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Important Information

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ENERGY RESOURCES OF AUSTRALIA LTD V

MINISTER FOR RESOURCES (COMMONWEALTH) & ORS

SUBMISSIONS OF ENERGY RESOURCES OF AUSTRALIA LTD

ON APPLICATION FOR INTERIM RELIEF

OVERVIEW

1. Energy Resources of Australia Ltd (**ERA**) is the titleholder of mineral lease **MLN1**, initially granted under the *Mining Act 1980* (NT) and continued in force and converted to an "ML" by s 202(1) of the ***Mineral Titles Act** 2010* (NT). MLN1 is a mineral title that gives the titleholder the right to occupy the title area specified in the ML and the exclusive right to carry out various activities in the title area, including to conduct mining for uranium ore and other minerals: MLN1, pp 1-3; s 40(1) of the *Mineral Titles Act*.

2. The title area specified in MLN1 is set out at the end of Schedule 4 of MLN1. It covers areas adjacent to the Kakadu National Park, east of Darwin in the Northern Territory. It is immediately north of another uranium mining title, which covers the mine known as the Ranger Uranium Mine.

3. MLN1 was granted for an initial term of 42 years ending on 11 August 2024. On 20 March 2024, the Applicant applied for a renewal of MLN1 for a period of ten years. On 26 July 2024, the Northern Territory Minister for Mining and Minister for Agribusiness and Fisheries (**NT Minister**) purported to refuse the application to renew. The NT Minister said in correspondence that on 25 July 2024 the Commonwealth Minister for Resources and Minister for Northern Australia (**Commonwealth Minister**) had advised him to refuse the application and (having referred to s 187(1) of the Mineral Titles Act) "accordingly" the application to renew was refused.

4. ERA challenges the validity and effectiveness of (i) the advice of the Commonwealth Minister (**the Advice Decision**), and (ii) the decision of the NT Minister to refuse to renew MLN1 (**the Renewal Decision**), on the grounds set out in the **Originating Application** filed on 6 August 2024. As set out in the **Interlocutory Application** filed on 6 August

2024, the applicant seeks urgent interim relief to maintain the status quo, and preserve the subject matter of the claim, until the hearing and determination of the claims in the Originating Application.

MATERIAL RELIED ON

5. ERA relies on:

   (a) the affidavits of Leon Chung affirmed 6 August 2024 of 29 paragraphs (**Chung #1**) and of eight paragraphs (**Chung #2**) and Exhibits LC-1 and LC-2;

   (b) the affidavit of Brad Welsh affirmed 7 August 2024 (**Welsh**) and Exhibit BW-1.

BACKGROUND

6. MLN1 was granted for a term of 42 years from 12 August 1982 to 11 August 2024. From the outset, condition 2 of MLN1 stated:

> The Territory covenants with the lessees that, provided the lessees have complied with the Mining Act and the conditions to which this lease is subject, the Minister at the expiration of this lease and in accordance with that Act will renew this lease for a further term not exceeding ten (10) years.

7. Section 43 of the *Mineral Titles Act* provides:

> (1) Before the end of the term of an ML, the title holder may apply in the approved form to the Minister for the renewal of the ML for all or part of the title area.
>
> (2) The Minister may renew the ML for the term the Minister considers appropriate.
>
> (3) The ML may be renewed more than once.

8. On 20 March 2024, ERA applied in the approved form for renewal of MLN1 (**the Application**): Chung #1 Exhibit LC-1 at 176 .

9. Until an application for renewal is determined, an existing mining title continues in force by operation of s 68 of the *Mineral Titles Act*, which provides:

> If the holder of a mineral title applies for renewal of the title before the end of its current term, the title continues in force until the Minister's decision takes effect in relation to the renewal or refusal to renew the title.

10. Pausing here, it is ERA's submission that s 68 has the effect that, unless and until there is a *lawful and valid* determination of a renewal application, then an existing mining title the subject of a renewal application continues in force. ERA also contends (for reasons developed below) that there has not yet been a lawful and valid determination of the Application, with the result that MLN1 continues in force, and will continue in force at least until the Application is lawfully determined.

11. Section 187(1) and (3) of the *Mineral Titles Act* state:

> (1) In relation to a prescribed substance, the Minister:
>
> (a) must exercise the Minister's powers in accordance with, and give effect to, the advice of the Commonwealth Minister; and
>
> (b) must not exercise the Minister's powers otherwise than in accordance with the advice of the Commonwealth Minister.
>
> …
>
> (3) In this section:
>
> ***Commonwealth Minister*** means the Minister for the Commonwealth administering the *Atomic Energy Act 1953* (Cth).

