NOTICE OF FILING

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Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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.

Form 59
Rule 29.02(1)

Affidavit

No. NSD1056 of 2024

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

Energy Resources of Australia Ltd ABN 71 008550 865
Applicant

Minister for Resources and Minister for Northern Australia (Commonwealth) and others
Respondents

Affidavit of:	**Gordon Grieve**
Address:	Piper Alderman, Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
Occupation:	Lawyer
Date:	4 October 2024

Contents

Filed on behalf of (name & role of party) Zentree Investments Limited and Packer & Co Ltd
Prepared by (name of person/lawyer) Gordon Grieve
Law firm (if applicable) Piper Alderman
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Document number	Details	Paragraph	Pages
2.5.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 19 September 2024	[15]	14-15
2.6.	Letter from Piper Alderman to Herbert Smith Freehills dated 19 September 2024	[16]	16-120
2.7.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 21 September 2024	[18]	121-124
2.8.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 21 September 2024	[19]	125-127
2.9.	Letter from Piper Alderman to Herbert Smith Freehills dated 22 September 2024	[20]	128-130
2.10.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 23 September 2024	[21]	131-133
2.11.	Letter from Piper Alderman to the Honorary Mr Gerard Maley MLA dated 23 September 2024	[22]	134
2.12.	Letter from Piper Alderman to Herbert Smith Freehills dated 24 September 2024	[23]	135-137
2.13.	Email from Ms Jennifer Laurence to Piper Alderman with letter dated 27 September 2024	[24]	138-139
2.14.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 27 September 2024	[25]	140-143
2.15.	Letter from Piper Alderman to Herbert Smith Freehills dated 3 October 2024	[26]	144-148
2.16.	Letter from Piper Alderman to the Honorary Mr Gerard Maley MLA dated 4 October 2024	[27]	149-150
2.17.	Email from Herbert Smith Freehills to Piper Alderman with letter dated 4 October 2024	[28]	151-153
2.18.	Email from Piper Alderman to Herbert Smith Freehills dated 4 October 2024	[29]	154

I Gordon Grieve, Partner of Piper Alderman of Level 23, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000, say on oath:

1. I am a Partner of Piper Alderman and I act for Zentree Investments Limited (**Zentree**) and Packer & Co Ltd (**Packer**) in respect of their interlocutory application filed on 4 October 2024. I am authorised to make this affidavit on behalf of Zentree and Packer.

2. I make this affidavit in support of the interlocutory application dated 4 October 2024 made by Zentree and Packer for a grant of leave to intervene in these proceedings pursuant to sections 236 and 237(1) of *Corporations Act 2001* (Cth) (**Corporations Act**) and rule 9.12(1) of the *Federal Court Rules 2011* (Cth).

3. Exhibited to me at the time of swearing this affidavit and marked "**GTG-1**" is a bundle of paginated documents I refer to in the course of this affidavit by reference to their page numbers in "**GTG-1**".

4. I make this affidavit based on:

   (a) matters within my own knowledge; and

   (b) matters in respect of which I have been informed and which I believe to be true and state that is the case.

5. I am not authorised to waive privilege or confidentiality and nothing in this affidavit is intended to waive confidentiality nor any privilege to which the Plaintiff may be entitled. To the extent that any part of this affidavit may be construed as a waiver, that part of this affidavit is not relied upon.

Experience

6. I have been a Partner of Piper Alderman for more than 30 years and have been a solicitor for 40 years. Prior to joining the Piper Alderman partnership, I was the Commissioner for Corporate Affairs in South Australia.

7. I have daily carriage of this matter, together with Ms Caterina Meduri, a Partner of Piper Alderman and the assistance of lawyers employed by Piper Alderman.

8. I have conducted and supervised complex litigation matters in Australia in the Supreme Courts of New South Wales, South Australia, Victoria, Western Australia and Queensland, various Registries of the Federal Court and the High Court and in the United Kingdom and Europe.

9. I am familiar with the conduct of litigation matters which involve complex factual and legal matters in the context of a wide variety of commercial disputes, including proceedings where shareholders seek to intervene in proceedings pursuant to sections 236 and 237 of the Corporations Act.

10. Based on my experience, I believe that it is appropriate in this case for Packer and Zentree to be granted leave to intervene in these proceedings.

Notice of the proceeding

11. On 6 August 2024, I reviewed an ASX Announcement published by ERA entitled "ERA commences legal proceedings". Among other things, the ASX Announcement stated:

> *"...On 6 August 2024, ERA commenced proceedings in the Federal Court of Australia (Court) against the Minister for Resources and Minister for Northern Australia (Commonwealth), the Commonwealth of Australia, the Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory), the Northern Territory and Jabiluka Aboriginal Land Trust, seeking judicial review of the Renewal Decision, including of the Commonwealth government's advice to the Northern Territory government to refuse the renewal of the Jabiluka Mineral Lease. ERA believes it had a right to have its renewal application lawfully determined and considers it was denied procedural fairness and natural justice in the decision-*

making process. ERA also considers that the decisions were subject to a number of other defects including because they were unreasonable."

A copy of the ASX Announcement is at pages **1 to 2** of **Exhibit GTG-1**.

Correspondence with ERA's legal representatives

12. On 17 September 2024, I caused a letter to be sent to Mr Leon Chung, the solicitor for ERA in these proceedings. Among other things, the letter, in effect:

    (a) informed Mr Chung that it was in ERA's best interests to pursue a further cause of action in the Proceedings, being the Commonwealth Minister and the NT Minister, the First and Third Respondents, permitted and/or engaged in conduct that wrongfully derogated from the grant of interests constituted by MLN1;

    (b) stated that when principles of issue and *Anshun* estoppel are considered, if ERA did not pursue a cause of action that there has been a wrongful derogation of a grant, ERA may be prevented forever from pursuing this cause of action; and

    (c) stated that if ERA elected not to pursue a cause of action that there has been a wrongful derogation of a grant, Piper Alderman anticipated receiving instructions to intervene in the Proceedings by way of an application pursuant to sections 236 and 237(1) of the Corporations Act.

    A copy of that letter is at pages **3 to 6** of **Exhibit GTG-1**.

Correspondence with NT Minister

13. On 18 September 2024, I caused a letter to be sent to The Honorary Mr Gerard Maley MLA, the Third Respondent in these proceedings. The solicitors for the Third and Fourth Respondents were copied into the email and letter. Among other things, that letter stated that we considered:

    (a) that the Third Respondent's predecessor improperly exercised his power to seek advice from the First Respondent pursuant to section 187 of the Mineral Titles Act and not to renew MLN1 on the basis that he followed the First Respondent's advice; and

    (b) the Third Respondent's should repeal, rescind or revoke his predecessor's actions and renew MLN1 on the basis that ERA complied with the terms of Condition 2.

    A copy of the letter is at pages **7 to 11** of **Exhibit GTG-1**.

14. On 19 September 2024, I caused an email to be sent to the Third Respondent's Office which attached the letter to the Third Respondent dated 18 September 2024. The email stated, in effect, that the letter had been attempted to be sent the previous night. A copy of the email and the attached 18 September 2024 letter is at pages **12 to 13** of **Exhibit GTG-1**.

Further correspondence with ERA's legal representative

15. On 19 September 2024, I received an email from Mr Chung attaching a letter which responded to my letter dated 17 September 2024. The letter, in effect, stated that ERA was considering the matters raised in my letter dated 17 September 2024 and would respond by close of business on

20 September 2024. A copy of Mr Chung's email, together with the attached letter, is at pages **14 to 15** of **Exhibit GTG-1**.

16. On 19 September 2024, I caused a letter to be sent to Mr Chung. Among other things, the letter, in effect stated that, in light of Ms Yvonne Margarula, the Seventh Respondent, being joined to the Proceedings, ERA should pursue the following arguments against her:

(a) the Seventh Respondent should be estopped from defending the Proceedings on the basis of her contention, in effect, that MLN1 is inconsistent with the relevant statutory regime in the Mining Act and the Mineral Titles Act (**Inconsistency with Statutory Regime Argument**) on the basis that she was previously party to legal proceedings where the issue of MLN1 was considered and determined and she should be estopped either by reason of issue estoppel or *res judicata*; and/or

(b) the Inconsistency with Statutory Regime Argument is effectively an argument seeking judicial review of the decision to grant MLN1 which is not able to be maintained at this late stage some 42 years after MLN1; and/or

(c) even if Ms Margarula is not otherwise estopped, in her defence of the Proceedings and in making the Inconsistency with Statutory Regime Argument, she is effectively making an application for judicial review of the grant of MLN1 which should be refused on the basis of delay.

A copy of the letter is at pages **16 to 120** of **Exhibit GTG-1**.

17. On 20 September, I attended a videoconference with the solicitors and counsel for ERA and with Ms Meduri and the counsel engaged by Packer and Zentree to discuss the matters set out in my 17 September 2024 letter and 19 September 2024 letter. During this conference, the solicitors and counsel for ERA raised questions as to the nature of the remedy for the wrongful derogation from a grant cause of action and the utility it has given the relief already being sought.

18. On 21 September 2024, I received an email from Ms Haiqiu Zhu, on behalf of the solicitors for ERA, attaching a letter in response to my letter dated 17 September 2024. Among other things, that letter, in effect:

(a) set out ERA's initial observations and concerns regarding including an additional cause of action on the basis of non-derogation of right, including the applicable remedy for such a cause of action;

(b) requested further information from Zentree and Packer as to what additional benefit the proposed claim would provide and case law that supports the principles identified in my letter dated 17 September 2024; and

(c) stating that ERA does not accept that there is a basis for Zentree and Packer to intervene in the Proceedings.

A copy of Ms Zhu's email, together with the attached letter, is at pages **121 to 124** of **Exhibit GTG-1**.

19. On 21 September 2024, I was copied into an email from Ms Zhu attaching a letter in response to my letter dated 19 September 2024. The letter, in effect, stated that ERA was considering the matters raised in my letter of 19 September 2024 and would respond as soon as possible. A copy of Ms Zhu's email, together with the attached letter, is at pages **125 to 127** of **Exhibit GTG-1**.

20. On 22 September 2024, I caused a letter to be sent to Mr Chung. The letter, in effect and among other things, stated that the utility that the wrongful derogation from a grant cause of action has in these proceedings is that it would enable the Court to grant a renewal of MLN1 in accordance with Condition 2 without the need for the NT Minister to decide the question again, which would occur if ERA was successful in obtaining the relief that it seeks. The letter also included a redacted copy of the advice from Mr Alan Sullivan KC who was engaged on behalf of Packer and Zentree to give his views about the non-derogation from a grant argument. The advice is not exhibited to this affidavit. The letter asked whether ERA would expand its originating application to bring this cause of action by 23 September 2024. A copy of the letter is at pages **128 to 130** of **Exhibit GTG-1**.

21. On 23 September 2024, I was copied into an email from Ms Zhu attaching a letter in response to my letter dated 22 September 2024. Among other things, that letter, in effect stated that ERA:

    (a) was concerned about the delay to the current timetable if it was to pursue a cause of action of wrongful derogation from grant; and

    (b) was continuing to consider the matters raised concerning the inclusion of the additional cause of action and would respond as soon as possible.

    A copy of Ms Zhu's email, together with the attached letter, is at pages **131 to 133** of **Exhibit GTG-1**.

Further correspondence with NT Minister

22. On 23 September 2024, I caused a letter to be sent to the Third Respondent which , in effect, requested a response to the matters raised in my letter dated 18 September 2024 by 24 September 2024 as it may affect steps that Zentree and Packer need to take in respect of the Proceedings. A copy of the letter is at page **134** of **Exhibit GTG-1**.

Further correspondence with ERA's legal representative

23. On 24 September 2024, I caused a letter to be sent to Mr Chung. The letter, in effect and among other things:

    (a) summarised the arguments that Zentree and Packer believe that ERA should pursue in the proceedings as set out in my letters dated 17, 19 and 22 September 2024; and

    (b) stated that the causes of action we address should be addressed as a matter of urgency.

    A copy of the letter is at pages **135 to 137** of **Exhibit GTG-1**.

Further correspondence with NT Minister

24. On 27 September 2024, I was copied into an email from Ms Jennifer Laurence, the Director of Legal Services for the Northern Territory Department of Mining and Energy, which attached a letter in response to my letters dated 18 and 23 September 2024. The letter, in effect, stated that the NT Minister did not consider it appropriate to respond separately to the matters raised in my correspondence as Zentree and Packer are not parties to the Proceedings and all parties are legally represented and subject to orders regarding the conduct of the proceedings. A copy of Ms Laurence's email, together with the attached letter is at pages **138** to **139** of **Exhibit GTG-1.**

Further correspondence with ERA's legal representative

25. On 27 September 2024, I received an email from Ms Zhu which attached a letter in response to my letter dated 24 September 2024. The letter, in effect, among other things, stated:

(a) that ERA is committed to prosecuting the proceedings fiercely and in doing so is prepared to consider and if appropriate pursue any available argument vigorously; and

(b) that ERA has determined that it is neither in the best interests of the company nor conducive to the proper and efficient prosecution of the Proceedings for ERA to seek to amend its originating application by adding a claim based on non-derogation of grant or argue that Ms Margarula should be estopped or otherwise prevented from advancing certain submissions in opposition to ERA's claim.

A copy of Ms Zhu's email, together with the attached letter is at pages **140** to **143** of **Exhibit GTG-1.**

26. On 3 October 2024, I caused a letter to be sent to Mr Chung. The letter, in effect:

(a) stated that we do not agree that it is not in the best interests of ERA for it to amend its originating application to include a cause of action for a non-derogation from a grant or the estoppel arguments;

(b) repeated our arguments that Zentree and Packer believe that ERA should pursue in the Proceedings; and

(c) stated that ERA should write to the NT Minister inviting him to exercise his contractual rights under MLN1 and renew the lease.

A copy of the letter is at pages **144** to **148** of **Exhibit GTG-1.**

Further correspondence with NT Minister

27. On 4 October 2024, I caused a letter to be sent to NT Minister, in effect:

(a) stated that the position expressed in Ms Laurence's letter is inappropriate and has a negative effect on Zentree and Packer's interest in light of the reasons detailed in my letter dated 18 September 2024;

(b) stated that liaising with the Applicant's solicitors is not a valid consideration as to why the Minister should not substantively respond to our letter;

(c) stated that he has a civic duty by reason of his public office; and

(d) requested that he address the matters stipulated in my letter dated 18 September 2024 and my letter dated 23 September 2024.

