.

Consideration of section 39(1)(e) – any public interest in the doing of the act

[266] Section 39(1)(e) of the *Native Title Act* requires the Tribunal to consider whether there is any public interest in the grant of the leases.

[267] As set out by the Full Court in the *principal reasons*, in the 2022 Determination the Tribunal took the view, as a matter of statutory construction, that the 1998 amendments had the consequent effect of narrowing the matters comprehended by the public interest criterion in s 39(1)(e) to exclude any evaluation by the Tribunal of the environmental effects of a future act. The Full Court found this was an error. Where the Tribunal erred, the Full Court found, was in conflating the removal of the environmental assessment function by the 1998 amendments, with the removal of *any* requirement for it to consider, under s 39(1)(e) of the *Native Title Act*, whether features or characteristics of the future act broadly described as “environmental” weighed for or against the public interest in the doing of the future act.²⁶⁰

[268] The Full Court also noted that despite the Tribunal considering the environmental and climate change evidence in the 2022 Determination, it did so only to emphasise that the task of evaluating the effects on climate change from the Project, and evaluating whether allowing a Project which increased emissions was in the public interest at all, was no part of its function, referring also to then-President Dowsett stating in his reasons that this was a matter “for government” and not his task under s 39(1)(e).²⁶¹

[269] Santos appeared to repeat some tenets of this overturned position adopted by then-President Dowsett in this remittal, contending that the Tribunal is not tasked with assessing the public interest in preventing climate change, or the public interest in changing Australia’s energy policy, and the Tribunal cannot make a determination that Australia should do more to stop climate change as such questions are matters of government policy.²⁶² When making contentions about Professor Karoly’s evidence, Santos stated that the native title party is, in effect, asking the Tribunal to

²⁶⁰ *Principal reasons* [2024] FCAFC 26, [212].

²⁶¹ *Principal reasons* [2024] FCAFC 26, [195].

²⁶² GP Remittal Closing Submissions [15], [23]. See also Closing Transcript, Ms Webb, P-35/L26-37.

adopt a policy position that a new gas production project is, *ipso facto*, not in the public interest.²⁶³ The native title party did not necessarily agree with this characterisation of its position.

[270] As noted by the Full Court, it is well established that Parliament’s use of the phrase “any public interest” confers a wide discretionary value judgment function. The phrase is not, and is not intended to be, susceptible of precise definition, nor is it appropriate to set out lists of matters that might fall within its scope. It tasks a body such as the Tribunal to look at interests common to or held amongst a wider community, but not necessarily across an entire community, or nation.²⁶⁴

[271] *Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85 contains useful discussion around the requirements of s 39(1)(e):²⁶⁵

Section 39(1)(e) requires the Tribunal to determine whether the proposed future act is ‘in the public interest’. This expression imports a discretionary value judgment made by reference to undefined factual matters, and only confined by the subject matter, scope and purpose of the legislation (see *Coalpac v Gundungurra Tribal Council* at [141], citing the High Court in *O’Sullivan v Farrer* at 216). There can be a public interest in the act proceeding or not proceeding, and the public interest is not limited to economic considerations: *Western Australia v Thomas* at 176.

[272] It is also worth quoting here the comments of Chief Justice Mortimer in the Full Court *principal reasons*:²⁶⁶

The point made by the Gomeroi applicant in its submissions to the Tribunal was that the Tribunal *should strike a different balance* under the NTA [*Native Title Act*] to the one struck by the State and its agencies through the environmental assessment process. The Gomeroi People, through the Gomeroi applicant, were entitled to ask the Tribunal to do that. The Tribunal’s function is independent of State government and conferred for quite a different purpose; namely **to examine the future act from the perspective of the holders (or putative holders) of native title, as well as**

²⁶³ GP Remittal Closing Submissions [57].

²⁶⁴ *Principal reasons* [2024] FCAFC 26, [213]–[214].

²⁶⁵ *Minister for Lands, State of Western Australia and Another v Buurabalayji Thalanyji Aboriginal Corporation RNTBC* [2014] NNTTA 85, [266].

²⁶⁶ *Principal reasons* [2024] FCAFC 26, [221] (Mortimer CJ).

from the perspective of other members of the community as set out in s 39(1).

As I explain below, it must perform that function in a statutory context where, despite the recognition of native title in the land and waters concerned (or putative recognition through registration), native title holders or claimants do not have any veto over future acts on their country. Rather, Parliament has given the capacity of veto to the Tribunal. It is a specific function, in which similar considerations taken into account by State government and their agencies might be evaluated quite differently, in the performance of a different legislative function, one informed by the objects of the NTA and the values set out in the Preamble. **The Preamble informs the content of the “public interest” when that phrase is used in the NTA. The legislative scheme of the NTA requires the Tribunal to form its own views on where the public interest lies both as a separate consideration and as part of a holistic exercise, reflecting on all the factors in s 39(1).** In performing that function it is no part of the Tribunal’s role to defer to government, state or federal. (emphasis added).

- [273] As examined from [30] to [31] above, the *Native Title Act* is a beneficial statute and the future act right to negotiate regime, which includes the scope of this inquiry, is an element of the protection of native title and not to be narrowly construed.²⁶⁷
- [274] The panel is of the view that the relevant community or public, whose interests must be considered for the purposes of s 39(1)(e) in respect of the Project, should be construed broadly as one comprising of all those that hold a common interest as community who will be effected by the benefits and detriments of the doing of the act, applying a predictive assessment.
- [275] In summary, in construing the public interest within the context of s 39(1)(e) the panel has considered the line of High Court authority that holds the ‘public interest’ is only confined by the subject matter, scope and purpose of the legislation.²⁶⁸ The panel has also had regard to Chief Justice Mortimer’s statement that the ‘Preamble

²⁶⁷ See *Smith v Western Australia* [2001] FCA 19, [23] (French J); *Kanak v National Native Title Tribunal* (1995) 61 FCR 103, 124 (Lockhart, Lee and Sackville JJ); *Re Koara People* (1996) 132 FLR 73, 81; *Native Title Act* Preamble.

²⁶⁸ See *O’Sullivan v Farrer* [1989] HCA 61, 216.

informs the content of the “public interest” when that phrase is used in the NTA’.²⁶⁹
 The Preamble provides relevantly that in the *Native Title Act* the:²⁷⁰

... people of Australia intend:... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

[276] Equally, the objects of the *Native Title Act* include to ‘provide for the recognition and protection of native title’.²⁷¹ The panel is therefore of the view that their consideration of the ‘public interest’ must recognise the common Australian interest in recognising and protecting native title, as well as protecting and preserving the rich and diverse cultures of Aboriginal and Torres Strait Islander peoples.

[277] Importantly, the Full Court found there was ample material before the Tribunal in the 2022 Determination, and therefore also in this inquiry, to make good the proposition that a matter of public interest in connection with the Project was the fact that it would generate substantial GHG emissions, in an undisputed factual context of the connection between GHG emissions and global warming, with the increased harm to people and the environment that comes from global warming. The Full Court also noted the terms of the Departmental report itself make good that this was a matter of public interest as it referred to ‘the community’ raising significant concerns about the Project saying: ²⁷²

... it would damage the region’s water resources, cause significant biodiversity impacts on the Pilliga State Forest, generate substantial greenhouse gas emissions, and adversely affect the health, safety and cohesion of the local community...
 [s]ubmissions about the greenhouse gas emissions of the Narrabri Gas Project were as much about the ongoing use of fossil fuels and gas in Australia as they were about the project.

²⁶⁹ *Principal reasons* [2024] FCAFC 26, [221] (Mortimer CJ).

²⁷⁰ *Native Title Act* Preamble.

²⁷¹ *Native Title Act*, s 3(a).

²⁷² *Principal reasons* [2024] FCAFC 26, [215]–[217].

- [278] The uncontested evidence before the Tribunal includes the fact that an increase in the concentration of GHGs in the atmosphere leads to a warming effect at the Earth's surface and in the lower atmosphere.²⁷³ This is also commonly known as 'global warming'. As a result of increased GHGs in the atmosphere, largely coming from anthropogenic emissions, global surface temperature has increased by 1.1° C since 1850.²⁷⁴
- [279] The evidence, particularly that of the native title party's climate science expert Professor Karoly, describes how increased global surface temperatures are associated with a number of key climate impacts including rising ocean temperatures, a decline in sea-ice and permafrost, increases in humidity and changing precipitation patterns around the world.²⁷⁵ Climate change is also associated with an increase in the frequency, size, and intensity of weather events, including 'extreme temperatures and heatwaves, weather conditions conducive to bushfires, extreme daily rainfall and associated flooding, drought in some areas, and coastal storm surges and associated flooding.'²⁷⁶ Similarly, while there is variability in how this manifests, the evidence shows that climate change has caused, and is likely to continue to cause, widespread damage to ecosystems.²⁷⁷ This evidence was not contested by the other parties.
- [280] The panel accepts the expert evidence concerning both the causes and effects of anthropogenic climate change. It is within this context that the consideration of the public interest will take place.

²⁷³ Karoly Report [13]; see also for example [124] of the GP Remittal Contentions.

²⁷⁴ Karoly Report [10].

²⁷⁵ Karoly Report [47]–[61].

²⁷⁶ Karoly Report [62]–[65].

²⁷⁷ Karoly Report [66]–[67], [100].

Public benefits and public detriments

[281] Justice O’Bryan, with whom the Chief Justice agreed, framed this task of weighing benefits and detriments to ascertain where the public interest lies for the purpose of s 39(1)(e), in the following way:²⁷⁸

The phrase “any public interest in the proposed act proceeding” necessarily requires consideration of the public benefits and the public detriments arising from the proposed act in order to assess whether there is an overall (or net) public interest in the proposed act proceeding...

[282] The panel agrees with and adopts this assessment of its task in relation to s 39(1)(e).

[283] This task must be applied by a non-scientific Tribunal within the statutory framework the *Native Title Act* and considering the evolving challenge of anthropogenic climate change caused by global GHG emissions in the atmosphere attributed to the effect of a Project – where molecules or emissions have no boundaries. This requires the panel undertake a complex and nuanced predictive assessment using the evidence before it.

[284] The global challenge presented by climate change has initiated numerous monitoring and regulatory regimes, including international agreements such as the Paris Agreement referred to by the parties in their evidence, and forms the common objective of several pieces of domestic federal and state policy and legislation.²⁷⁹ The challenge interacts with abstruse energy markets, that are influenced by and interact with broader international trade.

Counterfactual

[285] Against this complex backdrop, much time has been spent by both Santos and Gomeroi encouraging the panel to consider hypothetical scenarios that may occur should the act not proceed. This is not a criticism of the parties, indeed this is reflective of the complexity of the task associated with undertaking a predictive

²⁷⁸ *Remittal* [2024] FCAFC 49, [345] (O’Bryan J).