12. Section 35(1), (2) and (4) of the ***Atomic Energy Act*** *1953* (Cth) state:

> (1) This section applies to substances which, on or after the commencement of this Act, are prescribed substances existing in their natural condition, or in a deposit of waste material obtained from an underground or surface working, on or below the surface of land in a Territory, whether alienated from the Crown or not and, if alienated, whether alienated before or after the commencement of this Act.
>
> (2) A substance to which this section applies which:
>
> (a) is a prescribed substance at the commencement of this Act;
>
> (b) was not the property of the Commonwealth immediately before 11 September 1946 (being the date of commencement of the *Atomic Energy (Control of Materials) Act 1946*);

> is declared to have become the property of the Commonwealth on that date.
>
> …
>
> (4) The title of the Commonwealth to any substance to which this section applies is subject to any rights granted after 10 September, 1946 by or under the law of a Territory, with express reference to that substance, but to no other rights.

13. Uranium is a "prescribed substance": see *Atomic Energy Act* s 5(1).

14. Section 69(4) of the *Northern Territory (Self-Government) Act 1978* (Cth) states:

> All interests of the Commonwealth in respect of minerals in the Territory (other than prescribed substances within the meaning of the *Atomic Energy Act 1953* and the regulations made under that Act and in force immediately before the commencing date) are, by force of this section, vested in the Territory on that date [being, 1 July 1978].

15. One further provision of the *Mineral Titles Act* should be noted. Section 203(1) states:

> If a condition of a corresponding mineral title is inconsistent with a provision of this Act, the condition of the corresponding mineral title prevails to the extent of the inconsistency.

16. On or around 25 July 2024, the Hon Madeleine King MP, the Commonwealth Minister (the First Respondent), gave (or purported to give) "advice" to the Northern Territory Minister (the Third Respondent). The effect of the advice was that the Third Respondent should refuse the Application. The advice itself has, despite ERA's repeated requests, not been provided to ERA: the Third Respondent has taken the view that he is "unable" to provide ERA with a copy of the advice;[1] and the First Respondent has failed to provide ERA with a copy of the advice, despite undertaking to do so.[2]

17. A letter from the NT Department sent on behalf of the NT Minister to ERA dated 2 August 2024 reveals that, in deciding to advise that the Third Respondent should refuse the Application, the First Respondent considered "the views of … the Northern Land Council

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1 Although part of the content of the Commonwealth Minister's advice has been disclosed by the NT Minister: Chung #1 Exhibit LC-1 at 185 (Letter from Anne Tan, Deputy Chief Executive Officer Mining and Energy, NT Department of Industry, Tourism and Trade to ERA dated 2 August 2024).

2 Welsh at [54].

and Mirarr Traditional Owners", and various other matters, including that "the prospects of the site being developed or mines within the ten year renewal period were considered low": Chung #1 Exhibit LC-1 at 185. ERA has not been told, and does not have a copy of any document recording, the "views" of the Northern Land Council and Mirarr Traditional Owners referred to in the letter.

18. The Originating Application describes the decision of the First Respondent and/or the Second Respondent (the Commonwealth) to give "advice" as the **Advice Decision**. ERA contends that the Advice Decision was beyond power, was unlawful, and yielded advice which was not "advice" within the meaning of section 187(1) of the *Mineral Titles Act*. The basis of ERA's complaint is set out in the Originating Application. In particular, ERA contends:

    (a) First, the First and Second Respondent were obliged to afford procedural fairness in respect of the giving of advice, and failed to do so (Ground 1).

    (b) Secondly, the First and Second Respondent were obliged to act in a legally reasonable manner in respect of the giving of advice, and failed to do so (Ground 2).

    (c) Thirdly, any power or capacity of the First and Second Respondent to give advice was subject to statute and, having regard to s 35(4) of the *Atomic Energy Act*, the power to give advice was subject to the right of ERA to a renewal (Ground 3).

19. It is clear that, having received advice from the First Respondent, the Third Respondent felt himself bound to give effect to that advice (by reason of s 187(1) of the *Mineral Titles Act*) and thus to refuse the Application. The Third Respondent duly did so. The Originating Application calls this decision the **Renewal Decision**. ERA contends that the Renewal Decision is invalid. The basis of the complaint is, again, set out in the Originating Application. In particular, ERA contends:

    (a) First, the Third Respondent erroneously proceeded on the basis that there was before him valid "advice" for the purposes of s 187(1) of the *Mineral Titles Act*, and thus committed jurisdictional error (Ground 5). Ground 4 is, to an extent, derivative on the success of one or more of the challenges to the Advice Decision.

(b) Secondly, condition 2 of MLN1 prevailed over s 187(1) by reason of s 203(1) of the *Mineral Titles Act* (Ground 6).

