

NOTICE OF FILING

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Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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ENERGY RESOURCES OF AUSTRALIA LTD V

MINISTER FOR RESOURCES (COMMONWEALTH) & ORS

SUBMISSIONS OF ENERGY RESOURCES OF AUSTRALIA LTD ON APPLICATION TO SET ASIDE NOTICES TO PRODUCE DATED 16 SEPTEMBER 2024

A OVERVIEW

1. On 16 September 2024, the Applicant served two notices to produce pursuant to r. 30.28(1) of the *Federal Court Rules 2011* (Cth) to the First and Second Respondents (the **Notices**). In broad terms, the Notices seek production of documents relating to a Joint Media Release by the Hon Madeleine King MP and the Hon Tanya Plibersek MP titled “Work begins to add Jabiluka site to Kakadu National Park” dated 27 July 2024 (**JMR**)¹ and a speech given by the Hon Anthony Albanese MP at the New South Wales Labor Annual Conference on 27 July 2024 (**Speech**).² On 29 September 2024, the Applicant proposed via correspondence a narrowed form of the Notices.³ The narrowed form reflects the call for documents the Applicant now seeks.
2. For the reasons set out in these submissions, the application to set aside the Notices should be dismissed. The Notices readily satisfy the test of apparent relevance. Further, the Court would not accept on the basis of Ms Scott’s affidavit dated 24 September 2024 (**Scott Affidavit**) that compliance would be oppressive. In any event, the narrowed form of the Notices comfortably addresses any concerns of oppression that the Court may have.

B GENERAL PRINCIPLES

3. The test for apparent relevance is whether the documents sought are “reasonably likely to add, in the end, in some way or another to the relevant evidence of the case”.⁴ It imposes a “relatively low threshold”.⁵ The word “apparent” admits of the possibility that the documents sought may not ultimately turn out to be relevant.⁶ A document or class of documents may satisfy that test if it gives rise to a line of enquiry relevant to the issues before the trier of fact.⁷

C THE NOTICES SERVE A LEGITIMATE FORENSIC PURPOSE

4. The test for apparent relevance is met with respect to the Notices.

¹ Statement of Agreed Facts filed 4 September 2024 (**SOAF**) [69] and Annexure RR.

² SOAF [68].

³ Email from HSF to AGS dated 29 September 2024, attaching Notices to Produce to the First Respondent and Second Respondent with proposed limitations (Chung Affidavit at [8]).

⁴ See eg *Energic Co Ltd v Horizons (Asia) Pty Ltd* [2020] FCA 1233 at [9] (Markovic J) applying *Seven Network Limited v News Limited (No 11)* [2006] FCA 174 at [6]

⁵ *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [71] (Bell P).

⁶ *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [70] (Bell P).

⁷ *Hooke v Bux Global Limited (No 2)* [2018] FCA 836 at [38], citing *Boase v Axis International Management Pty Ltd (No 3)* [2012] WASC 498 at [11].

Background

5. It is essential to bear in mind the forensic landscape in which the request for documents arises. In these proceedings, the Applicant challenges (inter alia) the decision of the First Respondent (the Commonwealth Minister for Resources and Minister for Northern Australia) to provide advice to the Third Respondent that the Applicant's application for renewal of Jabiluka Mineral Lease 1 (MLN1) be refused: see Grounds 1 to 3A of the Amended Originating Application.
6. The Minister has, despite request, declined to provide reasons for the Advice Decision.⁸ The Applicant proposes to invite the Court to draw inferences as to the Minister's state of mind having regard to other material, in the absence of a statement of reasons and in the absence of evidence from the Minister.
7. The relevant background and context includes that:
 - (a) On 16 March 2023, and following a meeting between the Prime Minister and Justin O'Brien (CEO of the Gundjeihmi Aboriginal Corporation (GAC)) in February 2023, the Assistant Minister to the Prime Minister sent a letter to Mr O'Brien, Yvonne Margarula (Senior Mirarr Traditional Owner) and Samuel Bush-Blanasi (Chair of the Northern Land Council). The letter referred to the Australian Government having had the opportunity "to hear first-hand about the proposal for a complete Kakadu National Park" and said that the "Prime Minister has asked the Hon Tanya Plibersek MP, Minister for the Environment and Water, and the Hon Madeleine King MP, Minister for Resources, to come back to him after they have considered this issue".⁹
 - (b) On 31 May 2023, the Minister for the Environment and Water sent a letter to Mr O'Brien. Among other things, the letter referred to the Prime Minister's letter and said "I will consider the Jabiluka Mineral Lease issue together with the Minister for Resources, the Hon Madeleine King MP".¹⁰
 - (c) On 20 March 2024, the Applicant submitted the application to the Northern Territory Mineral Titles Office seeking renewal of Jabiluka MLN1 for a further term of 10 years.¹¹
 - (d) On 20 March 2024, a meeting also occurred between Minister King, the Mirarr Traditional Owners, and the GAC. A file note of that meeting produced on 13 September 2024 recorded Minister King stating that she will "talk [or take] to PM and Environment Minister".¹²
 - (e) On 10 May 2024, the First Respondent sent a letter to Ms Margarula and Thalia van den Boogaard (CEO of the GAC).¹³ Among other things, the letter said:

⁸ Chung Affidavit at [9].

⁹ Letter from the Hon Patrick Gorman MP to Justin O'Brien, Yvonne Margarula and Samuel Bush-Blanasi dated 16 March 2023 (Chung Affidavit at [20(b)]).

¹⁰ Letter from the Hon Tanya Plibersek MP to Justin O'Brien dated 31 May 2023 (Chung Affidavit at [20(c)]).

¹¹ SOAF [26].

¹² Handwritten file note of meeting between Minister King, Mirarr Traditional Owners and the GAC dated 20 March 2024 (Chung Affidavit at [20(a)]).

¹³ Letter from the Hon Madeleine King MP to Yvonne Margarula and Thalia van den Boogaard dated 10 May 2024 (Chung Affidavit at [18]).

As explained at our meeting, I will continue to work closely with my colleagues in the NT, particularly Minister Monaghan, and with the Hon Tanya Plibersek MP, Minister for the Environment and Water and the Hon Linda Burney MP, Minister for Indigenous Australians. While a decision with respect to the GAC's proposal for Jabiluka to be declared a special or general reserve under the *Mineral Titles Act 2010* (NT) is a matter for Minister Monaghan and any parties [*sic*] request that Jabiluka be incorporated into Kakadu National Park is ultimately a matter for Minister Plibersek, it is essential we all work together to make effective, meaningful decisions.

- (f) On or about 24 July 2024, Minister King received a memorandum from her Advisers Marie Illman and Ben Latham with a "Yellow date" of 25 July 2024. The memorandum included a comment that "[t]he offices of the PM, Ministers Plibersek and Burney, Senator McCarthy and MP Gosling have been notified – all would like the mineral lease to end so Jabiluka can be incorporated into Kakadu National Park".¹⁴
- (g) On or about 25 July 2024, the First Respondent made the Advice Decision.¹⁵
- (h) On 26 July 2024 at 8.31AM, Kym Moore (an officer of the Commonwealth Department of Industry, Science and Resources)¹⁶ sent an email to Christie Renton (Senior Adviser, Environment and Water, Department of Prime Minister and Cabinet (**DPMC**)) and Jyah Strachan (Policy Adviser, DPMC). The email referred to the Advice Decision and stated that "We are working with Minister King now on the order of communications of this matter and if there is any requirement for the stock market to be told in a specific way before either Government make announcements".¹⁷ The email further stated that "We understand there is interest from the PM to communicate this tomorrow in Sydney. We also understand there is a desire for a few media release (potentially today pending the above) from Min King about providing her advice, from the PM, and from Min Plibersek about working towards potential incorporation in into KNP" and "Suspect PMO will reach out shortly".¹⁸
- (i) On or about 26 July 2024, the Third Respondent made the Renewal Decision.¹⁹
- (j) On 27 July 2024, the Prime Minister gave the Speech.²⁰ During that speech, the Prime Minister stated:²¹

Over the past 18 months, Linda, Tanya Plibersek and myself have met with leaders and representatives of the Mirarr people, the traditional owners of the Jabiluka site in Kakadu. Madeleine King, our Resources Minister, has joined us. They were seeking a guarantee that there would never be uranium mining on their land.

¹⁴ Memorandum from Marie Illman and Ben Latham with Yellow date 25 July 2024 (Chung Affidavit at [16]).

¹⁵ SOAF [34].

¹⁶ SOAF [25(c)].

¹⁷ Email from Kym Moore to Christie Renton and Jyah Strachan dated 26 July 2024 (JBK.0001.0001.0762) (Chung Affidavit at [19(b)]).

¹⁸ Email from Kym Moore to Christie Renton and Jyah Strachan dated 26 July 2024 (JBK.0001.0001.0762) (Chung Affidavit at [19(b)]).

¹⁹ SOAF [36].

²⁰ SOAF [68].