²⁷⁹ See for example *Climate Change (Net Zero Future) Act 2023* (NSW) s 3(1); *National Greenhouse and Energy Reporting Act 2007* (Cth) s 7.

assessment where the Tribunal is being asked to consider an unprecedented future act determination, which effectively applies the Full Court decision and expands the previous understanding of the scope of s 39(1)(e).

- [286] Both the native title party and the grantee parties referred to the *Living Wonders* case in their submissions.²⁸⁰ While acknowledging that the *Living Wonders* case does take place in a different statutory context, the panel has found the *Living Wonders* case to be instructive and it is worth extracting the following portion of Justice Horan’s judgment:²⁸¹

Transposing his Honour’s reasoning to the present context, it may be accepted that the Minister was required to **identify the direct and indirect consequences of the proposed action, and not to hypothesise what might happen in a future “world” in which the proposed action is not taken.** But that did not preclude the Minister from having regard to the “variables” that might be relevant to the events or circumstances resulting from proposed action – here, the enlargement or extension of the existing coal mines. The Minister was engaged in a predictive exercise, in which it was necessary to determine whether and to what extent the accepted impacts of climate change on MNES [Matters of National Environmental Significance] would be caused by the proposed action.

- [287] The panel is of the view that it is exactly this hypothetical exploration of what ‘future world(s)’ might exist if the proposed act *does not* proceed which the panel has been urged to undertake. Whereas the statutory task required of the panel is to consider the public interest on the basis that the act *does* proceed. The predictive assessment required to be undertaken is complex enough without introducing a range of hypotheticals premised on counterfactuals. We must consider the effect of the acts should they proceed. The counterfactual exercise urged on the panel is so filled with conjecture, hypothesis and speculation as to be unhelpful.

- [288] For these reasons, the panel agrees with the submission of the native title party that the:²⁸²

²⁸⁰ GP Contentions [34], [128]; NTP Amended Remittal Reply, [14].

²⁸¹ *Living Wonders* [2024] FCAFC 56, [175].

²⁸² NTP Amended Remittal Reply [34].

correct comparison for the Tribunal in undertaking its task to consider the public interest is to comparing [sic] the Project's emissions over its projected lifetime with zero emissions from the Project not being approved.

[289] Nevertheless, the panel must consider the 'variables' relevant to its task and this does involve some consideration of the 'hypothetical' contentions of the parties. For Santos, the hypothetical contentions focused on whether a projected shortfall in gas would require the utilisation of energy sources in NSW likely to cost more and result in higher emissions if the Project does not proceed.²⁸³

[290] While Gomeroi generally reject the proposition of future hypothetical scenarios,²⁸⁴ Mr Mudge, an expert witness for the native title party, gave evidence on a range of non-fossil fuel alternatives and how each might meet any unmet demand if the Project does not proceed.²⁸⁵

[291] One of the alternative options put forward by Mr Mudge was biogas, which involves the use of naturally occurring CH₄ from biological sources such as crops and waste, minimising the additional CH₄ entering the carbon cycle.²⁸⁶

[292] Mr Mudge's evidence also addressed the development or advancement of greater energy storage capacity though the use of batteries or pumped hydro, including as part of a broader 'mix' of renewable power generation and storage facilities.²⁸⁷ In relation to batteries, Mr Mudge particularly drew the panel's attention to the speed at which battery costs are reducing.²⁸⁸

[293] The difficulty with these submissions, as noted repeatedly by the grantee parties' energy expert Mr Kelp, is that none of these options are currently operating within

²⁸³ GP Remittal Contentions [160]–[163]; See for example, Kelp Report [120]–[127].

²⁸⁴ NTP Amended Remittal Reply [34].

²⁸⁵ Mudge Report [173]–[178].

²⁸⁶ Expert Conclave Transcript, Mr Mudge, P-48/L4-30, P-55/L43-47, P-56/L1-15, Mr Kelp and Mr Kelly, P-71/L16-47.

²⁸⁷ Mudge Report [123], [218], [220]; Expert Conclave Transcript, Mr Mudge, P-56/L7-35.

²⁸⁸ Mudge Report [25]–[29].

NSW at a scale sufficient to cover the projected power needs of the State for the next 25 years.²⁸⁹

[294] During the expert conclave, Mr Mudge himself conceded that the biogas referenced was not currently going into the system, though with investment it could.²⁹⁰ Similarly, while Mr Mudge identified a number of hydrogen projects, he also acknowledged that they were not presently operating at the scale necessary to substitute other sources of gas.²⁹¹

[295] The panel found the same difficulties with the counterfactual evidence of Santos. Mr Kelp and the grantee parties asked the panel to accept that should the Project not proceed, not only would the alternative energy sources put forward by Mr Mudge not be viable, but that the likely shortfall in the energy market would likely mean coal plants in NSW would need to stay operational.²⁹²

[296] Mr Kelp points to the modelling of the **Australian Energy Market Operator**, which predicts a small supply gap emerging from 2026–2027 and likely increasing, and says any gap in supply means that should the Project not proceed imported gas will be required, which Mr Kelp says will be more costly and likely produce higher emissions.²⁹³ Mr Kelp also suggests that these factors would likely delay the retirement of coal generated power plants, citing Eraring Power Plant, or incentivise industrial users such as steelworks to continue using coal power.²⁹⁴

[297] The supply gap referred to by Mr Kelp is based on extreme peak day demand, characterised by 1-in-20-year highs in daily demand from residential, commercial

²⁸⁹ Expert Conclave Transcript, Mr Kelp, P-59/L1-23.

²⁹⁰ Expert Conclave Transcript, Mr Mudge, P-58/L30-46.

²⁹¹ Expert Conclave Transcript, Mr Mudge, P-57/L43-47, P-58/L1-46, P-59/L42-47, P-60/L1-29; Mudge Report [77], [169].

²⁹² Kelp Report [97]; GP Contentions [160].

²⁹³ Expert Conclave Transcript, Mr Kelp, P-62/L42-46, P-63/L1-47.

²⁹⁴ Expert Conclave Transcript, Mr Kelp, P-55/L28-35, P-68/L33-41.

and industrial customers and 1-in-10-year high daily gas requirements for gas-powered generation.²⁹⁵

[298] The difficulty with these supply gap predictions is the uncertainty and contingency of them. Indeed, the panel notes AEMO produces its forecasts based on modelling only, and as the parties addressed in evidence, these predicted shortfalls in gas supply have previously not eventuated.²⁹⁶ Reflecting the fluidity and unpredictability of the energy market, AEMO updates its forecasting regularly and did so again following the closing of submissions in this inquiry.²⁹⁷ The evidence before the panel regarding the energy market is replete with tenuous predictions and estimates, particularly where it attempts to assert what may occur over the next 20–30 years.

[299] Whilst the panel has had regard to these variables contained in the counterfactual evidence put forward by the parties, for the reasons set out above, the task of this panel is to consider the direct and indirect consequences of the Project, and the emissions it is predictively assessed to produce, not to hypothesise what might happen in a future world in which the Project does not proceed.

Direct and indirect

[300] Although the panel does not agree with the grantee parties' full contentions on the applicability of *Living Wonders*, the panel accepts that the direct and indirect consequences of the Project are relevant to consider in undertaking its predictive assessment.

[301] In this case, the Tribunal has before it uncontroverted expert evidence that GHG emissions produced by the Project over its lifetime (a direct consequence) will contribute to a rise in global temperature. The expert evidence going to the direct and indirect consequences of the doing of this Project are based on scientific forecasting largely not in dispute between the parties.

²⁹⁵ Mudge Report [160]–[162], referring to AEMO, *Gas Statement of Opportunities* (March 2024), 9, footnote 10; Expert Conclave Transcript, Mr Mudge, P-61/L-24-38; referring to underlying assumptions within Kelp Report eg Fig ES 1, Fig 2.9, Fig 2.10, Fig 2.15, Fig 2.26.

²⁹⁶ NTP Amended Remittal Contentions [39d]; Mudge Report [148].

²⁹⁷ AEMO, *Gas Statement of Opportunities* (March 2025).

- [302] Throughout the course of this matter different arguments concerning causation were urged on the panel. Gomeroi contended that if a standard of causation was to be accepted, which it said should not be, the appropriate test should be ‘material contribution’, following the *Bonnington Castings* line of authority.²⁹⁸ *Bonnington Castings* concerned a pursuer who had developed pneumoconiosis through exposure to multiple sources of silica dust, with one of these sources being the poorly maintained equipment of his employer. The question in this instance was not what ‘the most probable source of the disease was’ but rather whether the silica dust from his employer’s poorly maintained equipment ‘materially contributed’.²⁹⁹
- [303] In contrast Santos drew the panel’s attention to the *Living Wonders* case with its ‘substantial cause’ test, albeit noting that the legislative schemes were different and the ‘requirement of an action being the “substantial cause” of harmful effects is different to a consideration of whether the act is in the public interest’.³⁰⁰
- [304] The panel found neither of these submissions helpful in considering causation. Rather the panel accepts the contention of the Government party on this issue:³⁰¹

In a factual context where it is not controversial that there is more than one source of GHG emissions and more than one cause of global warming, it would be an error for the Tribunal to attribute every potential consequence of global warming to the Project. Rather, the Tribunal must take into account, based on the evidence before it, the Project’s estimated contribution to GHG emissions and the consequential effects of those emissions, including any contribution to global warming. It is in this context that the Project’s contribution to global temperature increases and representative percentages of total impacts should be taken into account: see paragraph [28] of the Contentions and paragraph [32] of the GP Contentions. It is a matter for the Tribunal to balance the potential detriment caused by the contribution of the Project’s GHG emissions and the other public interest considerations.

- [305] Ultimately, all three parties acknowledged during oral submissions that there should be no particular test for causation under s 39(1)(e).³⁰² As counsel for the

²⁹⁸ NTP Remittal Closing Submissions [10]–[11].

²⁹⁹ *Bonnington Castings* [1956] AC 613, [621].

³⁰⁰ GP Remittal Contentions [36].

³⁰¹ GVP Remittal Closing Submissions [14].