20. Ultimately, ERA seeks orders:

(a) setting aside or declaring invalid each of the Advice Decision and the Renewal Decision;

(b) enjoining the First and Second Respondent from delivering further advice unless and until natural justice has been afforded;

(c) declaring that MLN1 continues in force (by reason of s 68 of the *Mineral Titles Act*).

21. ERA has approached the Court with urgency because, on the face of MLN1 and the Renewal Decision, MLN1 ceases on Sunday, **11 August 2024**. If the title ceases, various statutory and other consequences follow. Statutory consequences which follow include:

(a) the loss of the rights and authority conferred on the applicant as title holder by s 40 of the *Mineral Titles Act* (note s 40(2));

(b) the enlivening of the statutory duty imposed by s 99(1) to remove from the title area all plant, machinery and other equipment placed there by the title holder, no later than 3 months after the mineral title ceases to be in force;

(c) the making of updates to the Mineral Titles Register by the Third Respondent reflecting the ceasing of the title (see s 121)).

22. Other significant consequences follow because MLN1 is interconnected with a series of agreements between ERA and third parties.

23. One set of consequences arises under the "Jabiluka Uranium Project – Agreement under Section 43 of the *Aboriginal Land Rights (Northern Territory) Act 1976*" (**Section 43 Agreement**). This is an agreement between ERA and the Northern Land Council. That agreement continues in force "until the expiration of the Mineral Lease issued in respect of the Jabiluka Project or any extension or renewal thereof" (cl 24.1). Upon the expiration of

the agreement, ERA becomes subject to various obligations, including compliance with certain environmental requirements relating to rehabilitation and protection of the environment (cl 25.1(a)) and payment of moneys (cl 25.1(b)). If MLN1 continues in force, the Section 43 Agreement also fully continues in force, and ERA is subject to different ongoing obligations, such as obligations to comply with certain environmental requirements (cl 9.1).

24. Another set of consequences arises under the "Jabiluka Long Term Care and Maintenance Agreement between ERA and the Traditional Aboriginal Owners of the Jabiluka project area, the Mirarr people, and the Northern Land Council" dated 25 February 2005 (**LTCM Agreement**). Under the LTCM Agreement, ERA is given qualified rights of access to the Jabiluka Project Area (cl 8.1), the Traditional Aboriginal Owners have acknowledged ERA's righ to hold MLN1 and agreed not to take actions prejudicially affecting MLN1 and ERA has promised not to undertake mining development in the Jabiluka Project Area without the approval of the Traditional Owners, which is to be given in accordance with a contractual process (cl 6.1-6.3). The LTCM Agreement comes to an end on the expiry or determination of the Section 43 Agreement (cl 2.1(b)). Clause 4 imposes certain rehabilitation obligations. So, each of ERA, the Mirarr people and the Northern Land Council will lose the benefits and burdens of the LTCM Agreement if the Section 43 Agreement has come to an end by reason of the Renewal Decision.

25. A further set of consequences arises under the "Agreement between the Northern Territory of Australia and ERA dated 23 December 2009" (**Waiver Agreement**). Amongst other things, the Waiver Agreement suspends or waives what would otherwise be obligations of ERA under statute and MLN1 in respect of development of the project area: see cl 3.1; Recital D. The Waiver Agreement expires "upon the expiry of the term of MLN1" (cl 5.1).

26. In these circumstances, ERA comes to this Court to obtain relief calculated to preserve the status quo, to the extent possible, prior to the hearing and determination of ERA's final application challenging the Renewal Decision and the Advice Decision.

27. In the first instance, ERA seeks only a short stay, to allow time for a hearing on the continuation of interim relief. The interim orders that ERA seeks, as set out in the Interlocutory Application, are:

> 1. Upon the giving by the Applicant of the usual undertaking as to damages, until the earlier of further order or 5pm on the date referred to in order 9, the Renewal Decision, the effect of the Renewal Decision, and enforcement or execution of the Renewal Decision, be stayed.
>
> 2. Such further or other order as the Court considers appropriate.
>
> 3. The matter be listed for hearing of prayer 10 on [date].

28. The intended effect of the relief sought is to suspend the operation of the Renewal Decision, and to stay its effect and intended steps taken in reliance upon it.

LEGAL PRINCIPLES

29. Section 23 of the *Federal Court of Australia Act 1976* (Cth) provides:

> The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

30. Section 23 reflects what is, in any event, implied from the vesting of jurisdiction in the Federal Court: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624 (Deane J) (Mason CJ agreeing at 616) (Wilson and Dawson JJ agreeing at 616) (Brennan J agreeing at 621).