A copy of the letter is at pages **149** to **150** of **Exhibit GTG-1.**

Further correspondence with ERA's legal representative

28. On 4 October 2024, I received an email from Mr Chung which attached a letter in response to my letter dated 3 October 2024. The letter, in effect, stated that they would respond in due course to my letter and requested a copy of the correspondence referred to in paragraph 12 of my letter. A copy of Mr Chung's email, together with the attached letter, is at pages **151** to **153** of **Exhibit GTG-1.**

29. On 4 October 2024, I was copied into an email from Ms Kirsty McGinlay, solicitor in the employ of Piper Alderman, in response to Mr Chung's letter dated 4 October 2024, attaching the correspondence requested in Mr Chung's letter and advised that we are otherwise considering the contents of his letter. A copy of Ms McGinlay's email is at page **154** of **Exhibit GTG-1** and copy of the relevant correspondence is at pages **7 to 11, 134 and 139** of **Exhibit GTG-1.**

Case management considerations

30. I am aware that the matter is currently listed for a four-day hearing commencing on 28 October 2024.

31. I consider that the causes of action described above and in the Interlocutory Application dated 4 October 2024 are strict legal arguments which, having regard to the material which has been filed in the Proceedings that I have been able to access, will not necessitate the filing of further evidence.

32. As a result, I do not believe that these causes of action would result in the current hearing date needing to be adjourned. Further, I also believe that it would take approximately half a day for these causes of action could be addressed in legal submission during the hearing. Accordingly, I do not consider that the present timetable needs be disturbed by reason of this application.

Sworn by the deponent)
at Brisbane)
in Queensland)
on 4 October 2024)
Before me:)

Signature of deponent

Signature of witness

Solicitor

Schedule

No. NSD 1056 of 2024

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

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

Certificate Identifying Annexure "GG-1"

This is the annexure marked "**GG-1**" referred to in the Affidavit of **Gordon Grieve** sworn on 4 October 2024.

Before me:

Signature of person taking affidavit

ASX Announcement

ERA commences legal proceedings

6 August 2024

Energy Resources of Australia Ltd (**ERA**) refers to its previous announcement on 26 July 2024 regarding the Northern Territory government's decision not to renew the Jabiluka Mineral Lease based on advice from the Commonwealth government (**Renewal Decision**).

On 6 August 2024, ERA commenced proceedings in the Federal Court of Australia (**Court**) against the Minister for Resources and Minister for Northern Australia (Commonwealth), the Commonwealth of Australia, the Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory), the Northern Territory and Jabiluka Aboriginal Land Trust, seeking judicial review of the Renewal Decision, including of the Commonwealth government's advice to the Northern Territory government to refuse the renewal of the Jabiluka Mineral Lease. ERA believes it had a right to have its renewal application lawfully determined and considers it was denied procedural fairness and natural justice in the decision-making process. ERA also considers that the decisions were subject to a number of other defects including because they were unreasonable.

ERA is also seeking an interlocutory injunction to stay the Renewal Decision and its enforcement or execution. ERA has requested that the Court hears its interlocutory application on an urgent basis, given the imminent expiry of the Jabiluka Mineral Lease on 11 August 2024.

ERA considers that its applications are warranted after taking into account the circumstances in which the Renewal Decision was made, which include the Commonwealth Minister providing her advice within two days of the renewal application being referred to her, and without providing ERA an opportunity to comment on information received and relied upon or other matters which she took into account.

The Independent Board Committee (**IBC**), consisting of independent directors Mr Rick Dennis, the Hon. Mr Ken Wyatt and Mr Stuart Glenn, will act for ERA in relation to this and any other potential challenges to the Renewal Decision, including legal proceedings, in accordance with ERA's Conflicts of Interest and Related Party Transactions Policy.

ERA will keep shareholders informed of material updates in accordance with its continuous disclosure obligations.

This announcement is authorised by the Independent Board Committee.

For further information, please contact:

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About Energy Resources Australia Ltd

Energy Resources of Australia Ltd (ERA) has been one of the nation's largest uranium producers and operated Australia's longest continually producing uranium mine.

After closure of the Ranger Mine in 2021, ERA is now committed to creating a positive legacy and achieving world class, sustainable rehabilitation of former mine assets.

The Ranger Rehabilitation Project is located on Aboriginal land and is surrounded by, but separate from, Kakadu National Park. ERA respectfully acknowledges the Mirarr people, Traditional Custodians of the land on which the Ranger Project Area is situated.

ERA's Ranger Project Area (100%) is located eight kilometres east of Jabiru and 260 kilometres east of Darwin, in Australia's Northern Territory. ERA also holds title to the Jabiluka Mineral Lease (100%) and is a signatory to the Long Term Care and Maintenance Agreement over the Jabiluka Mineral Lease.

Our Ref: GTG.452215
Your Ref:

17 September 2024

By Email: leon.chung@hsf.com

Mr L Chung
Herbert Smith Freehills
Level 34, 16 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Others
Federal Court of Australia Proceedings No. 1056/2024

1. We act for Zentree Investments Limited and Packer & Co Pty Ltd. We understand that you act for Energy Resources of Australia ACN 008 550 865 (**ERA**) in the above proceedings.

2. Zentree and Packer are shareholders of ERA.

3. We are writing to put you on notice of a cause of action that our clients consider ERA should pursue in the above proceedings it has commenced against the Commonwealth Minister for Resources and others arising out of the decision of the Northern Territory Minister to not renew Mineral Lease at Jabiluka, known as Mineral Lease 1 (**MNL1**) (**Proceedings**).

Factual Background

4. MLN1 was granted in 1982 under section 60 of the *Mining Act 1980* (NT) (**Mining Act**) with a provision that it would be renewed for a further term not exceeding 10 years. That provision, known as 'Condition 2', is in the following terms:

> "*The Territory covenants with the lessees* [being the original holders MLN1] *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.*"

5. On 20 March 2024, ERA applied for MLN1 to be renewed prior to the end of its term.

6. On 26 July 2024, the Northern Territory Minister announced that MLN1 would not be renewed (**Renewal Decision**).

Lawyers

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Legislative regime

7. In 2010, the Mining Act was replaced by the *Mineral Titles Act 2010* (NT) (**Mineral Titles Act**). The relevant sections of the Mineral Titles Act are:

   7.1 section 43(1) and 43(2) which provide that, before the end of a mineral lease, the title holder may apply in the approved form to the Minister for the renewal of the mineral lease for all or part of the title area and the Minister may renew the mineral lease for the term that the Minister considers appropriate;

   7.2 section 68, which provides that if a holder of a mineral lease applies for its renewal before the end of its term, it continues until the Minister's decision takes effect in relation to the renewal or refusal to renew the title;

   7.3 section 187, which provides that, in relation to a prescribed substance (of which uranium is one), the Minister must exercise his or her power in accordance with, and give effect to, the advice of the Commonwealth Minister and must not exercise his or her powers otherwise in accordance with the advice of the Commonwealth Minister; and

   7.4 section 203, which provides that if a condition of a mineral title is inconsistent with a provision of the Act, the condition of the corresponding mineral title prevails to the extent of an inconsistency.

Additional cause of action

8. In ERA's Originating Application dated 6 August 2024, ERA seeks relief on the following grounds:

   8.1 that the Renewal Decision was and is invalid or otherwise beyond power on the basis that, among other things, the NT Minister erred in law and made a jurisdictional error in considering that section 187 of the Mineral Titles Act conferred the power and duty to make the Renewal Decision (see paragraphs 5 and 6 of the Originating Application); and

   8.2 that the First and Second Respondents, in making the decision to provide advice to Third Respondent that ERA's application for MLN1 to be renewed not be granted (**Advice Decision**), denied ERA procedural fairness (see paragraphs 1 and 2 of the Originating Application).

9. We consider that there is a further basis to impugn the Renewal Decision and which should be pursued by ERA in the Proceedings, in the form of a cause of action that the Commonwealth Minister and the NT Minister, the First and Third Defendants, permitted and/or engaged in conduct that wrongfully derogated from the grant of the interests constituted by MLN1.

10. The doctrine of non-derogation from a grant embodies a general legal principle that if a party agrees to confer a benefit, it should not do anything that substantially deprives the enjoyment of that benefit. This principle clearly applies to grants or rights conferred by contract (see *Bocardo v Star Energy (UK) Onshore Limited* [2011] 1 AC 380 at 400), including a demise or lease granted by the Crown (see *O'Keefe v Williams* (1910) 11 CLR 171).

11. Condition 2 of MLN1 confers upon ERA (the lessee) a contractual right of renewal of MLN1 (a lease) for a further term of up to 10 years. Accordingly, the non-derogation principle described in paragraphs 9 and 10 above applies to MLN1.

12. While the position of the Third Respondent, the NT Minister, as per the announcement on 26 July 2024 was that the Renewal Decision was made on the basis of the Advice Decision, arguably falls within section 187 of the Mineral Titles Act, as MLN1 was entered into prior to the commencement of the Mineral Titles Act, the proper interpretation of the Mineral Titles Act and MLN is that section 203, as set out above in paragraph 7.5, takes precedence over section 187. That is, as Condition 2 pre-dates the requirement in section 187 of the Mineral Titles Act, MLN1 should have been renewed in accordance with Condition 2 of MLN1 notwithstanding any advice from the Commonwealth Minister to the NT Minister to which section 187 of the Mineral Titles Act would otherwise apply.

13. On this construction, there has been a wrongful or non-derogation of a grant as the NT Minister failed to renew MLN1 in accordance with Condition 2 of MLN1 which should take precedence over the requirement to follow the advice of the Commonwealth Minister in accordance with section 187 of the Mineral Titles Act. ERA would, as a result, be entitled to injunctive relief, both of a prohibitory and mandatory nature, in aid of its right not to have MNL1 derogated from (see, for example, *Sinclair v Jut* (1996) 9 BPR 16,219 (Santow J)). Such relief would be, in our clients' view, more expansive and better suited to ERA's interests than the relief presently sought in the Proceedings.

14. We are of the view that ERA would have reasonable prospects in successfully demonstrating that there was a wrongful derogation of a grant and it is in ERA's best interests to pursue this cause of action in the Proceedings. It being in ERA's best interests is compounded when principles of issue and *Anshun* estoppel are considered - that is, if ERA does not bring this cause of action, ERA may be prevented forever from pursuing this cause of action.

15. Please let us know by 19 September 2024 whether ERA will take steps to amend its Originating Application to include this cause of action.

Standing to intervene

16. Section 236 of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides, in effect, that a member may intervene in proceedings to which a company is a party if they have obtained leave under section 237(2) of the Corporations Act.

17. If ERA elects not to pursue a cause of action that there has been a wrongful derogation of a grant, we anticipate receiving instructions to intervene in the Proceedings by way of an application pursuant to sections 236 and 237(1) of the Corporations Act.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner

Our Ref: GTG.452215
Your Ref:

18 September 2024

By Email: cabinetoffice.cmc.@nt.gov.au

The Minister for Mining and Energy
C/o Cabinet Office
NT House
22 Mitchell Street
Darwin Northern Territory 0800

Attention: The Hononarary Mr Gerard Maley MLA

Dear Hon Gerard Maley MLA

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Others
Federal Court of Australia Proceedings No. 1056/2024

1. We act for Zentree Investments Limited (**Zentree**) and Packer & Co Ltd (**Packer**).

2. Zentree and Packer are shareholders of the Applicant, Energy Resources of Australia ACN 008 550 865 (**ERA**). ERA commenced the above proceedings against the Commonwealth Minister for Resources and Minister for Northern Australia (Commonwealth) (**First Respondent**) and others arising out of the decision of your predecessor, the Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory), not to renew Mineral Lease at Jabiluka, known as Mineral Lease 1 (**MLN1**) (**Proceedings**).

3. The Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory) is the Third Respondent to the Proceedings. We understand that, on 9 September 2024, the name of the portfolio changed to Mining and Energy and you are now the Minister for that portfolio.

4. We are writing to inform you of a matter that our clients believe that you, in your capacity as Minister for Mining and Energy, should consider as part of the position you take in the Proceedings.

Factual Background

5. MLN1 was granted in 1982 under section 60 of the *Mining Act 1980* (NT) (**Mining Act**) with a provision that it would be renewed for a further term not exceeding 10 years. That provision, known as 'Condition 2', is in the following terms:

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> "*The Territory covenants with the lessees* [being the original holders MLN1] *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."*

6. On 20 March 2024, ERA applied for MLN1 to be renewed prior to the end of its term.

7. On 23 July 2024, your predecessor sent a letter to the First Respondent requesting advice in respect of ERA's application for renewal of MLN1. The letter noted that such a request was consistent with section 187(1) of the *Mineral Titles Act 2010* (NT) (**Mineral Titles Act**).

8. On 25 July 2024, the First Respondent sent a letter to your predecessor advising your predecessor to refuse ERA's application to renew MLN1.

9. On 26 July 2024, your predecessor announced that MLN1 would not be renewed (**Renewal Decision**). The Renewal Decision was made in accordance with advice from the First Respondent.

10. On 8 August 2024, the Court made an order in the Proceedings staying the Renewal Decision, the effect of the Renewal Decision and enforcement or execution of the Renewal Decision.

Legislative Regime

11. In 2010, the Mining Act was replaced by the Mineral Titles Act. The relevant sections of the Mineral Titles Act are:

    11.1 section 43(1) and 43(2) which provide that, before the end of a mineral lease, the title holder may apply in the approved form to the Minister for the renewal of the mineral lease for all or part of the title area and the Minister may renew the mineral lease for the term that the Minister considers appropriate;

    11.2 section 68, which provides that if a holder of a mineral lease applies for its renewal before the end of its term, it continues until the Minister's decision takes effect in relation to the renewal or refusal to renew the title;

    11.3 section 187, which provides that, in relation to a prescribed substance (of which uranium is one), the Minister must exercise his or her power in accordance with, and give effect to, the advice of the Commonwealth Minister and must not exercise his or her powers otherwise in accordance with the advice of the Commonwealth Minister; and

    11.4 section 203, which provides that if a condition of a mineral title is inconsistent with a provision of the Act, the condition of the corresponding mineral title prevails to the extent of an inconsistency.

