ACCR

Investor Bulletin: Muddying the waters - industry lobbying on offshore oil and gas regulation

15 November 2023

Recent lobbying by the oil and gas industry claiming Australia's offshore oil and gas regulation system is "broken" is a distraction from company failings and a threat to First Nations' rights to consultation.

Over the past few months, more than twenty stories have appeared in the Australian media claiming the nation's offshore oil and gas approvals process is a "broken" system, with calls for "urgent" reform".[1] The oil and gas industry has been at the forefront of these calls, including the CEO of Woodside and the Australian Energy Producers (AEP, formerly APPEA).

> *"Some of Australia's biggest nation-building projects are entangled in a broken offshore environmental regulation system that is threatening the country's economy and climate change targets."* Samantha McCulloch, CEO AEP.[2]

> "*The latest evidence of an approvals system under extreme stress."* Meg O'Neill, CEO Woodside.[3]

A focus of this industry lobbying is the suggestion that oil and gas project approvals are taking too long because the regulatory system overseeing consultation with Traditional Owners is allegedly unfair, uncertain or overly complex.

> *"Consultation with traditional owners has been an important part of our sector's work for decades. But procedural fairness must be expected… it is difficult to understand how a business that plays by the rules, consults with stakeholders in good faith and is granted an approval by the national regulator should then see that approval overturned."* Samantha McCulloch, CEO AEP.[4]

Over the past year, successful legal challenges from Traditional Owners have stalled two large gas projects, Woodside's Scarborough and Santos' Barossa project. Unsurprisingly, both companies are now facing concerns from the market about potential cost overruns and changes to production guidance.

In both cases, the courts found that the regulations were workable and that the company in question had simply failed to comply with those regulations. ACCR's analysis is that these cases show a functioning system, not a broken system.

We are concerned that lobbying by the oil and gas industry is shifting discussion away from the central issue. Namely, a failure by companies to comply with regulations on consultation, which in turn raises important questions around corporate governance and project execution.

Additionally, we are concerned about the potential impact on First Nations rights to consultation, if lobbying for "reform" is successful.

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[1] See Appendix 3.
[2] Samantha McCulloch, The Australian, 2 October 2023. Energy future at mercy of regulatory grey zone.
[3] Meg O'Neill, the West, 20 October 2023, Approvals chaos threatens WA jobs and energy security.
[4] Samantha McCulloch, The Australian, 2 October 2023. Energy future at mercy of regulatory grey zone.

Key points:

- Oil and gas projects have significant environmental, cultural and economic impacts on First Nations communities, both during construction and operation, and over subsequent decades. Proper consultation prior to a project commencing is an essential component for minimising harm to First Nations communities.

- Existing legislation provides the bare minimum in protecting the rights of Traditional Owners to be properly consulted. For example, the international legal principle of Free, Prior and Informed Consent for Indigenous Peoples (FPIC) is generally not reflected in Australian law, although it is the stated policy of Woodside.[5,6]

- A clear and robust regulatory framework makes Australia an attractive place to do business. Investors benefit when the companies they invest in are discharging their consultation obligations in compliance with both the letter and spirit of the law. Complying with the law is a necessary cost of business for oil and gas companies.

- Over the past year, both Woodside's Scarborough and Santos' Barossa projects have faced legal challenges in the Federal Court from Traditional Owners over an alleged lack of consultation. In both cases, the challenges were successful, with the court finding the regulations are workable, and that it was the companies and the regulator (NOPSEMA) that had not complied with the law in regards to consultation.

    - **Santos v Tipakalippa (2022):** A group of Tiwi Islanders contended that they, as well as the other seven clans on the Tiwi Islands, should have been consulted about environmental approvals for drilling for Santos' Barossa project.[7] Santos had not consulted these Tiwi Islanders at all. The Full Federal Court ni concluded the Tiwi Islanders had "interests" within the meaning of the regulations, and further held that "Santos did not address these matters in the Drilling EP as we consider they should have."

