

Santos uses new tactic to fight climate change movement after traditional owners lose court challenge against Barossa gas project

Michael Slezak, ABC News, 29 June 2024

The fight to stop climate change is slowly creeping from the environmental front lines of land and sea to the hallowed halls of Australia's courtrooms.

Where once protests and stunts were the mainstays of climate action, it's now more likely to involve gavels and wigs — and one side usually has much deeper pockets than the other.

With Australia increasingly recognising Indigenous land claims, now the climate battle often involves First Nations people.

Armed with relatively meagre resources, they're usually represented by legal charities and supported by philanthropists — and facing off with multi-billion-dollar fossil fuel companies or governments.

The climate movement appears to be driving change, among other consequences, judgements have forced fossil fuel projects to consult more with traditional owners.



Simon Munkara (second from left) with other traditional owners who protested against the project. (ABC News: Michael Franchi)

According to Tiwi Islander Antonia Burke, a First Nations woman, it gives First Nations people new power after centuries of oppression.

But now multinational oil and gas giant Santos is hitting the climate movement where it hurts — and some experts say it could change the face of Australia's democracy.

Santos is now pursuing the charities that cheered on a First Nations group in a failed action earlier this year, looking to recover its own legal costs.

These charities were not parties to the case, nor were they witnesses in court. They didn't indemnify the parties or direct the litigation.

For some of those groups, the only available evidence of their involvement in the case comes down to tangentially-linked social media posts and celebratory remarks in their annual reports.



*The subsea pipe-laying vessel used by Santos for its Barossa project in the Timor Sea.
(Supplied: Santos)*

The way Ms Burke sees it, the removal of support networks is just a different form of oppression for First Nations people.

"If you remove all of our resources, that leaves us with nothing, right?"

According to climate activists though, Santos' move is broader and bolder than that.

Some say it puts a cloud over the viability of climate campaigning in Australia.

And if you ask public interest lawyers, the effects are even more widespread, threatening the viability of all court cases brought in the public interest to test or enforce laws.



Advocates warn public interest litigation, similar to that brought by Eddie "Koiki" Mabo in the 1980s and 1990s, will be put at risk if Santos succeeds. (Supplied: Gail Mabo)

If Santos is successful, barrister Geoffrey Watson SC says court cases we've come to know as landmark rulings would be impossible.

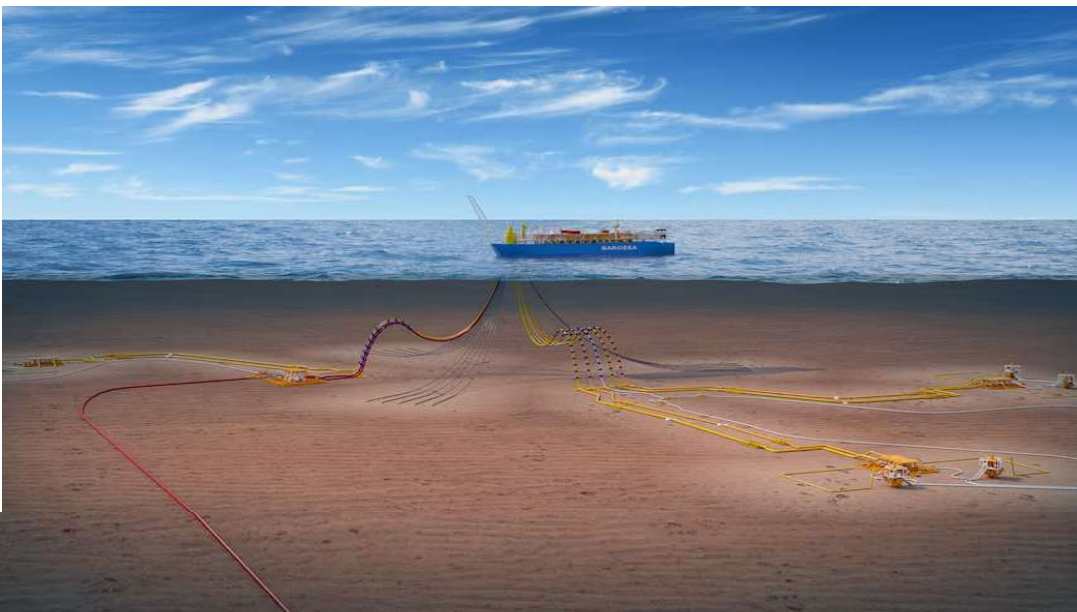
"You'd never see another Mabo," he says.

The Tiwi Island case

Santos is a big company. It's worth about \$25 billion, employs nearly 4,000 people and describes itself as a "global energy pioneer".