Wrongful Derogation

12. In ERA's Originating Application dated 6 August 2024, ERA seeks relief on the following grounds:

    12.1 that the Renewal Decision was and is invalid or otherwise beyond power on the basis that, among other things, your predecessor erred in law and made a jurisdictional error in considering that section 187 of the Mineral Titles Act conferred the power and duty to make the Renewal Decision (see paragraphs 5 and 6 of the Originating Application); and

    12.2 that the First and Second Respondents, in making the decision to provide advice to your predecessor that ERA's application for MLN1 to be renewed should not be granted (**Advice Decision**), denied ERA procedural fairness (see paragraphs 1 and 2 of the Originating Application).

13. On 18 September 2024, we wrote to ERA's solicitors informing them of what our clients consider to be a further basis to impugn the Renewal Decision which ERA should pursue in the Proceedings. This is a cause of action that the Commonwealth Minister/First Respondent, and your predecessor, the Third Respondent, permitted and/or engaged in conduct that wrongfully derogated from the grant of the interests constituted by MLN1. The basis of this is set out in paragraphs 14 to 17 below.

14. The doctrine of non-derogation from a grant embodies a general legal principle that if a party agrees to confer a benefit, it should not do anything that substantially deprives the enjoyment of that benefit. This principle clearly applies to grants or rights conferred by contract (see *Bocardo v Star Energy (UK) Onshore Limited* [2011] 1 AC 380 at 400), including a demise or lease granted by the Crown (see *O'Keefe v Williams* (1910) 11 CLR 171).

15. Condition 2 of MLN1 confers upon ERA (the lessee) a contractual right of renewal of MLN1 (a lease) for a further term of up to 10 years which is contingent upon the lessee complying with the Mining Act and the conditions to which MLN1 is subject. Accordingly, the non-derogation principle described in paragraphs 12 to 14 above applies to MLN1.

16. While the position of your predecessor, the Third Respondent, as per the announcement on 26 July 2024, was that the Renewal Decision was made on the basis of the Advice Decision, arguably falls within section 187 of the Mineral Titles Act, as MLN1 was entered into prior to the commencement of the Mineral Titles Act, the proper interpretation of the Mineral Titles Act and MLN1 is that section 203, as set out above in paragraph 10.4, takes precedence over section 187. That is, as Condition 2 pre-dates the requirement in section 187 of the Mineral Titles Act, MLN1 should have been renewed in accordance with Condition 2 of MLN1 notwithstanding any advice from the Commonwealth Minister/First Respondent to your predecessor to which section 187 of the Mineral Titles Act would otherwise apply.

17. When the provisions of the Mineral Titles Act are properly construed, there was a wrongful or non-derogation of a grant as your predecessor, the Third Respondent, failed to renew MLN1 in accordance with Condition 2 of MLN1. This is because the effect of section 203 of the Mineral Titles Act was that the requirement to follow the advice of the Commonwealth Minister in accordance with section 187 of the Mineral Titles Act did not apply to your predecessor's determination of ERA's application to renew

18. It follows that there was no reason for your predecessor, the Third Respondent, to have sought advice from the Commonwealth Minister or to have acted in accordance with that advice, given the contractual nature of Condition 2 that MLN1 be renewed for a period of up to 10 years.

Invalid Conduct

19. Having regard to the matters set out in paragraphs 12 to 18 above, we consider that your predecessor, the Third Respondent, improperly exercised his power:

    19.1 to seek advice from the First Respondent pursuant to section 187 of the Mineral Titles Act; and

    19.2 not to renew MLN1 on the basis that he followed the First Respondent's advice.

20. Section 43 of the *Interpretation Act 1978* (NT) (**Interpretation Act**) is a broad provision which provides, in effect, that a power under an Act to take an action is exercisable in the same manner and subject to the same conditions to repeal, rescind or revoke the action. It is in the following terms:

> *A power under an Act to take an action or to make, grant or issue a statutory instrument includes a power, exercisable in the same manner and subject to the same conditions, to repeal, rescind, revoke, amend or vary the action or instrument.* (emphasis added)

21. We consider that the effect of section 43 of the Interpretation Act is that, you as the Minister for Mining and Energy, can under sections 187 and 43 of the Mineral Titles Act, being the provisions pursuant to which your predecessor took advice from the First Respondent and decided not to renew MLN1, repeal, rescind and revoke those decisions.

22. In your capacity as Minister for Mining and Energy, we consider that you should, pursuant to sections 187 and 43 of the Mineral Titles Act and section 43 of the Interpretation Act:

    22.1 repeal, rescind or revoke your predecessor's actions:

        (a) to have sought advice from the First Respondent pursuant to section 187 of the Mineral Titles Act; and

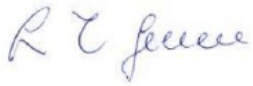
        (b) not to renew MLN1 on the basis that he followed the First Respondent's advice; and

22.2 renew MLN1 on the basis that ERA complied with the terms of Condition 2.

23. We note that your evidence in the Proceedings is to be served by 23 September 2024. We are more than happy to discuss these matters with you and your legal advisers and would appreciate if you could let us know your initial views as soon as possible, and ideally by 20 September 2024, as these matters could affect steps we may need to take depending on ERA's response to our letter, as referred to above.

24. All of our clients' rights are otherwise reserved.

Yours faithfully
Piper Alderman



Gordon Grieve
Partner

Copy to:
Solicitor for the Northern Territory
Level 2, 68 The Esplanade
DARWIN NT 0800

By Email: melissa.forbes@nt.gov.au

Kirsty McGinlay

From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Thursday, 19 September 2024 9:34 AM
To: minister.maley@nt.gov.au
Cc: Gordon Grieve; Caterina Meduri; melissa.forbes@nt.gov.au
Subject: FW: Letter to Northern Territory Minister for Mining and Energy - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]
Attachments: 20240918 Letter to NT Minister(1067589994.4).pdf

Importance: High

Dear Sir/Madam,

Please find **attached** our letter dated 18 September 2024.

As you can see from the email below, we attempted to send the letter last night.

Please confirm receipt.

Kind regards

Kirsty McGinlay
Lawyer

T: +61 2 9253 3873
E: kimcginlay@piperalderman.com.au
W: piperalderman.com.au

PiperAlderman

From: Kirsty McGinlay
Sent: Wednesday, September 18, 2024 9:20 PM
To: cabinetoffice.cmc.@nt.gov.au
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>; melissa.forbes@nt.gov.au
Subject: Letter to Northern Territory Minister for Mining and Energy - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Sir/Madam

Please find **attached** a letter addressed to the Northern Territory Minister for Mining and Energy dated 18 September 2024.

Please confirm receipt of this email.

We have copied in the solicitors for the Northern Territory Government to this email.

Kind regards

Kirsty McGinlay
Lawyer

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Kirsty McGinlay

From: Chung, Leon <Leon.Chung@hsf.com>
Sent: Thursday, 19 September 2024 3:46 PM
To: Gordon Grieve; Kirsty McGinlay; Caterina Meduri
Cc: Stone, Philippa; Scott, Nicholas; Laird, Kayla; Zhu, Haiqiu
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]
Attachments: 2024.09.19 Letter to Piper Alderman.pdf

Dear Colleagues

Please see **attached** correspondence.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Tuesday, September 17, 2024 6:12 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>
Subject: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Mr Chung,

Please find **attached** a letter dated 17 September 2024 .

Kind regards

Kirsty McGinlay
Lawyer

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Gordon Grieve
Partner
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19 September 2024
Matter 82783241
By Email

Dear Mr Grieve

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

Thank you for your letter dated 17 September 2024.

Our client is considering the matters raised in your letter and will respond by close of business on 20 September 2024.

Yours sincerely

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Herbert Smith Freehills

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Our Ref: GTG.452215
Your Ref:

19 September 2024

By Email: leon.chung@hsf.com

Mr L Chung
Herbert Smith Freehills Level 34, 16 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Others Federal Court of Australia Proceedings No.1056/2024

1. We refer to our letter dated 17 September 2024 (**17 September 2024 Letter**).

2. Defined terms in this letter have the same meaning as in our 17 September 2024 Letter.

3. We understand that, as per your letter dated 19 September 2024, you are currently considering the matters raised in our previous letter and will respond to our letter by close of business on 20 September 2024.

4. We have now reviewed the recent documents filed by Ms Yvonne Margarula in the Proceedings and are writing to put you on notice of arguments that our clients consider that ERA should pursue against Ms Margarula in the Proceedings.

Ms Margarula joined as Seventh Respondent to the Proceedings

5. On 10 September 2024, Ms Margarula filed her Interlocutory Application seeking to be joined to the Proceedings, together with supporting affidavits and submissions.

6. On 16 September 2024, Ms Margarula's interlocutory application was heard. ERA, the Commonwealth Respondents and the NT Respondents, the First to Fourth Respondents, neither consented to nor opposed Ms Margarula being joined to the Proceedings. The Jabiluka Aboriginal Land Trust and the Northern Land Council, the Fifth and Sixth Respondents, consented to Ms Margarula being joined to the Proceedings.

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Ms Margarula's basis for being joined

7. Ms Margarula relied on a number of grounds, including and in effect, that Ms Margarula's, and by extension the Mirarr People's, interests may be affected by the determination of whether the decision not to renew MLN1 was valid or not as they are traditional owners within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (see paragraphs [13] to [20] of Ms Margarula's Submissions.

8. In addition, Ms Margarula's Submissions state, at [27]:

> *"Finally, if joined to the proceeding, Ms Margarula would further contend that cl 2 of MLN1 purports to fetter the exercise of statutory powers, in connection with both the Mining Act 1980 (NT) and the Mineral Titles Act, with the consequence is that cl 2 is invalid."*

9. It appears that Ms Margarula is contending, in effect, that MLN1 is inconsistent with the relevant statutory regime in the Mining Act and the Mineral Titles Act (**Inconsistency with Statutory Regime Argument**).

10. We do not consider that Ms Margarula's submission as set out above, and by extension, her continued defence of the Proceedings is sustainable, on the basis that:

    10.1 Ms Margarula should be estopped from defending the Proceedings on the basis of the Inconsistency with Statutory Regime Argument; and/or

    10.2 The Inconsistency with Statutory Regime Argument is effectively an argument seeking judicial review of the decision to grant MLN1 which is not able to be maintained at this late stage some 42 years after MLN1 was granted.

11. We address each of these arguments below.

Previous Judicial Decisions

12. By way of introduction to the arguments set out in paragraph 10 above, we enclose copies of the following judgments of the Federal Court:

    12.1 *Margarula v Minister for Resources and Energy* [1998] FCA 48 (Sackville J) (**First Instance Decision**);

    12.2 *Margarula v Minister for Resources & Energy* (1998) 86 FCR 195 (Beaumont, Lindgren and Emmett JJ) (**Appeal Decision**); and

    12.3 *Margarula v Minister for Resource Development and Anor* (1998) 147 FLR 377 (**Supreme Court Decision**).

First Instance Decision and the Appeal Decision

13. The parties to First Instance Decision and the Appeal Decision were as follows:

13.1 Applicant: Ms Margarula;

13.2 First Respondent: Minister for Resources and Energy;

13.3 Second Respondent: the Commonwealth of Australia;

13.4 Third Respondent: ERA; and

13.5 Fourth Respondent: Northern Territory of Australia.

14. In the First Instance Decision, the validity of MLN1 was squarely in issue and determined. As Sackville J explained in the First Instance Decision (relevantly):

> *"These proceedings concern the validity of a mineral lease granted in 1982 by the Northern Territory of Australia, to permit the exploitation of deposits of uranium ore.*
> *…*
> *The substance of the applicant's case is that the lease of uranium and other prescribed substances, granted by the Northern Territory to ERA's predecessors in title in 1982, is void and of no effect. The applicant's pleaded case is that neither the Northern Territory, nor the Minister, had any valid authority under the Atomic Energy Act or any other law of the Commonwealth, at the date of the execution of the lease, nor at any time since, to execute the purported lease, nor to grant to any person any entitlement to mine and remove the uranium from the land comprised within NT Portion 2253.*
> *…*
> *The Jabiluka Project Lease is expressed to be granted pursuant to the Mining Act 1980 (NT) (the "Mining Act 1980"), which commenced operation on 1 July 1982. It was executed by the lessees and by the then Territory Minister for Mines and Energy "for and on behalf of the Territory".*
> *…*
> ***The Lease is renewable for a further term not exceeding ten years: cl 2."***
>
> *[emphasis added]*

15. Ultimately, Ms Margarula's challenge to the validity of MLN1 failed as Sackville J found MLN1 to be valid. In the Appeal Decision, the Full Court dismissed the appeal. In addition, the High Court refused an application for special leave to appeal the Appeal Decision.

Supreme Court Decision

16. The parties to Supreme Court Decision were as follows:

16.1 Applicant: Ms Margarula;

16.2 First Respondent: Minister for Resource Development; and

16.3 Second Respondent: ERA

17. In the Supreme Court Decision, the parties filed an Agreed Statement of Facts which is extracted at parges 380 to 385 of the Supreme Court Decision. The following is an extract of paragraphs 5.1 to 5.3 of the Agreed Statement of Facts, which is set out at pages 380 to 381 of the Supreme Court Decision:

> *"5.1 On 12 August 1982, the Northern Territory granted to Pancontinental and Getty a mineral lease No MLN1 of about 7275 hectares of land (the Jabiluka project area) and all deposits of uranium ore and prescribed substances in or under the land. The lease was for an initial term of 42 years with an option to renew for a further 10 years and expressed to be for the purposes of mining uranium ore and other prescribed substances, and for 'all purposes necessary effectually to carry on mining operations.'*
>
> *"5.2 The mineral lease is expressed to be granted pursuant to the Mining Act of the Northern Territory. Section 60 of the Mining Act (which came into operation on 1 July 1982) empowers the Territory Minister to grant a mineral lease for a period not exceeding 25 years. However, Pancontinental and Getty had applied for a special mineral lease under the (subsequently repealed) Mining Ordinance (NT), which could be granted for a term of 42 years [see attachment 3A]. The transitional provisions in s 191(15) and (15B) of the Mining Act enabled the Minister under s 60 to grant a mineral lease for a term not exceeding the 42-year term for which the special mineral lease could have been granted.*
>
> *5.3 In accordance with s 175 of the Mining Act, the mineral lease was granted by the Territory Minister on the advice of the Commonwealth Minister administering the Atomic Energy Act 1953 (Cth) [see attachment 3B]."*

18. While the issue of the validity of MLN1 was not an issue to be determined in the Supreme Court Judgment, Ms Margarula consented to the Agreed Statement of Facts which set out the basis of how MLN1 was validly granted pursuant to the statutory regime at the time, including her agreement to the fact that the Minister (as defined in the Mining Act) had the power to grant MLN1 in accordance advice from the Commonwealth Minster pursuant to section 175 of the Mining Act.