³⁰² Closing Transcript P-17/L10-14, P-25/L8-10, 34-45, P-38/L19-41.

grantee parties correctly submitted, what is required of the Tribunal is a balancing exercise in assessing the s 39 criteria.³⁰³

- [306] The panel accepts that there must be a causal link between the doing of an act and the direct and indirect consequences that flow but does not find it is helpful to introduce a test of ‘substantial’ or ‘material’ causation. Common sense is necessary in considering both causation and proportionality and this will always depend upon on the specific facts and circumstances under consideration.
- [307] It is accepted on the evidence that the Project will contribute to provide energy to the wider community. It is also accepted on the evidence, that the Project will result in GHG emissions which will cumulatively contribute to adverse climate change impacts.
- [308] Climate change is a serious threat for the public interest we must consider. All GHG emissions contribute to global temperature rises, which will have, based on the scientific modelling in the various IPCC reports, a sliding scale of impacts depending upon whether the global temperature rise is equivalent to 1.5, 2 or 4°C, with the level of rise impacted by a range of looming risks. These risks include climate ‘tipping points’ or temperature increases beyond which serious and irreversible damage to the world’s ecosystems will occur.³⁰⁴
- [309] Gomeroi expert witness, Professor Karoly, estimates that the emissions generated by the Project, calculated based on figures contained in the EIS, will result in a global temperature increase of 0.00005°C over the course of its 25-year lifespan. The native title party contends that this temperature increase, as a contributor to the broader global temperature rise, presents a range of risks that are too high, and the impacts too dire, to justify the doing of the act.³⁰⁵ While not directly contesting the temperature increase presented by the native title party, Santos contended that such a temperature increase is ‘immeasurably small’ so as to be *de minimis*.³⁰⁶ The State

³⁰³ See Closing Transcript P-25/L7-11.

³⁰⁴ Karoly Report [139]-[142].

³⁰⁵ NTP Amended Remittal Contentions, [4] citing IPCC, 2023, AR6 Synthesis Report Summary for Policymakers, 24 [3016]; NTP Amended Remittal Contentions, [11].

³⁰⁶ See Closing Transcript, P-24/L25-35.

also does not appear to challenge the figure presented, contending that, even accepting this figure, it comprises a 0.0033% contribution by reference to the aim of the international community to keep warming below 1.5°C.³⁰⁷

- [310] The panel accepts the native title party's contention that any contribution of GHG emissions leading to a rise in global temperature would have negative impacts for the planet and the public. The panel further accepts that the expert evidence demonstrates a link between the doing of the Project to a range of specific local and regional risks, even if the links take a circuitous route through a series of direct and indirect consequences. It does not matter if the same carbon and CH₄ molecules generated by the Project directly cause the potential risks to the Narrabri region, this is the unique nature of the effect of the act as molecules have no boundaries, yet contribute to the cumulative impacts caused.
- [311] Of course, any emissions which arise from the doing of the future act must be understood in the context of the totality of global emissions. It would be an error to attribute all the consequences of climate change to the doing of a single project. Section 39(1)(e) directs the panel to consider the doing of *this* future act.
- [312] The panel does not accept any characterisation that the projected emissions of the Project, which the panel accepts, based on the evidence before it, will result in an approximately 0.00005°C increase in global temperatures, is 'immeasurably small'. Such a figure is measurable, as reflected in the evidence of the experts. Even though this figure appears 'small' out of context, as noted by Professor Karoly, these emissions are significant when you have regard to the fact that these emissions are from a single source and the contribution of emissions will remain in the atmosphere for decades, and contribute to the cumulative impacts and risks that are, in turn, potentially catastrophic and irreversible for the planet, including the Narrabri region and the wider community of Australia. Such consequences are not *de minimis*.

³⁰⁷ GVP Remittal Contentions [28]; NTP Amended Remittal Contentions [28].

Contentions and evidence

[313] The Project has been declared a Strategic Energy Project for NSW.³⁰⁸ The NSW Government identified the projected gas shortfalls, finding the Project will strengthen energy security and reliability, as a key basis for this declaration.³⁰⁹ In its assessment of the Project, the Department of Planning, Industry and Environment also found that the Project would serve to increase competition in the domestic gas market, clarifying at the public hearing however that it did not expect the price of gas on the market to decrease, due primarily to the small size of the Project relative to the broader gas market.³¹⁰

[314] In addition to the Project's role in securing gas supplies for NSW, during the course of submissions the State encouraged the panel to have regard to the role of gas in the transition to 'net zero'.³¹¹ In making this submission the State took the panel to the Commonwealth Gas Strategy which identifies gas as a 'bridging fuel', allowing for the closure of coal powered power plants.

EIS and related evidence

[315] As discussed at [49] above, the evidence contained in the EIS is now nearly 10 years old. A key criticism of the EIS, other than simply on account of its age, comes from Mr Mudge who criticises that the EIS does not properly account for the fugitive emissions generated by the Project.

[316] Mr Mudge gives evidence that the fugitive emissions would be some 10 times greater than those reported in the EIS, stating in his expert report:³¹²

However, the delivery of the Narrabri Gas in preference to the biogas and hydrogen substitutes that Jemena is proposing to largely displace fossil fuel gas over the Narrabri Gas Operating Period imposes rapidly escalating methane leakage liabilities on the NSW gas network operator that would lead to:

³⁰⁸ IPC Statement of Reasons [44]; SSD 6367 Assessment Report [94].

³⁰⁹ SSD 6367 Assessment Report [83]–[84].

³¹⁰ SSD 6367 Assessment Report, x-xi; IPC Statement of Reasons for Decision [342].

³¹¹ GVP Remittal Contentions [17]–[20].

³¹² Mudge Report [60].

- a) fossil fuel sourced gas such as the Narrabri Gas production falling outside the NSW network's Gas Specification and therefore not being able to be transported or
- b) the Narrabri Gas Project being obliged to compensate the NSW Gas Network for incremental methane emissions attributable to transporting fossil fuel gas from the project.

This finds a base emissions arising from the Narrabri Gas Project that is approximately 10 times that estimated by Santos in its EIS analysis, with an economic cost almost 10 times higher than for the Santos analysis.

[317] Mr Mudge's calculation and methodology are disputed by Mr Kelp and Santos.³¹³

[318] Related to this, Mr Mudge then uses the IVER formula to come up with an economic cost of the Project of some \$30 billion. As referenced by Mr Mudge, the IVER is a formula intended to measure 'the dollar value per tonne of avoided greenhouse gas emissions in order to operationalise emissions reduction as a component of the national energy objectives'.³¹⁴

[319] Based on all the evidence before us, the panel is not satisfied that the fugitive emissions are approximately 10 times that estimated in the EIS analysis, nor is the panel satisfied as to the appropriateness of applying the IVER methodology to the Project in the manner Mr Mudge suggests. On this point Santos submits:³¹⁵

The IVER is not intended to be used to calculate the economic cost of emissions from individual projects. Rather, it is clear from the very source cited by Mr Mudge in support of his analysis that it was developed as a tool to evaluate regulatory change proposals in the energy sector.

[320] In support of this contention Santos point to the documents Mr Mudge cites in his discussion of the IVER. These documents provide that IVER is to be 'used by a government or regulatory entity in considering or applying the national energy objectives' and 'measures the dollar value per tonne of avoided GHG emissions in

³¹³ GP Remittal Contentions [140], Expert Conclave Transcript, Mr Kelp, P-81/L1-11.

³¹⁴ Mudge Report [34]-[35]; GP Remittal Contentions [106], Ministerial Council of Energy, *MCE statement about the interim value of greenhouse gas emissions reduction* (28 February 2024), 2 (**MCE Statement**).

³¹⁵ GP Remittal Contentions [106].

order to operationalise emissions reduction as a component of the national energy objectives’.³¹⁶

[321] Counsel for the native title party submitted that Mr Mudge’s expert evidence was the only evidence before the panel that relates to the current costs of emissions. Whilst it is the case that the EIS figures are now aged, the panel accepts Santos’ submission that based on the plain reading of the use of the IVER formula, it is a methodology used by governments to set policy and not helpful to the panel in its task. We also note here, as discussed above, following contentions from the parties on the issue the panel decided the expert reports of Mr Mudge and Mr Kelp lodged in the remittal would be considered in relation to s 39(1)(e). Regardless, whatever subsection this evidence was considered under, our finding would remain, that is; based on the evidence before us we are not convinced of the appropriateness of the IVER formula in the manner posed by Mr Mudge.

[322] Returning to the EIS directly, the panel notes Chapter 24 deals with the GHG emissions of the Project, as discussed from [50] to [53] above. Over the 25-year lifetime of the Project the EIS anticipates ‘direct’ emissions of either 26.3 Mt CO₂-e equivalent (**CO₂-e**) with self-generated electricity, or 15.5 Mt CO₂-e with electricity sourced from the national grid.³¹⁷ The above consideration is of the ‘Scope 1’ emissions, or those emissions which arise directly from the activities of the grantee parties in the Project. In the event that the Project does source electricity from the national grid there will be a further 18 Mt CO₂-e of ‘Scope 2’ emissions, resulting from the generation of electricity by third parties where Santos is the end user.³¹⁸ For the sake of completeness, the EIS provides that if the Project uses self-generated electricity there will be no ‘Scope 2’ emissions.³¹⁹

[323] ‘Scope 3’, or to use the language of the EIS ‘downstream emissions’, resulting from the combustion of the gas coming from the Project would be expected to be much

³¹⁶ MCE Statement 1, 3.

³¹⁷ EIS, Chapter 24 Greenhouse Gases, 24-4.

³¹⁸ EIS, Chapter 24 Greenhouse Gases, 24-3 – 24-4.

³¹⁹ EIS, Chapter 24 Greenhouse Gases, 24-4.

higher and the EIS provides for approximately 3.77 Mt CO₂-e annually.³²⁰ Over the 25 years of the Project this comes to approximately 94.25 Mt CO₂-e.³²¹

Energy security (supply)

[324] There is an identified need for gas reserves within the Australian east coast domestic gas network. The panel considers that it does not need to determine whether a predicted shortfall will eventuate. Rather, it accepts the contention of the State that the addition of a further energy source will provide ‘a separate benefit which should be attributed significant weight in the assessment of the public interest’.³²² This is mirrored in Santos’ contention that the Project will ‘directly support energy stability in NSW via the domestic market’.³²³

[325] The evidence shows the Project is anticipated to meet some 47% of NSW current gas demand.³²⁴ Further, the evidence of Mr Kelp is that the Project is the most ‘shovel ready’ of all the prospective gas projects within the Australian domestic market and that ‘other projects would be significantly later than Narrabri’.³²⁵ Mr Kelp also reports that existing reserves in NSW and Victoria are rapidly declining as more productive and economic sources of gas are depleted over the next decade.³²⁶ This depletion has resulted in predicted shortfalls in gas as demand begins to outstrip supply in the period 2028 to 2043.³²⁷

[326] Gomeroi challenge this predicted shortfall, noting that previous predicted shortfalls have not eventuated.³²⁸ Mr Mudge gave evidence during the expert conclave that in forecasting expected gas demand AEMO uses an ‘extreme peak day’ model, ‘which is a one-in-20-years forecast, for the residential, commercial, industrial customers,

³²⁰ EIS, Chapter 24 Greenhouse Gases, 24-4.