The company plans to drill up to eight gas wells north of Darwin in its massive Barossa Gas Project, pipe it under the Timor Sea past the Tiwi Islands and deliver it into Darwin Harbour where most of it will be turned into LNG and exported.

It's backed by the Northern Territory and federal governments, who spruik the economic benefits of the project.



The Barossa project would be in the Timor Sea, about 300km off Darwin. Up to eight subsea wells are planned and the gas extracted would be piped back to a facility in Darwin. (Supplied: Santos Limited)

"It's accurately described as one of the dirtiest gas projects in the world with an extraordinarily high carbon dioxide content," says Kirsty Howey, executive director of the Environment Centre NT, which is part of the Stop Barossa Gas campaign.

She says the infrastructure built as part of the project will also unlock other massive gas projects, including the controversial fracking in the Beetaloo Basin.

"This project is absolutely key to the proposed fossil fuel expansion planned for northern Australia," Ms Howey says.



Kirsty Howey says the gas project the traditional owners were trying to stop is one of the dirtiest in the world. (ABC News: Che Chorley)

In March 2022, Santos received approval to start drilling and to build the pipeline.

But then a group of Tiwi Islander traditional owners, led by Dennis Tipakalippa, took the regulator to court, saying the approval was unlawful as they hadn't been properly consulted.

That case won, sending Santos back to the drawing board.

The fossil fuel industry was dismayed.

The Labor government proposed laws to fast-track offshore gas projects, which activists said would undermine the precedent set by the Tiwi Islanders.

That proposal was later watered down through negotiations with the Greens.

'Coaching witnesses'

Then in 2023, Santos found itself in court again. This time things would go differently.

Again, it was a group of Tiwi Islanders leading the charge, now spearheaded by Simon Munkara.

The group argued the approval was invalid because the pipeline would destroy important cultural heritage under the Timor Sea.

Santos was taking no chances, and it called in the cavalry.

Representing the company was a multi-billion-dollar US law firm: Quinn Emanuel.

It's been described as the biggest litigation and arbitration law firm in the world. It markets itself as the world's most feared law firm.

Representing Mr Munkara was the legal charity, the Environmental Defenders Office (EDO).



Simon Munkara tried to stop the Barossa project in court. (AAP: Tymunna Clements)

Things went badly in court for Mr Munkara. The judge decided some of the evidence was confected, and said the lawyers had coached witnesses.

Mr Munkara lost.

Things got complicated.

'Willing to litigate you to death'

When someone loses a court case in Australia, the winner of the case can try to recover costs from the other party.

But following its win, Santos CEO Kevin Gallagher stood in front of reporters in Darwin and said the company wouldn't pursue the Tiwi Islanders for costs.

It then quickly became apparent Santos had other organisations in its sights.



Kevin Gallagher, chief executive of Santos. (ABC News: Roxanne Fitzgerald)

Santos applied to the court for subpoenas seeking a wide range of documents from four environmental charities: The Environment Centre NT (ECNT), Jubilee Australia, Sunrise and Market Forces.

It also asked for subpoenas seeking an even wider range of documents from Mr Munkara's lawyers, the EDO.

Santos said in court it was looking for evidence to support an adverse costs order against all those groups.

The court granted Santos the subpoenas against three of the environmental charities, despite acknowledging those three charities didn't fund or indemnify Mr Munkara.

The judge said those groups potentially stood to gain from the proceedings through "the achievement of a political or ideological objective".



Environment Centre NT is in Darwin, NT.

2 November 2023 · 🌐



Tiwi Traditional Owner Simon Munkara has today won a Federal Court injunction that temporarily halts the commencement of construction on Santos' Barossa Gas Pipeline.

How can you help Tiwi people in their efforts to protect their Sea Country from irreparable harm?

👉 Sign this petition: https://www.ecnt.org.au/protect_tiwi_sea_country

#santos #tiwiislands #culturalheritage



A post from the Environmental Centre Northern Territory in November. (Facebook)

Geoffrey Watson SC, a barrister who sits on the board of the Grata Fund — an organisation that funds public interest litigation — said this sort of costs order could sink environmental organisations.

"It becomes an existential crisis for [them] if you've got a powerful and wealthy litigant, who is willing to litigate you to death over these sorts of issues."

'The most terrible chilling effect'

"Santos is using the potential of seeking costs against third parties ... to go after groups who merely offer moral or solidarity support to public interest litigants," Mr Watson says.

He says that has "the most terrible chilling effect," since litigation taken in the public interest — rather than for personal gain — can't easily happen without that third-party support.

Mr Watson says he couldn't comment on the motivation of Santos, but actions like this often did have clear motivations to stop public participation in litigation.