    - **Cooper v NOPSEMA (2023):** This case came about after the regulator, NOPSEMA, decided that while it was not reasonably satisfied that Woodside had met its requirements to consult with Traditional Owners, it would not reject the company's Environmental Plan for seismic surveys, instead imposing a condition to do further consultation, i.e. an approve now, consult later approach. The Federal Court, however, ruled that consultation is a fundamental step in assessing the facts, and without those details neither the company nor the regulator can make a proper assessment and make decisions.[8] Therefore the court ruled that approval should be withdrawn until proper consultation had been undertaken.

- **In both cases, it was inadequate consultation by Santos and Woodside at the correct stages of the process that led to successful legal challenges.** The court rulings clarified the correct interpretation of the law, and the regulator's guidelines have since been updated following detailed engagement with industry.

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[5] Office of the High Commissioner for Human Rights, 2013, Free, Prior and Informed Consent of Indigenous Peoples.

[6] Woodside, 2021. First Nations Communities Policy.

[7] For more detail on the Santos v Tippakalippa case, see ACCR's March 2023 webinar and presentation https://www.accr.org.au/insights/accr-presentation-on-santos-ltd-2023-agm/

[8] NOPSEMA, 28 September 2023, Scarborough court decision.

- **In ACCR's view, these two court cases revealed greater clarity about what constitutes adequate consultation with Traditional Owners - not a broken system, or regulatory uncertainty.**
- **ACCR is concerned that industry lobbying will have the impact of undermining the rights of First Nations people to proper consultation.** While public lobbying to date has been of a general nature, e.g. claims of a "broken" system, we encourage Woodside Energy Ltd and Australian Energy Producers in particular to publicly clarify what specific legislative changes they are seeking, including with regard to "relevant persons", "interests" and timelines for consultation.

Key stewardship considerations for investors

Lobbying concerns

ACCR research has shown that Woodside and Santos – Australia's two largest oil and gas companies – perform poorly on assessments of their disclosure and governance of their climate lobbying and political spending.[9] They underperform their US peers on political spending disclosures by a large margin. Investor scrutiny will likely improve monitoring and disclosure of lobbying activities, and allow shareholders to understand the companies' risk profiles better.

Costs of inadequate consultation

Companies that conduct proper consultation will face less uncertainty about investments, manage legal and regulatory risks better, reduce risks of delays and cost overruns, and ensure they remain attractive to investors.

The recent court findings suggest that the companies in question may be insufficiently resourcing and prioritising genuine consultation efforts.

- Santos' Barossa project:
    - The start of drilling for Santos' Barossa project has been delayed for over a year, with an estimated cost of $350 million to September 2023 for the drilling vessel to remain idle.[10]
    - The pipelay activities have also been delayed, with NOPSEMA issuing a General Direction requiring Santos to conduct wider consultation.
    - Subsequent to Santos announcing that it had completed this consultation and was going to commence the pipelay, on 2 November 2023 the Federal Court agreed to an injunction that prevented the start of this activity in the light of new information relating to undersea archaeology.[11] The court expected Santos "would accommodate risks of the kind involved with cessation or disruption of works".[12] A civil enforcement action will be heard in the coming weeks.
    - Santos maintains that the project can still be delivered within FID guidance, as long as it can start the drilling and pipelay activities by end 2023.[13] The market is however

[9] ACCR, October 2023, Benchmarking for change: corporate political expenditure and climate lobbying in Australia.
[10] NT News. 14 September 2023. Santos confident Barossa project will resume work this year. See also IEEFA, September 2023, Crunch time for stalled Barossa gas project.
[11] On the archaeology, see for example ABC, 26 October 2023. Tiwi elders fear Santos pipeline risks committing an undersea Juukan Gorge-style disaster.
[12] Australian Financial Review, 2 November 2023, Court halts Santos' Barossa pipeline to answer 'serious' questions.
[13] Santos, 2 November 2023, Barossa gas project update.

questioning whether this is credible, with some analysts estimating a 12 month delay and a 20% cost increase.[14]

- To date, Woodside has not informed the market that the suspended approval for its seismic testing will cause any delays or cost overruns for its Scarborough project. The proposed seismic testing is not essential to the construction of the project. It resubmitted its plan only ten days after the ruling, despite clear instructions from NOPSEMA and the court that its consultation had been inadequate. This gambit from Woodside raises the risk profile of the project, and casts doubt on whether Woodside is committed to meaningful consultation with Traditional Owners.