³²¹ EIS, Appendix R Greenhouse Gases, i.

³²² GVP Remittal Contentions [22]–[23].

³²³ GP Remittal Contentions [124].

³²⁴ Mudge Report [163].

³²⁵ Expert Conclave Transcript, Mr Kelp, P-64/L17-23; Mudge Report, Fig. 2.17.

³²⁶ Kelp Report [51]–[54], Table 2.2, Attachment D-2.

³²⁷ Kelp Report [112]–[115]; AEMO Gas Statement of Opportunity 2024, Figure 38.

³²⁸ NTP Amended Remittal Contentions [39(d)].

and then overlay on top of that a one-in-10-year forecast for gas-fired power generation'.³²⁹

- [327] There is evidence before the panel that gas offers some benefits over other sources of available energy. Santos contends that the most obvious of these is gas as 'an alternative energy source/firming power to address energy requirements where an intermittent renewable source is not available'.³³⁰ In his evidence Mr Kelp states:
331

For industry, gas is generally the preferred fuel where processes require a lot of energy, high heat or as a feedstock. It is used in the manufacture of pulp, paper, chemicals, glass, processed foods and bricks. It is a chemical feedstock to produce ammonia for fertilisers and explosives, which play a major role in Australia's fertiliser and mining sectors.

- [328] There is also evidence before the panel that Australia already produces a significant amount of gas capable of meeting domestic demand, however most gas produced in Australia is exported. In 2022–2023 some 4,976 PJ of domestically produced gas was exported while 1,083 PJ was used for domestic purposes.³³² Much of this exported gas appears to be tied up in long term international supply agreements with a number due to expire around 2035, although there is no certainty that this gas would then become available domestically.³³³

Gas prices

- [329] There was much contradictory evidence before the panel concerning the impact that the Project would have on gas prices. Indeed, in their own consideration the IPC noted:³³⁴

While the Department's AR [Assessment Report] describes how the Project will result in increased competition in the domestic gas market and put downward

³²⁹ Expert Conclave Transcript, Mr Mudge, P-61/L24-27.

³³⁰ GP Contentions [110], GP Remittal Contentions [124]; Dunn Affidavit [205]–[206].

³³¹ Kelp Report [40].

³³² Kelp Report [32].

³³³ Expert Conclave Transcript, Mr Kelp, P-55/L8-20.

³³⁴ IPC Statement of Reasons [342].

pressure on gas prices, the Department acknowledged at the Public Hearing that it did not expect the price of gas to decrease, due primarily to the small size of the Project relative to the broader gas market.

[330] This view appears to be bolstered by Mr Kelp's evidence that while his firm ACIL Allen did not have access to detailed cost information concerning the Project they.³³⁵

would expect the cost of the gas produced from the field to be more expensive than most comparable coal seam gas production fields in Queensland as the NSW coal seams tend to be deeper and have a lower permeability (the ability to gas to flow within the coal seam). This will tend to make the gas production rates lower per well than for similar Queensland Surat/Bowen Basin developments and therefore more expensive on a \$/GJ basis when unitised.

[331] Mr Kelp also noted that increasingly domestic gas prices are affected through prevailing international prices though 'netback' pricing, noting particularly the effect rising Qatari and United States LNG supply might be expected to have in coming years.³³⁶

[332] Despite this, Mr Kelp opined that the Project would have an effect in two principal ways, 'bringing in a lower cost source of supply', and 'an incremental competition impact from having Santos Gas supply in the market that wouldn't otherwise be there'.³³⁷

[333] Based on the evidence before it, the panel is not satisfied that this Project will have any major impact, positive or negative, on energy market pricing. However, for reasons set out below at [372], the panel is satisfied that securing domestic sources of gas will assist to prevent upward pressure on gas prices providing a marginal benefit.

³³⁵ Kelp Report [123]–[124].

³³⁶ Kelp Report [45]–[46], [114].

³³⁷ Expert Conclave Transcript, Mr Kelp, P-85/L1-6.

Impacts of climate change: expert evidence

- [334] There is no contest in this matter that the direct impact of the Project proceeding will be the contribution of GHG to the atmosphere. This will have the indirect impact of increasing climate change. The panel accepts this. The evidence of the native title party's expert and lay witnesses concerning the impacts of climate change is both compelling and unchallenged (other than Mr Mudge's evidence which has been dealt with above).
- [335] Professor Karoly estimates that the emissions generated by the Project, calculated based on figures contained in the EIS, will result in a global temperature increase of 0.00005°C over the course of its 25-year lifespan. As discussed above at [309], this evidence was not directly contested by the other parties.
- [336] On the topic of climate change, both expert witnesses Professor Karoly and Dr Mitchell were largely agreed.³³⁸
- [337] Dr Mitchell noted his agreement with the emissions figures found in the Project's EIS.³³⁹ He noted that based on these figures the emissions for the Project comprised approximately 0.2182 per cent of the total Australian emissions for 2024.³⁴⁰ Dr Mitchell provided an overview of the most recent IPCC modelling, however noted that the modelling did not allow for the linkage of 'a single molecule of CO₂ emitted into the atmosphere by a particular local facility, such as the Narrabri Gas Project, to a specific fractional rise in global atmospheric temperature' or to particular extreme weather events which might occur as a result of climate change.³⁴¹ With respect to Dr Mitchell, the panel did not find this analysis concerned with linking 'molecules' to particular temperature increases particularly helpful for reasons set out in this determination. It is also worth emphasising that Dr Mitchell took no objection to Professor Karoly's calculation of 0.00005° C

³³⁸ Expert Conclave Transcript, Dr Mitchell P-8/L1-8 and Dr Karoly, P-9/L1-6.

³³⁹ Michell Report CCR81-CCR82.

³⁴⁰ Michell Report CCR82.

³⁴¹ Michell Report CCR84-CCR85.

global temperature rise as a result of the Project, although he characterised it as ‘tremendously small’.³⁴²

[338] Professor Brendan Mackey provided evidence concerning the ecological risks posed to the Pilliga by the impacts of climate change, including the 107 listed threatened species to be found in the Pilliga which he notes are ‘highly vulnerable’ to climate change impacts.³⁴³ This evidence was examined from [92] to [97] above and was not contested by the other parties.

[339] Associate Professor Nina Lansbury gave evidence addressing the health and wellbeing impacts of climate change, breaking them down into physical, social and emotional, cultural, spiritual, economic and environmental. This evidence was examined from [98] to [101] above and was not contested by the other parties.

[340] Dr Karl Mallon provided a climate risk report which identified a number of risks to properties within the Narrabri region. Dr Mallon noted both direct risks such as increased chance of fire, flood, as well as secondary or consequential risks such as rising insurance costs and lessening insurability/access to mortgages.³⁴⁴ In calculating these figures Dr Mallon selected a particular climate ‘pathway’ which he considered ‘consistent with a policy environment in which new fossil fuel reserves are being developed and exploited - such as the one being considered in Narrabri’.³⁴⁵ Dr Mallon then modelled the likelihood of a number of climate risks across the period to 2100, finding significantly increased risks of riverine flooding, surface water flooding, forest fire, soil movement and extreme wind in some or all of the properties within his study area.³⁴⁶

[341] Overall Dr Mallon found that insurance costs in his area of study would rise by 72% due to climate change this century.³⁴⁷

³⁴² Expert Conclave Transcript, Dr Mitchell, P-11/L10-34.

³⁴³ Mackey Report [10].

³⁴⁴ Mallon Report [14]–[46].

³⁴⁵ Mallon Report [10]–[19].

³⁴⁶ Mallon Report [60]–[64].

³⁴⁷ Mallon Report [68].

Impacts of climate change: Gomeroi witnesses

[342] The native title party also provided compelling evidence from traditional owners concerning the potential impacts of climate change.

[343] Ms Suelllyn Tighe discusses the potential impacts of climate change in a number of different dimensions. Firstly she discusses the impact of climate change on the Gomeroi's ability to undertake wooden tool manufacture, with a particular focus on how trees used to make coolamons are affected by an increasing frequency of bushfires.³⁴⁸ She also discusses the impact of greater frequency of bushfires on the Gomeroi's ability to gather bushtucker and the impacts a warming climate is having on the seasonality of plants and animals, with warmer winters leading to plants fruiting earlier and not reaching full maturity.³⁴⁹

[344] Ms Tighe discusses the potential impacts of climate change on the waterways of the Gomeroi in some detail and it is worth extracting these portions in their entirety:³⁵⁰

That's how *Baiame*, through the Rainbow Serpent, provided water for people. If you want to keep that water system going, Gamilaraay have responsibility to maintain it, through usage and through sustainable practices. For instance, not just going there and just bucketing out water for the sake of it, or pumping it or things like that. Because it's been provided, we have a responsibility to maintain that. And we know that droughts are going to come at some stage, to have those chains of pools maintained just makes sense.

If water levels drop because there 's more droughts because of climate change, that means we can't exercise that responsibility. It's our cultural mandate to look after that. Because these chains of pools are sandstone, if we see a drying out of that sandstone to the point where it collapses, that affects that water source and the flow of water. That would impact the story of the *Garriya*. It also shows that actions have consequences. That's a common theme throughout a lot of stories: actions have consequences.

[345] The second lay witness, Mr Booby, comments on the effect climate change will have on the Gomeroi's ability to go out on country and transmit cultural knowledge

³⁴⁸ Tighe Affidavit [16]–[18].

³⁴⁹ Tighe Affidavit [22]–[25].

³⁵⁰ Tighe Affidavit [36]–[37].

as well as the impacts greater fire events will have on significant sites.³⁵¹ Mr Booby also discusses the impact of climate change, noting how increased temperature in particular, raised the likelihood of longer, more intense droughts in his evidence:³⁵²

Those rain events introduce flash flooding. Flash flooding has an enormous impact on how the water's filtered, and clog the streams with leaves and vegetation. Flash flooding would create issues for the Pilliga, including the trees, shrubs, plants, animals. The impact of these flash flooding events would also be on particular animals that were a bit slower and couldn't get away fast. You'd have to look at the breakdown within the moiety system and how those are impacted within that moiety. If this animal belongs to this moiety group and it can't access fresh water because the filtration system's been clogged up, then that's breaking down those linkages within that system.

...