31. Section 23 and the implied powers of the Court confer power "in an appropriate case, to make an interim order which will, in practical effect, preserve the subject matter of a dispute pending its final resolution, or otherwise [to] maintain the status quo so as to enable a court to do justice between the parties": *Re Minister for Immigration and Multicultural Affairs; ex parte* ***Fejzullahu*** (2000) 74 ALJR 830, [2000] HCA 23 at [7] (Gleeson CJ); *Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC* [2024] FCAFC 34 at [100] (Colvin and Jackson JJ); ***EWR18*** *v Minister for Home Affairs* [2018] FCA 1460 at [50].

32. The moulding of an interlocutory injunction under s 23 depends on the circumstances of the case, to ensure the effective exercise of the jurisdiction invoked: *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, [1998] HCA 30 at [35]. It is appropriate in this matter – in which proceedings for judicial review have been commenced while MLN1 continues to be in force, and promptly after the purported refusal of the renewal application – to maintain the status quo until (at the least) the determination of the interlocutory application.

33. The basic principles governing the grant of interlocutory relief to maintain the status quo are the same in both public law and private law: *Fejzullahu* at [7]; *EWR18* at [50]; ***ABAR15*** *v Minister for Immigration and Border Protection* [2016] FCA 363 at [18]. The Court must be satisfied "that there is a serious question to be tried and that the balance of convenience favours the grant": *ABAR15* at [18].

34. The power to make orders calculated to preserving the status quo where there is a challenge to an administrative decision includes the power to make orders staying the taking of effect of a decision of an administrative character, until further order: see ***DHP19*** *v Secretary of the Department of Health* [2019] FCA 1451 at [32]-[33]; ***Manoher*** *v Minister of Immigration, Local Government and Ethnic Affairs* (1991) 24 ALD 405, [1991] FCA 279 at [4], [40]; *Attorney-General of New South Wales v* ***Liew*** [2012] NSWSC 1223 at [21] (Beech-Jones J); see laso ***Re Kerry*** [2010] NSWCA 232 at [13]-[25] (Young JA). Thus, section 23 of the *Federal Court of Australia Act 1976* (Cth) gives power "to suspend or stay [a] decision sought to be reviewed": ***Dallikavak*** *v Minister of State for Immigration and Ethnic Affairs* (1985) 9 FCR 98 at 105 (Northrop and Pincus JJ).

35. In *DHP19*, the applicant challenged a decision of the Secretary of the Department of Health to cancel a listing of the applicant's medicine on the Australian Register of Therapeutic Goods: at [1]. The applicant commenced proceedings under both ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth): at [2]. The applicant sought orders setting the cancellation decision aside: at [2]. The applicant sought interlocutory relief staying or suspending the decision: at [3]. The Court (Thawley J) held that s 23 of the *Federal Court of Australia Act 1976* (Cth) provided "[a]n alternative source of power to grant a stay or suspension of a decision such

as the present": at [33]. In so holding, his Honour rejected an argument that there was not a power to suspend the operation of a decision: see at [40]-[53]. His Honour treated the issue of whether there should be a suspension by reference to there was a prima facie case and whether the balance of convenience favoured the relief: at [35], [54]-[99]. His Honour ultimately granted relief suspending the decision: see at [96], [100].

36. In *Manoher*, the applicant applied to review a decision a decision that he be refused a border entry visa: at [1]. The applicant also applied to suspend the operation of a decision to take the applicant into custody and to hold him in custody thereafter: at [4]. These decisions were reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and thus attracted the specific power to suspend or stay decisions given by s 15 of that Act. However, the Court held that there was power to suspend the decision otherwise given by s 23 of the *Federal Court of Australia Act 1976* (Cth): at [36], [40]. So, the Court said that the application, in addition to attracting s 15 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), also attracted the Court's powers under s 23 of the *Federal Court of Australia Act 1976* (Cth) (at [36]) and there was "power and no reason in law why an order should not be made under the powers provided by s 23 of the *Federal Court of Australia Act 1976* and s 15 of the ADJR Act": at [40].

37. *Liew* concerned a decision by the State Parole Authority to grant parole to Mr Liew: at [3]. The Attorney-General for the State of New South Wales challenged the validity of the parole decision: at [4]. The Attorney sought interlocutory relief from the Supreme Court of New South Wales. The purpose of the interlocutory relief was to ensure that Mr Liew would remain detained, even though parole had been determined. Beech-Jones J granted the relief. The nature and effect of that order was described at [21] as follows:

> The decision of the Authority dated 19 September 2012 that is challenged in these proceedings was expressed by the Authority as a "grant ...of parole not earlier than 3 October 2012 and not later than 10 October 2012" with certain conditions attached. I understand this to be the combination of a decision under s 149(1) and the specification of a period under s 149(3). The effect of the Authority's decision is that the last day upon which he can be detained was Wednesday, 10 October 2012. Absent intervention by this Court, the Authority would have been obliged to make an order under s 149(3) with the effect of requiring his release no later than 10 October 2012. As this matter was heard on Tuesday, 9 October 2012, at the conclusion of oral submissions I ordered that the decision made by the Authority on

> 19 September 2012 be stayed until further order to enable the preparation of this judgment (see *Re Kerry* [2010] NSWCA 232). This has the effect of preventing the engagement of the obligation imposed by s 149(3) on the Authority to make an order directing Mr Liew's release.