Estoppel

19. The First Instance Decision and the Appeal Decision demonstrate that the issue of the validity of MLN1 (including Condition 2) has previously been an issue the subject of determination by the Federal Court. Therefore, we consider that there is a persuasive basis for ERA to argue that Ms Margarula should be estopped from advancing the Inconsistency with Statutory Regime Argument because it goes to an issue in the First Instance Decision and the Appeal Decision and Ms Margarula did not raise the Inconsistency with Statutory Regime Argument. Furthermore, Ms Margarula, as a party to the Supreme Court Decision, agreed to the Statement of Agreed Facts which set out the basis of how MLN1 was validly granted pursuant to the statutory regime at the time as detailed in paragraph 18 above.

20. Accordingly, the issue of MLN1's operation in the context of the statutory regime, that is the Inconsistency with Statutory Regime Argument, is *res judicata* or, at the very least, the subject of an *Anshun*[1] estoppel binding on Ms Margarula.

[1] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

21. As you are aware, *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes once and for all the fundamental matters decided so that, except on appeal, they cannot be re-litigated between parties bound by the judgment. An *Anshun* estoppel doctrine arises where the matter relied upon in the subsequent proceeding could and should have been raised in the first proceeding on the basis that it was relevant to the subject matter of the first action that it would have been unreasonable not to have relied on it.

22. The doctrines of *res judicata* and issue estoppel have been held to apply to applications for judicial review.[2] Equally, the Anshun estoppel doctrine can apply to judicial review of administrative decisions.[3]

23. Given the Proceedings are fundamentally judicial review applications, doctrines of *res judicata* and *Anshun* estoppel apply to the Proceedings.

24. We are of the view that ERA should contend that Ms Margarula is estopped, by reason of *res judicata* or *Anshun*, from advancing the Inconsistency with Statutory Regime Argument as she properly should have run this argument in the First Instance Decision or the Appeal Decision, or perhaps even the Supreme Court Decision.

25. Subject to the evidence to be led by the Commonwealth Respondents and the NT Respondents on 23 September 2024, those parties may also be able to be estopped for the same reasons as Ms Margarula to the extent that they assert an argument that the terms of MLN1 are inconsistent with the statutory regime.

Delay

26. We consider that, even if a *res judicata* argument and/or *Anshun* estoppel argument were to fail, ERA should argue that the Inconsistency with Statutory Regime Argument is, properly characterised, an application for judicial review of the grant of MLN1, which has been made just over 42 years after the date of the grant.

27. This is important, where the Court has a discretion to refuse a judicial review remedy due to an applicant's delay in instituting a challenge. In this regard, we refer to the observations of Spigelman CJ in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [93] (emphasis added):

> *[R]emedies on judicial review are discretionary and may be refused, depending on the circumstances, including delay. The further a decision making process has gone, in reliance on the validity of a decision […], the more difficult it will be for an applicant to obtain relief.*

[2] See *Taylor v Ansett Transport Industries Ltd* (1987) 18 FCR 342 at 354–6; ALR 201–2 per Fisher J and 365 per Ryan J.

[3] *Wong v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 242; 46 FCR 10 at [39] per Emmett, Conti and Selway JJ.

28. In this respect, we also draw attention to *Re Refugee Review Tribunal; Ex parte AALA* (2000) 204 CLR 82 in which Gaudron and Gummow JJ (at [55] – [56]) emphasised that the Court should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws that govern their exercise, but that a circumstance which may attract an exercise of discretion adverse to an applicant is if the applicant has been guilty of "unwarrantable delay" (quoting from *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Pty Ltd* (1949) 78 CLR 389 at 400).

29. Having regard to paragraphs 26 and 28 above, Ms Margarula's attempt to seek judicial review in these Proceedings of the grant of MLN1 42 years after it was granted, should be refused on the basis that such a delay is plainly extreme and unwarrantable. The same could be said of any other respondent to the Proceedings who now seeks to advance the Inconsistency with Statutory Regime Argument.

30. We are of the view that ERA should argue that, even if she was not otherwise estopped in the manner set out in paragraphs 19 to 25 above, Ms Margarula, in her defence of the Proceedings and in making the Inconsistency with Statutory Regime Argument, is effectively making an application for judicial review of the grant of MLN1 which should be refused on the basis of delay.

Standing to intervene

31. As set out in our 17 September 2024 Letter, section 236 of the *Corporations Act 2001* (Cth) (**Corporations Act**) provides, in effect, that a member may intervene in proceedings to which a company is a party if they have obtained leave under section 237(2) of the Corporations Act.

32. If ERA elects not to pursue the cause of action set out in our previous letter or the arguments against the position advanced by Ms Margarula set out above, we anticipate receiving instructions to seek to intervene in the Proceedings by way of an application pursuant to sections 236 and 237(1) of the Corporations Act.

33. Please let us know by 20 September 2024 whether ERA will make the arguments set out in this letter.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner

FEDERAL COURT OF AUSTRALIA

MINES AND MINERALS - mining leases in prescribed substances - Northern Territory - mining lease granted pursuant to *Mining Act* 1980 (NT) - effect of transition to self-government - whether entitlement to mine, recover and remove prescribed substances could only be granted by the Commonwealth under the *Atomic Energy Act* 1953 (Cth) - effect of *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and *Northern Territory (Self-Government) Act* 1978 (Cth) ss 6, 69, 70 - whether the *Mining Act* 1980 (NT) was capable of operating concurrently with the *Atomic Energy Act* 1953 (Cth).

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), ss 3, 4, 10, 11, 12, 23, 40, 41, 43, 44, 45, 46, 47.
Aboriginal Land Rights (Northern Territory) Amendment Act (No 3) 1987 (Cth).
Atomic Energy (Control of Materials) Act 1946 (Cth), ss 3, 6, 13A.
Atomic Energy (Control of Materials) Act 1952 (Cth).
Atomic Energy Act 1953 (Cth), ss 5, 17, 34, 38, 39, 40, 41.
Atomic Energy Amendment Act 1978 (Cth), s 9.
Atomic Energy Amendment Act (No 2) 1978 (Cth).
Constitution, s 122.
Customs (Prohibited Exports) Regulations, reg 11.
Environmental Protection (Impact of Proposals) Act 1976 (Cth), s 11.
Judiciary Act 1903 (Cth).
Mining Act 1980 (NT), ss 3, 4, 54F, 60, 175.
Mining Act (No 4) 1978 (NT), ss 4, 10.
Mining Ordinance 1939, ss 3, 7A.
Mining Ordinance (No 2) 1953.
Northern Territory Acceptance Act 1910 (Cth), s 7.
Northern Territory (Administration) Act 1910 (Cth), ss 13, 21.
Northern Territory (Administration) Act 1947 (Cth).
Northern Territory (Self-Government) Act 1978 (Cth), ss 6, 7, 8, 9, 32, 35, 57, 69, 70.
Northern Territory (Self-Government) Regulations, reg 4.
Trade Practices Act 1974 (Cth), s 75.

Attorney-General for the Northern Territory v Hand (1989) 25 FCR 345 (FCA/FC), cited.
Australian Conservation Foundation v Forestry Commission (1988) 81 ALR 166, cited.
Capital Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248, cited.
The Commonwealth v Bogle (1953) 89 CLR 229, cited.
The Commonwealth v Newcrest Mining (WA) Ltd (1995) 58 FCR 167 (FCA/FC), cited.
The Commonwealth v Tasmania (1983) 158 CLR 1, cited.
Cudgeon Rutile (No 2) Pty Ltd v Chalk [1975] AC 220, considered.
Minister for Arts, Heritage and Environment v Peko-Wallsend (1987) 15 FCR 274 (FCA/FC), cited.
Newcrest Mining (WA) Ltd v The Commonwealth (1997) 71 ALJR 1346, cited.
Newcrest Mining (WA) Ltd v The Commonwealth (1993) 46 FCR 342, cited.

Northern Land Council v The Commonwealth (1986) 161 CLR 1, cited.
Northern Land Council v The Commonwealth (No 2) (1987) 61 ALJR 616, cited.
The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 545, cited.
The Queen v Kearney; Ex parte Japanangka (1984) 158 CLR 395, cited.
R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170, cited.
Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority (1997) 71 ALJR 1254, cited.
Svikart v Stewart (1994) 181 CLR 548, cited.
Wake v Northern Territory (1996) 109 NTR 1 (S Ct NT/FC), cited.
Webster v McIntosh (1980) 49 FLR 317 (FCA/FC), cited.
Williams v Attorney-General (1913) 16 CLR 404, cited.

YVONNE MARGARULA v MINISTER FOR RESOURCES AND ENERGY & ORS
NG 448 of 1997

SACKVILLE J
SYDNEY
11 FEBRUARY, 1998

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 448 of 1997**

BETWEEN: **YVONNE MARGARULA**
APPLICANT

AND: **MINISTER FOR RESOURCES AND ENERGY**
FIRST RESPONDENT

COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT

ENERGY RESOURCES OF AUSTRALIA LIMITED
THIRD RESPONDENT

NORTHERN TERRITORY OF AUSTRALIA
FOURTH RESPONDENT

JUDGE: **SACKVILLE J**

DATE OF ORDER: **11 FEBRUARY 1998**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The matter be stood over for seven days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NG 448 of 1997**

BETWEEN: **YVONNE MARGARULA**
APPLICANT

AND: **MINISTER FOR RESOURCES AND ENERGY**
FIRST RESPONDENT

COMMONWEALTH OF AUSTRALIA
SECOND RESPONDENT

ENERGY RESOURCES OF AUSTRALIA LIMITED
THIRD RESPONDENT

NORTHERN TERRITORY OF AUSTRALIA
FOURTH RESPONDENT

JUDGE: **SACKVILLE J**

DATE: **11 FEBRUARY 1998**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

THE PROCEEDINGS

These proceedings concern the validity of a mineral lease granted in 1982 by the Northern Territory of Australia, to permit the exploitation of deposits of uranium ore. The deposits are located at Jabiluka, about twenty kilometres north of Jabilu and twelve kilometres west of the boundary of the Arnheim Land Aboriginal Reserve. Although proposals have been in existence for the exploitation of these deposits for well over twenty years, and the lease was granted over fifteen years ago, it appears that no mining operations have yet been conducted at the site. (Background information concerning the Jabiluka deposits and proposals for their exploitation are contained in the *Second Report of the Ranger Uranium Environmental Inquiry* (AGPS 1977) (the "*Second Ranger Repor*t"), at 161-164).

The applicant, who claims to be the principal custodian by Aboriginal tradition of the land at Jabiluka, seeks declaratory relief against four respondents, namely, the Minister for Resources and Energy ("the Minister"), the Commonwealth, Energy Resources of Australia

Ltd ("ERA") and the Northern Territory. The applicant seeks two forms of relief:

- an order prohibiting the Minister from granting approval to ERA, pursuant to reg 11 of the *Customs (Prohibited Exports) Regulations,* to export minerals, including uranium, mined from land held by the Jabiluka Aboriginal Land Trust at Jabiluka, which is included in the lease; and
- a declaration that the Commonwealth is the owner of uranium and other "prescribed substances" as defined in the *Atomic Energy Act* 1953 (Cth) (the "*Atomic Energy Act"*) within land at Jabiluka, identified in the application as NT Portion 2253, and that the Commonwealth has granted no valid interest to any person in respect of the uranium.

The substance of the applicant's case is that the lease of uranium and other prescribed substances, granted by the Northern Territory to ERA's predecessors in title in 1982, is void and of no effect. The applicant's pleaded case is that neither the Northern Territory, nor the Minister, had any valid authority under the *Atomic Energy Act* or any other law of the Commonwealth, at the date of the execution of the lease, nor at any time since, to execute the purported lease, nor to grant to any person any entitlement to mine and remove the uranium from the land comprised within NT Portion 2253. That land constitutes the bulk of the land included in the lease.

The fee simple estate in the land comprised within NT Portion 2253 is vested in the Jabiluka Aboriginal Land Trust and is "Aboriginal land" within the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (the "*Land Rights Act"*). This land, which comprises about 6,758 hectares, was granted by the Governor-General to the Jabiluka Aboriginal Land Trust on 25 June 1982. I shall refer to it as the "Jabiluka Trust Land". I shall refer to the larger area of land included in the lease (a total of about 7,275 hectares) as the "Jabiluka Project Land". I shall refer to the lease as the "Jabiluka Project Lease" or, more simply, the "Lease".

I was informed by counsel that the Jabiluka Project Land is surrounded by what is now the Kakadu National Park, but does not constitute part of the Park itself. No issue arises in this case as to the operation of the legislation and instruments creating and expanding the boundaries of the Park.

