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

FEDERAL COURT OF AUSTRALIA, PROCEEDING NSD 1506/2024

ZENTREE INVESTMENTS LIMITED AND PACKER & CO LTD'S WRITTEN SUBMISSIONS IN SUPPORT OF INTERLOCUTORY APPLICATION

1 INTRODUCTION

1 By an interlocutory application dated 4 October 2024, **Zentree** Investments Limited and **Packer** & Co Ltd seek leave to intervene in the proceeding pursuant to:

a) ss 236(1) and 237(1) of the ***Corporations Act*** *2001* (Cth); and

b) in the alternative, r 9.12(1) of the *Federal Court* ***Rules*** (Cth).

2 In support of their application, Zentree and Packer rely on the affidavits of:

a) Richard Anthony **Magides** (director of Zentree) affirmed 4 October 2024;

b) William **Packer** (director of Packer) sworn 4 October 2024; and

c) Gordon **Grieve** (solicitor for Zentree/Packer) sworn 4 October 2024 (with Exhibit **GG-1**).

2 ZENTREE AND PACKER

3 Zentree and Packer are persons who are entitled to be registered as a member of the applicant in the proceeding, Energy Resources of Australia Limited (**ERA**).[1]

4 Both have a real and significant interest in the conduct and outcome of the proceeding, in circumstances where MLN1 contains one of the world's largest uranium deposits.[2] They have sought and obtained legal advice from their solicitors and counsel in relation to the proceeding.[3]

3 THE REASON FOR SEEKING INTERVENTION

5 The reason for Zentree and Packer seeking leave to intervene in the proceeding is that they seek to advance arguments and, should they be so permitted, seek to obtain relief that would be determinative of the subject matter of the proceeding (or at least bear heavily on its disposition), being the decision to renew MLN1 or, following the joinder of the seventh respondent, Ms Margarula, the validity of MLN1.

6 The arguments that Zentree and Packer seek to advance (which ERA does not contend for) are:

a) **Argument 1**: The third respondent, the **Territory Minister**, has wrongfully derogated from the grant of MLN1 by not renewing it for a term of 10 years (despite all relevant conditions having been met) such that ERA is now entitled to injunctive relief (or an order in the nature of specific performance) to the effect that the Territory Minister take immediate steps to renew MLN1. The obligation on a lessor not to derogate from their grant has long been recognised.[4] It applies to grants of rights or interests pursuant to a contractual promise to

[1] Affidavit of Richard Anthony Magides (**Magides Affidavit**) at [2] and Affidavit of William Packer (**Packer Affidavit**) at [5].
[2] Packer Affidavit at [6].
[3] Ibid at [10].
[4] Butt P, *Land Law* (6th ed, 2010) at [16.52].

do so, such as an option to renew. It has been applied to mining leases.[5] There does not need to be an actual interference with the possession or occupancy of the land or the interest for wrongful derogation to occur. Rather, it embraces every interruption to a beneficial enjoyment of the thing demised whether accidental or wrongful or in whatever way the interruption may be caused.[6] Where a grantor has derogated from their grant, the Court may, by way of mandatory injunction, require the grantor to take steps to honour their grant.[7]

b) **Argument 2**: Ms Margarula should be estopped from challenging the validity of clause 2 of MLN1, as she has foreshadowed that she will in her written submissions in support of joinder, whether by reason of *res judicata* (including the principle arising from *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589), issue estoppel or estoppel by deed. In relation to the *res judicata* and issue estoppel-related contentions, the validity of MLN1 was the subject of judicial review proceedings brought by Ms Margarula in this Court in the late 1990s.[8] Special leave to appeal to the High Court was refused.[9] In relation to estoppel by deed, Ms Margarula signed, as a deed, the Jabiluka Long Term Care and Maintenance Agreement (**LTCMA**), a copy of which is at Annexure E to the Statement of Agreed Facts filed in this proceeding.[10] Clause 5.1(d) provides (relevantly):

> *In consideration of ERA entering into this Agreement, the NLC and the Traditional Owners each:*
>
> *(d) acknowledge that ERA holds and is entitled to continue to hold MLN 1, and that they will not initiate, fund or allow to be brought in their names any action which seeks the result that MLN 1 is forfeited, cancelled or otherwise prejudicially affected, otherwise than for breach by ERA of this Agreement.*

The execution block of the LTCMA indicates that it was executed as a deed. The basis of estoppel by deed was explained by Gummow J in *Caboche v Ramsay* [11]:

> Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between parties and privies and therefore as not admitting any contradictory proof.

An estoppel by deed may arise from a recital or, as it does here, an operative provision of a deed (being cl 5.1(d) of the LTCMA).[12]

c) **Argument 3**: Any challenge to the validity of MLN1 in the proceeding, whether by Ms Margarula or any other respondent, should be dismissed or otherwise not heard on discretionary grounds having regard to the significant period of delay in doing so, noting that the date of the grant of MLN1 was 12 August 1982.