38. *Re Kerry* concerned an application by the mother and grandmother of a child to allow "them to have visitation rights to [a child] while he was in hospital" and pending the hearing of an application for certiorari in respect of a decision. Young JA granted the relief. His Honour said at [16] and [23]:

> I have no difficulty at all with the idea that when seized with an application for certiorari the Court might make a stay order of the whole of the decision made below and probably a discrete part of it. Nor have I any difficulty with the situation where the subject matter of the litigation is to be reserved until the hearing of the matter. …
>
> Accordingly, if an application is made to this Court under s 69, in my view the Court has jurisdiction either to stay in whole or in part the decision which it is sought to review or to grant the appropriate injunction to hold the status quo pending the hearing of the appeal or, as in this case, to grant an injunction that is ancillary to the relief being sought on the application.

39. The power to make orders calculated to preserving the status quo also includes the power to grant interlocutory injunctions directed to restraining the enforcement or execution of administrative decisions said to be invalid: as in, eg, *ABAR15* at [40] (order 3), *Low v MCC Pty Ltd* [2018] QSC 6 (orders 1, 2).

40. Two other cases relevant to this line of authority should be noted.

41. In *Council of the City of Ryde v Azizi* [2019] NSWSC 1605, Payne JA declined to apply *Re Kerry*. In that case, a judge of the Land and Environment Court had granted a stay of the operation of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW): at [4]. His Honour held that it was not permissible to "stay an Act": see at [175]. That is not the present case. ERA does not ask the Court to stay a statute. It asks the Court to maintain the status quo by staying the taking of effect of the Renewal Decision.

42. In ***Long** v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 122 FCR 159, the applicant's visa had been cancelled. He sought a stay of the cancellation decision: at [3]. The Court posed the issue as whether there was power to stay an

administrative decision "which is fully implemented and has no continuing operation": at [12]. The Court concluded that it had "no power to stay an administrative decision which has taken effect in law so as to affect legal rights so that there is no continuing aspect of the decision remaining to be stayed" but "[i]f, however the decision has continuing effects the Court has power, subject to any statutory provision, to stay those effects or some of them subject to it being appropriate for a stay order to be made": at [23]. The judgment does not refer to *Manoher*, or to the Full Court's decision in *Dallikavak*, and those decisions may not have been brought to his Honour's attention. In any event, in this case, the Renewal Decision has continuing effects. Most importantly, MLN1 has not yet come to an end, and will only come to an end if, as at 12 August 2024, there is in place a subsisting, valid renewal decision. Consistently with *Long*, the Court can stay the prospective effect of the Renewal Decision in bringing to an end MLN1.

SERIOUS QUESTION TO BE TRIED

43. There is a serious question to be tried that each of the two decisions under challenge is invalid.

Advice Decision

44. It is convenient to start with the Advice Decision of the Commonwealth Minister, for this was the foundation for the Renewal Decision.

Legal Principles

45. The Advice Decision was either made in the exercise of non-statutory executive power given by ss 61 and 64 of the *Constitution* (and, in turn, derivative of the Commonwealth's proprietary interest in "prescribed substances" given by s 35(2) of the *Atomic Energy Act*), or an implied statutory power derived from s 35(2) of the *Atomic Energy Act*.

46. Either way, the exercise of the power is subject to natural justice. Exercise of a power to give advice in respect of an application for renewal of a mining lease (including, in particular, a mining lease which contained a right to renewal) is one which is apt adversely

to affect the interests of the titleholder and applicant for renewal.[3] The interests which ground the arising of a duty to afford procedural fairness include proprietary interests and financial interests,[4] each of which is engaged where adverse advice in respect of the renewal of a mining title is to be given. A duty to afford natural justice can arise in respect of a person seeking a favourable exercise of a statutory discretion.[5]

47. The principles of natural justice apply to *all* administrative decision-makers.[6] They are applicable where what is being exercised is non-statutory executive power.[7]

48. Natural justice requires, among other things:

(a) the adoption of a process which is reasonable in all the circumstances to afford an opportunity to be heard;[8]

(b) the affording of an opportunity to make submissions on the procedure to be adopted by the decision-maker;[9]

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3 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30] (Kiefel, Bell and Keane JJ).