In its defence, ERA pleads, *inter alia,* that the applicant is estopped from denying the validity of the Jabiluka Project Lease. An order made by another Judge of the Court, on 22 August 1997, provides that the questions raised by this paragraph of ERA's defence (designated as the "Estoppel Questions"), to be determined separately and after trial of all other questions in the proceedings. Other orders made on that occasion noted the agreement of the parties that the questions for determination in the proceedings, other than the Estoppel Questions, are limited to the following:

> *"(a) Whether the entitlement to mine, recover and remove prescribed substances from NT Portion 2253* [the Jabiluka Trust Land] *could only be granted by the Commonwealth of Australia under the* Atomic Energy Act 1953 (Cth).
>
> *(b) Whether the* Mining Act 1980 (NT) *was a law of the Northern Territory of Australia capable of operating concurrently with the* Atomic Energy Act *so as to entitle the Minister for Mines and Energy of the Northern Territory of Australia to grant a lease of and a right to mine prescribed substances.*
>
> *(c) Whether the* Atomic Energy Act *as in force on 12 August 1982 on its true construction excluded the operation of a law of a Commonwealth Territory purporting to grant or authorise the grant of a leasehold mining interest in uranium or other 'prescribed substance' within the meaning of that Act, in such a Territory.*
>
> *(d) Whether the Northern Territory of Australia was entitled to grant a lease conveying a proprietary interest in prescribed substances within the* [Jabiluka Trust Land] *which are the property of the Commonwealth of Australia and not the property of the Northern Territory of Australia.*
>
> *(e) Whether the* Northern Territory (Self-Government) Act 1978 (Cth) *on its true construction conferred legislative power on the Legislative Assembly of the Northern Territory with the assent as provided by that Act to enact legislation enabling or authorising the grant of a leasehold mining interest in uranium or other prescribed substance in the Northern Territory.*
>
> *(f) Whether the* Northern Territory (Self-Government) Act 1978 (Cth) *and the* Northern Territory (Self-Government) Regulations *on their true construction enabled the conferral of executive authority on the Minister for Mines and Energy of the Northern Territory to grant the Mineral Lease ML N1 dated 12 August 1982 in the circumstances set forth in paragraphs 17 to 20 inclusive of the Defence of* [the Minister and the Commonwealth] *and sub-paragraphs 5.6 to 5.9 inclusive of* [ERA's] *Defence.*

(g) If the answer to question 2(f) is yes, whether such executive authority was conferred in the circumstances set forth in [those] *paragraphs.*

The written and oral submissions in the proceedings were not framed explicitly by reference to the series of questions identified in the orders of 22 August 1997. However, the issues raised by these questions were, in substance, addressed in the submissions.

None of the submissions explicitly referred to reg 11 of the *Customs (Prohibited Exports) Regulations* or to the Administrative Procedures under the *Environmental Protection (Impact of Proposals) Act* 1974 (Cth). The latter impose requirements which must be satisfied if an approval is to be granted under reg 11. The applicant pleaded that the Minister has no power or authority to grant to ERA an approval in writing to export from Australia uranium which is vested in the Commonwealth, and to which ERA has no lawful right, title or interest. This allegation was denied by each of the respondents, but the pleadings did not make it clear whether the denial was intended to raise any issue other than the validity of the Jabiluka Project Lease. In any event, no further argument was put in relation to the order sought by the applicant prohibiting the Minister from granting approval under reg 11.

The Minister, the Commonwealth and ERA admitted in their respective pleadings that the applicant is a member of a community or group of Aboriginals of local descent having spiritual affiliations to the Jabiluka Trust Land, and is entitled by Aboriginal tradition to forage as of right over that land. The Northern Territory did not admit the applicant's claim to be the principal custodian by Aboriginal tradition of the land. Despite the different form of the defences, none of the respondents challenged the standing of the applicant to seek the relief to which I have referred.

The Minister and the Commonwealth apparently considered that a constitutional issue might arise concerning the executive power of the Commonwealth or the legislative and executive power of the Northern Territory. For this reason, they gave notice of a constitutional matter to the Attorneys-General of the State, pursuant to the *Judiciary Act* 1903 (Cth). In any event, none of the Attorneys-General of the States wished to intervene in or participate in the proceedings.

THE LEASE

By a mineral lease dated 12 August 1982, the Northern Territory granted to Pancontinental Mining Ltd ("Pancontinental") and Getty Oil Development Co Ltd ("Getty") the Lease of the Jabiluka Project Land comprising, as I have said, about 7,275 hectares, of which about 6,758 hectares is the Jabiluka Trust Land.

The Jabiluka Project Lease is expressed to be granted pursuant to the *Mining Act* 1980 (NT) (the "*Mining Act 1980"*), which commenced operation on 1 July 1982. It was executed by the lessees and by the then Territory Minister for Mines and Energy "for and on behalf of the Territory". The Lease includes a grant expressed in the following terms:

> *"ALL THOSE mines and deposits of uranium ore and other prescribed substances together with the minerals associated or combined therewith so that they must necessarily be mined in the mining of any such uranium ore or other prescribed substances in or under the leased land, together with the rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining, EXCEPTING AND RESERVING out of this lease the rights of ingress, egress and regress hereinafter. ...for the term of forty-two (42) years from the date hereof for the purpose of mining thereon for uranium ore and other prescribed substances."*

The expression "prescribed substance" is defined to mean a prescribed substance within the meaning of the *Atomic Energy Act*: Jabiluka Project Lease, cl 7(a). In view of the definition of "prescribed substance" in s 5(1) of the *Atomic Energy Act,* the expression includes uranium, any element having an atomic number greater than 92 and any other substance declared by the regulations to be capable of being used for the production of atomic energy. The Lease is renewable for a further term not exceeding ten years: cl 2.

The lessees are obliged to pay the rent and royalties reserved by the Lease: cl 1(a). Rental is payable yearly at the rate provided from time to time by the *Mining Act 1980* and the regulations made thereunder: cl 4(a). Royalties are payable on the value of uranium and other prescribed substances obtained from the leased land at rates specified in the Fourth Schedule: cl 4(b). The Fourth Schedule provides a formula for a royalty payable by the lessees "for so long as ownership of uranium and other prescribed substances is vested in the Commonwealth": Fourth Schedule, cl 1(a). The formula contemplates that, after 30 June 1990, the rate payable to the Commonwealth is to be that determined by the Commonwealth Minister administering s 41 of the *Atomic Energy Act*: Fourth Schedule, cl 1(a), (c). A

different royalty is provided for "in the event of the vesting of ownership of uranium and other prescribed substances in the Northern Territory": Fourth Schedule, cl 1(b).

By agreement dated 6 August 1991, Pancontinental and two other parties (but not Getty) assigned their interest in certain assets, including the Lease, to ERA. This agreement appears not to be referred to in the pleadings and it is not entirely clear how Getty's interest in the Lease vested in the assignors, although the agreement refers to an option agreement to which Getty was a party. In any event, there seemed to be no dispute that the 1991 agreement was effective to vest the benefit of the Lease (assuming it to be valid) in ERA. The case was conducted on this basis.

I shall set out later the factual background to the Lease. However, it is first necessary to deal with the complex and interlocking legislation around which the argument revolved.

LEGISLATION

The 1946 Act

The *Atomic Energy (Control of Materials) Act* 1946 (Cth) (the "*1946 Act*") was inspired, to some extent at least, by the establishment of the United Nations Atomic Energy Commission and the simultaneous enactment of atomic energy control legislation in other countries, including Great Britain and the United States: see the second reading speech on the *Atomic Energy Bill* 1953, Cth Parl Deb, HR, 19 March 1953, at 1390.

The purpose of the *1946 Act*, which came into force on 11 September 1946, according to its long title, was

> *"to make provision, in the interests of the Defence of the Commonwealth, for the Control of Materials which are or may be used in producing Atomic Energy...".*

Section 6 of the *1946 Act* was as follows:

> *"6(1) All prescribed substances existing in their natural condition, or in a deposit of waste material obtained, from any underground or surface working, on or below the surface of any land in any Territory of the Commonwealth, whether alienated from the Crown or not, and, if alienated, whether alienated before or after the commencement of this Act, are hereby declared to be the property of the Commonwealth.*

> *(2) The title of the Commonwealth to any prescribed substance under sub-section (1) of this section shall be subject to any rights granted after the commencement of this Act, by or under the law of any Territory of the Commonwealth, with express reference to the prescribed substance, but to no other rights."*

The expression "prescribed substance" was defined in s 3 of the *1946 Act* to mean:

> *"uranium, thorium, plutonium, neptunium or any of their respective compounds, and includes any other substance (being a substance which, in the opinion of the Minister, is or may be used for the production or use of atomic energy or research into matters connected with atomic energy) which is declared by the Minister, by order published in the Gazette, to be a prescribed substance for the purposes of this Act."*

Sections 8 to 11 of the *1946 Act* gave the Minister powers to obtain information, prohibit the mining of prescribed substances and require the delivery up of prescribed substances. Section 12 empowered the Minister to, where he or she considered it necessary in the interests of the defence of the Commonwealth, to acquire all prescribed substances on or under any land. Section 13 empowered the Minister, where any minerals from which a prescribed substance could be obtained were present on or under land, to make an order compulsorily vesting in the Commonwealth the exclusive right to work those minerals. Section 14 of the *1946 Act* made the Commonwealth liable to pay compensation to any person who had title to or an interest in prescribed substances that had been acquired by the Commonwealth by virtue of the Act.

The *1946 Act* was amended by the *Atomic Energy (Control of Materials) Act* 1952 (Cth). The most important amendment inserted s 13A into the legislation. It provided as follows:

> *"13A(1) Where it appears to the Minister that any prescribed substances, or any minerals from which, in the opinion of the Minister, any prescribed substances can be obtained, are present on or under the whole or a part of an area of land in a Territory of the Commonwealth, either in a natural state or in a deposit of waste material obtained from any underground or surface working, the Minister may, by writing under his hand, authorise a person to carry on, on behalf of the Commonwealth, operations in accordance with this section on that land."*

Section 13A(2) specified the activities that could be undertaken pursuant to an authority granted under s 13A(1). Section 13A was the forerunner to s 41 of the *Atomic Energy Act,*

which was the focus of considerable argument in the present case.

The Atomic Energy Act 1953

The *1946 Act* was repealed by the *Atomic Energy Act*, which came into force on 15 April 1953. According to the Minister's second reading speech, the legislation was made necessary because of important discoveries of uranium-bearing ores, especially in the Northern Territory and

> *"by the Government's determination that those deposits shall be vigorously and promptly exploited for the defence of Australia and its allies, and also ultimately for industrial and other purposes."*

Cth Parl Deb, HR, 19 March 1953, at 1390. At the time the *Atomic Energy Act* was enacted, an agreement had already been entered into between the Commonwealth Government and a company, Consolidated Zinc Pty Ltd, for the development of a site containing uranium at Rum Jungle in the Northern Territory: *id* at 1391.

The *Atomic Energy Act* has been amended from time to time, most notably for present purposes in 1978. The provisions I extract and refer to in this part of the judgment reflect the form of the Act in August 1982, the time at which the Jabiluka Project Lease was executed. Where I refer to the legislation in its original form, I say so.

The *Atomic Energy Act* established the Australian Atomic Energy Commission: s 8. The functions of the Commission included the following (s 17(1)):

> *"(a) to undertake, or arrange for or encourage other authorities or persons to undertake, exploration for, and mining and treatment of, uranium and minerals found in association with uranium;*
>
> *(b) to supervise the activities of persons who, in pursuance of contracts with the Commonwealth, are exploring for, mining, treating or selling uranium, or minerals found in association with uranium, and to exercise the rights and powers of the Commonwealth under any such contract;*
>
> *(c) to co-operate with the appropriate authorities of a State in matters associated with -*
>
> > *(i) the discovery and mining in the State of uranium and minerals found in association with uranium; or*

> *(ii) the treatment, use or disposal of uranium, or of any such mineral, found in the State."*

The functions of the Commission were to be exercised only for the purposes specified in s 17(4). These included ensuring the provision of uranium or atomic energy for the defence of the Commonwealth or for any other purpose of the Commonwealth and the provision of uranium to other countries.

Section 34(1) of the *Atomic Energy Act* required the powers conferred by Part 3 (ss 34-43) to be exercised only for the purposes specified. These purposes reflected various heads of Commonwealth legislative power under the Constitution and included purposes related to the defence of the Commonwealth (s 34(1)(a)), overseas and interstate trade (s 34(1) (b),(c)) and external affairs (s 34(1)(d)). In addition, the powers could be exercised

> *"(f) in relation to substances situated in or recovered from, or things done or proposed to be done in or in connection with, a Territory".*

Section 34(1)(f) invoked the Parliament's power under s 122 of the *Constitution*, to make laws for the government of a Territory.

In its original form, s 34 had provided that the powers conferred by Part 3 were to be exercised for defence purposes or in relation to substances situated or things to be done in a Territory. The invocation of the broader range of Commonwealth heads of power was effected by the *Atomic Energy Amendment Act* 1978 (Cth), s 9, which substituted a new s 34 in the principal Act.

Section 35 of the *Atomic Energy Act* was the counterpart to s 6 of the *1946 Act* and provided as follows:

> *"35(1) This section applies to substances which, on or after the commencement of the 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; and*
> *(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.*
>
> *(3) A substance to which this section applies which -*
> *(a) becomes a prescribed substance after the commencement of this Act; and*
> *(b) is not, immediately before the date on which it becomes a prescribed substance, the property of the Commonwealth,*
>
> *becomes, by force of this Act, 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."*

The definition of "prescribed substance" in s 5(1) of the *Atomic Energy Act* (as amended in 1978) was similar, but not identical, to that in the *1946 Act*:

> *"'Prescribed substance' means -*
> *(a) uranium, thorium, an element having an atomic number greater than 92 or any other substance declared by the regulations to be capable of being used for the production of atomic energy or for research into matters connected with atomic energy; and*
> *(b) any derivative or compound of a substance to which paragraph (a) applies."*

Section 36 required a person who discovered a prescribed substance anywhere in Australia to notify the Minister and s 37 empowered the Minister to require persons to furnish information as to prescribed substances in their possession. Section 38 conferred a power to make regulations, *inter alia,* prohibiting (except under a licence), regulating or controlling the working of minerals from which a prescribed substance could be obtained, or the production or processing of a prescribed substance. Section 38(3) empowered the Minister to grant or refuse a licence for the purposes of the section. Section 38(4) was as follows:

> *"(4) Notwithstanding the provisions of section 34, where a person applies for a licence under this section in respect of anything proposed to be done in a State, the Minister shall grant the licence unless he considers it necessary or desirable for a purpose referred to in paragraph (a), (b) or (d) of sub-section (1) of section 34 to refuse to grant the licence."*

Section 39 empowered the Minister to authorise a person to enter lands on or under which prescribed substances are reasonably thought to exist, for the purpose of making tests and

extracting samples. Section 40 authorised the Minister to require a person who has a prescribed substance in his or her possession to deliver up the substance.