Actions investors may take

- Engage with Woodside Energy Ltd and Australian Energy Producers to understand:
  - the intent behind their lobbying ;
  - what specific legislative changes they are seeking, including with regard to “relevant persons”, “interests”, timelines for consultation, and incorporating the principle of Free, Prior and informed Consent.
- Ask Woodside Energy Ltd and Santos Ltd to improve their disclosure and governance of political spending in line with the CPA-Zicklin Index. Neither company appears to perform well on ‘best practice’ benchmarks (see assessments at the end of this Bulletin and in ACCR’s report ‘Benchmarking for change’.)[15]

1. Lobbying by the oil and gas industry distracts from company failings

In the past month, there has been significant media activity claiming that the system of consultation with Traditional Owners about offshore oil and gas regulation is in need of “urgent reform”. The primary argument is that oil and gas project approvals are taking too long because the regulatory system overseeing consultation with Traditional Owners is allegedly unfair, uncertain or overly complex.

Two court cases reveal a functioning system, not a broken system

Two major cases have brought greater clarity about the consultation process for offshore oil and gas: Santos v Tipakalippa (2022) and Cooper v NOPSEMA (2023). For further details on these cases see the ‘Closer look’ Appendices below.

In both cases, the judges clearly stated that the regulations are workable, and it is the companies and the regulator that have not complied with the law. It was inadequate consultation by Woodside and Santos at the correct stages of the planning process that led to the successful legal challenges, resulting in significant costs to business.

[14] Australian Financial Review, 5 November 2023, Santos bulls face test amid Barossa gas threat.
[15] ACCR, October 2023, Benchmarking for change: corporate political expenditure and climate lobbying in Australia.

Both cases provided further clarity around what constitutes adequate consultation with First Nations groups. For example, in Santos v Tipakalippa (2022), the Federal Court specified that it should not be assumed that sending an email with an information package (even if followed up with another email) constitutes adequate consultation.[16]

Following the Tippakalippa ruling, the regulator (NOPSEMA) rapidly updated the guidelines in close collaboration with industry to "ensure the information provided is clear and consistent with the regulations and case law". The regulator also returned all Environment Plans to titleholders to check their consultations were complete. This has created a temporary backlog of approvals while companies and the regulator assess progress.

This is the legal and regulatory system working properly to ensure consultation is undertaken in accordance with the law, while providing clarity and certainty to companies and affected communities. Successful legal challenges to offshore oil and gas projects have been very rare in Australia. It is not evidence of a "broken system" or one "under extreme stress".

Companies are expected to make efforts appropriate to the scale of impacts of the project and the range and diversity of the communities affected. The companies now need to factor these legal and regulatory risks - and the time and resources necessary for consultation - into their project planning.

2. Should the regulations be reformed?

As indicated above, recent court findings have delivered a higher degree of clarity for companies around what constitutes adequate consultation. Following extensive engagement with the offshore oil and gas industry, NOPSEMA issued refreshed consultation guidelines in May 2023. The resultant changes were only "minor updates" which suggests that the regulations and guidelines are now clear enough for companies to proceed.[17]

However, in response to questions about the Tipakalippa case, Resources Minister Madeleine King stated in Parliament that:

> *"We know that there has been a distressing lack of genuine consultation and collaboration with First Nations Australians for more than two centuries in this country and we aim to fix that."*[18]

In May 2023, the Government announced a "review of the environmental management regime for offshore petroleum and greenhouse gas storage activities, with a particular focus on consultation, including with First Nations Australians."[19] This review is currently underway.