These are referred to, collectively, as the **Proposed Arguments**.

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[5] *Giacomi v Nashvying Pty Ltd* [2007] QCA 454 at [24].
[6] *Bocardo v Star Energy (UK) Onshore Limited* [2011] 1 AC 380 at 400 [32].
[7] *Cable v Bryant* [1908] 1 Ch 259 at 259 (headnote), also *Homebush Abattoir Corporation v Bermria Pty Ltd* (1991) 22 NSWLR 605 at 606.
[8] *Margarula v Minister for Resources and Energy* [1998] FCA 48 (Sackville J) (**GG-1, pp 22-81**), *Margarula v Minister for Resources & Energy* (1998) 86 FCR 195 (Beaumont, Lindgren and Emmett JJ) (**GG-1, pp 82-101**), see also the affidavit of Susan O'Sullivan sworn 10 September 2024 (**O'Sullivan Affidavit**) at [18].
[9] *Margarula v Minister for Resources and Energy and ORS S132/1998* [1998] HCATrans 427.
[10] O'Sullivan Affidavit at [19].
[11] *Caboche v Ramsay* (1993) 119 ALR 215 at 237ff.
[12] *Re Patrick Corporation Ltd and the Companies Act* [1981] 2 NSWLR 328 at 332-33.

7 In the weeks preceding the making of this application, Zentree and Packer's solicitors have raised the Proposed Arguments with ERA's solicitors in correspondence and, on one occasion, in conference,[13] and sought confirmation that they would, or would not, be advanced. Those steps were taken in good faith and with a view to assisting ERA's solicitors with understanding the nature and utility of the Proposed Arguments.

8 In addition, Argument 1 has been raised in correspondence with the Territory Minister.[14]

9 ERA's solicitors have confirmed ERA will not make the Proposed Arguments in the proceeding.[15]

10 ERA's written submissions were filed on 4 October 2024. Zentree and Packer have not, despite a request by their solicitors, been provided with a copy of those submissions. Additionally, Zentree and Packer only have access to the documents filed by the parties which have been made available on the public record.

4 INTERVENTION UNDER SECTIONS 236 AND 237 OF THE CORPORATIONS ACT

11 Section 236(1) of the *Corporations Act* provides a person may intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if the person is "a member, former member, or person entitled to be registered as a member, of the company" and the person is acting with leave granted under section 237.

12 Section 237 (2) of the *Corporations Act* provides that the Court must grant such an application for leave under section 237 if it is satisfied that:

> (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
>
> (b) the applicant is acting in good faith; and
>
> (c) it is in the best interests of the company that the applicant be granted leave; and
>
> (d) if the applicant is applying for leave to bring proceedings--there is a serious question to be tried; and
>
> (e) either:
>
> > (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
> >
> > (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

13 The Court must be satisfied of each of the matters listed in s 237(2)) on the balance of probabilities.[16] If the Court is so satisfied, then the Court must grant the application although it may grant leave subject to conditions that it deems necessary in the exercise of its discretion.[17]

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[13] Affidavit of Gordon Grieve sworn 4 October 2024 (**Grieve Affidavit**) at [17].
[14] Grieve Affidavit at [13]-[14], [22], [24], [27], GG-1 at pp 7-13, 134, 138-139, 149-150.
[15] Grieve Affidavit at [25], [28], GG-1 at pp 140-143, 153; Affidavit of Gordon Grieve sworn 18 October at [8]
[16] *Swansson v RA Pratt Properties Pty Ltd* (2002) 42 ACSR 313 (***Swansson***) at [26].
[17] *Ao Qing Investment Pty Ltd v 52 Lord St East Perth Pty Ltd* [2022] FCA 743 at [47].

14 Dealing with each of the requirements in turn:

a) **s 237(2)(a)**: The correspondence from ERA's solicitors confirms that this criterion is satisfied; ERA will not advance the Proposed Arguments in the proceeding.[18]

b) **s 237(2)(b)**: the existence of good faith, in substance, turns on:

i) whether Zentree and Packer honestly believe that a good cause of action exists; and

ii) whether they are seeking to bring the derivative action for a proper purpose, as opposed to a collateral purpose amounting to an abuse of process.[19]

Zentree and Packer's respective directors give evidence that they honestly believe that the Proposed Arguments enjoy good prospects of success based on their having received legal advice.[20] Aspects of that advice have been shared with ERA's solicitors on a confidential basis.[21] There is nothing to suggest that Zentree and Packer have any ulterior or improper purpose in seeking to intervene in the way proposed. Moreover, there is no improper purpose in a shareholder bringing an application under ss 236 and 237 in order to restore what it considers to be full value to its shareholding in the company, enabling it at some future point in time to realise the value, as well as increasing through dividends, a higher share of the profits:.[22] This ground is satisfied.