4 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [66] (Gummow, Hayne, Crennan and Bell JJ).

5 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 at [84]-[88] (Griffiths J) (Besanko J agreeing at [51]; Mortimer J agreeing at [118]).

6 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [30] (Kiefel, Bell and Keane JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at [65] (Gummow, Hayne, Crennan and Bell JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [81]-[83] (McHugh and Gummow JJ).

7 *The State of Victoria v The Master Builders' Association of Victoria* [1995] 2 VR 121 at 140 (Tadgell J), 147-149, 151 (Ormiston J), 160-161, 168 (Eames J); *Minister for Arts v Peko-Wallsend* (1987) 15 FCR 274 at 277 (Bowen CJ); see also 282 (Sheppard J), 308 (Wilcox J); *Apache Northwest Pty Ltd v Agostini (No 2)* [2009] WASCA 231 at [21] (Wheeler and Newnes JJA), [227], [259]-[260] (Buss JA).

8 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82]-[83] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

9 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [27]-[30] (Bell, Gageler and Keane JJ).

(c) notice of the nature and purpose of the inquiry;[10]

(d) notice of the issues to be considered in conducting the inquiry;[11]

(e) notice of the nature and content of information that the repository of power might take into account as a reason for coming to a conclusion adverse to the affected person.[12]

49. The power of the First and/or Second Respondent to give advice was also subject to the principles of legal unreasonableness. Again, this is so whether the power is statutory[13] or non-statutory.[14] The principles of legal unreasonableness are concerned, not only with *why* but also *how* a decision is made.[15] It is relevant to ask whether the decision is made in a *manner* which is devoid of plausible or intelligible justification.[16] The duty to act in a legally reasonable manner may carry with it a duty to consider a matter even where that matter is not the subject of a mandatory relevant consideration in the conventional sense.[17] Further, a disproportionate exercise of power may be legally unreasonable.[18] So too, giving excessive weight to a consideration may evidence or constitute legal unreasonableness.[19]

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10 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82]-[83] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

11 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82]-[83] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

12 *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at [82]-[83] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.

13 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [43] (Allsop CJ, Robertson and Mortimer JJ).

14 *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 213 at [81] (Griffiths J) (Besanjo J agreeing at [51]; Mortimer J agreeing at [118]).

15 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at [19]-[21] (Kiefel CJ, Bell, Gageler and Keane JJ).

16 *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at [19]-[21] (Kiefel CJ, Bell, Gageler and Keane JJ).

17 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* [2021] FCAFC 195 at [152]-[155], [157]-[160], [172] (Besanko J).

18 *Comcare v Banerji* (2019) 267 CLR 373 at [84] (Gageler J) (and cases there cited).

19 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [72] (Hayne, Kiefel and Bell JJ).

50. Further, whether the power to give advice derives from the *Atomic Energy Act* or derives otherwise from sections 61 and 64 of the *Constitution*, it is subject to the *Atomic Energy Act*. So far as the power is sourced in the *Atomic Energy Act*, that follows from the proposition that any discretionary power is subject to limitations derived from the scope, context and purpose of the statute vesting the power.[20] So far as the power is non-statutory executive power, that follows from the proposition that non-statutory executive power is subject to statute.[21]

Ground 1: denial of natural justice

51. It is ERA's case that, in making the Advice Decision, the First and/or Second Respondent denied procedural fairness to ERA. In summary:

    (a) 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 or 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 and the Mirarr Traditional Owners);

    (b) 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 Second Respondent in making the Advice Decision;

    (c) the First Respondent and/or Second Respondent failed to give the Applicant the opportunity to ascertain the relevant or critical issues on which the decision was likely to turn, and the opportunity to make submissions and provide information on those issues, including:

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[20] *R v Australian Broadcasting Authority; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50 (Stephen, Mason, Murphy, Aickin and Wilson JJ).

[21] *Brown v West* (1990) 169 CLR 195 at 202 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

(i) the desire, on the part of the Commonwealth, to extend Kakadu National Park upon the expiry of the initial term of MLN1;

(ii) the views of the Northern Land Council and the Mirarr Traditional Owners;

(iii) the likelihood (or otherwise) that local landowners and the parties to the LTCMA would not consent to mining during the ten year renewal period; and

(iv) the prospects of the site being developed or mined within the ten year renewal period that was sought by the Applicant.