Section 41 is of importance in this case. It provided as follows:

> *"41(1) Subject to sub-section (2B), where it appears to the Minister that a prescribed substance, or minerals from which, in the opinion of the Minister, a prescribed substance can be obtained, is or are present on or under the whole or a part of an area of land, either in a natural state or in a deposit of waste material obtained from an underground or surface working, the Minister may, by writing under his hand, authorise a person,* ***or 2 or more persons engaged in a joint venture****, to carry on, on behalf of* ***or in association with*** *the Commonwealth, operations in accordance with this section on that land.*
>
> *(2) Subject to any conditions or restrictions specified in the authority, the person so authorised in relation to any land may -*
>
> *(a) enter upon that land, with such workmen and other persons as he thinks fit, and bring on to that land such machinery, vehicles and other things as he thinks fit;*
>
> *(b) take possession of the whole or a part of that land;*
>
> *(c) carry on, upon or under that land, operations for discovering prescribed substances, and for mining, recovering, treating and processing prescribed substances and such other minerals as it is necessary or convenient to mine or recover in order to obtain prescribed substances;*
>
> *...*
>
> *(g) do all such other things as are necessary or convenient for the effectual exercise of the powers specified in the preceding paragraphs of this sub-section.*
>
> *...*
>
> *(2B) The Minister shall not confer an authority under sub-section (1) in relation to land in a State without the consent of the Government of that State unless that authority is conferred for a purpose that is, or purposes each of which is, related only to the defence of the Commonwealth.*
>
> *(3) All prescribed substances and minerals mined or otherwise recovered in pursuance of an authority under this section that are not otherwise the property of the Commonwealth are, by force of this section, vested in the Commonwealth.*

> *(4) Except as provided by the regulations, this section shall not be construed as intended to exclude or limit the operation of any provision of a law of a State or Territory that is capable of operating concurrently with this section."*

The bolded words in s 41(1) were added by amendments in 1978, and s 41(4) was added in the same year: *Atomic Energy Amendment Act* 1978 (Cth), s 11(a), (c); *Atomic Energy Amendment Act (No 2)* 1978 (Cth), s 4(a).

As I have already indicated, the precursor to s 41 of the *Atomic Energy Act* was s 13A of the *1946 Act.* However, there were two major differences between the provisions. First, s 13A(1) was confined to operations in a Territory, while s 41(1) extended to operations in both States and Territories. Secondly, s 41(3), which vested property in the Commonwealth in prescribed substances recovered under an authority, had no equivalent in s 13A.

Section 41A, which was added to the legislation in 1978, provided that, subject to ss 41B and 41C, an authority granted under s 41 was not to be varied or revoked otherwise than under and in accordance with s 41A itself. Revocation could take place, for example, where the person in whom authority was conferred applied for revocation, or where that person failed to comply with a condition to which the authority was subject: s 41A(2), (4). In exercising the powers under s 41A, the Minister was not to act in a manner inconsistent with the obligations of the Commonwealth under any agreement entered into under ss 44 and 46 of the *Land Rights Act*: s 41A(8).

The Commonwealth was liable to pay compensation where any prescribed substance was acquired by the Commonwealth by virtue of Part 3 or where a person suffered loss or damage by reason of anything done in pursuance of ss 39-41: s 42.

The Lands Rights Act

The *Land Rights Act* commenced on 26 January 1977. It defined "Aboriginal land" to include "land held by [an Aboriginal] Land Trust for an estate in fee simple": s 3(1). That definition applied to the Jabiluka Trust Land and it is therefore necessary to consider the effect of the *Land Rights Act* in the present case. The following outline of the *Land Rights Act* relates, unless otherwise stated, to the legislation as it stood at the date the Jabiluka Project Lease was executed.

The *Land Rights Act* provided for the establishment of Aboriginal Land Trusts, to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned: s 4. The *Land Rights Act* identified certain tracts of land in respect of which the Minister was required to recommend to the Governor-General that a fee simple grant be made to a Land Trust: s 10. The Minister was also required, subject to certain conditions, to grant land to a Land Trust where it was recommended by the Aboriginal Lands Commissioner in a report, that such a grant should be made: s 11. A deed of grant to a Land Trust had to be expressed to be subject to a reservation that the right to any minerals existing in their natural condition or in a deposit of waste material from any underground or surface working, being minerals all interests in which were vested in the Commonwealth, were to remain with the Commonwealth: s 12. A Land Trust was subject to the supervision of the Land Council for the relevant area in relation to the Land Trust's holding of Aboriginal land: s 23(1)(h).

Part 4 of the *Land Rights Act* dealt with mining interests and operations. (Part 4 was repealed and replaced by a new Part 4 by the *Aboriginal Land Rights (Northern Territory) Amendment Act (No 3)* 1987 (Cth).) A mining interest in respect of Aboriginal land could not be granted unless both the Minister and the Land Council for the area consented to the making of the grant (s 40(1)(a)), or the Governor-General had declared that the national interest required that the grant be made (s 40(1)(b)). A "mining interest" meant any lease or other interest in land granted under a law of the Northern Territory relating to mining for minerals: s 3(1).

Section 41 addressed the application of the *Atomic Energy Act* to Aboriginal land. Section 41(1) provided as follows:

> *"41(1) The* Atomic Energy Act *1953 or any other Act authorising mining for minerals does not apply in relation to land that is Aboriginal land so as to authorise the entry or remaining of a person on the land or the doing of any act by a person on the land unless -*
>
> *(a) the Governor-General has, by Proclamation, declared that both the Minister and the Land Council for the area in which the land is situated have consented to the application of that Act in relation to entry on that land; or*
> *(b) the Governor-General has, by Proclamation, declared that the national interest requires the application of that Act in relation to entry on that land."*

Section 43(1) provided that a Land Council could agree with an applicant for a mining interest in respect of Aboriginal land for the giving of consent by the Land Council in return for agreed payments. Where by virtue (*inter alia)* of a proclamation made by the Governor-General under s 40(1)(b) a mining interest in respect of Aboriginal land could be granted without the consent of the Land Council for the relevant area, the mining interest was not to be granted unless the applicant for that interest had entered into an agreement with the Land Council: s 43(2). The agreement was to contain such terms and conditions as the parties might agree, having regard to the effect of the grant of the mining interest on Aboriginals. The terms and conditions could include a requirement that moneys be paid to the Council.

Section 44(1) provided that a Land Council could agree with the Commonwealth for the giving of the Council's consent to the application of the *Atomic Energy Act* to Aboriginal land, in consideration of agreed payments and subject to any other terms and conditions as were provided for in the agreement. If a proclamation were made under s 41(1)(b), without the consent of the relevant Land Council, the *Land Rights Act* did not authorise any act on the Aboriginal land unless an agreement was entered into between the Commonwealth and the Land Council providing for the payment of agreed amounts to the Council and containing such other terms and conditions as might be agreed: s 44(2). A Land Council was not permitted, without the approval of the Minister, to enter into a contract involving the payment or receipt of an amount exceeding $50,000: s 27(3).

Where the Minister was satisfied that a Land Council was unwilling to give its consent to the grant of a mining interest because the applicant for the grant would not agree to the consideration proposed by the Council, the Minister could appoint an arbitrator to determine the terms and conditions of the agreement that should have been acceptable to the Council: s 45(1). The Land Council was obliged to enter an agreement with the applicant on the terms and conditions specified by the arbitrator: s 45(2).

Section 46(1) established an arbitral mechanism in relation to the agreement contemplated by s 43(2) and s 44(2) of the *Land Rights Act.* The sub-section was as follows:

> *"46(1) Where the Minister is satisfied that -*

> *(a) a Land Council has refused, or is unwilling, to negotiate with respect to the terms and conditions of an agreement required by sub-section 43(2) and 44(2); or*
> *(b) the Land Council and the applicant for the relevant mining interest or the Commonwealth, as the case may be, cannot agree on the terms and conditions of the agreement,*
> *the Minister may, after consultation with the Land Council and, where appropriate with the applicant for the grant, appoint an Arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially, to determine the terms and conditions of the agreement...".*

Section 74 of the *Land Rights Act* provided that the Act did not affect the application to Aboriginal land of a law of the Northern Territory to the extent that the law was capable of operating concurrently with the Act.

The Self-Government Act

Before 1 January 1911, what is now the Northern Territory was part of the State of South Australia. By the *Northern Territory Acceptance Act* 1910 (Cth), (the *"Acceptance Act"*), which commenced on 1 January 1911, the Northern Territory was surrendered by South Australia and the surrender was accepted by the Commonwealth, a course contemplated by ss 111 and 122 of the *Constitution.* The *Acceptance Act* continued all laws in force at the time of acceptance but provided that they could be altered or repealed under a law of the Commonwealth: *Acceptance Act*, s 7. It also provided that all estates and interests held by any person from South Australia within the Northern Territory at the time of acceptance would continue to be held from the Commonwealth on the same terms and conditions as they were held from the State: s 10.

The *Northern Territory (Administration) Act* 1910 (Cth) (the *"Administration Act"*) provided for the appointment by the Governor-General of an Administrator for the Territory: s 4. In its original form, s 13 of the *Administration Act* empowered the Governor-General to make ordinances having the force of law in the Territory. This was later repealed and, in 1931, s 21 was inserted into the Act, providing for the making of ordinances having the force of law in the Territory. Section 21 itself was repealed in 1947, with the creation of the Legislative Council for the Territory: *Administration Act*, s 4B, inserted by the *Northern Territory (Administration) Act* 1947 (Cth). Section 21 provided the foundation for the *Mining Ordinance*, as originally enacted, to which I refer later: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346, at 1399, per Gummow J.

The purpose of the *Northern Territory (Self-Government) Act* 1978 (Cth) (the "*Self-Government Act*"), as stated in the recitals, is

> *"to confer self-government on the Territory, and for that purpose to provide, among other things, for the establishment of separate political, representative and administrative institutions in the Territory and to give the Territory control over its own Treasury."*

The *Self-Government Act,* most provisions of which came into force on 1 July 1978, established the Northern Territory as a body politic under the Crown, by the name of the Northern Territory of Australia: s 5. The Act created the Legislative Assembly of the Northern Territory and conferred powers upon it as follows (s 6):

> *"6. Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory."*

While the grant of power under s 6 is in wide terms, the Legislative Assembly is subject to certain constraints. Every proposed law passed by the Legislative Assembly must be presented to the Administrator for assent: s 7(1). The Administrator is appointed by the Governor-General and is charged with the duty of administering the government of the Territory: s 32(1), (2). The Administrator is to exercise and perform all powers and functions, except (relevantly) for those relating to matters specified in s 35, in accordance with such instructions as are given by the Commonwealth Minister: s 32(3). If the proposed law makes provision only for or in relation to a matter specified under s 35 (that is, a matter in respect of which Territory Ministers have executive authority), the Administrator must declare either that he or she assents or withholds assent to the proposed law: s 7(2). In any other case, the Administrator must either assent, withhold assent or reserve the proposed law for the Governor-General's pleasure, in which case the Governor-General must assent or withhold assent to the proposed law, or return the proposed law with any amendments that he or she recommends: s 8.

The Governor-General also has power, within six months of the Administrator's assent to a proposed law, to disallow the law or part of the law or to recommend to the Administrator any amendments to the laws of the Territory he or she considers desirable: s 9(1), (2). If the

Governor-General recommends such amendments, the time within which a law may be disallowed is extended until the expiration of six months from the date of the recommendation: s 9(3).

Section 35 of the *Self-Government Act* provides that the regulations "may specify the matters in respect of which the Ministers of the Territory are to have executive authority". The power conferred by s 35 was exercised in the *Northern Territory (Self-Government) Regulations* (No 102 of 1978), (the "*Self-Government Regulations"*) which came into force on 1 July 1978. They were later amended and, as at August 1982, the *Self-Government Regulations* took the form described below.

