NOTICE OF FILING

Details of Filing

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File Title:	ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH) &ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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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.

The date of the filing of the document is determined pursuant to the Court's Rules.

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 1056 OF 2024**

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH) and others named in the Schedule
Respondents

FIRST AND SECOND RESPONDENTS' SUBMISSIONS OPPOSING INTERVENTION

INTRODUCTION

1. On 4 October 2024, **Zentree** Investments Ltd and **Packer** & Co Ltd (**intervention applicants**) applied to intervene in the proceedings under ss 236 and 237(1) of the ***Corporations Act** 2001* (Cth) (**intervention application**). The stated purpose of the proposed intervention is to: pursue a cause of action that the first and third respondents permitted and/or engaged in conduct wrongfully derogating from the grant of interests conferred by the Jabiluka mineral lease (**Jabiluka MLN1**); submit that the seventh respondent is estopped (whether by reason of *res judicata*, issue estoppel *Anshun* estoppel or estoppel by deed) from defending the proceeding on the basis that clause 2 of Jabiluka MLN1 is invalid; and submit that, to the extent any respondent seeks relief to the effect that clause 2 of Jabiluka MLN1 is invalid, the Court should exercise its discretion to refuse that relief on the ground of delay.[1]

2. The first and second respondents (**Commonwealth parties**) submit that the intervention application should be dismissed because the intervention applicants cannot satisfy the requirement in s 237(2)(a) of the Corporations Act that it is probable the applicant will not "properly take responsibility" for the proceedings or the steps in the proceedings.

[1] Interlocutory application filed by intervention applicants dated 4 October 2024, proposed order 1. The interlocutory application is supported by the affidavits of Gordon Grieve (**Grieve affidavit**) (legal representative for Zentree) and William Packer (**Packer affidavit**) (Director of Packer) both sworn on 4 October 2024.

Filed on behalf of the First and Second Respondent
Minister for Resources and Minister for Northern Australia
Commonwealth of Australia
File ref: 24007108

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INTERVENTION APPLICATION SHOULD BE DISMISSED

3. An application for intervention under ss 236 and 237(1) must be dismissed unless the applicant can satisfy *all* five criteria in s 237(2)(a)-(e) of the Corporations Act.[2] As the applicant has commenced the proceedings, the intervention applicants must establish "it is probable that the [applicant] will not … properly take responsibility for [the proceedings], or for the steps in [the proceedings]" (s 237(2)(a)). The intent of Part 2F.1A is that leave under s 237 "must not be given lightly",[3] and it is "[not] intended that there should be judicial carte blanche permitting the grant of leave" where an applicant makes out a case on grounds foreign to those outlined in s 237(2) or fails to bring themselves wholly within those parameters.[4]

4. The evidence in the Grieve and Packer affidavits falls well short of establishing that it is probable the applicant will not properly take responsibility for the proceedings or the steps in the proceedings. To the contrary, the affidavits show that the applicant's legal representatives gave detailed consideration to the arguments presented by the intervention applicants, and the applicant was satisfied that the arguments were unlikely to add anything of material benefit to the proceedings (and would also be likely to cause delay to the trial date, which was not in the interests of the company or its shareholders).[5]

5. While the intervention applicants as minority shareholders may have a different view to the applicant on the merits of their proposed arguments, this does not mean the applicant is not taking "proper responsibility" for the proceedings or the steps in the proceedings. As it suffices to dispose of the intervention application that the intervention applicants have failed to satisfy s 237(2)(a), it is not necessary for the Court to consider (and the Commonwealth parties do not wish to be heard on) the remaining criteria in s 237(2)(b)-(e) (which are matters for the applicant and its shareholders) or the merits of the intervention applicants' proposed substantive arguments.

6. The intervention application should also be refused in circumstances where the arguments the intervention applicants seek to run have not been clearly articulated in the interlocutory application. For example, Prayer 1(a) of the interlocutory application sets out the argument in general terms without any precision or particularisation. The intervention applicants should be required to

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2 *Charlton v Baber* [2003] NSWSC 745 at [31] (Barrett J); ***Goozee*** *v Graphic World Group Holdings Ltd* (2002) 170 FLR 451 at [27] (Barrett J); ***Fiduciary Ltd*** *v Morningstar Research Pty Ltd* [2005] NSWSC 442 at [16] (Austin J); *Oates v Consolidated Capital Services Ltd* (2009) 76 NSWLR 69 at [55]-[65]; *Huang v Wang* [2016] NSWCA 164 at [57] (Bathurst CJ, McColl JA agreeing), [78] (Barrett AJA).

3 *Swansson v RA Pratt Properties Pty Ltd* [2002] NSWSC 583 at [24] (Palmer J).

4 *Goozee* at [27] (Barrett J).

5 Grieve affidavit, [18], Exhibit GTG-1, pp 121-124, [21], Exhibit GTG-1, pp131-133, [25], Exhibit GTG-1, pp 140-143, [28]; Packer affidavit, [12].

articulate the precise argument they wish to run in the same way an ordinary applicant would need to.

7. Furthermore, the grant of leave would give rise to prejudice and delay. The intervention applicants have been on notice of the proceedings since they were commenced on 6 August 2024, and the evidence indicates that the intervention applicants did not start corresponding with the applicant about the issues raised in the intervention application until 17 September 2024.[6] The applicant's outline of opening submissions was filed on 4 October 2024 and the respondent parties' submissions are due to be filed on 18 October 2024. The intervention applicants also seek up to half a day for their proposed arguments, which has a very real prospect of affecting the hearing date including given that all parties will have filed their submissions before the intervention application is determined, with the trial due to commence on Monday 28 October 2024. If leave is granted, it should be conditioned on the basis that the Commonwealth parties are not liable for the intervention applicants' costs of the proceedings. The proceedings are brought in the name of the applicant, and the Commonwealth parties should not be liable for two sets of the company's costs.[7]

CONCLUSION

8. For the above reasons, the intervention application should be dismissed with costs.

Date: 18 October 2024



Patrick Knowles
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12 Wentworth Selborne Chambers

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6 Grieve affidavit, [11], [12], [16], [20], [23], [26]; Packer affidavit, [8], [12].

7 cf *HP Mercantile Pty Ltd v Hartnett* [2017] NSWCA 79 at [13]-[15] (Bathurst CJ, Leeming and Payne JJA).