

NOTICE OF FILING AND HEARING

Filing and Hearing Details

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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
Reason for Listing: To Be Advised
Time and date for hearing: To Be Advised
Place: To Be Advised



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.



Amended Originating application for judicial review

No. 1056 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

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

To the Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date]

Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable]

Date: ~~6 August 2024~~ 25 September 2024

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of	Energy Resources of Australia Ltd ABN 71 008 550 865, Applicant
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The Applicant applies to the Court to:

- (a) review the decision of the Third Respondent dated 26 July 2024 that the Applicant's **Application** for renewal of Jabiluka Mineral Lease 1 (**Jabiluka MLN1**) be refused (**the Renewal Decision**);
- (b) review the decision and/or conduct of the First Respondent and/or Second Respondent to provide advice to the Third Respondent that the Application be refused (**the Advice Decision**).

Details of claim

The Applicant is aggrieved by the decisions and/or conduct because:

1. the Applicant is the titleholder of Jabiluka MLN1;
2. the Applicant made the Application and had a right to have it lawfully determined.

Grounds of application

The Advice Decision

The Advice Decision was and is invalid or otherwise beyond power, on the grounds set out in paragraphs 1, 2, 3 and/or 3A below.

1. In making the Advice Decision, the First Respondent and/or the Second Respondent denied the Applicant procedural fairness.

Particulars:

- (a) In deciding whether to give advice, and as to the terms of advice, for the purposes of s 187(1) of the *Mineral Titles Act 2010* (NT), the First Respondent and/or the Second Respondent was obliged to afford the Applicant procedural fairness and natural justice, including because the advice was apt to affect adversely the proprietary and financial interests of the Applicant and to destroy or impair the rights or expectations of the Applicant arising by reason of condition 2 of MNL1-MLN1.
- (b) In making the Advice Decision, the First Respondent and/or the Second Respondent denied the Applicant procedural fairness and natural justice, because:
 - (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



from the ~~Northern Land Council~~ Sixth Respondent and the Mirarr Traditional Owners);

- (iA) the First Respondent and/or Second Respondent failed to give the Applicant a reasonable opportunity to be heard on the issues raised in the submissions and representations referred to in sub-paragraph (i);
- (ii) the First Respondent and/or Second Respondent failed to give to the Applicant a reasonable opportunity to be heard on the procedures to be applied by the First Respondent and/or the Second Respondent in making the Advice Decision; because:
- (A) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to when the decision would be made;
- (B) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to what information would be placed before the decision-maker;
- (C) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to what oral and/or written representations would be sought and/or received by the First Respondent and/or Second Respondent;
- (iii) the First Respondent and/or Second Respondent failed to give the Applicant the opportunity, or a reasonable opportunity, 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 being:
- (A) the desire, on the part of the Commonwealth, to extend Kakadu National Park upon the expiry of the initial term of Jabiluka MLN1;
- (B) the views of the ~~Northern Land Council~~ Sixth Respondent and the Mirarr Traditional Owners;
- (C) the likelihood (or otherwise) that the ~~local landowners~~ Mirarr Traditional Owners would not consent to mining during the renewal period applied for; and
- (D) the prospects of the site being developed or mined within the ten year renewal period that was sought by the Applicant.



- (iv) On 28 June 2024, there were meetings involving two representatives of the Applicant (Brad Welsh and Ken Wyatt), two or three representatives of the Commonwealth Department ~~of Industry, Science and Resources~~ (including Kym Moore and Georgia Tree) and the First Respondent and, in respect of those meetings:
- (A) there was a single meeting involving the First Respondent scheduled for approximately 30 minutes, at which the First Respondent was present only for the last 10 minutes;
 - (B) there was a separate meeting between Brad Welsh, Ken Wyatt and Kym Moore;
 - (C) the First Respondent did not ask any questions or otherwise identify any issues of concern or for consideration by the Applicant, and instead said that the Applicant had “made good points”;
 - (D) no representatives of the Commonwealth Department raised any issues of concern or for consideration by the Applicant;
 - (E) the First Respondent and representatives of the Commonwealth Department created the impression in the minds of the Applicant that no advice in respect of the Applicant was imminent and that, if a decision was pending, there would be consultation with the Applicant because:
 - (i) Kym Moore said that the Third Respondent had not referred the Application at that point;
 - (ii) Mr Welsh said that he did not expect the Application to be referred before the Northern Territory went into caretaker mode, and that he would come back to Canberra to meet with relevant parties, including the First Respondent, and the Commonwealth Department during September to continue the discussion;
 - (iii) the First Respondent and the representatives of the Commonwealth Department did not indicate that it would or might be futile to return in September because advice would, by that point, have been given;
- (v) in previous discussions between Mr Welsh and representatives of the Commonwealth Department, there had been discussions about different ways of working through potential issues with the Application, including a possible workshop; the First Respondent and/or Second Respondent otherwise failed



to give the Applicant a fair and reasonable opportunity to be heard in respect of the Advice Decision;