NOPSEMA has already provided industry feedback to the Department of Industry, Science and Resources (DISR) for consideration in the regulatory review. In NOPSEMA's engagement with industry stakeholders, some parties raised three outstanding concerns with the regulations:

[16] Federal Court of Australia, 2 December 2022. "A consultation with First Nations groups may not be as simple (or quick) as sending an email with a package of information, which is apparently how Santos demonstrated it had consulted the [Tiwi Land Council]… In other words, it cannot be assumed that by sending an email with an information package attached, and perhaps following up with one further email, the requirement to consult in reg 11A has been satisfied." Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193 [94].
[17] NOPSEMA, 12 May 2023, Consultation in the course of preparing an Environment Plan guideline published.
[18] Sky News. 10 August 2023. Government aware of distressing lack of genuine consultation with First Nations peoples.
[19] The Hon Madeleine King MP, 9 May 2023. Budget promotes energy security and a low carbon future.

1. The legislation itself could be improved, specifically reg 11A of the Offshore Petroleum and Greenhouse Gas (Environment) Regulations 2009, "providing definitions and clarity of consultation requirements".[20]
2. A need for "streamlining the public comment and relevant persons consultation process and alignment with consultation requirements of other legislation."[21]
3. The lack of clarity in Australian regulations about "informed consent".[22]

The first two matters seem to be challenging the courts' interpretation of "relevant persons" as too broad, thus creating uncertainty for companies as they approach their consultation responsibilities. However, the courts' findings and the regulator's approach have laid out clear principles for a titleholder to design its own consultation appropriate to the project - i.e. there is no one size fits all approach - it is hard to see how the legislation could be worded to encompass all possible scenarios.[23] The court rulings brought in current practice in other environmental and cultural heritage law to provide adequate context.

On the third matter, regulatory change could provide an opportunity to strengthen the regulatory framework to reflect the international standard of Free, Prior and Informed Consent (FPIC). The Federal Government has already committed to do so following the inquiry into the Juukan Gorge disaster.[24] Woodside's own First Nations Community Policy commits the company to "engaging with affected communities of First Nations in ways that are consistent with the principles of seeking Free, Prior and Informed Consent."[25]

It is unclear what the intent of the current lobbying by Woodside and AEP is; if they are seeking specific legislative changes, including with regard to "relevant persons", "interests", timelines for consultation, and incorporating the principle of Free, Prior and informed Consent; and if they are seeking to strengthen, or undermine, First Nations rights to consultation.

If the legislation is to be changed, investors might rightly expect that Woodside will be calling for the new regulations to include the principles of FPIC, although this has been notably absent from their media appearances, despite Woodside's own stated policy.

3. Institutional investors and macro-stewardship

Macro stewardship is defined as:

> "The idea [that] market participants have a responsibility to help preserve the integrity of the whole financial system, keeping it in healthy service of society and the planet. This should be done by engaging with regulators, policymakers and many other changemakers."[26]

Institutional investors should expect robust and clear regulations, and that the companies they invest in are acting in compliance with both the letter and spirit of the law. Good regulations exist to balance

[20] NOPSEMA, 12 May 2023, Feedback on the NOPSEMA Consultation in the course of preparing an Environment Plan guideline.
[21] ibid.
[22] ibid.
[23] NOPSEMA, 15 December 2022, Consultation in the course of preparing an Environment Plan guideline. See also Corrs Chambers Westgarth, 21 December 2023, Ensuring effective stakeholder consultation following Santos v Tipakalippa.
[24] DCCEEW, November 2022. Australian response to the destruction of Juukan Gorge.
[25] Woodside, 2021. First Nations Communities Policy.
[26] Aviva Investors, 21 September 2022, Macro stewardship: An introduction.

the needs of many stakeholders. Adequate consultation is enshrined in law and is fundamental not only for legal approvals of projects but also for any company's social licence to operate.

Companies which conduct full and thorough consultation with affected communities will face less uncertainty about investments, manage legal and regulatory risks better, reduce risks of delays and cost overruns, and ensure they remain attractive to investors. It is also an important hallmark of responsible corporate governance, particularly when proposed projects have significant impacts on local communities, the natural environment, and global climate change goals.