It's my role and responsibility to look after the water system and the Namoi. Part of that cultural responsibility is that I don't send shit downstream to poison my brother's Country. Doing that takes away our right to be reciprocal in the way in which we treat Country with the people downstream. Wee Waa, Pilliga, where that Namoi system flows til it gets out at the gate (Walgett). It gets all the way down to the Murray, to the Murray Darling, to the actual Coorong. It's Brewarrina, it's Broken Hill, Wentworth, all those places.

[346] Mr Wilson also discussed the impacts of climate change, particularly focusing on the impacts of droughts and increasing fires on the ability of the Gomeroi to access Country as well as the transmission of cultural knowledge.³⁵³ Mr Wilson discusses how climate change will affect the landscape and the impacts this will have on the cultural landscape of the Pilliga, including the sites, spiritual beings and stories that reside there.³⁵⁴ He provides:³⁵⁵

There are other ways climate change might disturb or destroy or affect different types of ' sites. These extreme weather events; I had never seen lightning storms in the last couple years like I have seen out at Narran. That happens in the Pilliga too,

³⁵¹ Booby Affidavit [24]–[25], [47]–[49].

³⁵² Booby Affidavit [6], [10].

³⁵³ Wilson Affidavit [6]–[8], [43].

³⁵⁴ Wilson Affidavit [13], [15], [51].

³⁵⁵ Wilson Remittal Affidavit [15], [23].

and everybody shits themselves because there's full on big alerts, big fires. Fire can be generated through too much vegetation in an area or the amount of material that's on the ground. From a climate change point of view, the way that vegetation has changed in the Pilliga means it's hard for us to try and manage how to use that Country and look after sites. Some of these pine trees ' are extremely important to some of the mob. And even some of the other trees like *pillar* or *pillarga*; that's where the Pilliga gets its name from. We used those trees in different ways. If through human intervention they go from the landscape, it's very difficult for us to continue to do our culture there. But from a climate change point of view, if they're dying because there's a lack of water or there's a massive number of fires, we start to worry about the total obliteration of not only our native title, but our cultural landscapes.

...

Drought is another big killer. It's one of those processes that through Gamilaraay and my Yuwaalaraay heritage, we have relationships with, like with the trees. Drought: we don't give it a name. It's either a good season or a bad season. Drought is a beast that we've learnt to embrace. It's longer, and it's hotter, even the winters are hotter, when you have droughts for over five years, six years in this Country. You really feel it's getting cooked and burnt and dying, through drought. So, you look for refugia, but you also look to assist pain relief in some of these areas within the Pilliga, within the Santos Project Area. So that's a real climate change massive screw that has been turned. But we're not able to use any of the tools that we used to put in place to help Country through that period of drought, because we've been taken off the Country. The fences are up. We're not able to access these places, plus we don't have our own cultural mapping of the place done properly don't have the opportunity to apply our methodologies because we're being kept off Country. There's been a massive break in between us managing Country.

Regulatory regime

Safeguard Mechanism

[347] The Project will be subject to the Federal Government's Safeguard Mechanism which serves to manage the emissions of Australia's most significant emitters with a view to reaching 'net zero' by 2050.³⁵⁶

³⁵⁶ GP Remittal Closing Submissions [10], [58]; GVP Remittal Closing Submissions [19].

[348] The Safeguard Mechanism is given effect by Part 3H of the *National Greenhouse and Energy Reporting Act 2007* (**GER Act**). The safeguard mechanism applies to all facilities that emit more than 100,000 tonnes CO₂-e of covered emissions in a financial year.³⁵⁷ These ‘Safeguard Facilities’ must either keep their emissions below a certain ‘baseline’ or manage the excess emissions which exceed that ‘baseline’. The baseline is calculated by reference to Rule 29 of the Safeguard Mechanism Rule.

[349] The ‘baseline’ falls by 4.9% each year to 2030 (following which the number will be set in five-year blocks by the Department of Climate Change, Energy, the Environment and Water). Under the mechanism there are four principal ways a responsible emitter can manage excess emissions:

- (a) surrender Australian carbon credit units or Safeguard Mechanism credit units;
- (b) apply to become a trade-exposed baseline-adjusted facility;
- (c) apply to borrow baseline from the following year;
- (d) apply for a multi-year monitoring period (**MYMP**) whereby a facility proposes to reduce emissions across an extended period so that they fall beneath the baseline over the lifetime of the MYMP (eg beneath 300,00 if the MYMP was for 3 years, 400,000 if it was for 4 years etc).

NSW legislation

[350] In their written contentions the State provided:³⁵⁸

in determining the conditions of environment protection licences pursuant to s 63 of the *Protection of the Environment Operations Act 1997* (NSW) (**PEO Act**), the EPA must take into account the objectives of the EPA as referred to in s 6 of the *Protection of the Environment Administration Act 1991* (NSW) (**PEA Act**). Since the enactment of the *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024* (NSW) on 3 April 2024, those objectives include “taking action in relation to climate change” to “reduce the risks to human health and prevent the degradation of the environment”: PEA Act, s 6(1)(b).

³⁵⁷ *GER Act*, s 22XJ; Safeguard Mechanism Rule r 8.

³⁵⁸ GVP Remittal Closing Submissions [18].

[351] During the course of oral submissions the State noted that Santos would need to seek a revision or variation of the Environmental Protection Licences it currently holds before it can conduct any further activities as the licences it currently holds only relate to the conduct of exploration activities.³⁵⁹ Although the State could not advise what the particular conditions would be, they did note that the EPA would be required to consider the objectives of the EPA, including taking action in relation to climate change. It must also consider any pollution caused or likely to be caused and practical measures that could be taken to prevent, control, mitigate that pollution.³⁶⁰ As noted by the State, the conditions which could be imposed are found at Part 3.5 of the *PEO Act* and ‘include conditions about monitoring, certification, provision of information, mandatory environmental audits, pollution studies, production programs, and conditions relating to waste’.³⁶¹

IPC conditions

[352] The panel has already summarised the conditions to which the Project is subject to pursuant to the IPC’s Development Consent at [4] above. These conditions are extensive and cover a range of issues, however particularly relevant to the consideration of the public interest in this context are conditions B20 and B21.

[353] Condition B20 requires that the grantee parties ‘must ensure that all reasonable and feasible avoidance and mitigation measures are employed so that GHG emissions generated by the development do not cause exceedances of the criteria listed in’ a table identified as ‘Table 6’. These criteria apply only to ‘Scope 1’ and ‘Scope 2’ emissions and, in total, add up to 33.45 Mt CO₂-e over the lifetime of the Project.

[354] Condition B21(a) requires that the grantee parties must ‘develop cumulative maximum forecasts (the total of which may not exceed the criteria in Table 6) for the GHG emissions of the development’ over the 25-year lifetime of the Project. Santos must then:

³⁵⁹ Closing Transcript, Ms Parker, P-37/L37-42.

³⁶⁰ Closing Transcript, Ms Parker, P-38/L1-4; *PEO Act* s 45.

³⁶¹ Closing Transcript. Ms Parker, P-38/L6-11.

monitor and publicly report... the development's actual greenhouse gas emissions against the cumulative forecasts' and 'ensure that the actual greenhouse gas emissions generated by the development at the end of the periods which exceed the forecasts for those periods... are 100% offset within one year after those periods.

- [355] The IPC noted in its statement of reasons that the conditions had been imposed in light of submissions that the direct emissions of the Project had been underestimated, 'which would jeopardise the expected greenhouse gas emissions advantage of CSG over coal'.³⁶² The IPC further noted that Scope 3 emissions were not included in those conditions as they were 'outside the direct control of the [grantee parties] and therefore not able to be reasonably conditioned'.³⁶³
- [356] The IPC also imposed a range of conditions designed to manage the environmental consequences of the Project. These conditions included restrictions on the location and extent of gas wells limiting well pads to 250 m apart, as discussed above at the panel's consideration of s 39(1)(a).

The weighing of public interest

- [357] As already discussed, the panel's task is to weigh public interest, by considering any public benefits and detriments arising from the Project and assessing whether there is a net public interest in the act proceeding. Importantly, the Gomeroi people are also members of the wider community or public to be considered. It must then follow that this net public interest outcome is then weighed against any negative impact upon the registered native title rights and interests of the Gomeroi people, and other factors, through the process of weighing all the criteria under s 39(1).
- [358] In the context of this inquiry, with its particular focus on climate change impacts, this task necessarily includes examining benefits and detriments that span short, medium and long-term timeframes.
- [359] The panel notes a distinction must be made between the economic and other significance of the Project under s 39(1)(c), and the public interests of the wider community as it relates to the energy market for the purpose of s 39(1)(e). This

³⁶² IPC Statement of Reasons [171]–[172].

³⁶³ IPC Statement of Reasons [172].

distinction was particularly relevant for our consideration of the evidence of Mr Kelp and Mr Mudge lodged in this remittal.

[360] Where a detriment is found to exist, the panel has considered what is the appropriate proportionate response that should be implemented to ameliorate the detriment so that the doing of the act may balance in the public interest.

[361] In summary, the three key areas of public interest identified in this matter based on the evidence before us are:

- (a) energy security and affordability;
- (b) environmental protection; and
- (c) social impact.

[362] As has already been noted the evidence in this matter has been extensive and voluminous. Of principal use to the panel in their consideration of the public interest was the evidence adduced in the original inquiry, specifically the EIS and the IPC decision upheld on appeal. There are several key reports in evidence before the Tribunal, including the latest IPCC report, alongside Commonwealth and NSW regulatory, policy and strategy documents. Both Santos and Gomeroi submitted lay and expert evidence reports. The panel also had the benefit of evidence adduced in the expert witness conclave.

Emissions

[363] The EIS lists the scope 1, 2 and 3 emissions from this Project in terms of CH₄ and CO₂ emissions over the life of the Project. When considering the emissions, the panel has had regard to the cumulative emissions and notes that Scope 3 emissions within Australia would constitute an indirect consequence of doing this act. However, it has been put to the Tribunal that Scope 3 emissions for the Project will be treated as the Scope 1 emissions of other users and captured under such users' regulatory obligations.³⁶⁴ We also agree with the contentions of the State that Scope 3 emissions are outside of the control of the grantee parties.

³⁶⁴ Kelp Report [145].

[364] The IPC noted that respondents to its inquiry expressed doubt about the Scope 1 and 2 emissions stated in the EIS. As was noted during the consideration of the evidence above, the panel did not accept the evidence of Mr Mudge that the emissions figures in the EIS should be dramatically uplifted. Considering all the evidence, we are satisfied that the IPC condition B21 making Santos responsible for any exceedance of the emission levels in the EIS is sufficient. Further the panel notes the Safeguard Mechanism, and additional penalties introduced in 2024,³⁶⁵ will regulate emissions and impose remedial steps upon the grantee parties.

