

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	30/09/2024 5:08:01 PM AEST
Date Accepted for Filing:	30/09/2024 5:08:06 PM AEST
File Number:	NSD1056/2024
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



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.

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
IN SUPPORT OF INTERLOCUTORY APPLICATION TO SET ASIDE NOTICES TO PRODUCE**

Filed on behalf of the First and Second Respondent
Minister for Resources and Minister for Northern Australia
Commonwealth of Australia
Prepared by: Grace Ng
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*
Address for Service:
The Australian Government Solicitor
Level 10, 60 Martin Place, SYDNEY NSW 2000

File ref: 24007108

Telephone: 02 9581 7320
Lawyer's Email: siran.nyabally@ags.gov.au

INTRODUCTION

1. On 16 September 2024, the applicant issued notices to produce (**notices**) to the first and second respondents (**Commonwealth parties**) seeking documents relating to: 1) a joint media release issued by the first respondent and the Hon Tanya Plibersek MP (Minister for Environment and Water) dated 27 July 2024 titled “Work begins to add Jabiluka site to Kakadu National Park” (**joint media release**);¹ and 2) a speech given by the Hon Anthony Albanese MP (Prime Minister) at the New South Wales Labour Annual Conference on 27 July 2024 in which Jabiluka was addressed (**Prime Minister’s speech**).²
2. Documents sought in the notices are directed to amendments that were proposed by the applicant to its originating application.³ A number of the amendments proposed were disallowed by Kennett J on 24 September 2024;⁴ a table of the amendments disallowed is at **Annexure A** to these submissions. The Commonwealth parties now apply for orders under r 1.32 of the *Federal Court Rules 2011* (Cth) to set aside the notices on the grounds that the documents sought have no apparent relevance to the grounds of review relating to the Advice Decision and/or the notices are oppressive in light of the extent of the searches required and the significantly expedited timetable of the matter for hearing.

LEGAL PRINCIPLES

3. The notices were issued under r 30.28 of the Rules. While the Rules do not specifically provide for a notice to produce to be set aside, such an order may be made under r 1.32 or alternatively compliance may be dispensed with under r 1.34.⁵
4. A notice to produce has the same coercive effect as a subpoena and similar principles apply.⁶ As with a subpoena, a notice to produce may be set aside where it is an abuse of process, oppressive or the documents sought do not have apparent relevance to the issues in the proceeding.⁷ Apparent relevance requires that the documents sought would be reasonably likely to add in the end in some way or another to the relevant evidence in the case, or the documents would materially assist on an identified issue or there is a reasonable basis beyond speculation that it is likely the documents

¹ Notice to produce issued by applicant to first respondent dated 16 September 2024 (**first notice**), [1]; Notice to produce issued by applicant to second respondent dated 16 September 2024 (**second notice**), [3]. These submissions respond to the proposed revised versions of the notices sent to the Commonwealth parties by email on 29 September 2024.

² Second notice, [1]-[2].

³ Applicant’s interlocutory application dated 17 September 2024; Affidavit of Leon Chung affirmed 17 September 2024.

⁴ Orders made on 24 September 2024, Order 1; Transcript of Hearing dated 24 September 2024, TT44.5-44.32.

⁵ *Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 7)* [2023] FCA 1164 (**Thai Massage**) at [26] (Katzmann J).

⁶ *Seven Network Ltd v News Ltd (No 5)* [2005] FCA 510 (**Seven Network**) at [6] (Sackville J); *Re Ox Operations Pty Ltd* [2008] FCA 61 (**Ox Operations**) at [42] (Gordon J); *Australian Competition and Consumer Commission v BlueScope Steel Limited (No 4) (BlueScope Steel)* [2021] FCA 1162 at [19] (O’Byrne J); *Thai Massage* at [18] (Katzmann J).

⁷ *Seven Network* at [10] (Sackville J); *Ox Operations* at [42] (Gordon J); *BlueScope Steel* at [19]-[20] (O’Byrne J); *Thai Massage* at [18] (Katzmann J).

will so assist.⁸ The issuer of the notice carries the burden of establishing that the documents sought in the notice are sufficiently relevant to require production.⁹

5. A notice to produce may be oppressive where it is unduly burdensome in the circumstances, or if the categories requested are too broad or not described with adequate specificity.¹⁰ Whether a notice to produce is oppressive often involves a multifactorial assessment, and where documents sought are of little or slight apparent relevance, the extent of the burden imposed by production will weigh more heavily.¹¹ Also relevant is the time at which production is required, and the potential disruption of a trial may be a determinative factor.¹²