Part 7 of the *Self-Government Act* is headed "TRANSITIONAL PROVISIONS" and includes provisions designed to continue existing laws of the Territory after the date of commencement of the Act. Section s 57(1) provides that

> *"[s]ubject to this Act, on and after the commencing date, all existing laws of the Territory have the same operation as they would have had if this Act had not been enacted, subject to alteration or repeal by or under an enactment."*

Section 69 addresses the question of transfer of Commonwealth property to the Northern Territory, including Commonwealth interest in minerals:

> *"(1) In this section -*
> *'mineral' means a naturally occurring substance or mixture of substances, whether in a solid, liquid or gaseous state;*
>
> ...
>
> *(2) All interests of the Commonwealth in land in the Territory, other than interests referred to in sub-section (5), are, by force of this section, vested in the Territory on the commencing date.*
>
> *(3) All interests in land in the Territory held from the Commonwealth immediately before the commencing date are, by force of this section, held from the Territory on and after the date on the same terms and conditions as those on which they were held from the Commonwealth.*
>
> *(4) 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."*

Part 7 of the *Self-Government Act* also provides for the acquisition by the Commonwealth of any interest on land vested in the Territory pursuant to s 69(2) of the Act. Section 70 provides as follows:

> *"70(1) The Minister may, from time to time, recommend to the Governor-General that any interest in land vested or to be vested in the Territory by sub-section 69(2) (including an interest less than, or subsidiary to, such an interest) be acquired from the Territory by the Commonwealth under this section.*
>
> *(2) The Governor-General may, on the recommendation of the Minister under sub-section (1), authorise the acquisition of the interest for a public purpose approved by the Governor-General.*
>
> *(3) The Minister may cause to be published in the* Gazette *notice of the authorisation by the Governor-General and, in the notice, declare that the interest is acquired under this section for the public purpose approved by the Governor-General.*
>
> *(4) Upon publication of the notice in the* Gazette *or immediately after the commencement of section 69, whichever is the later, the interest to which the notice relates is, by force of this section -*
>
> *(a) vested in the Commonwealth; and*
> *(b) freed and discharged from any restriction, dedication or reservation made by or under any enactment (not being an interest to which sub-section (6) applies),*
>
> *to the intent that the legal estate in the interest, and all rights and powers incident to that estate or conferred by the* Lands Acquisition Act *1955 in relation to that estate, are vested in the Commonwealth."*
>
> ...
>
> *(6) Upon the acquisition of an interest by the Commonwealth under this section, all interests that were held from the Territory immediately before the acquisition, being interest derived from the first-mentioned interest are, by force of this section, held from the Commonwealth on the same terms and conditions as those on which they were held from the Territory."*

The words "or to be vested", in s 70(1), appear to be explained by the fact that s 70 came into force on 22 June 1978, the date of assent, while the other provisions of the *Self-Government Act* came into force on 1 July 1978: see *Newcrest Mining v Commonwealth*, at 1405, per Gummow J. Section 70(11) was added by the *Northern Territory (Self-Government) Amendment Act* 1982 (Cth), s 11:

> *"Where sub-section (4) has effect in relation to an interest in land, that sub-section has the like effect in relation to any interest vested in the Territory by sub-section 69(4) in respect of minerals in or on that land."*

The Self-Government Regulations

As I have noted, the power conferred by s 35 of the *Self-Government Act* was exercised by the promulgation of the *Self-Government Regulations*. Regulation 4(1) provides that, subject to subregs (2) and (4), the Ministers of the Territory are to have executive authority under s 35 of the Act in respect of a large number of specified matters, including

> *"Mining and minerals (including gases and hydrocarbon fuels)".*

Regulation 4(2) creates an exception to the operation of reg 4(1), but is itself subject to a qualification. Regulation 4(2) is as follows:

> *"(2) Subject to sub-regulation (6), a matter specified in sub-regulation (1) shall not be construed as including or relating to -*
>
> *(a) the mining of uranium or other prescribed substances within the meaning of the* Atomic Energy Act *1953 and regulations under that Act as in force from time to time; or*
> *(b) rights in respect of Aboriginal Land under the* Aboriginal Land Rights (Northern Territory) Act *1976."*

Regulation 4(6) provides that

> *"[s]ub-regulation (2) does not apply to a matter specified in sub-regulation (1) if the matter is also included in the matters specified in sub-regulation (5)".*

The Ministers of the Territory therefore have executive authority in matters relating to the mining of prescribed substances or rights in respect of Aboriginal land if the matters fall within reg 4(5). Regulation 4(5) states that the Ministers of the Territory are to have executive authority under s 35 in respect of a number of "matters", including the following:

> *"(a) ...*
>
> *(b) matters in respect of which duties, powers, functions or authorities are expressly imposed or conferred by or under another Act in force in the*

> *Territory, or by or under an enactment or an agreement or arrangement referred to in paragraph (f), on the Administrator or a Minister or officer of the Territory;*
>
> *(c) matters under an enactment (including the making of regulations, rules, by-laws and other instruments) made for the purposes of, and to the extent provided by, such another Act that expressly provides for the making of such an enactment;*
>
> ...
>
> *(f) agreements and arrangements between the Territory and the Commonwealth or a State or States, including the negotiation and the giving effect to any such agreement or arrangement by the Territory by way of enactment, regulations or other instrument, or otherwise."*

The word "enactment", used in subregs (b) and (c), is defined in s 4 of the *Self-Government Act* to mean

> *"(a) a law (however described or entitled) passed by the Legislative Assembly and assented to under section 7 or 8; or*
> *(b) an Ordinance made under the* Northern Territory (Administration) Act *1910 and continued in force by this Act."*

The definition of "enactment" in the *Self-Government Act* applies in the absence of a contrary intention, to the *Self-Government Regulations*: *Acts Interpretation Act* 1901 (Cth), s 46(a).

The Mining Ordinance and the Mining Act

Prior to self government in the Northern Territory, mining in the Territory was governed by the *Mining Ordinance 1939*, as amended from time to time. The *Mining Ordinance* 1939 continued in force after self-government until its repeal in 1982, and was cited after self-government as the *Mining Act* 1939. However, I shall refer to it as the "*Mining Ordinance*". (For a general description of the operation of the *Mining Ordinance* and the *Mining Regulations* 1940, see the judgment of French J in *Newcrest Mining (WA) Ltd v The Commonwealth* (1993) 46 FCR 342, at 398-401.) The *Mining Ordinance* repealed earlier legislation, including specified Acts of South Australia which continued to apply in the Territory after its acceptance by the Commonwealth in 1910, and Ordinances of the Northern Territory: *Mining Ordinance*, s 3.

Part 5 of the *Mining Ordinance* authorised the Administrator of the Northern Territory to

grant a variety of mining leases, including leases of Crown land for the working of "minerals", subject to the payment of rent and royalties: Part 5, Div 2. The expression "minerals" was defined in s 7 to mean

> *"all minerals other than gold, and includes all...naturally occurring inorganic or fossil substances...as the Administrator...declares to be minerals".*

The *Mining Ordinance* was amended in 1953, shortly after the enactment of the *Atomic Energy Act*: *Mining Ordinance (No 2) 1953*, commencing on 3 September 1953. The amendments authorised the Administrator to grant a lease of such area as he or she saw fit "for the purpose of mining for a prescribed substance within the meaning of the *Atomic Energy Act 1953*": *Mining Ordinance*, s 47A; see also ss 51(3), 87A.

The *Mining Ordinance* continued in force under s 57 of the *Self-Government Act*, until repealed by the *Mining Act 1980*, which came into force on 15 April 1982: *Mining Act 1980*, s 3, Schedule. Between the date of commencement of the *Self-Government Act* and the coming into force of the *Mining Act 1980*, the *Mining Ordinance* was amended on three occasions. The *Mining Act (No 4)* 1978 (NT), s 4, which came into force on 3 January 1979, inserted s 7A into the *Mining Ordinance* (which by then was cited as the *Mining Act*). Section 7A provided as follows:

> *"7A(1) Subject to sub-section (2), but notwithstanding anything elsewhere contained in this Act or the Regulations made thereunder, in respect of a prescribed substance within the meaning of the* Atomic Energy Act *1953 of the Commonwealth, the Minister* -
>
> *(a) shall exercise his powers in accordance with and give effect to the advice of the Minister of the Commonwealth for the time being administering section 41 of that Act; and*
>
> *(b) shall not exercise his powers otherwise than in accordance with such advice.*
>
> *(2) Sub-section (1) does not operate to prevent the Minister from acting without advice, or to require the Minister to take or give effect to advice, in relation to a matter arising under Part IVA."*

(Part 4A dealt with exploration licences.) The *Mining Act (No 4)* 1978 (NT), s 10, introduced a further amendment which required the lessee under a special mineral lease granted in

respect of a prescribed substance to pay royalty to the Commonwealth at the rate specified in the lease and approved by the Commonwealth Minister for the time being administering s 41 of the *Atomic Energy Act*: see *Mining Act*, s 54F(1A).

The Lease in the present case was granted under the *Mining Act 1980*. At the relevant time, Part 6, Division 2 of the *Mining Act 1980* regulated the grant of mineral leases. Section 60 empowered the responsible Minister of the Territory to grant a lease for a term of twenty-five years for the mining of minerals specified in the lease and for related purposes. The Act defined "mineral" to include any naturally occurring inorganic element or compound obtainable from land by mining: s 4(1). The Act established a regime for such matters as surveys (s 61), conditions of lease (s 66) and renewal of leases (s 67).

Section 175 of the *Mining Act 1980* was headed "PRESCRIBED SUBSTANCES UNDER THE ATOMIC ENERGY ACT" and reflected the terms of s 7A of the *Mining Ordinance.* Section 175 provided (incorporating amending legislation passed prior to the commencement date of 15 April 1982) as follows:

> *"(1) Subject to sub-section (2), but notwithstanding anything elsewhere contained in this Act (other than sub-section (3)) or the Regulations, in respect of a prescribed substance within the meaning of the* Atomic Energy Act *1953 of the Commonwealth, the Minister -*
>
> > *(a) shall exercise his powers in accordance with, and give effect to, the advice of the Minister of the Commonwealth for the time being administering section 41 of that Act; and*
> >
> > *(b) shall not exercise his powers otherwise than in accordance with such advice.*
>
> *(2) Sub-section (1) does not operate to prevent the Minister from acting without advice, or to require the Minister to take or give effect to advice, in relation to a matter arising under Part IV.*
>
> *(3) The lessee of a mineral lease granted in respect of a prescribed substance referred to in sub-section (1) is liable to pay royalty to the Commonwealth, in respect of that prescribed substance obtained from the land comprised in the lease, in such manner and at such times, and at such rate on an amount calculated or assessed in accordance with such method, as are -*
>
> > *(a) specified in the lease; or*
> > *(b) varied or determined in accordance with the terms of*

the lease."

The reference in s 175(2) to Part 4 of the Act was to the provisions governing the grant of exploration licences.

THE RANGER PROJECT

Frequent reference was made in the parties' submissions to the Ranger Project and, in particular, to the legislative amendments designed to permit that project to proceed. Since some of those amendments bear on the issues in the present case, it is convenient to trace briefly the relationship between the Ranger Project and the complex legislation already outlined.

In October 1975, the Commonwealth and two co-venturers entered into a Memorandum of Understanding relating to the exploitation of Ranger uranium deposits situated (like Jabiluka) near Jabilu in the Northern Territory. Under the Memorandum of Understanding, the Commonwealth, through the Atomic Energy Commission, was to contribute most of the working capital and was to receive 50 per cent of the net proceeds of sale: *First Report of the Ranger Uranium Environmental Inquiry* (AGPS 1977), at 9; *Second Ranger Report*, at 249. Prior to the signing of the Memorandum of Understanding, the then Prime Minister, in July 1975, directed that an inquiry be held into the Ranger proposal under s 11 of the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). That inquiry, known as the Ranger Inquiry, produced the two reports to which I have referred, both published in 1977.

While the Ranger Inquiry was under way, but before its completion, the Commonwealth Parliament enacted the *Land Rights Act.* Section 40(6) of that Act provided that s 40(1) (relating to the conditions for the grant of mineral interests on Aboriginal land) was not to apply if the land known as the Ranger Project Area became Aboriginal land. Similarly, s 41(2) provided that s 41(1) (concerning the application of the *Atomic Energy Act* to Aboriginal land) was not to apply to the Ranger Project Area if it became Aboriginal land.

The Ranger Inquiry considered whether the mining legislation of the Northern Territory should be used to authorise the Ranger Project. The Inquiry concluded that to take this course was inappropriate, although it does not seem to have been suggested that the Northern

Territory legislation was incapable of application: *Second Ranger Report*, at 246-248. The Inquiry also considered, but recommended against the use of, s 41 of the *Atomic Energy Act* to authorise exploitation of the uranium reserves by the co-venturers. The *Second Ranger Report* pointed out that s 41(1) of the *Atomic Energy Act*, in its then form, empowered the Minister to authorise operations only if they were conducted "on behalf of the Commonwealth". The Inquiry considered it was doubtful whether the Ranger Project was to be carried out "on behalf of the Commonwealth", since it was "an ordinary commercial [project]" (at 249). Moreover, s 41 was an inappropriate source of authority for a project which required strict environmental controls. The Inquiry pointed out that s 41 of the *Atomic Energy Act* derived from s 13A of the *1946 Act* (introduced in 1952) and made the following comments (at 249):

> *"Section 13A was enacted in order to make more clear and certain the powers already existing under the 1946 Act (see House of Representatives* Hansard *for 21 May 1952, 614, 950).*
>
> *It seems to us that s 41 is a special power which was enacted at a time when the need to secure Australian uranium for use by Great Britain and the United States of America in nuclear weapons was uppermost in the minds of those concerned. If its use is to be continued in a situation where peaceful uses only are in mind and commercial profit is intended, the changed rationale should be recognised. The power, if it can be applied in the circumstances, should not be used simply because it exists and may appear convenient.*
>
> *In our First Report we explained the very special nature of uranium, and described it as being a highly strategic material. It is therefore necessary for there to be close government controls. This does not mean that the actual mining operations must be conducted by or on behalf of the Government, still less that the local environment controls be determined or supervised under the Atomic Energy Act."*

As has been previously noted, the *Atomic Energy Amendment Act* 1978 (Cth) amended s 41(1) of the *Atomic Energy Act* (by inserting the words "or in association with") and introduced s 41(4) into the legislation (contemplating the concurrent operation of State and Territory law). It also substituted a new s 34, invoking a number of available heads of Commonwealth legislative power, in addition to the powers with respect to defence and the Territories.

The second reading speech of the Minister stated that the 1978 amending bill was part of a package of legislation designed to give effect to the Government's decision on the further

development of Australia's uranium resources including, as a "fundamental element" the development of the Ranger deposit in accordance with the 1975 Memorandum of Understanding: Cth Parl Deb, HR, 10 April 1978, at 1293 (Minister for National Development). The speech recorded the Government's rejection of the Ranger Inquiry's recommendation that the *Atomic Energy Act* could not provide an appropriate basis for mining operations at Ranger: *id* at 1294. The Minister stated that amendments were to be made to broaden the basis of the Act, clearly authorise the participation of the Atomic Energy Commission in the project and "remove the main obstacle that the Ranger Inquiry saw in proceeding with the Ranger project under the *Atomic Energy Act*": *ibid*.