52. A further cluster of natural justice issue arose from the meetings between ERA and the First Respondent (and related departmental representatives) on 28 June 2024, which are described in Ground 1 of the Originating Application. The short points are that, during those meetings, no adverse information or other issue was raised and the First and Second Respondent caused ERA to harbour the expectation (ultimately defeated) that ERA would have a further opportunity to address on the issues (see paragraphs 36-41 of Welsh).

53. Further procedural issues may arise once the content and basis of the Advice Decision are revealed. The secrecy with which the process has been attended *since* the Advice Decision is symptomatic and a continuation of the prior unfairness.

Ground 2: legal unreasonableness

54. It is also ERA's case that the Advice Decision was unreasonable. ERA contends, in summary:

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

(i) engaged in the procedurally unfair conduct otherwise addressed in respect of Ground 1;

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

(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 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);

(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 and the Mirarr people (including because of the obligations under cl 5.1(d) of the LTCM Agreement).

(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 LTCM Agreement 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 MLN 1 is forfeited, cancelled or otherwise prejudicially affected, otherwise than for breach by ERA of [the LTCM Agreement]";

(v) acted with regard to and for the purpose of extending the Kakadu National Park into the land covered by MLN1 upon the expiry of the initial term of the lease;

(vi) did not act for the purposes of the *Atomic Energy Act 1953*, including the interest in preserving Commonwealth control over "prescribed substances" in the national interest.

55. Again, further aspects of legal unreasonableness may be revealed once the decision and the context in which the decision was made are revealed.

Ground 3: inconsistency with the Atomic Energy Act

56. It is also ERA's case that the Advice Decision was inconsistent with the *Atomic Energy Act*.

57. The key point is that the title of the Second Respondent to uranium was *always* subject to rights granted by the Northern Territory: see *Atomic Energy Act* s 35(4).

58. On the proper construction of the *Atomic Energy Act*, powers under that Act or related non-statutory executive powers were thus subject to the constraint that they not be exercised for the purpose or with the effect of destroying, extinguishing or impairing such rights.

59. Here, ERA had a right to a renewal by reason of condition 2 of MLN1. That right was apt to be destroyed, extinguished or impaired by the advice given by the First and/or Second Respondent.

60. A purported exercise of a power to give advice which had that effect is contrary to and inconsistent with s 35(4) of the *Atomic Energy Act*.

Renewal Decision

61. The Renewal Decision of the NT Minister was founded on the Advice Decision of the Commonwealth Minister. There is a serious question to be tried as to its validity.

Ground 5: if the "advice" was not "advice" within the meaning of s 187(1) of the Mineral Titles Act, then the Renewal Decision is invalid

62. It is clear from the terms of the letter from the NT Minister refusing the renewal application (see <u>Chung #1</u> Exhibit LC-1 at 181) that the Third Respondent proceeded on the basis that he was bound, by s 187(1) of the *Mineral Titles Act*, to give effect to the "advice" given by the First Respondent and/or Second Respondent. On the basis of his perception that he was subject to that duty, he treated the exercise of the discretionary power to renew given by

s 43 of the *Mineral Titles Act* as one which did not involve the exercise of a discretion, but as one which instead involved subjection to determinative advice from a third party.

63. The Third Respondent was, of course, obliged to proceed by reference to "correct legal principles, correctly applied".[22] He was obliged to proceed on a "correct understanding of the law".[23] He was obliged not to misunderstand an important attribute of the decision to be made.[24] He was also obliged to ask the right question.[25] He was also obliged, subject to contrary statutory specification, to exercise the power on the merits of the case, and to treat it as it was, namely a discretionary power.

64. ERA contends that the reference in s 187(1) to "advice" is to advice given lawfully and within power. That reflects the general principle that, when a statute refers to an exercise of public power, it ordinarily refers to a *valid* and *lawful* exercise of public power.[26] It could not reasonably be thought that the *Mineral Titles Act* subjects the Northern Territory to unlawful and ultra vires directions from the Commonwealth.

65. The Third Respondent treated the "advice" he received as if it was advice given lawfully and within power. The Third Respondent also treated the "advice" he received as if it was "advice" within the meaning of s 187(1). If ERA is correct in its challenge to the Advice Decision, then those conclusions were erroneous, and the Third Respondent did not proceed in accordance with correct legal principles, correctly applied, and he misunderstood an important attribute of the decision he was making.

66. Further, if ERA is correct in its challenge to the Advice Decision, then the Third Respondent was not obliged to give effect to the advice; it was not "advice" within the

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22 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [29] (Kiefel CJ, Gageler and Keane JJ); *CEU22 v Minister for Home Affairs* [2024] FCAFC 11 at [29] (Wigney, Thawley and Wheelahan JJ).

23 *CEU22 v Minister for Home Affairs* [2024] FCAFC 11 at [29] (Wigney, Thawley and Wheelahan JJ).