(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 to:

(A) the fact that the First Respondent had a copy of MS24-000911, which included (together with a volume of other documents) the Application, for not more than 79 minutes before making, and then communicating, the Advice Decision;

(B) the absence of any reasons from the First Respondent indicating that she gave reasonable or lawful consideration, or any consideration, to the Application.

2. The Advice Decision was unreasonable.

Particulars

(a) In deciding whether to give advice, and as to the terms of advice, for the purposes of s 187(1) of the *Mineral Titles Act 2010* (NT), the First Respondent and/or the Second Respondent was obliged to act in a manner which was legally reasonable and having regard to all considerations which the law required, and was obliged otherwise to act for authorised purposes;

(b) in making the Advice Decision, the First Respondent and/or the Second Respondent:

(i) engaged in the conduct alleged in particular (b) in Ground 1;

(ii) failed to have regard to, or give the weight lawfully required to (inter alia):

(A) the Applicant's interest in Jabiluka MLN1;

(B) condition 2 of Jabiluka MLN1;

(C) the potential for Jabiluka MLN1 to be renewed beyond the 10 years referred to in condition 2 of Jabiluka MLN1;

(D) the adverse economic consequences (including for shareholders of the Applicant) of advice that the Application be refused;

(E) section 35(4) of the *Atomic Energy Act 1953* (Cth), including the consideration that the title and property of the Commonwealth in any uranium in the area of Jabiluka MLN1 was subject to the rights of the Applicant in Jabiluka MLN1;



- (F) the obligations of the Applicant under condition 3 and Schedule 3 of Jabiluka MLN1 (including the Applicant's rehabilitation obligations);
- (G) clauses 2.1 and 5.1(d) of the Long Term Care and Maintenance Agreement with the Applicant dated 25 February 2005 (LTCMA) and the provisions made in those clauses;
- (H) in the event that Jabiluka MLN1 was not renewed, the potential for a future government to grant a new mining lease over the area of Jabiluka MLN1;
- (I) further to sub-paragraph (H), in the event that a future government were to grant a new mining lease over the Area, the potential for any future titleholder not to be the subject of a contractual or other obligation to the effect set out in clause 5.1(d) of the LTCMA;
- (J) the process for proclaiming land into Kakadu National Park as set out under s 344 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- (K) the fact that a proclamation to include land into Kakadu National Park under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can be reversed by further proclamation;
- (L) section 68 of the *Mineral Titles Act 2010* (NT);
- (M) section 203 of the *Mineral Titles Act 2010* (NT);
- (N) the national interest in preserving Commonwealth control over "prescribed substances" within the meaning of the *Atomic Energy Act 1953* (Cth);
- (iii) 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) the views of the Northern Land Council Sixth Respondent and the Mirarr people Traditional Owners (including because of the obligations under cl 5.1(d) of the Long Term Care and Maintenance Agreement with ERA (LTCMA) dated 25 February 2025 LTCMA).
- ~~(iv) failed to have regard to (or gave inadequate weight to) the fact, of which they were aware, that the Mirarr people were obliged, by cl 5.1(d) of the LTCMA to acknowledge that "ERA holds and is entitled to continue to hold MLN1 and that they will not initiate, fund or allow to be brought in their names any action which seeks the result that MLN1 is forfeited, cancelled or otherwise prejudicially affected, otherwise than for breach by ERA of [the LTCMA]";~~



- (iv) acted with regard to and for the purpose of extending the Kakadu National Park into the land covered by Jabiluka MLN1;

Particulars

The Hon Madeleine King MP, “Work Begins to Add Jabiluka Site to Kakadu National Park” (27 July 2024).

Anthony Albanese, Speech, New South Wales State Labor Conference (27 July 2024).

Further particulars will be provided after compulsory production.