c) **s 237(2)(c)**: It is plainly in the interests of ERA that MLN1 be renewed. It is ERA's key asset.[23] Without it, ERA would remain in what is essentially a state of run-off. The Proposed Arguments are aimed not only at enhancing ERA's prospects of success in the proceeding but at entitling it to relief beyond that which is presently sought, namely a mandatory injunction requiring the Territory Minister to renew MLN1. That outcome, if it can be achieved, is considerably more valuable to ERA than quashing the decision and sending it back for re-determination according to law.

d) **s 237(2)(d)**: This is a familiar standard adopted by courts for assessing interlocutory injunction applications and does not require the applicant to establish that it is more probable than not that the action would succeed:.[24] The Proposed Arguments are plainly arguable and founded on considered legal advice. In any event, there is authority for the proposition that an application to intervene in a proceeding (as opposed to an application to bring a proceeding) does not engage the subsection, with the effect that it is not necessary to prove the existence of a serious question to be tried.[25]

e) **s 237(2)(e)**: Zentree and Packer's solicitors first gave written notice to ERA's solicitors of their intention to apply for leave, as well as reasons for doing so, on 17 September 2024 .[26] The application to intervene was lodged for filing on 4 October 2024. The 14-day written notice period is satisfied.

15 The purpose of ERA's application is to obtain renewal of MLN1. The relief sought by Zentree and Packer is consistent with that purpose and, indeed, is a direct route to achieving this purpose.

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[18] Grieve Affidavit at [25], [28], GG-1 at pp 140-143, 153.
[19] *Swansson* at [36].
[20] Packer Affidavit at [10]-[11], Magides Affidavit at.[7].
[21] Grieve Affidavit at [20].
[22] *Re Connective Services Pty Ltd* [2017] VSC 609 at [108].
[23] See the affidavit of Brad Welsh affirmed 4 August 2024 at [64].
[24] *Cemcon; In the matter of Hall Concrete Constructions (Vic) Pty Ltd* [2009] FCA 696 at [24].
[25] *Zhu v Orico Australia Pty Ltd* [2019] VSC 313 at [31]. See also *Ehsman v Nutectime International Pty Ltd* (2006) 58 ACSR 705 at [58].
[26] Grieve Affidavit at [12], GG-1 at pp 3-6.

16 If the Proposed Arguments are not made in these proceedings, then ERA, and as a result Zentree and Packer, could be prevented from making the Proposed Arguments in any subsequent proceedings as a result of the principles of *Anshun* estoppel.

5 INTERVENTION UNDER RULE 9.12 OF THE RULES

17 Further or alternatively, Zentree and Packer seek leave to intervene under r 9.12 of the *Rules*.

18 Rule 9.12 (1) of the *Rules* provides that a person may apply to the Court for leave to intervene in a proceeding with such rights, privileges and liabilities (including liabilities for costs) as may be determined by the Court. The Court may have regard to any matters is considers relevant, including whether the intervener's contribution will be useful and different to that of the other parties, and whether intervention might unreasonably interfere with the ability of the parties to conduct the proceeding as the parties wish.[27]

19 The touchstone or guiding principle is one of usefulness; that is, whether the intervener will contribute facts or arguments that will assist the court to determine the matter.[28] Such a rule recognises that there may be value in the Court hearing arguments from persons who have a legitimate interest in how the dispute should be determined. Zentree and Packer are such persons.

20 Arguments 2 and 3 concern important issues of principle which, as things stand, no other party intends to raise for this Court's consideration.

21 In respect of Argument 2 (estoppel), the principle is that of finality of litigation, in which there is strong public interest.[29] This affects more than just prejudice to the parties. Ms Margarula is in this proceeding, 26 years following the proceedings referred to at paragraph 6(b) above, re-running a challenge to the validity of MLN1. She should not be allowed to do so.

22 In respect of Argument 3 (delay), it is recognised that remedies on judicial review are discretionary and may be refused depending on circumstances, including delay. The more time that has elapsed, during which countless persons beyond the parties to the proceeding have conducted themselves in reliance on the validity of an administrative decision (including, but not limited to Zentree and Packer), the more difficult it will be for an applicant to obtain relief.[30]

6 CASE MANAGEMENT CONSIDERATIONS

23 Zentree and Packer recognise that the proceeding is subject to an expedited timetable. They equally recognise that the Court will be mindful not to disrupt the orderly conduct of the proceeding.

24 Here, the Proposed Arguments are of a narrow legal nature, not requiring any additional evidence beyond the material already read or tendered in the proceeding, as well as the limited material tendered in support of this application.

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[27] Rule 9.12(2) of the *Rules*.
[28] *Wilson v Manna Hill Mining Company Pty Ltd* (2004) 51 ACSR 404 at [102]-[103].
[29] *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 (Kirby P).
[30] *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [93] (Spigelman CJ).