THE NOTICES TO PRODUCE SHOULD BE SET ASIDE

6. Paragraph 2 of the first notice and paragraphs 1 and 2 of the second notice seek documents relating to the Prime Minister's speech. The amendments that were disallowed on 24 September 2024 included proposed amended grounds 1(b)(vi)(A) and (B) and 2(b)(iii)(C) (see Annexure A, p 5). By these amendments the applicant proposed to argue that the Advice Decision involved a denial of procedural fairness and/or was legally unreasonable because of a desire to make a decision adverse to the applicant quickly to allow the Prime Minister to deliver a speech at the NSW State Labor Party Conference to make an announcement about mining in Jabiluka and Kakadu National Park.
7. As the above amendments have been disallowed, there is now no proper basis on which the applicant can say that the documents sought in the second notice relating to the Prime Minister's speech have any apparent relevance to the issues raised in the proceeding concerning the Advice Decision. Even if the applicant seeks to point to some possible relevance of documents relating to the Prime Minister's speech to the remaining grounds of review (which is disputed and remains for the applicant to demonstrate), draft versions of the speech or comments or communications relating to such drafts (paragraph 2 of the first and second notices) could only be of slight relevance and is outweighed by the burden imposed by the searches and review required.¹³
8. Paragraphs 1 and 2 of the second notice will require making inquiries with the Office of the Prime Minister and the Department of Prime Minister and Cabinet, searching email accounts and mobile phones of staff in each of these Offices and the Prime Minister, searching internal document management systems of the Office of the Prime Minister and the Department of Prime Minister and Cabinet, searching hand-written as well as electronic notes, and reviewing documents for

⁸ *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [65] (Bell P), [89] (Brereton JA), [98], [100] (McCallum J); *Seven Network (Operations) Limited v Fairfax Media Publications Pty Limited* [2023] FCAFC 185 at [38] (Wheelahan, Anderson and Jackman JJ).

⁹ *Seven Network Ltd v News Ltd (No 11)* [2006] FCA 174 at [7] (Sackville J); *Cheung Kong Infrastructure Holdings Limited v BlueScope Steel Limited* [2010] FCA 739 at [55] (Foster J); *CFMEU* at [6] (Collier J); *Thai Massage* at [20] (Katzmann J).

¹⁰ *Azzi and Ors v Volvo* [2006] NSWSC 283 (*Azzi*) at [20] (Brereton J); *Construction, Forestry, Mining, Maritime and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 (*CFMEU*) at [6] (Collier J).

¹¹ *Azzi* at [6] (Brereton J); *Transport for NSW v Boensch (No 2)* [2023] NSWSC 1354 at [111] (McGrath J); *G H Varley Pty Ltd v GCG Distribution Pty Ltd* [2022] NSWSC 514 at [18] (Robb J).

¹² *CFMEU* at [7] (Collier J); *Thai Massage* at [21] (Katzmann J).

¹³ Affidavit of Madisen Scott affirmed 24 September 2024 (**Scott affidavit**).

relevance and privilege and immunity claims.¹⁴ Given that the documents sought relating to the Prime Minister’s speech lack apparent relevance to the remaining grounds of review, and in light of the burden imposed by the required searches and the expedited timetable of the matter for hearing, paragraph 2 of the first notice and paragraphs 1 and 2 of the second notice are properly viewed as oppressive and should be set aside.

9. Paragraph 1 of the first notice and paragraph 3 of the second notice seek documents relating to the joint media release. As outlined in Ms Scott’s affidavit, these paragraphs of the notices would require making inquiries beyond the Office of the first respondent and the Department of Industry, Science and Resources, namely with the Office of the Minister for Environment and Water and the Department of Climate Change, Energy, Environment and Water (**DCCEEW**), searching the email accounts and mobile phones of staff in that Office and DCCEEW, searching the internal document management systems of that Office and DCCEEW, searching for hand-written as well as electronic notes and reviewing documents for relevance and privilege and immunity claims.¹⁵ Statements as to possible incorporation of Jabiluka MLN1 into Kakadu National Park already form part of the evidence in the proceeding, including in the joint media release itself¹⁶ and inferences are able to be sought and submissions made based on this material. Further, under orders made on 9 September 2024 relating to a notice to produce filed on 7 August 2024, the Commonwealth parties are already required to produce all documents evidencing or recording information received by the first respondent between 1 December 2022 and 25 July 2024 in relation to the extension of Kakadu National Park into Jabiluka MLN1 and any communications from a range of persons including the Minister for Environment and Water.¹⁷ Given the very limited relevance (if any) of drafts, comments and communications relating to the joint media release beyond the existing documentary record and documents already required to be produced by the Commonwealth parties, and the burden imposed by the required searches and the expedited timetable, paragraph 1 of the first notice and paragraph 3 of the second notice are also properly viewed as oppressive and should be set aside.