4. Lobbying and political expenditure

Businesses have an influential role in shaping Australian politics and regulation. Transparency and accountability for corporate political spending and lobbying are therefore essential to the healthy functioning of Australia's democratic political system, and "fair, efficient and informed markets."[27]

The UN Principles for Responsible Investment (PRI) initiative, the Australian Council of Superannuation Investors (ACSI), the Investor Group on Climate Change (IGCC) and other groups concerned with responsible investment have all noted that stewardship to promote good governance of corporate political engagement is part of responsible investment practice.

The important role of policy in Australia's energy transition makes this all the more apparent. The recent public criticism of oil and gas regulations is just one instance of companies and industry associations lobbying in ways that may not serve the best interests of their shareholders.
Yet company lobbying is poorly disclosed in Australia. Investors and other important stakeholders have limited insight into the political spending and climate lobbying activities of Australian companies. Australian disclosure requirements for political spending are less stringent than in the US and the UK.[28]

This lack of transparency can increase reputational, legal and regulatory risks to companies and shareholders.

ACCR recently found that top ASX companies have poor governance and disclosure of their political spending, compared to the US-listed S&P 500 companies.[29] We also found that the five energy & resources companies we assessed do not have strong disclosure and governance of their climate lobbying. Woodside and Santos were both poor performers on best practice benchmarks the CPA-Zicklin Index and the Global Standard on Responsible Climate Lobbying.

The charts below, from ACCR's report Benchmarking for change: corporate political expenditure and climate lobbying in Australia, show both companies appear to perform poorly on two international benchmarks.

[27] ASIC Deputy Chair Karen Chester, 10 May 2023, ASIC and greenwashing antidotes.
[28] ACCR, June 2016, Corporate Political Expenditure in Australia, p4.
[29] ACCR, October 2023, Benchmarking for change: corporate political expenditure and climate lobbying in Australia.

Chart 1: Woodside and Santos on the CPA-Zicklin Index (political spending transparency, accountability)

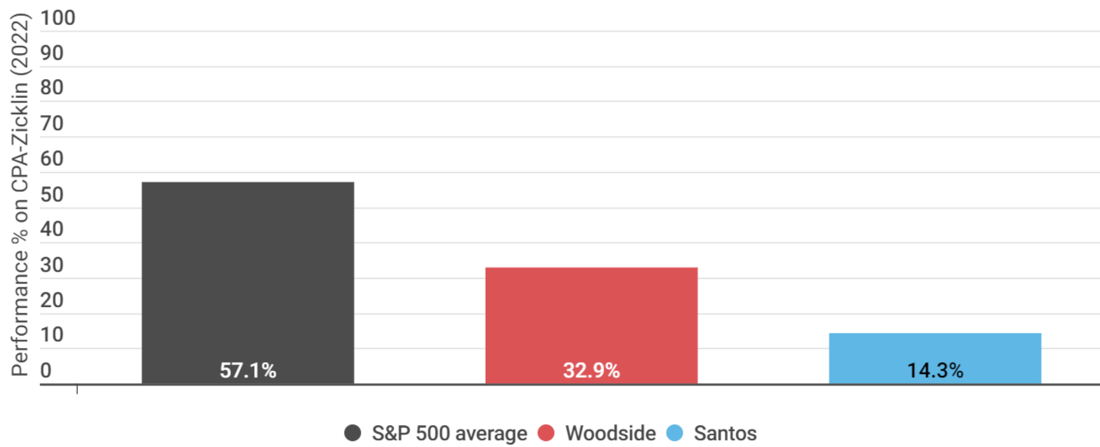

Chart: ACCR | Source: ISS ESG (WDS, STO), CPA-Zicklin (S&P 500)

Chart 2: Pilot assessments - Woodside and Santos on the Global Standard on Responsible Climate Lobbying