- (v) did not act for the purposes of the *Atomic Energy Act 1953* ~~(NT)~~(Cth), including the interest in preserving Commonwealth control over “prescribed substances” in the national interest-;

- (vi) failed to proceed on the basis of correct legal principles, correctly applied, by proceeding on the basis that:

(A) non-renewal of Jabiluka MLN1 would ensure Jabiluka was protected from mining forever;

(B) non-renewal of Jabiluka MLN1 had the effect that the area the subject of Jabiluka MLN1 was allowed to be added to Kakadu National Park;

(C) her advice was binding on, and must be adhered to, by the Third Respondent and/or Fourth Respondent;

(D) the effect of the Advice Decision was that the Third Respondent was enabled to decline to extend Jabiluka MLN1, when it would not otherwise have been enabled to do so.

3. The Advice Decision was a purported exercise of executive power of the Commonwealth that was not authorised by, or was inconsistent with, statute.

Particulars

- (a) The executive power vested in the First Respondent and/or Second Respondent to give “advice” was, at all times, subject to statutory control;
- (b) On the proper construction of the *Atomic Energy Act 1953* (Cth), including s 35(4) of that Act, the power or capacity of the First Respondent and/or Second Respondent to give “advice” in respect of a “prescribed substance” was subject to rights granted by the Northern Territory in respect of uranium, including Jabiluka MLN1, such that it was (and is) not open to the First Respondent and/or Second Respondent to give “advice” to the effect that such a right should be extinguished, defeated or impaired;



- (c) At all material times, under Jabiluka MLN1, by reason of condition 2 of that lease, the Applicant had a right to a renewal of Jabiluka MLN1;
- (d) Further, at all material times, under the *Mineral Titles Act 2010* (NT) and Jabiluka MLN1, the Applicant had a right to a consideration of an application for renewal of Jabiluka MLN1 on the merits;
- (e) The effect of the Advice Decision was to extinguish, defeat or impair those rights, and/or to acquire the property of the Applicant recognised in s 35(4) without statutory authority, and the Advice Decision was therefore in breach of the condition alleged in paragraph (b).

3A. The Advice Decision was unlawful because the First Respondent and/or Second Respondent failed to proceed on the basis of correct legal principles, correctly applied.

Particulars

(a) Paragraph 2(b)(vi) is repeated.

(b) Paragraphs 6(a)–(f) below are repeated.

4. In all the circumstances, by reason of the Advice Decision being invalid or otherwise beyond power as set out above, the “advice” provided to the Third Respondent was not “advice” within the meaning of section 187(1) of the *Mineral Titles Act 2010* (NT).

The Renewal Decision

The Renewal Decision was and is invalid or otherwise beyond power, on the grounds set out in paragraphs 5, 6 and/or 6-7 below.

5. The Third Respondent erred in law and made a jurisdictional error in considering that s 187 of the *Mineral Titles Act 2010* (NT) conferred the power or the duty to make the Renewal Decision.

Particulars

(a) It was a condition of validity of the Renewal Decision that:

- (i) the Third Respondent proceed in accordance with correct legal principles correctly applied;
- (ii) the Third Respondent treat the exercise of the power to renew as a discretionary power, to be exercised in accordance with the circumstances of the case pursuant to ss 43 and 70 of the *Mineral Titles Act 2010* (NT), subject to any valid operation of any duty imposed by s 187(1) of the *Mineral Titles Act 2010* (NT);

(b) in making the Renewal Decision, the Third Respondent:



- (i) proceeded on the basis that the Advice Decision was valid;
 - (ii) proceeded on the basis that there was, before him, “advice of the Commonwealth Minister” for the purposes of section 187(1) of the *Mineral Titles Act 2010* (NT)
 - (iii) proceeded on the basis that he was subject to a duty to act in accordance with, and to give effect, to that advice;
 - (iv) failed to exercise a discretion, by reference to all the circumstances of the case, and instead treated the exercise of the power as foreclosed by the purported “advice” from the Second Respondent;
- (c) the Advice Decision was invalid, and the “advice” given by the First Respondent was not “advice of the Commonwealth Minister” within the meaning of section 187(1) of the *Mineral Titles Act 2010* (NT);
- (d) further or in the alternative to (c) above, s 187(1) of the *Mineral Titles Act 2010* (NT) purported to impose a statutory limitation on the power to renew that was inconsistent with the obligation to renew in condition 2 of Jabiluka MLN1, with the consequence that condition 2 prevailed and s 187(1) did not operate in the circumstances;
- (e) the Third Respondent therefore:
- (i) failed to proceed in accordance with correct legal principles correctly applied;
 - (ii) failed to treat the exercise of the power to renew as a discretionary power, to be exercised in accordance with the circumstances of the case, subject to any valid operation of any duty imposed by s 187(1) of the *Mineral Titles Act 2010* (NT);
 - (iii) committed jurisdictional error in making the Renewal Decision.
6. The Third Respondent asked the wrong question, and/or failed to take account of a relevant consideration, and/or failed to act in accordance with correct legal principles correctly applied and/or otherwise acted unlawfully, by failing to consider and determine the ~~renewal application~~ Application by reference to and application of condition 2 of Jabiluka MLN1.