24 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at [68]-[69] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

25 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82].

26 See, eg, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [104]-[105] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

meaning of s 187(1). The Third Respondent erred by failing to treat the issue before him as one of discretion, to be exercised in all the circumstances of the case, and instead by subjecting himself to an external direction.

Ground 6: condition 2 of MLN1

67. Ground 6 involves the following steps.

(a) If a condition of MLN1 is inconsistent with the *Mineral Titles Act*, the condition prevails: *Mineral Titles Act* s 203(1).

(b) Condition 2 of MLN1 is a "condition" of MLN1 within the meaning of s 203(1) of the *Mineral Titles Act*. It is clear from the example given in s 203(3) that the term "condition" in s 203(1) extends to provisions identifying the rights of a titleholder under the lease. Condition 2 of MLN1 is a provision conferring a right on ERA and imposing a correlative obligation on the First and Second Respondent.

(c) Condition 2, properly construed, gives a right to a renewal for a period of up to 10 years, upon the making of an application for such a term by ERA.

(d) That right is subject to substantial compliance by ERA with various obligations, and ERA has substantially complied.

(e) If and to the extent that right is inconsistent with "advice" from the First or Second Respondent, then the right is to prevail. Here, that meant that the Third Respondent was *not* obliged to give effect to the "advice", but the Third Respondent did so.

Conclusion

68. ERA respectfully submits that there is a serious question to be tried.

Balance of Convenience

69. The balance of convenience points strongly in favour of the maintenance of the status quo.

70. ***First***, upon the expiry of MLN1, ERA will no longer have the rights given by s 40(1) of the *Mineral Titles Act*. So, for example, it will no longer have the right to occupy the Jabiluka area. ERA is currently undertaking rehabilitation activities in that area: Welsh [62]-[64]. ERA will have no right to occupy the site to carry on those activities in the event that the title expires. ERA is carrying out rehabilitation activities via, not only its employees, but also its contractors: Welsh [65(a)]. These individuals will need to leave the site unless arrangements with the landowners can be negotiated.

71. ***Secondly***, upon the expiry of MLN1, private arrangements inconsistent with the MLN1 will no longer be prevented by the subsistence of the title. For example, the landowners could deal in the land burdened by MLN1 in a way inconsistent with the the subsistence of ERA's rights: see Welsh [64(c)].

72. ***Thirdly***, upon the expiry of MLN1, other agreements will expire. So, as explained, each of the Section 43 Agreement, the LCTMA and the Waiver Agreement expire with MLN1. Those agreements, on their face, come with benefits and burdens for ERA. These are explained, in particular, at Welsh [12]-[14] and [64(b)]. It might be possible to renegotiate these agreements after they expire, but the prospect of that occurring is uncertain, and they may be on different and more onerous terms.

73. ***Fourthly***, upon the expiry of MLN1, ERA will come under a statutory obligation to remove all plant, machinery and other equipment from the Jabiluka site, within three months of the end of the lease: s 99 of the Mineral Titles Act. Anything done to comply with that obligation will need to be undone in the event of a successful challenge to the Renewal Decision.

74. ***Fifthly***, there is evidence that the Commonwealth wishes to incorporate Jabiluka into Kakadu National Park: Welsh [65(d)]. There is also evidence that the Commonwealth sees the non-subsistence of MLN1 as a stepping stone along the way to the extension of Kakadu National Park into the Jabiluka area: Welsh [65(d)]. National parks are declared and

extended under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**): see, in particular, ss 344, 350. It is easier to *extend* Kakadu National Park than to revoke an extension: see ss 351(1), (6). Under s 387(1) of the EPBC Act, "[a] person must not carry out mining operations in Kakadu National Park". It is reasonable to think that, if Kakadu is extended, the Commonwealth will take the view that mining at Jabiluka is prohibited. That would be highly prejudicial to ERA.

75. ***Sixthly***, MLN1 is, while it continues, of significant commercial value to ERA: <u>Welsh</u> [7]. The expiry of MLN1 destroys that value. Already, ERA has lost a $550m offer because of fears as to the expiry of the lease: <u>Welsh</u> [65(d)].

76. ***Seventhly***, the Northern Territory maintains a register setting out information relating to mineral titles: see *Mineral Titles Act* s 121. It can reasonably be inferred that, without a stay, the Northern Territory will update the register to reflect a view that MLN1 is a historical title only. The register is a public record of legally and commercially relevant information pertaining to mineral titles. It can be inferred that updates to the title in reliance on the validity of the Renewal Decision will cause commercial harm to ERA.

77. ***Finally***, there are no evident balance of convenience factors pointing against the grant of relief.

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