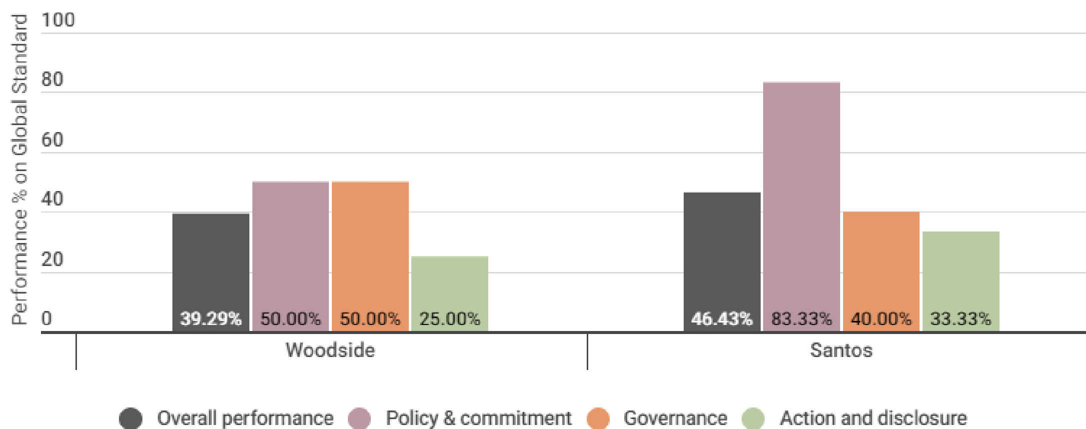

Chart: ACCR | Source: ACCR assessments

Appendix 1: Closer look - Full Federal Court ruling on Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193[30]

Santos applied under the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth) to sink eight wells in an area of the Timor Sea almost directly north of the Tiwi Islands in Commonwealth waters of the Timor Sea.

Mr Tipakalippa contended that the Regulations require that he, and other members of the Munupi clan of which he is an elder, as well as the other seven clans on the Tiwi Islands, be consulted by Santos because the project is taking place in, and is capable of having an impact on, sea country and sea country resources to which they have traditional connections.

The Federal Court found in favour of Mr Tipakalippa. Santos appealed to the Full Federal Court.
In December 2022, the Full Federal Court found unanimously that the evidence of Tiwi Islanders' interests before NOPSEMA demonstrated an "immediate and direct" interest in the sea country, of a kind well known to Australian law (at [68]). Further, traditional interests in sea country are recognised in Commonwealth laws including the ATSI Heritage Protection Act 1984 [86-69] and the Full Federal Court concluded that Mr Tipakalippa and other Tiwi Islanders had "interests" within the meaning of reg 11A (OPGGS).

In response to Santos' and NOPSEMA's submission that the Court's interpretation of "interests" renders the relevant legislation "unworkable", the Court held that "a statutory obligation to consult must be understood in a practicable and reasonable way so that it is capable of performance." [95] However, they saw "no particular difficulty with the proposition that the First Nations peoples who have a traditional connection to the sea, and to the marine resources it holds, which may be affected by Santos' activities under the Drilling EP are reasonably ascertainable" [90] and therefore could be consulted with meaningfully. Although AEP has claimed there was a lack of "procedural fairness", the Full Federal Court has in fact directly rejected that argument.[31]

The Court set out clearly the procedure that should be followed. There is no suggestion of any factor or circumstance that demands regulatory amendment.

The Full Court has gone to some length to emphasise that the problem in this case was with Santos' and NOPSEMA's misunderstanding of the Regulations, and Santos' failure to follow the Regulations, rather than any unworkability in the Court's interpretation of the Regulations.

[30] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2022/2022fcafc0193
[31] Federal Court, 2 December 2022. https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2022/2022fcafc0193 [81-84].

Appendix 2: Closer look - Cooper v NOPSEMA (No 2) [2023] FCA 1158

Woodside applied for approval to undertake a marine seismic survey for its Scarborough project off the coast of the Pilbara region in WA. To prepare its Environment Plan (EP), it was required to consult with affected parties, including Aboriginal and Torres Strait Islander communities whose cultural interests may be impacted. When considering whether to approve an EP, NOPSEMA must assess the reported impacts and the measures being taken to minimise them.

