



Environmental Defenders Office

XX December 2022

Molly Choucair
Senior Executive Leader, Markets Enforcement
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email: Molly.Choucair@asic.gov.au

Copied to: Jennifer.Balding@asic.gov.au; info@asx.com.au

Dear Ms Choucair

Complaint about potential misleading or deceptive conduct: Santos Ltd ASX Announcement about Santos NA Barossa Pty Ltd v Tipakalippa [2022] FCAFC 193

1. We act for the Environment Centre NT Inc. Our client is the peak community sector environmental organisation in the Northern Territory.
2. Our client is concerned about statements made by Santos Ltd (**Santos**) in an ASX Announcement released on 2 December 2022 (**Announcement**), which is contained at Annexure A to this complaint. Those statements are as follows:

Santos notes the decision by the Full Federal Court today to dismiss the appeal from Justice Bromberg's decision in September, which set aside NOPSEMA's approval of the Barossa Gas Project's Drilling Environmental Plan (Plan).

...

As a result, Santos does not anticipate any material cost or schedule impact, and first gas from the Barossa Gas Project remains on track to be delivered in the first half of 2025.

3. This representation has subsequently been repeated in extensive media coverage of the Full Federal Court's decision in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 (**Full Court's decision**), including in the Australian Financial Review,¹ Reuters,² and the ABC.³
4. Our client is concerned that Santos' representation that it "does not anticipate any material cost or schedule impact" to the Barossa project as a result of the Full Court's decision is inconsistent with Santos' evidence at first instance that, if drilling at its Barossa project were enjoined, it would suffer

¹ <https://www.afr.com/companies/energy/santos-ruling-risks-hitting-east-coast-gas-next-year-20221204-p5c3j3>.

² <https://www.reuters.com/business/energy/australia-court-rejects-santos-bid-resume-barossa-gas-drilling-2022-12-02/>.

³ <https://www.abc.net.au/news/2022-12-04/nt-explainer-santos-federal-court-loss-barossa-gas/101730568>.

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“a daily loss in the order of hundreds of thousands of dollars” and that “a delay in the commencement of drilling operations will prejudicially impact upon the scheduled work necessary to be undertaken once drilling is completed, because essential contractors and equipment may become unavailable”.⁴ The primary judge denied an application for an interlocutory injunction primarily due to the “largely certain loss and damage” that an injunction would cause Santos.⁵

5. For the reasons set out below, our client considers that the representation that Santos “does not anticipate any material cost or schedule impact” to the Barossa project as a result of the Full Court’s decision may constitute misleading or deceptive conduct, and therefore contravene s 1041H of the *Corporations Act 2001* (Cth), s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and/or s 18 of the *Australian Consumer Law* (**ACL**) (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)).
6. Our client considers this representation is particularly material in circumstances where it and other involved parties frequently receive enquiries from actual or potential investors and financiers of Santos’ Barossa project about the impact the Full Court’s decision will have on the profitability of the project. In those circumstances, Santos’ representation that it “does not anticipate any material cost or schedule impact” to the project is a representation that actual or potential investors and financiers would clearly rely upon.

The Full Court’s decision and the evidence given at first instance

7. On 14 March 2022, the National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) accepted Santos NA Barossa Pty Ltd’s environmental plan for offshore drilling in the Timor Sea some 140 kilometres north of the Tiwi Islands for the purposes of Santos’ Barossa project (**Drilling EP**).
8. On 6 May 2022, NOPSEMA published its reasons for accepting the Drilling EP.
9. On 3 June 2022, the applicant at first instance, Mr Dennis Tipakalippa, an elder, senior law man and traditional owner of the Munupi clan of the Tiwi Islands, filed an originating application for judicial review of NOPSEMA’s decision.
10. On 8 July 2022, the applicant sought an interlocutory injunction prohibiting the commencement of drilling under the Drilling EP.
11. On 14 July 2022, the primary judge dismissed the application for an interlocutory injunction. His Honour concluded that, despite the strength of the applicant’s prima facie case and the harm likely to be occasioned upon the applicant by the commencement of drilling, “on balance the interests of justice do not favour the grant of the interlocutory injunction”. This was primarily due to “the largely certain loss and damage that an injunction will cause to Santos”.⁶
12. In this regard, the primary judge summarised the evidence provided by Santos as follows:⁷

⁴ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838, [45]-[46].

⁵ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838, [52].

⁶ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838, [52].

⁷ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838, [45]-[46].

Turning then more directly to the balance of convenience, I accept Santos' unchallenged contention that if it's drilling, due to commence on 17 July 2022, is enjoined, it will suffer a daily loss in the order of hundreds of thousands of dollars. The drilling operations are a step in an elaborate project involving billions of dollars in investment that is the subject of extensive planning and scheduling. The works and support services necessary for the drilling operation are to be provided by multiple contractors to Santos. The contractual obligations in place which have now been engaged will require Santos to pay 'standby rates' or other compensation to contractors even if no work can be performed.