The subpoena issued to ECNT disrupted the organisation enormously, Ms Howey says, forcing them to hire lawyers and divert staffing resources.

After the subpoenas were granted, the three environmental groups appealed that decision. But before the appeal could be heard, Santos discontinued its enforcement of the subpoenas.

Mr Watson and Ms Howey say that provides absolutely no relief for the groups involved.

For one thing, the same documents and many more are likely to be obtained via the subpoena to the EDO.

For another, Ms Howey says ECNT still needs to engage lawyers to represent its interest in stopping those documents from being handed over via the EDO.

And thirdly, the precedent now stands, as the appeal is unlikely to be heard.



*Geoffrey Watson says public interest litigation can't easily happen without third-party support.
(ABC News: Josh Bavas)*

Mr Watson believes that might have even been the reason Santos stopped pursuing the documents — to stop the appeal undermining that precedent.

"Santos has been able to create the precedent they wished to create ... and they're not going to let anybody harm that."

A new spin on old tricks, advocates say

Alice Drury is a lawyer at the Human Rights Law Centre, where she focuses on what she sees as "systemic and emerging threats to Australian democracy".

She says this move by Santos is one such emerging threat — and we haven't seen anything quite like it before.

"We're not aware of any other case in which a multi-billion-dollar company has sought costs from organisations that aren't even party to the case on the basis of ideological alignment," she says.



Alice Drury (right) says the action could be an emerging threat to Australian democracy. (AAP: Joel Carrett)

Elaine Johnson used to be a lawyer for the EDO, and then head of legal strategy. She now runs her own practice. In her time at the EDO, she was involved in lots of cases with similarities to the Santos one.

She says she's seen elements of this legal strategy before — particularly where the lawyers become the subject of costs orders. She ran one case where the NSW government unsuccessfully pursued the EDO for costs.

"Unfortunately, this is a legal strategy and a legal tactic that I have seen in many other public interest, environmental cases," she says.

Other jurisdictions have seen more moves like this against environmental groups and acted to stop them.

Michael Gerrard is a professor at Columbia Law School and founder and director of the Sabin Centre for Climate Change Law.



Michael Gerrard says there should be more laws in Australia to protect smaller litigants. (Supplied)

"About 30 years ago, there was a trend in the United States where developers ... were suing environmental groups and neighbourhood groups that were trying to litigate," he says.

"But most of the states adopted laws inhibiting what were called SLAPP suits — Strategic Litigation Against Public Participation — so we don't see many of those anymore."

Ms Johnson says there is one jurisdiction in Australia with a law like that inhibiting SLAPP suits — the ACT — and she says that should be replicated at the federal level.

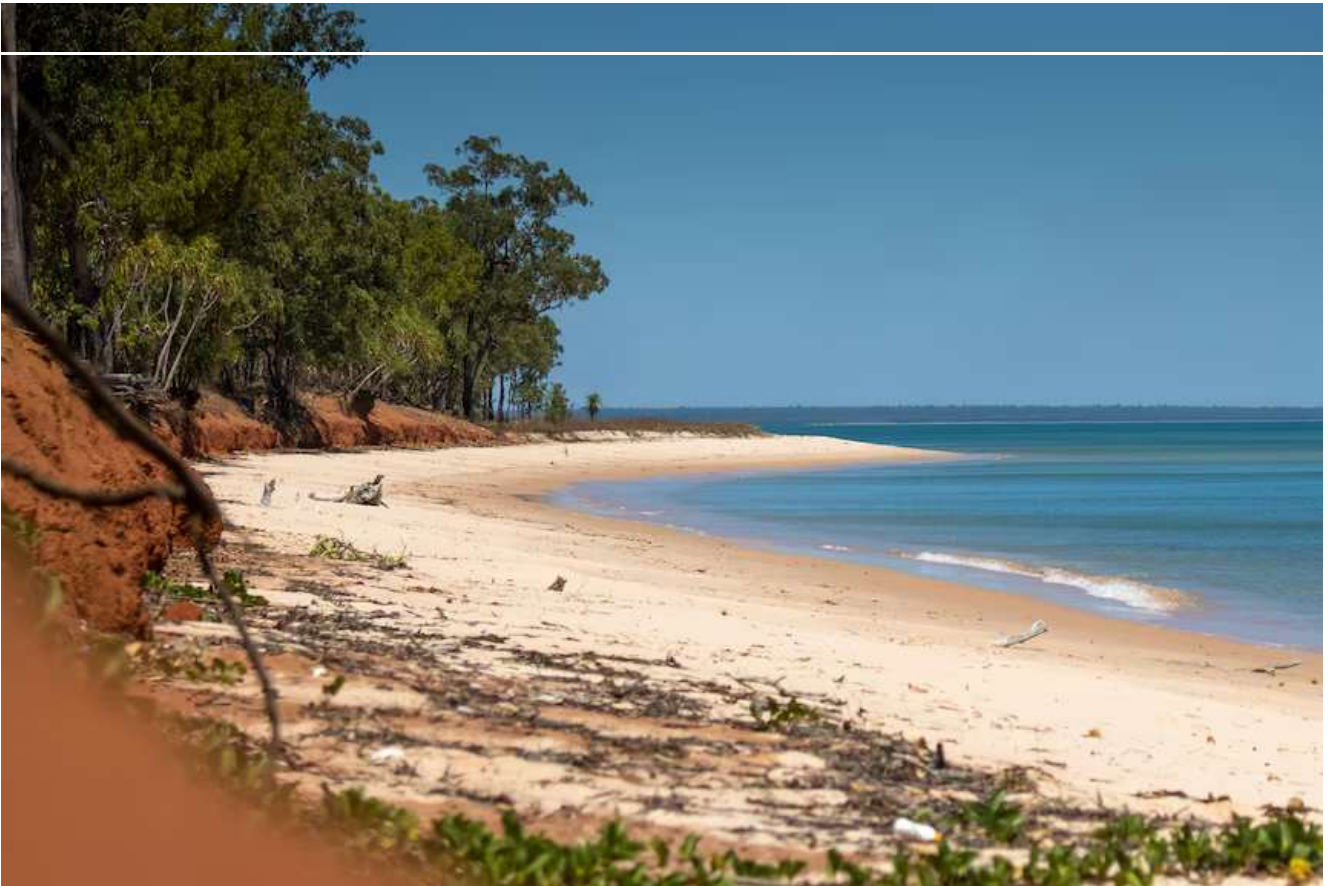
"So you would have legislation that defines what a SLAPP suit is, which would usually be by reference to the disproportionate nature of the power imbalance at play between the litigants."

