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Important Information

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ENERGY RESOURCES OF AUSTRALIA LTD v MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH) & ORS

SUBMISSIONS OF ERA OPPOSING APPLICATION TO INTERVENE

INTRODUCTION

1. The application of Zentree Investments Limited (**Zentree**) and Packer & Co Pty Ltd (**Packer**) for leave to intervene pursuant to ss 236 and 237 of the *Corporations Act 2001* (Cth) or pursuant to r 9.12(1) of the *Federal Court Rules 2011* (Cth) should be refused. The s 237 application does not satisfy at least two of the criteria in s 237(2). The steps (if they are "steps" at all) sought to be taken would be of no utility, and granting the application would be inconsistent with the overarching purpose. The application to intervene under r 9.12(1) suffers from related difficulties.

APPLICATION FOR LEAVE UNDER SECTIONS 236 AND 237

2. Sections 236(1) and 237(1) permit an application by a member of a company for leave to "bring, or intervene in, proceedings", "for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings". Zentree and Packer are members of ERA who seek to take responsibility on behalf of the company for particular "steps" being, first, to pursue and seek relief in respect of an asserted cause of action based on wrongful derogation of a grant of interests (1(a)) and, secondly, to make two submissions (1(b) and (c)).

3. At the outset, it may be doubted that the activities described in paragraphs 1(a), (b) and (c) are "steps" within the meaning of s 236(1). Nothing in s 236(1) indicates that running an additional cause of action, or advancing particular submissions, amounts to a "step" in the requisite sense. ERA has not identified any case in which leave has been granted for the purpose of running particular arguments (or an unparticularised cause of action), in circumstances where the company is also actively prosecuting the proceedings and is separately represented. Litigation would quickly become unwieldy if any eligible person could "intervene" in proceedings which the company is already prosecuting for the purposes of advancing a few additional submissions.

4. In any event, s 237(2) prescribes four criteria for the grant of leave in respect of an application to intervene (as opposed to leave to bring proceedings). If the criteria are

satisfied the application must be granted and if they are not satisfied the application should be refused: *South Johnstone Mill Ltd v Dennis* (2007) 163 FCR 343 at [60] (Middleton J); *Maher v Honeysett & Maher Electrical Contractors* [2005] NSWSC 859 at [12]-[13] (Brereton J); *In the matter of Gillespie Cranes Nominees Pty Ltd* [2024] NSWSC 1136 at [17] (Black J). Here, the conditions in at least s 237(2)(a) and (c) are not met.

5. **As for s 237(2)(a)**, it is not the case that "it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them": cf s 237(2)(a). ERA has brought proceedings and is properly taking responsibility for them and the steps in them. ERA is represented by experienced solicitors and counsel; it is well-placed to prosecute any available meritorious legal arguments, and is doing so. ERA considers that the proposed steps need not and should not be taken.

6. In respect of the asserted "cause of action" which is the subject of 1(a) of the Interlocutory Application, no prayers for relief have been identified, no draft amended originating application is supplied, and the proposed relief and nature of the asserted cause of action remain unclear. In particular, it would add nothing to the case to assert that there has been a wrongful derogation from grant in circumstances where ERA already contends that the Advice Decision and the Renewal Decision were made inconsistently with the grant by condition 2 of MLN1 of an entitlement to a renewal to ERA: Amended Originating Application at [3A(b)] and [6]. Zentree and Packer's acceptance that their application involves no new facts (see Affidavit of Gordon Grieve dated 4 October 2024 at [31]) suggests that all that is proposed here is the addition of a new and superfluous legal label to an existing argument.

7. In respect of order 1(b) (estoppel of seventh respondent): this submission is unmeritorious. Zentree and Packer seek leave to intervene to argue that Ms Margarula is estopped from making certain submissions. Even assuming *arguendo* there was a reasonable basis for ERA to contend that she is so estopped, that would not preclude any other respondent to the proceeding from doing so. Advancing this point would distract from the hearing and determination of the proceedings without any practical gain**.** In respect of order 1(c) (delay): this submission is also unmeritorious. The application for review has been brought by ERA and it is the only party which seeks relief. The relevance of "delay" by one or other of the respondents is not apparent.

8. **As for s 237(2)(c)**: the court would not be satisfied that it is in the best interests of the company that Zentree and Packer be granted leave. The proposed arguments lack merit and utility, for reasons already addressed, and ERA is well-placed to prosecute all meritorious arguments as it is currently doing.

9. Timing considerations also loom large. This matter has been set down for a four day hearing commencing on 28 October. There are seven respondents and it is likely that there will be cross-examination of several witnesses. A large volume of documents have been produced, including in the last few weeks. Time will be required for oral opening and closing submissions, potentially by all parties. It may very well be challenging to accommodate the hearing within the existing four days allocated. Zentree and Packer's position is that their arguments will add half a day to the existing timetable, but the timetable was fixed without allowing for this additional time. To the extent that Zentree and Packer's participation would impact on the hearing timetable, the grant of leave would not be in ERA's best interests.

APPLICATION TO INTERVENE UNDER R 9.12 OF THE FEDERAL COURT RULES 2011 (CTH)

10. The principles governing the grant of leave to intervene under r 9.12 are well-established. The Court should consider all the circumstances of the case, whether the intervention will assist the Court, whether intervention is in the parties' interests, whether the intervention will occupy time unnecessarily, whether it will add inappropriately to the cost of the proceeding and the matters in r 9.12(2): see, eg, ***Wilson*** *v Manna Hill Mining Company Pty Ltd* (2004) 51 ACSR 404, [2004] FCA 1663 at [101]-[105]. The leave sought in order 2 is at large, but it is assumed that leave is sought only to put the matters the subject of prayer 1. In respect of those matters, each of the conditions identified in *Wilson* points against the grant of leave, for the reasons addressed in respect of ss 236 and 237. Further, as a matter of discretion, it has been open to Zentree and Packer to prepare and serve a draft amended originating application and draft submissions which explain the nature of the case they propose to put as intervener and their failure to do so means it is not possible for the Court to be positively satisfied that intervention is appropriate and in the interests of justice.

R P L LANCASTER SC **D HUME** **M ELLICOTT**

COUNSEL FOR ENERGY RESOURCES OF AUSTRALIA LTD **18 OCTOBER 2024**