Further, and beyond those immediately quantifiable losses, there is, I accept, a substantial risk that a delay in the commencement of the drilling operations will prejudicially impact upon the scheduled work necessary to be undertaken once drilling has been completed, because essential contractors and equipment may become unavailable. Santos has also relied upon the likelihood of detriment to third parties but I have given that little or no weight. That is because I am assessing the balance of convenience over a six week period until the completion of the expedited trial and the evidence is that third party contractors are likely to be compensated by Santos for any disruption and consequent loss.

13. On or about 17 July 2022, Santos commenced drilling the first of the wells to be drilled under the Drilling EP.
14. On 21 September 2022, the primary judge concluded that NOPSEMA's decision to accept the Drilling EP was not legally valid, and ordered that the decision be set aside.⁸
15. On 2 December 2022, the same day as Santos' Announcement, the Full Federal Court dismissed Santos' appeal against the primary judge's decision.⁹

The reasons why the Announcement is potentially misleading or deceptive

16. The primary judge's statements regarding Santos' evidence at first instance, on which his Honour relied in refusing to grant an interlocutory injunction, is at odds with the Announcement's representation that Santos "does not anticipate any material cost or schedule impact" to the Barossa project as a result of the Full Court's decision.
17. The consequence of the Full Court's decision is that Santos does not have the requisite approvals to drill wells for its Barossa project. According to the primary judge's interlocutory decision, this means Santos is currently suffering "a daily loss in the order of hundreds of thousands of dollars" and that the scheduled work at Barossa has been "prejudicially impact[ed]... because essential contractors and equipment may become unavailable".¹⁰
18. It is important to note that the delay the subject of the Announcement is significantly longer than the one contemplated in the primary judge's interlocutory decision. The primary judge was considering a delay of 6 weeks, whereas the delay to drilling has already been 2.5 months (since

⁸ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 1121, [290], Order 1.

⁹ *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193.

¹⁰ *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority* [2022] FCA 838, [45]-[46].

the primary judge's ultimate decision on 21 September 2022) and will be some further months as Santos obtains the requisite approvals. The cost and schedule impact of the delay the subject of the Announcement is therefore likely to be more significant than that considered by the primary judge.

19. Our client considers this information is material. As stated above, actual or potential investors and financiers of the Barossa project have been actively enquiring into the impact of the Full Court's decision on the project. The omission of this information could potentially mislead a reasonable person into thinking that Santos does not expect the Full Court's decision to materially impact the cost or schedule of the Barossa project.
20. The materiality of this information is demonstrated by a note published by Citigroup after the first instance decision, stating that:

STO has lost a Federal Court decision which determined that it did not adequately consult with Tiwi Islanders for Barossa plans. It is possible that the project may be delayed. STO is expected to launch an appeal. Any delays to original start-up (CY25) set to hurt project economics with high JKM prices (US\$37/mmbtu forecast by Citi in CY25), expected to normalise to US\$12/mmbtu in CY27 on our current price deck (Figure 2).

21. The representation in the Announcement was 'in relation to a financial product' for the purposes of s 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the ASIC Act.¹¹ The Representations concern the future viability of a project critical to Santos' growth portfolio, and, being made in an ASX Announcement, is directed to actual or potential investors in Santos' shares. This is sufficient for the making of the representation to be 'in relation to' Santos' shares,¹² which constitute financial products.¹³
22. The representation made 'in trade or commerce' for the purposes of s 18 of the ACL because it was published in an ASX announcement.¹⁴ Further, our client considers the purpose of the representation was to convince actual or potential investors of the future viability of one of Santos' critical growth projects. This is conduct in trade or commerce because it could influence the listing and trading of shares in Santos.
23. Accordingly, our client considers that the representation may constitute misleading or deceptive conduct, and therefore contravene s 1041H of the *Corporations Act 2001* (Cth), s 12DA of the ASIC Act and/or s 18 of the ACL.

Conclusion

24. Our client requests that ASIC investigate the matter with a view to requiring Santos to provide the market with full and frank disclosure of the expected impact of the Full Court's decision on the Barossa project.

¹¹ In 2018, the term 'financial service' in s 12DA of the ASIC Act was amended to include a 'financial product', with the result that s 12DA of the ASIC Act also applies to conduct 'in relation to' a 'financial product': ASIC Act s 12BAB(1AA); Revised Explanatory Memorandum, *Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018* (Cth) 17.

¹² *Australian Securities and Investments Commission v Narain* (2008) 169 FCR 211, 215 [12].

¹³ *Corporations Act* s 764A(1); *ACL* s 2; *Australian Securities and Investments Commission Act 2001* (Cth) s 12BAA(7).

¹⁴ *McKerlie v Drillsearch Energy Ltd* (2009) 74 NSWLR 673, 684 [62].

25. Please do not hesitate to contact us at zoe.bush@edo.org.au if you wish to discuss any matters related to this complaint.

Yours faithfully

Environmental Defenders Office

Zoe Bush

Senior Solicitor, Safe Climate (Corporate)