[365] However, it is not the emissions themselves of primary concern to the panel in this inquiry, but rather the consequences of these emissions. As such, it is necessary to consider the implications of these emissions in light of the evidence before the panel.

Energy security and affordability

[366] The stated rationale for the Project is to provide additional gas to the Australian domestic gas market, in particular, to supply the state of NSW. The evidence demonstrates the role of gas is to act as both a transitioning energy source for when coal-fired power plants are eventually decommissioned, as well as a ‘firming’ energy source when there are gaps in a future energy market dominated by solar, wind and other non-fossil fuel alternatives. These dual roles of gas are part of a broader national and NSW strategy to achieve the Paris Agreement goals of net zero by 2050.

[367] Santos’ evidence referred to AEMO projections that the National Electricity Market gas supply would experience shortfalls in the future, as existing on and offshore gas wells reduced in gas levels and quality. Mr Kelp also outlined in the quality, and duration of gas reserves and resources for all current gas operations.³⁶⁶ The forecast of a domestic gas shortfall is raised in unusual circumstances, noting Australia has considerable gas capacity and is one of the largest exporters of LNG gas in the world.

³⁶⁵ GVP Remittal Closing Submissions [18] citing *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024* (NSW).

³⁶⁶ See Kelp Report, Table 2.2, Annexure D-2.

- [368] Overall, the evidence highlighted the difficulty in forecasting supply, or indeed demand, in volatile energy markets that are influenced by many factors, including international contracts and geo-political events.
- [369] Nonetheless, AEMO is the independent energy regulator, and the panel has accepted their official forecasts in undertaking its predictive task.
- [370] The panel notes that energy security in the short to medium term is subject to a high degree of uncertainty and that there is a significant portion of the NEM that relies upon gas as a reliable, scaled energy source. The panel also heard from Mr Kelp that the Project was the most ‘shovel ready’ supply of gas that could be brought online to meet the forecasted gas supply shortfall and would satisfy approximately 50% of NSW’s gas needs. This is, in and of itself, a benefit for the wider community and in the public interest.
- [371] The panel notes the report and evidence of the NSW Government before the IPC that it was of the view that the Project is not likely to reduce gas prices. Mr Kelp gave evidence to the panel that there are many variables that could impact upon the price of gas, including international gas prices in setting the domestic spot price, climatic variability (for instance, warmer winters), the competition for gas as feedstock or manufacturing. Other variables include the supporting infrastructure such as the availability of distribution network to service a region.
- [372] While the panel cannot be satisfied that the Project will have the effect of reducing prices, considering all the variables identified above the panel is satisfied that securing domestic sources of gas will assist to prevent upward pressure on gas prices. As such, the panel considers this will be a marginal benefit.
- [373] On balance, the panel is satisfied that energy security and reliability is an important benefit of this Project for the wider community, provided the gas produced is made available only for domestic consumption.

Environmental protections

- [374] The panel has considered extensive expert and traditional owner evidence, as well as the IPC findings relevant to the environmental impacts of the doing of the act.

- [375] In the remitted inquiry, Gomeroi adduced extensive evidence not contested by the other parties, addressing the local and regional impacts caused by climate change, including the ecological impacts of reduced winter rainfall, increased droughts, bushfires and heat waves.³⁶⁷ Professor Mackey provided evidence that global temperature rises would put further pressure on some 107 listed threatened species residing in the Pilliga region ‘highly vulnerable’ to climate change.
- [376] The evidence of the Gomeroi witnesses was that the impacts of natural disasters are already affecting their traditional activities, including trees being affected by bushfires impacting wooden tool manufacturing, as well as native fruits not reaching maturity due to temperature increases.³⁶⁸ A Gomeroi witness gave evidence of flash flooding affecting trees, shrubs, plants and animals through flood debris clogging streams and waterways in the Narrabri region.³⁶⁹ Importantly for the Gomeroi people, as set out in their witness evidence, the Pilliga contains important tree species used to collect ‘Brigalow wood’, described as being special ‘knotted’ wood, light and flexible, and the Gomeroi use this wood culturally to make shields and weapons.³⁷⁰
- [377] Any negative impacts on the natural environment presents a clear detriment to the wider community, but also specifically to the Gomeroi people forming a part of such community having regard to their interwoven cultural connection to the Pilliga, including the lease areas.
- [378] During the IPC inquiry, members of the wider community raised a range of environment risks associated with the Project. To address those concerns the IPC introduced conditions designed to increase monitoring of environmental and water supply impacts. Further, the IPC placed conditions on Santos to ensure saline water was stored, prohibited pilot well flares to reduce the risk of bushfire events, and

³⁶⁷Mackey Report [4]–[14].

³⁶⁸ Tighe Remittal Affidavit, [16]–[19], [22].

³⁶⁹ Booby Remittal Affidavit [6]–[8], [43].

³⁷⁰Booby Affidavit [33]–[35].

placed protective measures in place requiring expert monitoring of biodiversity concerns.³⁷¹

[379] The panel accepts that there are environmental risks which arise as a direct and indirect consequence of the doing of this act. To manage these risks, the panel is of the view that, consistent with the beneficial intent of the *Native Title Act*, conditions should be imposed by the Tribunal to ensure that Gomeroi can actively participate in the IPC processes, including participating in the various expert panels arising from the IPC conditions. Gomeroi people are experts in their traditional knowledge systems as they relate to the environment, and this traditional knowledge will bolster and strengthen the regime which has already been put in place to manage and mitigate the implications of the Project. This traditional knowledge should also be applied to the amelioration of the direct environmental threats through the establishment of a Ranger Program, set out in the determination conditions 13 to 18 below.

[380] The panel accepts that the Project presents environmental risks in the construction and operation of the Project, as well as climate change impacts due to the Project emitting GHG that will contribute to global temperature increases. The panel notes that the IPC has imposed several conditions to address those concerns and is of the view that, along with the imposition of conditions of its own, these effectively ameliorate the detriments.

Social impacts

[381] The panel considered extensive evidence on the social impacts of the Project. This evidence covers the direct and indirect consequences of the act as well as the benefits and detriments.

[382] The IPC findings list the social benefits and risks associated with this Project proceeding, as set out above at [5]. These findings were based on over 11,000 public submissions,³⁷² alongside submissions from various expert panels, the NSW

³⁷¹ IPC Statement of Reasons [150]–[151], [252]–[253], [280]; IPC Development Consent Condition A11, B37, B69.

³⁷² IPC Statement of Reasons [30].

Government departments, federal expert bodies and Santos. Such submissions dealt with the issue of public interest within the context of the NSW planning legislation. The panel notes these findings were made in a different statutory context and are certainly not determinative. Nevertheless, the panel considers the findings of the IPC relevant to its consideration of public interest, particularly noting the direct access the IPC had to the views of the public through its way of operating.

- [383] The native title party adduced evidence from experts, Associate Professor Lansbury and Dr Mallon, in relation to the local and regional impacts of global climate change. Associate Professor Lansbury gave evidence of the specific impacts of climate change on Gomeroi's cultural wellbeing. Dr Mallon gave evidence on the impact of climate change-related events and natural disasters on the residents of Narrabri and surrounding regions. The Gomeroi witnesses gave evidence that the Project's contribution to climate change would impact totemic structures, affect various cultural activities, impede responsibilities to protect and transmit cultural knowledge and uphold cultural duties, including in relation to water. None of this evidence was contested by the other parties.
- [384] The panel accepts the native title party's expert and traditional owner evidence that climate change will contribute to local and regional risks and impacts. However, as the panel has indicated previously, while a direct link can be established between the Project and local risks and impacts of climate change, the Project itself should not be held wholly responsible for all the consequences of climate change. Nonetheless, the contribution of the Project to the effects of climate change is a serious detriment to be considered.
- [385] The panel has formed the view that significant weight must be placed on energy reliability as the absence of reliable, secure energy has significant short to medium term detrimental impacts upon the wider community, including Gomeroi people.³⁷³

³⁷³ See for example Dunn Affidavit [191], [198]; SSD 6367 Assessment Report 23; Dunn Affidavit, Exhibit TD-18, NSW government, *NSW Gas Plan: Protecting what's valuable, Securing our future*, 2; Dunn Affidavit, Exhibit TD-19, NSW Government, *Future of Gas Statement* (2021), 3, 5; Dunn Affidavit, Exhibit TD-20, Australian Competition and Consumer Commission, *Gas Inquiry 2017-2025 –Interim Report* (January 2020), 73, 76; Commonwealth of Australia, *Future Gas Strategy* (May 2024) 13-15, 40.

- [386] Weighing the evidence, the panel finds that the Project offers a net public benefit and has formed the view that the act may be done subject to conditions aimed at addressing the environmental and social impacts discussed throughout these reasons.

Consideration of section 39(1)(f) – any other relevant matters

- [387] Under s 39(1)(f) the panel must take into account any other matters it considers relevant. While this a broad criterion limited only by relevance, the use of the word ‘other’ necessarily excludes grounds that were covered by any of the preceding s 39 criteria.

- [388] The native title party and the grantee parties made contentions under s 39(1)(f) in the 2022 Determination largely going to matters of cultural heritage already considered under the broad umbrella of criteria set at s 39(1). This evidence was not updated or revisited in the remittal.

- [389] Gomeroi contend that the relevant future acts:³⁷⁴

... are not proposed to be done pursuant to a voluntary regime that would adequately protect the native title interests in the cultural heritage values of the land the subject of the applications (s 39(1)(f) of the Act), and nor are those values adequately protected by existing laws.

- [390] In support of this contention, they submit that:³⁷⁵

... due to the inadequacies of other statutory schemes relating to the identification and protection of Indigenous heritage, the future act provisions of the *Native Title Act* provide an important opportunity for the identification and protection of Indigenous cultural heritage as an incident of the recognition and protection of native title rights and interests under the Act.

- [391] Gomeroi contend that approaches, including the ‘avoidance principle’, fencing and buffer zones, provided for in the NSW heritage regime ‘fail to account for the broader significance of landscape and the way in which the proposed Project as a whole will affect the geography of the region’ and ‘fails to protect sites and

³⁷⁴ NTP Contentions [180(d)].