NOPSEMA concluded that it was not reasonably satisfied that the requirement for consultation with Traditional Owners had been met. That is to say, from the outset it was clear that Woodside had not discharged its obligation to consult with affected persons.

However, NOPSEMA did not reject the EP. Instead, it approved the EP and imposed conditions requiring Woodside to consult further and minimise potential impacts found following consultation. In other words, 'approve now, consult later'.

The relevant issue in the court case was whether NOPSEMA could impose conditions like this when it was not satisfied that the consultation required by the regulations had been carried out.
In its judgment, the court re-emphasised the foundational importance of consultation in the EP approval process. Consultation with affected parties is the mechanism through which 'details on the environmental impacts and risks' are ascertained. NOPSEMA is consequently 'materially dependent upon the consultation undertaken by the titleholder in order to identify all environmental impacts and risks' and without consultation and reporting as required, NOPSEMA does not even 'have the foundation to evaluate whether the other criteria [for acceptance of the EP] have been met'. In summary, regulatory oversight could not be effective without suitable consultation as required under the regulations.

The court found that NOPSEMA did not have the power to approve Woodsides EP where consultation requirements had not first been satisfied. Woodside must conduct further, adequate consultation with Traditional Owners before receiving approval for the seismic surveys.

Woodside resubmitted its EP only ten days after the court ruling, with minimal changes. This suggests Woodside may not be committed to the full and proper consultation with Traditional Owners which both the regulator and the court required.

Appendix 3: Sample of recent media articles indicating industry lobbying

- The Australian, 2 October 2023, Editorial, Chief Executive AEP; Energy future at mercy of regulatory grey zone.
- The Australian, 2 October 2023, Broken oil and gas approvals system 'to drive away energy investment'
- The Australian, 3 October 2023, Editorial; 'Making a mess of energy is starting to take its toll'
- The West Australian, 18 October 2023; Woodside Energy posts rise in production, says Scarborough delay won't stop 2026 timeline
- The West Australian, 18 October 2023; Woodside calls for gas-permitting reforms after ruling.
- The Australian, 18 October 2023, Woodside calls for regulatory reform as legal cases slow new developments
- Australian Financial Review, 18 October 2023, Woodside calls for 'urgent' reforms amid threat to Scarborough gas.
- Sydney Morning Herald, 18 October 2023, Woodside seeks urgent reform to avert more gas delays
- The Daily Telegraph,18 October 2023, Woodside calls for reform as opponents use courts to disrupt
- The West Australian, 20 October 2023, Woodside chief executive Meg O'Neill warns jobs, reliable power and green energy at risk from red tape.
- The West Australian, 20 October 2023, Editorial, Meg O'Neil; Approvals chaos threatens WA jobs and energy security
- The West Australian, 20 October 2023, Editorial; Why the stable gas supply that WA takes for granted is at risk
- Australian Energy Producers, 27 October 2023, 'Media Release: Offshore regulatory approval chaos as wait times blow out to 562 days and counting'.
- The Australian, 27 October 2023. Offshore gas regulator NOPSEMA says compliance has become more complex from Scarborough stall
- Daily Telegraph, 31 October 2023, 'We need to step on the gas for everyone's sake'.
- The Australian, 1 November 2023, After spate of legal wins against gas developers, federal government mulls relaxing consultation requirements.
- The Australian, 2 November 2023, Santos blocked from pipeline work on $5.3bn Barossa project in latest Federal Court blow.
- The West Australian, 5 November 2023, Scarborough timeline the focus for Woodside Energy investors.
- The Australian, 8 November 2023. Woodside expects environmental lawsuits as the market frets about the Scarborough LNG project.
- The West Australian, 8 November 2023. Woodside Energy boss Meg O'Neill doubles down on regulation overhaul to protect WA's energy security.
- The Australian. 9 November 2023. Woodside pushes on with Scarborough plan after consultation controversy.
- Australian Financial Review, 9 November 2023. Woodside's slow-going on $7.8b clean energy spend.

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