Ms Johnson says with that definition in law, a party could put a motion before the court to say some action is an example of that, and have it disallowed.

The question of indemnity

What makes the pursuit of the three environmental charities even more curious is that it turns out there is an agreement in place to indemnify Mr Munkara — meaning if it was about recouping some costs via Mr Munkara, Santos would have been able to do so.

"We decided that it was worth supporting Mr Munkara against the risk of adverse costs, which is a pretty extreme risk if you're a First Nations person from a remote community trying to take on a pretty big fossil fuel giant to assert your land rights in court," says Isabelle Reinecke, the executive director and founder of Grata Fund.



A beach on Melville Island, part of the Tiwi Islands. (ABC News: Tristan Hooft)

Ms Reinecke says the deed spelling out the agreement between Grata Fund and Mr Munkara was provided to Santos several months ago.

Santos says it couldn't comment on the matter while it was before the courts.

And most others the ABC spoke to wouldn't speculate on Santos' motives for focusing on the environmental charities, although many pointed out that climate litigation was a thorn in the side of companies like Santos, and by scaring the other groups involved, it was likely to have a "chilling effect".

Ms Reinecke agrees: "I think it's fair to categorise this as the latest chapter in SLAPP tactics in Australia against environmental and land rights movements."

Ms Reinecke says the decision to look for possible costs orders against the other groups suggests they think there is a conspiracy going on.

"I think that's what is implied by Santos's actions: they feel that there must be ... some bigger force at play in this litigation, and then they really are entitled to seek further costs from those organisations."



Tiwi Islands spokeswoman Antonia Burke. (ABC News: Mike Donnelly)

But underlying that position, in her view, is racism.

"I think, whether unwittingly or not, there is something inherently racist about the assumption that a First Nations community couldn't possibly seek to assert their legal rights to country unless they were being backed by some kind of conspiracy of anti-Santos forces."

That's something Ms Burke agrees with strongly.

Ms Burke says members of the community on the Tiwi Islands led the litigation and aren't the puppets of any environmental groups.

"Santos and the fossil fuel industry are trying to remove the resources [of the First Nations communities] and say that Aboriginal people are their puppets," she says.

Ms Johnson says something needs to happen to fix what she regards as a power imbalance.

"I think that when we see a multi-billion-dollar corporation, hiring a multi-billion-dollar US law firm to go after environmental charities for its legal costs," she says.

"In a case like this, we do have to ask questions about whether or not people — ordinary Australians and charities — ought to be protected from this type of legal strategy."

"Because we want to make sure that the justice system is accessible to everyone."

Santos was approached for comment, but provided the following statement: "As the matter is before the courts, Santos won't comment."

The EDO, Sunrise and Jubilee Australia also declined to comment.