²¹ Chung Affidavit at [12]-[15] See also news reports at Chung Affidavit at [22].

....

Today, I am proud to announce that our Government will be working with the traditional owners to make Jabiluka part of Kakadu National Park, once and for all.

This means there will never be mining at Jabiluka.

The Mirarr people have loved and cared for their land for more than 60,000 years.

Our Government will work with them to keep it safe for all time.

- (k) On 27 July 2024, the JMR was issued.²² It stated that “The Albanese Labor Government has advised the Northern Territory Government that the Jabiluka Ministerial Lease should not be renewed, allowing the site to be added to Kakadu National Park”. It includes, among other things, a statement attributed to the Minister for the Environment and Water that “Following this significant step, we can now work with Traditional Owners to begin the process of incorporating Jabiluka into Kakadu National Park”.

Relevance of the documents sought in the Notices

8. Ground 2 of the Amended Originating Application filed 25 September 2024 alleges that the Advice Decision was unreasonable. Particulars 2(b)(iii) and (iv) allege that, in making the Advice Decision, the First Respondent and / or the Second Respondent:
- (a) “*had regard to and gave excessive and impermissible weight to (inter alia) (A) the desire to extend the Kakadu National Park upon the expiry of the initial term of Jabiluka MLN1*”;
- (b) “*acted with regard to and for the purpose of extending the Kakadu National Park into the land covered by Jabiluka MLN1*”. The particulars of Ground 2(b)(iv) expressly refer to the JMR and the Speech.
9. Giving excessive weight to a consideration may evidence or constitute legal unreasonableness.²³
10. The documents sought in the Notices relating to the JMR and the Speech (including drafts, amendments, comments and communications) constitute contemporaneous evidence within a highly targeted date range which may be relevant to establishing the Minister’s state of mind at the time of making the Advice Decision, particularly in the absence of a statement of reasons or evidence from the Minister. On that basis, the documents are “apparently relevant” to, at least, Ground 2. Further, as shown by the evidence described above, there were interactions and communications between the Minister on the one hand, and the Prime Minister / Minister for the Environment and Water (and their respective Departments) on the subject of the Renewal Application and the Advice Decision, including as to the potential inclusion of the land covered by Jabiluka MLN1 in Kakadu National Park. In short, there is a real possibility that the documents sought in the Notices will form part of the corpus of evidence at trial from which the Applicant will invite the Court to draw inferences as to the Minister’s state of mind, relevant to (at least) the issue of legal unreasonableness.

²² SOAF [69] and Annexure RR.

²³ See, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] (Hayne, Kiefel and Bell JJ).

D THE NOTICES SHOULD NOT BE SET ASIDE ON THE BASIS OF OPPRESSION

11. The evidence served by the First and Second Respondents falls far short of establishing that compliance with the Notices would be oppressive.
12. Ms Scott’s evidence is to the effect that compliance with the Notices would involve inquiries being made of the Office of the Prime Minister, the DPMC, the Office of the Minister for Environment and Water and The Department of Climate Change, Energy, Environment and Water.²⁴ Ms Scott then deposes that this would require searches of individual email inboxes and devices (eg mobile phones).²⁵ This evidence is notable for its generality and for what it does not say. For example, Ms Scott does not specify how many individual email inboxes and devices would need to be searched, nor the likely volume of documents which would need to be reviewed, nor how long it is anticipated the review of particular inboxes would take.
13. The high point of Ms Scott’s evidence is that she is “instructed that” it is very unlikely that the Commonwealth parties would be a position to “respond completely” to the Notices before the close of evidence on 30 September 2024 and that “production may not be able to be completed before 28 October 2024”.²⁶ That evidence should be given little weight. The source and basis of the instructions is not identified. Moreover, in any event, it is qualified in its terms and equivocal at best. It does not establish that there would be any real jeopardy to the hearing date.
14. There are further reasons why the Court would not find that compliance would be oppressive. First, the Notices clearly identify the documents sought. Secondly, the documents covered by the Notices are sought for a limited time period, proximate to the Advice Decision. Thirdly, the subject matter of the Notices – that is, the JMR and the Speech – is targeted and specific. Further, the Applicant would be willing to engage in discussions with the First and Second Respondents in relation to the prioritisation of review of the inboxes of particular custodians, to ensure that there is no jeopardy to the trial date.

E CONCLUSION

15. The Interlocutory Application should be set aside with costs.

M ELLICOTT

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30 SEPTEMBER 2024

²⁴ Scott Affidavit at [15].

²⁵ Scott Affidavit at [16].

²⁶ Scott Affidavit at [18].