³⁷⁵ NTP Contentions [223].

landscapes like waterways or forested areas, which are imbued with a more general significance'.³⁷⁶ Equally, they say, the measures proposed to preserve cultural heritage under the ACHA and the heritage regime cannot 'predict location of culturally significant intangible sites or areas'.³⁷⁷ Gomeroi submit there is no doubt that the Project will 'affect the cultural integrity' of the landscape.³⁷⁸

[392] Concerning these issues Santos contends that additional measures, such as the Additional Research Program, have been introduced to promote the identification and protection of intangible cultural heritage. They also contend micro-siting promotes the avoidance of sites of intangible cultural heritage and assert consultation with the Gomeroi has been 'extensive... and will continue throughout the life of the Project'.³⁷⁹

[393] Gomeroi also raise issue with Santos's control over and management of cultural heritage processes.³⁸⁰ Noting, in expert evidence, that in the ACHMP the majority of the cultural heritage provisions are directly controlled by Santos, with Santos also controlling the recording of Aboriginal cultural information and the processes of managing and validating that information.³⁸¹

[394] As set out above, the panel was not satisfied that the whole of the Pilliga was a place of particular significance for the purposes of s 39(1)(a)(v). However, the panel accepts that the Pilliga is an important cultural landscape for the Gomeroi people. It is in this context the panel considered the adequacy of the NSW heritage regime to protect Aboriginal cultural heritage in the Project area. The Aboriginal cultural heritage protection regime in NSW is discussed from [55] to [64] above.

[395] It is first important to reiterate that while the panel was satisfied that only Yarrie Lake and Bohena Creek are sites of particular significance for the purposes of s 39(1)(a)(v), it also notes issues with the ACHMP and the *NPW Act*, particularly

³⁷⁶ See for example NTP Contentions [239], [241].

³⁷⁷ NTP Contentions [240], citing Affidavit of Jitendra Kumarage, dated 18 February 2022, [159] (**Kumarage Affidavit**).

³⁷⁸ NTP Contentions [243], citing Kumarage Affidavit [167].

³⁷⁹ GP Contentions [50] & [73].

³⁸⁰ See NTP Contentions [247].

³⁸¹ Kumarage Affidavit [184]–[185].

regarding protection of intangible cultural heritage.³⁸² The difficulty in the native title party's contentions is that there is very little specific evidence before the panel concerning these intangible heritage values and how they will be impacted by the Project. As noted above, Gomeroi contend the Project will damage the integrity of the cultural landscape but there is very little information before the panel concerning how this will specifically manifest or what the implications of the loss of integrity will be for the cultural landscape.

[396] The panel nonetheless accepts that cultural heritage constitutes tangible and intangible dimensions that together form 'one indissoluble whole',³⁸³ and conditions imposed to augment and supplement the ACHMP must be applied to both. The panel has imposed a condition requiring the Additional Research Program, including identification of intangible cultural heritage, be undertaken before the commencement of Phase 2 of the Project. The panel has also required the inclusion of representatives of the Gomeroi in cultural heritage management protocols and the establishment of a Ranger Program to manage Country.

[397] There are no other matters the panel considers relevant to their determination, beyond the question of conditions which it will turn to below.

CONCLUSION

[398] The panel is required to make a determination in this matter, having regard to all the criteria set out in s 39 of the *Native Title Act*, and informed by the facts before it and the material and evidence provided by the parties.

[399] The s 39(1) criteria reflect an attempt by parliament to strike a balance between the protection of native title and the interests of the broader community.

[400] A focus of this remittal was consideration of s 39(1)(e). The panel placed significant weight on energy reliability to find that the Project offers a net public benefit. This net outcome must then be weighed against any negative impact upon

³⁸² See [55]–[64], [230]–[237] above.

³⁸³ See for example *Principal reasons* [2024] FCAFC 26, [340].

the registered native title rights and interests of the Gomeroi people, through the weighing of all criteria under s 39(1).

[401] The panel has weighed the likely effect of the Project on the matters in s 39(1)(a), particularly the likely effect on the Gomeroi way of life, culture and traditions; their freedom of access to the lease areas overlapped by the important cultural landscape and waterways of the Pilliga; and the risk to Yarrie Lake, Bohena Creek and other important places to Gomeroi people, against the expressed wishes of the Gomeroi people that the Project not proceed in the absence of their consent (s 39(1)(b)), the economic significance of the Project (s 39(1)(c)), the net public interest in the doing of the act (s 39(1)(e), and other matters considered relevant by the panel (s 39(1)(f)). The panel has also taken into account the matters set out in s 39(2).

[402] Based on the evidence before it, the panel is satisfied the negative effects of the Project can be mitigated by appropriate, comprehensive conditions and that on balance the future acts should be done.

CONDITIONS

[403] The Tribunal possesses a broad power to determine that an act may be done subject to conditions to be complied with by any of the parties to the inquiry.³⁸⁴

[404] Where the Tribunal makes a determination that an act may be done subject to conditions,³⁸⁵ this has effect, if the act is done, as if the conditions were terms of a contract among the negotiation parties.³⁸⁶

[405] The power of the Tribunal to impose conditions does have some limitations. As noted by Justice Rangiah in the *principal reasons* of the Full Court,³⁸⁷ the Tribunal must not determine a condition which has the effect of entitling the native title

³⁸⁴ *Native Title Act* s 38(1).

³⁸⁵ *Native Title Act* s 38(1)(c).

³⁸⁶ *Native Title Act* s 41.

³⁸⁷ *Principal reasons* [2024] FCAFC 26, [309] (Rangiah J).

party to any ‘profit-sharing’ payments.³⁸⁸ The Tribunal is also prohibited from making a determination as to the amount of compensation to be paid to a native title party under Division 5 of the *Native Title Act*.³⁸⁹ The Tribunal may however impose a bank guarantee or trust condition that an amount is to be paid to secure any future determination of compensation in relation to the act.³⁹⁰

[406] As correctly noted by then-President Dowsett in the 2022 Determination, the subject matter of conditions should be guided by the criteria for making arbitral body determinations listed in s 39 of the *Native Title Act*.³⁹¹

[407] The Tribunal must give a full and final determination of the issues before it. This requirement also extends to conditions, and the Tribunal cannot impose a condition that would defer or delegate the determination of any issues between the parties.³⁹² The evidence adduced in the matter should also support the need for the imposition of any conditions.³⁹³

[408] With these principles in mind and having regard to the facts and evidence before us, the panel is of the view that three categories of conditions should be imposed in this matter.

[409] The first condition category is domestic supply. The panel finds the acts may be done on the condition that all gas extracted from the Project must be used for domestic supply only, to address the forecasted energy supply gap facing the Australian domestic gas market. See reasons set out at [324] to [328] above.

[410] The grantee parties and the State have put evidence and contentions before us to demonstrate that the Project is in the public interest as it is required to secure

³⁸⁸ *Native Title Act* s 38(2).

³⁸⁹ *Native Title Act* ss 41, 50.

³⁹⁰ *Native Title Act* ss 41(3), 41(5).

³⁹¹ 2022 Determination [2022] NNTTA 74, [1025], citing *Walley v Western Australia* [1999] FCA 3, [13]; *Evans v Western Australia* (1997) 77 FCR 193, 213; *Minister for Mines (WA) v Evans* (1998) 163 FLR 274, 283.

³⁹² See *Evans v Western Australia* (1997) 77 FCR 193, 207; *Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal* [2018] NNTTA 24, [158]; *Re Koara People* (1996) 132 FLR 73.

³⁹³ See *Magnesium Resources* [2011] NNTTA 80, [92]–[96].

domestic energy supply in NSW. Whilst acknowledging the detrimental impact of the Project through the contribution of GHG emissions and climate change, those parties also assert it is critical to allow the transition away from reliance on coal-fired power plants to supply the NSW and Australian domestic energy market.

- [411] The Tribunal also has evidence before it that there is a more than adequate amount of gas already being extracted nationally to meet the energy market needs of NSW and across the Australian domestic market, however such gas is contracted to offshore customers and is not readily available to meet the short-term forecasted energy supply gap.
- [412] Having regard to all the evidence before us, for there to be a net weighing that the Project is in the public interest, all of the gas recovered must be used for domestic supply only. We also note the grantee parties have made various broad statements, including as part of the IPC process, indicating that the gas to be extracted from the Project is intended to meet the domestic supply needs.³⁹⁴
- [413] The second condition category of conditions relate to Aboriginal cultural heritage. The panel is of the view that the Additional Research Program, identified in the ACHMP,³⁹⁵ must be implemented and completed prior to the commencement of Phase 2 of the Project to ensure the protection and preservation of cultural heritage. This was also a condition in the 2022 Determination.
- [414] The panel also agrees with native title party's contentions that under the current NSW heritage protection regime there is insufficient protection when it comes to intangible cultural heritage, and the *NPW Act* operating after harm or desecration has already occurred, operating as a deterrent but not a scheme to reduce any likelihood of damage such as might be achieved by requiring pre-clearance surveys be conducted by the traditional owners of the impacted land and waters.³⁹⁶

³⁹⁴ See GP Remittal Contentions [124(b)] and IPC Statement of Reasons [334].

³⁹⁵ Dated 21 February 2022.

³⁹⁶ NTP Remittal Condition Comments [21]–[22].

- [415] Further, also noted by Gomeroi, as the Project is classified as a State Significant Development by the State, an AHIP is not required and the offences relating to the desecration and harm of Aboriginal objects and places do not apply.³⁹⁷
- [416] Based on the evidence before us relating to matters of cultural heritage, the panel has imposed several conditions related to matters addressed in the ACHMP, to address the protection and preservation of cultural heritage. See reasons set out at [230] to [237] above.
- [417] The third condition category deals with a fully funded and implemented Ranger Program covering the entire Pilliga Forest. The program is to be implemented to manage Country, protect the environment, and monitor and manage ecological threats, including through weed control, the protection of water, and cultural burns aimed at minimising fire risk and damage. There is persuasive evidence before the panel relating to the cultural concerns and obligations of the native title party to care for Country across the important cultural landscape of the Pilliga Forest. These concerns and obligations are only heightened in the current climate change environment facing us all. Importantly, this evidence also relates to cultural safety, and cultural safety is an important matter of public interest. This evidence was not contested by any of the parties. Nor did the grantee parties or the State challenge the native title party's expert evidence going to health, environmental, and ecological risks and adverse direct and indirect impacts of the Project.³⁹⁸ The Ranger Program is intended to address these matters for the reasons set out in this determination.
- [418] As noted earlier in these reasons, the parties were given the opportunity to comment on the categories of conditions the Tribunal intended to impose. All parties filed contentions addressing this issue and the panel has had due regard to such contentions.

³⁹⁷ Ibid [22] referencing s 4.41 of the *Environmental Planning and Assessment Act 1979* (NSW).

³⁹⁸ GP Remittal Contentions [130].