CONCLUSION

10. For the above reasons, the notices should be set aside under r 1.32 of the Rules. The Commonwealth parties will seek their costs of the interlocutory application if they are successful.

Date: 30 September 2024



Patrick Knowles
Tenth Floor Chambers
Counsel for the First and Second Respondents

Joanna Davidson
6th Floor Selborne Wentworth
Chambers



Anthony Hall
12 Wentworth Selborne Chambers

¹⁴ Scott affidavit, [15]-[17].

¹⁵ Scott affidavit, [15]-[17].

¹⁶ Statement of Agreed Facts dated 4 September 2024, [69], Annexure RR, pp 547-549.

¹⁷ See orders made on 9 September 2024, Annexure A, 2(a)-(b)(ii).

Annexure A

Table of amendments disallowed on 24 September 2024

Paragraph	Proposed amendment disallowed
1(b)(i)	<p>(i) the First Respondent and/or the Second Respondent failed to disclose to the Applicant, and to give the Applicant an opportunity to comment on, information (including credible, relevant, adverse and significant information) received by the First Respondent and/or the Second Respondent, and/or to which the First Respondent and/or Second Respondent had regard, including submissions <u>and/or representations by or on behalf of:</u></p> <p>(A) the <u>Sixth Respondent;</u> (B) the <u>Mirarr Traditional Owners;</u> (C) the <u>Gundieihmi Aboriginal Corporation (GAC);</u> (D) the <u>Third Respondent;</u> (E) the <u>office of the First Respondent;</u> (F) the <u>Prime Minister;</u> (G) the <u>Minister for the Environment and Water (Environment Minister);</u> (H) the <u>Minister for Indigenous Australians (Indigenous Australians Minister);</u> (I) <u>Peter Garrett;</u> (J) <u>Professor Don Henry;</u> (K) the <u>Department of Prime Minister and Cabinet;</u> (L) the <u>office of the Third Respondent;</u> (M) the <u>office of the Prime Minister;</u> (N) the <u>office of the Environment Minister;</u> (O) the <u>office of the Minister for Indigenous Australians;</u> (P) <u>Senator Malarndirri McCarthy;</u> (Q) the <u>office of Senator Malarndirri McCarthy;</u> (R) <u>Luke Gosling OAM MP;</u> (S) the <u>office of Luke Gosling OAM MP;</u> (T) <u>Senator Marion Scrymgeour;</u></p>

	<p><u>(U) the Commonwealth Department of Industry, Science and Resources (Commonwealth Department);</u></p> <p><u>(V) the Northern Territory Department of Industry, Tourism and Trade</u></p> <p><u>(W) the Northern Territory Department of Environment Parks and Water Security;</u></p> <p><u>(X) the Office of the Supervising Scientist;</u></p> <p><u>(Y) Yvonne Margarula; and</u></p> <p><u>(Z) unidentified members of the public;</u></p>
1(b)(iii)(E) and (F)	<p>(iii) the First Respondent and/or Second Respondent failed to give the Applicant the opportunity, <u>or a reasonable opportunity</u>, of ascertaining the relevant or critical issues on which the decision was likely to turn, and the opportunity or a reasonable opportunity, to make submissions and provide information on those issues, including:</p> <p>...</p> <p><u>(E) the material received by the First Respondent and/or Second Respondent in respect of the Advice Decision; and</u></p> <p><u>(F) the material placed before the First Respondent and/or Second Respondent at the time of the Advice Decision;</u></p>
1(b)(vi)(A) and (B)	<p>(vi) the First Respondent and/or Second Respondent failed to give reasonable and lawful consideration to the submissions advanced by the Applicant, including the material in the Application, having regard (inter alia) to:</p> <p><u>(A) the representations that had already been communicated to, by or on behalf of the Prime Minister, the Environment Minister and/or the Indigenous Australians Minister;</u></p> <p><u>(B) the desire on the part of the First Respondent to make a decision quickly and adversely to the Applicant (inter alia) to allow the Prime Minister to make an announcement at the NSW State Labor Conference on 27 July 2024 and having regard to the timing of the NT election;</u></p>
1(b)(vii)	<p><u>(vii) the material referred to in the Affidavit of Brad Welsh affirmed 9 September 2024.</u></p>
2(b)(iii)(C)	<p>2. The Advice Decision was unreasonable.</p> <p>...</p> <p>(b) in making the Advice Decision, the First Respondent and/or the Second Respondent:</p> <p>...</p> <p>(iii) had regard to and gave excessive and impermissible weight to (inter alia):</p> <p>...</p> <p><u>(C) the desire to make a decision, adverse to the Applicant, to allow the Prime Minister to deliver a speech to the NSW State Labor Party conference making announcements about mining in Jabiluka and the Kakadu National Park.</u></p>