Particulars

- (a) Jabiluka MLN1 was a “corresponding mineral title” within the meaning of the *Mineral Titles Act 2010* (NT);



- (b) under s 203(1) of the *Mineral Titles Act 2010* (NT), if a condition of a corresponding mineral title is inconsistent with a provision of the Act, the condition of the corresponding mineral title prevails to the extent of the inconsistency;
- (c) it was a condition of Jabiluka MLN1 that, provided the Applicant has complied with the *Mining Act 1980* (NT) (or, alternatively, the *Mining Act 1980* (NT) and any successor statutes, including the *Mineral Titles Act 2010* (NT)) and the conditions to which Jabiluka MLN1 is subject, the Third Respondent must renew the lease for a period not exceeding ten years (condition 2);
- (d) at all material times, the Applicant had, as a matter of substance, complied with the *Mining Act 1980* (NT), the *Mineral Titles Act 2010* (NT) and the conditions of Jabiluka MLN1, such that the entitlement given by condition 2 was enlivened;
- (e) the entitlement given by condition 2 of Jabiluka MLN1 included an entitlement to a renewal of Jabiluka MLN1 for such lease term, not exceeding 10 years, as was applied for by the Applicant;
- (f) the Third Respondent was obliged to give effect to that entitlement, that being an obligation which prevailed over any obligation otherwise arising to give effect to advice of the First Respondent and/or Second Respondent;
- (g) the Third Respondent unlawfully failed to give effect to that entitlement, and instead purported to treat the advice of the First Respondent and/or Second Respondent as binding and determinative of the Application.

7. In making the Renewal Decision, the Third Respondent denied the Applicant procedural fairness.

Particulars:

- (a) In deciding under s 43(2) of the *Mineral Titles Act 2010* (NT) (or otherwise) whether to renew a mineral title, the Third Respondent was obliged to afford the Applicant procedural fairness and natural justice, including because any decision in respect of renewal was apt to affect adversely the proprietary and financial interests of the Applicant and to destroy or impair the rights or expectations of the Applicant arising by reason of condition 2 of MLN1.
- (b) The decision-making process put in train and acted on by the Third Respondent in respect of the renewal involved the seeking, preparation, communication and receipt of advice from the First Respondent and/or Second Respondent.
- (c) The First Respondent and/or Second Respondent departed from the requirements of procedural fairness and natural justice, for the reasons set out in Ground 1.



(d) At all material times, including after the Advice Decision and before the Renewal Decision, the First Respondent and/or Second Respondent did not remedy these departures by the First Respondent and/or Second Respondent, and those departures infected the fairness of the Renewal Decision.

Orders sought

1. An order setting aside the Renewal Decision.
2. Further, or alternatively, an order declaring that the Renewal Decision is invalid and of no legal effect.
3. An order declaring that the Advice Decision was beyond power and is invalid and of no legal effect.
4. Further or in the alternative, an injunction restraining the First Respondent and/or the Second Respondent from giving advice to the Third Respondent and/or the Fourth Respondent, for the purposes of section 187(1) of the *Mineral Titles Act 2010* (NT), unless and until natural justice has been afforded to the Applicant.
5. An order declaring that Jabiluka MLN1 continues in force.
6. Costs.
7. Interest on costs.
8. Such further or other order as the Court considers appropriate.

Applicant's address

The Applicant's address for service is:

Place: Level 34, 161 Castlereagh St, Sydney NSW 2000

Email: leon.chung@hsf.com

The Applicant's address is:

Level 8, TIO Building

24 Mitchell St,

Darwin City NT 0800.



Service on the Respondents

It is intended to serve this application on all Respondents.

Date: ~~6 August 2024~~ 25 September 2024

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Signed by Leon Chung
Lawyer for the Applicant

**Schedule**

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: General

Respondents

- Second Respondent:** Commonwealth of Australia
- Third Respondent:** Minister for Mining and Minister for Agribusiness and Fisheries
(Northern Territory)
- Fourth Respondent:** Northern Territory
- Fifth Respondent:** Jabiluka Aboriginal Land Trust
- Sixth Respondent:** Northern Land Council
- Seventh Respondent:** Yvonne Margarula