DETERMINATION

[419] The Tribunal determines that the proposed future acts, being the grants of Petroleum Production Lease Applications 13, 14, 15 and 16 may be done, subject, in each case, to the following conditions, pursuant to s 38(1)(c) of the *Native Title Act*:

Domestic supply only

1. The grantee parties must:
 - (a) supply all gas extracted in relation to the Project pursuant to the petroleum production leases into the Australian domestic gas market; and
 - (b) not supply the gas for export from Australia.

Cultural heritage

2. When, prior to commencing any activities on the leases, the grantee parties submits a plan of proposed operations, application, approval, or assessment, including in relation to any pipelines, environmental or other matter related to the Project, the grantee parties must at the same time give to the native title party a copy of the proposal, application or assessment, excluding sensitive commercial data, and a plan showing the location of the proposed operations and related infrastructure, including proposed access routes.
3. The Aboriginal Cultural Heritage Working Group set out in Cl 5.3 of the ACHMP, responsible for assisting in the implementation of the plan, shall be comprised of a maximum of 10 people. Up to 8 persons with traditional authority and responsibility for the Pilliga area must be members of, and nominated by, the native title party or any prescribed body corporate determined to hold such native title rights and interests on trust. For the avoidance of doubt, this condition applies notwithstanding any different, contrary or alternative composition provided for in the ACHMP.
4. The Cultural Heritage Coordinator and any of the Cultural Heritage Officers referred to in Cl 5.4 of the ACHMP must be members of, and be nominated by, the native title party or any prescribed body corporate determined to hold such native title rights and interests on trust. Such persons must have traditional authority and responsibility for the Pilliga area and not be an employee of the

grantee parties. For the avoidance of doubt, this condition applies notwithstanding any different, contrary or alternative terms provided for in the ACHMP.

5. All references to the Santos Aboriginal Cultural Heritage Site Register in the ACHMP must be changed to and replaced with 'Narrabri Aboriginal Cultural Heritage Site Register'.
6. The grantee parties must acknowledge and agree that all cultural information obtained and recorded in the Narrabri Aboriginal Cultural Heritage Site Register remains the intellectual property of the native title party and must only be used as permitted by them in relation to the Project and at all times the Register must be used in accordance with any traditional laws and customs that may apply in relation to such information, such as gender restrictions on access.
7. The grantee parties must provide the native title party with access to the Narrabri Aboriginal Cultural Heritage Site Register maintained for the Project whenever requested. All requests from the native title party for access to the Register must be made to the Cultural Heritage Coordinator who must then obtain such access from the grantee parties.
8. Notwithstanding anything to the contrary contained in Cl 5.8.4 of the ACHMP or otherwise, no pre-clearance surveys or work programs are required only when the area has already been surveyed by the parties for the same scope of works and in accordance with the ACHMP and these conditions.
9. Notwithstanding anything to the contrary contained in the ACHMP or otherwise, the grantee parties will not undertake any future ground or surface disturbing work on or within 500 metres of the following sites of significance to the native title party, without the prior written consent of the native title party:
 - (a) Yarrie Lake; and
 - (b) Bohena Creek.
10. Notwithstanding anything to the contrary contained in Cl 7.2 and 7.3 of the ACHMP or otherwise, where there is a dispute between the grantee parties and the Aboriginal Cultural Heritage Working Group or the native title party in relation to any aspect of the ACHMP and the parties are unable to resolve the issue via a meeting, the parties must jointly agree on a suitably qualified

archaeologist or anthropologist, the Expert, to independently decide the matter. The Expert must be funded by the grantee parties and written reasons for the decision must be provided to all parties within five (5) business days of any decision being made.

11. The grantee parties must complete the Additional Research Program, identified in the ACHMP, prior to the commencement of Phase 2 of the Project and prior to any future ground disturbing works, whatsoever, occurring.
12. As part of its activities, the Additional Research Program must identify the locations of Wombat Rock and *Yaminbah* and determine whether those locations are within the Project area. If Wombat Rock and/or *Yaminbah* are found to be located within the Project area, they must be included in Condition 9 above, and the grantee parties may not undertake any future ground or surface disturbing work on or within 500 metres of such sites without the prior written consent of the native title party.

Ranger Program

13. The native title party will establish a Ranger Program for the purpose of monitoring and managing the effects of climate change in the Pilliga Forest, including the Project area.
14. The grantee parties must pay all reasonable costs, fees, disbursements and expenses incurred in connection with establishment and operation of the Ranger Program.
15. The Ranger Program will be established for the duration of the operation of the Project, up to and including rehabilitation, and will undertake the following activities in the Pilliga Forest, including the Project area:
 - (a) biodiversity monitoring and research, including environmental sustainability;
 - (b) traditional knowledge transfer and ceremony;
 - (c) cultural awareness;
 - (d) fire management and mitigation, including utilising traditional methods of fire management and controlled burns;

- (e) cultural site management, monitoring and reporting to the Aboriginal Cultural Heritage Working Group anything relevant for their role;
 - (f) water management and monitoring; and
 - (g) feral animal and weed management.
16. The grantee parties must cooperate with the native title party as required to ensure the success of the Ranger Program, including by granting any required access to the Project area and sharing any information, not of a commercially sensitive nature, which the grantee parties have in relation to environmental, ecological and water impacts of the Project.
17. The grantee parties and the State must use all reasonable endeavours to ensure that the native title party has an appointed representative on, and is an active and funded participant in, all committees to be established in relation to the Project, including but not limited to:
- (a) the local committee tasked with setting the direction of the Gas Community Benefit Fund;
 - (b) the Community Consultative Committee referred to by the IPC;
 - (c) the Water Technical Advisory Group referred to by the IPC;
 - (d) the Greenhouse Gas Emissions Advisory Group referred to by the IPC;
 - (e) the Biodiversity Advisory Group referred to by the IPC; and
 - (f) the Aboriginal Cultural Heritage Advisory Group referred to by the IPC.
18. Following grant of the leases, the grantee parties must ensure that all persons who are not the native title party and who are engaged directly or indirectly by or on behalf of the grantee parties to work on the Project are given appropriate information, provided by the native title party through the Ranger Program, for the following purposes:
- (a) to familiarise such persons with the traditions and culture of the native title party;
 - (b) to promote a knowledge and understanding of, and respect for, the traditions and culture of the native title party; and

- (c) to foster good relationships between the native title party and others accessing the Project area.

General

19. Any right of the native title party to access or use the land the subject of the leases is not to be restricted except in relation to those parts of the land which are used for productive operations or for safety or security reasons related to those activities.
20. The grantee parties shall take all reasonable action to ensure compliance with these conditions by its employees, agents and contractors.
21. Upon any assignment of the leases, the assignee shall be bound by these conditions.
22. All references to the native title party in these conditions shall include any prescribed body corporate determined to hold such native title rights and interests on trust.
23. For the avoidance of doubt, any or all of these conditions may be varied by the parties by mutual agreement, in writing.

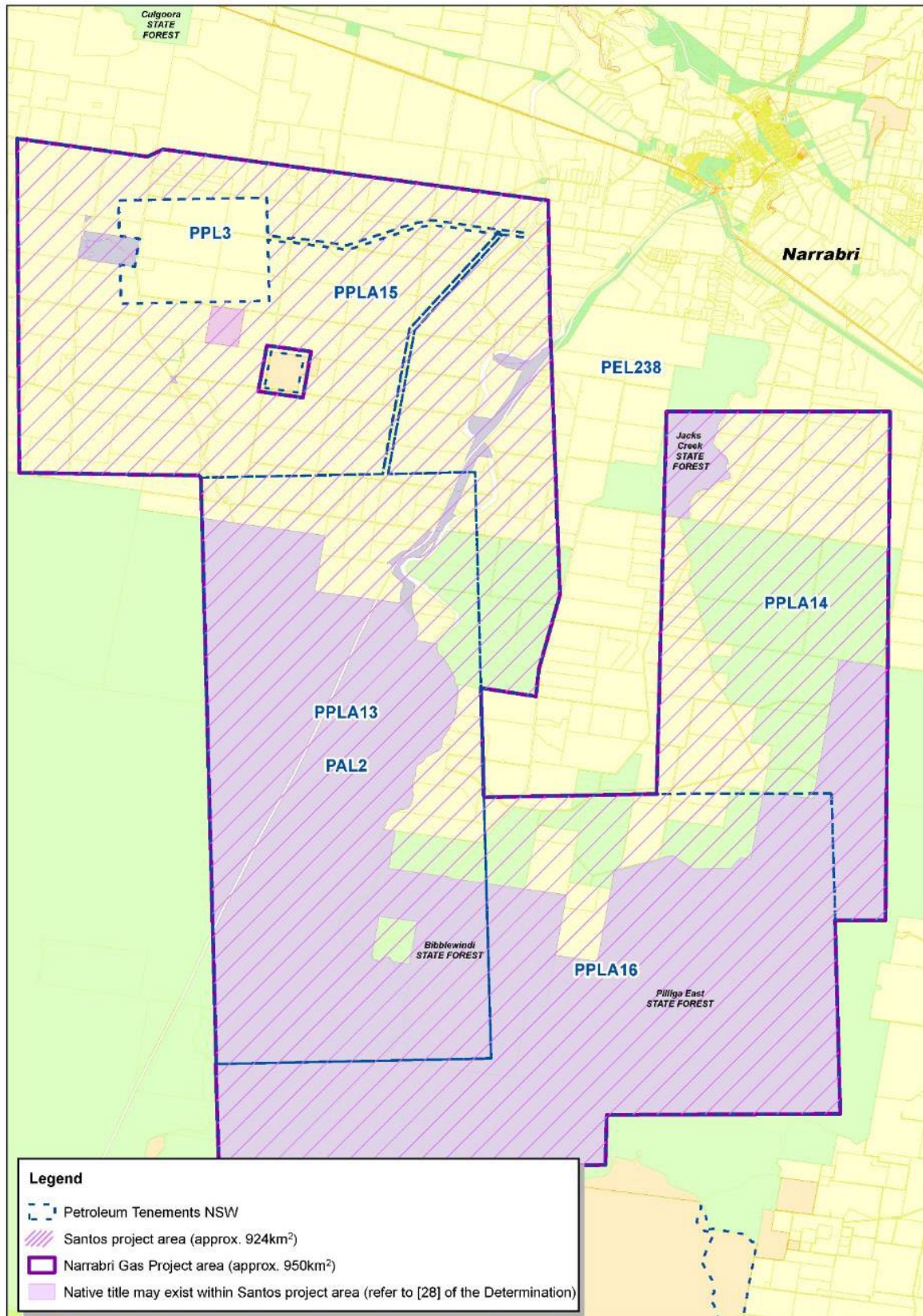
Kevin Smith
President

Lisa Eaton
Member

Glen Kelly
Member

19 May 2025

ANNEXURE 1



ANNEXURE 2