The amendments effected by the *Atomic Energy Amendment Act* 1978 (Cth) apparently did not resolve all difficulties, since further amendments were made by the *Atomic Energy Amendment Act (No 2)* 1978 (Cth). The later Act, *inter alia*, inserted the words "or 2 or more persons engaged in a joint venture" in s 41(1) and introduced ss 41A to 41C into the legislation (dealing with revocation and variation of authorities, assignment of interests and further authorities in respect of the Ranger Project Areas). The Minister stated in the second reading speech that the main purpose of the Bill was to ensure that the authority issued under s 41 of the *Atomic Energy Act* afforded the joint venturers security of tenure similar to that enjoyed by the holder of a mining lease under State or Territory law: Cth Parl Deb, HR, 16 November 1978, at 2920 (Minister for Trade and Resources). The Minister made the following observations (at 2920):

> *"The Ranger joint venturers have pointed out that section 41 of the Atomic Energy Act, as it presently stands, does not provide them with adequate security of tenure. While the Act was designed to allow mining, detailed provisions to cover mining on a commercial basis were never included. Consequently, the Act does not address these issues. Because of the decision to proceed with Ranger under the Act, amendments to deal with them have now become necessary. This does not indicate, however, that the Government has in mind using the Act for other mining projects."*

Further amendments were made later to the *Atomic Energy Act* to accommodate the Ranger Project. Following assignment by the joint venturers of their interests in the authority in September 1980, the Act was amended to provide that operations on the Ranger Project Area, if carried out as provided in the authority and in accordance with other requirements, were to

> *"be deemed for the purposes of this Act, to be carried on on behalf of the*

Commonwealth and to be authorised by the authority":

Atomic Energy Act, s 41(2AA), inserted by the *Atomic Energy Amendment Act (No 2)* 1980 (Cth), s 5.

In *Northern Land Council v The Commonwealth* (1986) 161 CLR 1, the High Court upheld the "statutory fiction" enacted by s 41(2AA) as a drafting device supported by the Territories' power in s 122 of the *Constitution*. See also *Northern Land Council v The Commonwealth (No 2)* (1987) 61 ALJR 616, in which the Court held that s 44(2) of the *Land Rights Act*, of itself, did not impose a fiduciary duty on the Commonwealth when negotiating with a Land Council.

EVENTS PRECEDING THE LEASE

I have referred earlier to the terms of the Jabiluka Project Lease. It is necessary to provide some further details of the events leading up to the Lease.

On 29 June 1978, shortly before the *Self-Government Act* came into force, the Governor-General, under s 70(2) of the *Self-Government Act*, authorised the acquisition of an area of about 20,000 square kilometres for the purpose of creating Kakadu National Park. This acquisition was of land which otherwise would have vested in the Territory on the commencement of the *Self-Government Act*, by virtue of s 69(2) of the Act. The land included what later became the Jabiluka Project Land. (The terms of the notice of acquisition appear in the judgment of French J in *Newcrest Mining v Commonwealth* (1993) 46 FCR 342, at 350-351.)

On 22 March 1979, the Commonwealth and the Northern Territory executed an agreement. The agreement provided that, in all matters under the *Mining Act* (that is, the *Mining Ordinance* as continued in force by the *Self-Government Act*) relating to prescribed substances situated in the Territory, the Territory Minister administering that Act would exercise or perform his or her duties, powers and functions in accordance with the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act*, and not otherwise: cl 3. This agreement was entered into shortly after s 7A was introduced into the *Mining Ordinance.*

By a second written agreement between the Commonwealth and the Northern Territory, dated 8 February 1982, it was agreed that in all matters under the *Mining Act 1980* (which by then had been enacted but was not yet in force) relating to prescribed substances situated in the Territory the Territory Minister would exercise and perform all duties, powers and functions in accordance with the advice of the responsible Commonwealth Minister and not otherwise: cl 3. Clause 4(a) of the second agreement required the Territory Minister to ensure that, whenever any mining project involving prescribed substances was under consideration, consultations would be held between the Commonwealth Minister and the Territory Minister at the earlier practicable stage. Clause 4(b), as amended by a further agreement of 12 May 1982, required that in every mineral lease granted or approved under the *Mining Act* for the mining of a prescribed substance, there would be specified, in terms approved by the Commonwealth Minister, all relevant matters relating to the determination, variation, assessment and payment of royalty in respect of prescribed substances mined in the Territory under the mineral lease.

On 25 June 1982, the Commonwealth Minister for Trade and Resources wrote to the Territory Minister for Mines and Energy. The letter included the following passages:

> *"On 16 March 1982 I announced that I had given conditional development approval under the Government's uranium export policy for the development of the Jabiluka uranium deposits in the Northern Territory. As the project is partly on land which has been recommended for granting to an Aboriginal Land Trust, I indicated at that time that my approval was conditional upon Pancontinental Mining Limited and Getty Oil Development Company Limited ("the Project Partners"), concluding an agreement with the Northern Land Council on the terms and conditions under which development might proceed and that a lease would not be issued until after then. I understand that such an agreement is close to finality and I am therefore now writing to you in relation to determining the terms and conditions for the Jabiluka Mineral Lease, so that certain other administrative steps which must be taken before the lease is issued can be completed.*
>
> ...
>
> *Section 175 of the* Mining Act 1980, *as amended, of the Northern Territory envisages that you would exercise your powers under that Act in respect of a prescribed substance within the meaning of the* Atomic Energy Act *1953 of the Commonwealth, in accordance with my advice as the Commonwealth Minister administering section 41 of that last-mentioned Act. I advise therefore that the terms and conditions of the mineral lease to be issued for the Jabiluka uranium project, under the* Mining Act 1980 *as amended should, in respect of prescribed substances, include those set out in the attachment*

> *hereto. Because the administrative steps that I have mentioned have yet to be completed, I advise further that the mineral lease should not be issued until I have requested you to do so."*

The schedule set out the detailed terms and conditions of the mineral lease later incorporated in the Lease to Pancontinental and Getty.

On 25 June 1982, the same date as the letter extracted above, the Governor-General made a grant to the Jabiluka Aboriginal Land Trust of a fee simple estate in 6,758 hectares of land, said to be more or less NT Portion 2253 (that is, the land to which I have referred as the Jabiluka Trust Land). The deed reserved to the Commonwealth the right to any minerals existing in their natural condition, being minerals all interests in which were vested in the Commonwealth.

By letter dated 29 June 1982, the Territory's Acting Minister for Mines and Energy responded to the Commonwealth Minister's letter of 25 June 1982. The response advised that the Acting Minister had determined that the terms and conditions of the proposed lease should be those set out in the schedule accompanying the earlier letter. The Acting Minister stated that he was prepared to grant the lease after the commencement of the *Mining Act 1980* on 1 July 1982 and after the Commonwealth Minister's further advice that all other necessary procedural steps had been completed.

On 21 July 1982, the Northern Land Council (which was responsible for the Jabiluka Trust Land) and the proposed lessees entered a deed of agreement, pursuant to s 43 of the *Land Rights Act*. Under this agreement, the Northern Land Council consented to the prospective grant of the mineral lease by the Northern Territory to Pancontinental and Getty, on the terms and conditions specified in the agreement. The deed was a detailed one, running to ninety-two pages, and covered such issues as financial arrangements, rights of traditional owners, sacred sites and Aboriginal places and cultural appreciation. The Commonwealth Minister gave consent, pursuant to s 27(3) of the *Land Rights Act*, to the Northern Land Council entering the agreement.

On 23 July 1982, the Commonwealth Minister wrote to his Territory counterpart, as follows:

> *"On 23 July 1982 the Acting Minister for Aboriginal Affairs consented in*

> *writing to the making of a grant of a mining interest in respect of Aboriginal land, being a Mineral Lease to be granted under the* Mining Act 1980 *of the Northern Territory over land including Aboriginal land, the subject of a Deed of Grant dated 25 June 1982 to the Jabiluka Aboriginal Land Trust. The Northern Land Council has also given its consent.*
>
> *I am informed that on 22 July 1982 there was registered by the Registrar-General of the Northern Territory a transfer to the Northern Territory of the title to certain land other than Aboriginal land within the Jabiluka Project Area and the title to minerals other than prescribed substances within that area.*
>
> *Accordingly, I now advise you to grant a Mineral Lease for the Jabiluka uranium project, in so far as it relates to prescribed substances, in the form and subject to the terms and conditions determined by the Acting Minister for Mines and Energy of the Northern Territory on 29 June 1982."*

On the same date the Acting Minister for Aboriginal Affairs executed a consent, pursuant to s 40(1)(a) of the *Land Rights Act*, to the grant of a mining lease over the Jabiluka Trust Land.

It will be seen that the Commonwealth Minister's letter of 23 July 1982 refers to the registration of a transfer to the Northern Territory. Immediately prior to the registration of that transfer, the Commonwealth was the registered proprietor of an estate in fee simple in

- any minerals on or below the surface of the Jabiluka Trust Land; and
- the Jabiluka Project Land, other than the Jabiluka Trust Land which had already been granted in fee simple to the Jabiluka Aboriginal Land Trust.

By a transfer dated 21 July 1982, the Commonwealth transferred to the Territory its interest in the minerals, on or below the surface of the Jabiluka Trust Land, except that it reserved its interest in all prescribed substances. By a second transfer of the same date the Commonwealth transferred to the Territory its interest in the Jabiluka Project Land other than the Jabiluka Trust Land.

On 12 August 1982, the Territory Minister advised his Commonwealth counterpart that the Lease had been issued on that day.

THE SUBMISSIONS

The Applicant's Case

The starting point for the applicant's argument was that, at the date of the Jabiluka Project Lease, the Commonwealth had title to all prescribed substances in the Northern Territory. The effect of the *Acceptance Act* was that, as from 1 January 1911, the Commonwealth became the owner of land in the Territory, subject to interests previously created and to existing native title interests. As from 11 September 1946, title to uranium and other prescribed substances in the Territory was declared to be the property of the Commonwealth by the *1946 Act*, s 6, and the *Atomic Energy Act*, s 35(2). Prescribed substances were excluded from interests of the Commonwealth in minerals which were vested in the Territory by the *Self-Government Act*, s 69(4). Mr Basten QC conceded on behalf of the applicant, for the purposes of these proceedings, that the *1946 Act* was effective to extinguish any native title rights to uranium deposits which are the subject of the Jabiluka Project Lease.

The conveyancing documents creating interests in the Jabiluka Project Land had preserved the Commonwealth's title to the prescribed substances. The deed of grant of the Jabiluka Trust Land under the *Land Rights Act* had excepted minerals all interests in which were vested in the Commonwealth (as the *Land Rights Act* required). When the Commonwealth transferred to the Territory its interest in minerals on or under the Jabiluka Trust Land, on 21 July 1982, it reserved its interest in prescribed substances. Thus, at the time of the Lease, property in the prescribed substances remained vested in the Commonwealth.

Next, the applicant submitted, on the authority of *Cudgeon Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520, at 532-534, that the Crown in right of the Commonwealth cannot create or dispose of any interest in land vested in it in the absence of statutory authority and strict compliance with the terms of any statutory authority. Section 41 of the *Atomic Energy Act* provided authority for the grant of mining leases in respect of prescribed substances, but the Jabiluka Project Lease had not been granted pursuant to s 41. Section 41, in Mr Basten's words, constituted a "mandatory requirement" and, in the absence of compliance with that provision, there was no statutory authority to support the grant of the Jabiluka Project Lease. Although both the *1946 Act*, s 6(2), and the *Atomic Energy Act*, s 35(4), envisaged that the title of the Commonwealth to any prescribed substance would be subject to rights granted under the law of a Territory "with express reference to that substance", those provisions did not support the grant of the Jabiluka Project Lease.

That compliance with s 41 of the *Atomic Energy Act* was required for the creation of interests in prescribed substances was further demonstrated by the "dual scheme" established under the *Land Rights Act* with respect to mining on Aboriginal land. The first part of the scheme was that mining interests could be created under Territory law only where both the Minister and the Land Council consented: ss 40, 43. The second part of the scheme was that an authority under the *Atomic Energy Act* or any other Commonwealth Act could apply to Aboriginal land only if the Commonwealth Minister and the Land Council consent to the application of the Act, or the Governor-General declared that the national interest required the Act to apply: ss 41, 44. The parallel schemes suggested that it would make little sense for a Northern Territory lease, of itself, to be sufficient to create interests in prescribed substances. Otherwise, the need for Land Council approval to the application of the *Atomic Energy Act*, and the provision for the Commonwealth to pay for that approval under s 44, could be circumvented. Indeed, the amendments to the *Atomic Energy Act* designed to facilitate the Ranger Project (notably the insertion of s 41(2AA) into the *Atomic Energy Act*, upheld in *Northern Land Council v The Commonwealth (No 1))* would have been unnecessary if there had been no need for an authority under s 41 of the *Atomic Energy Act.*

The *Land Rights Act*, as at 1982, envisaged that the *Atomic Energy Act* would apply to Aboriginal land. To accede to the proposition that a valid lease of prescribed substances could be created under Territory law would enable the Commonwealth to avoid the "protective requirement" of an agreement with the Land Council and the payment of moneys pursuant to that agreement.

In the event that the principal argument was rejected, the applicant made further submissions.

First, the *Mining Act 1980* could not and did not have the effect of authorising a lease which divested the Commonwealth of its interest in prescribed substances. Where a Commonwealth law and a Territory law are inconsistent, the Commonwealth law has primacy: *Attorney-General for the Northern Territory v Hand* (1989) 25 FCR 345 (FCA/FC), at 366-367, per Lockhart J. The Territory therefore could not enact laws inconsistent with the constraints, express and implied, imposed by the *Atomic Energy Act* and the *Land Rights Act.* If the applicant's primary argument were correct, the *Mining Act 1980*, insofar as it purported to authorise leases over prescribed substances, was inconsistent with the *Atomic Energy Act.*

In any event, the *Self-Government Act*, on its proper construction, did not contemplate that the Territory could legislate so as to authorise the grant of leases in respect of prescribed substances. This conclusion flowed from the terms of s 69(4) of the *Self Government Act* (excepting prescribed substances from the vesting of Commonwealth interests in minerals in the Territory) considered in conjunction with the *Atomic Energy Act* and the *Land Rights Act.* Further, s 175 of the *Mining Act 1980* specifically stated that the Territory Minister was to exercise his or her powers in accordance with the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act.* This provision assumed that the *Self-Government Act* did not permit the Territory to make laws with respect to the Commonwealth's property in uranium. A Territory law of general application should not be construed as giving power to a Territory Minister to create or dispose of Commonwealth interests in land.

Secondly, the Territory Minister lacked the executive authority to execute the Jabiluka Project Lease. That authority had to be found in the *Self-Government Regulations* promulgated under the *Self-Government Act.* None of the paragraphs of reg 4(5) relied on by the respondents was sufficient to support the actions of the Territory's Minister. This was because

- the relevant regulations applied only in relation to agreements or arrangements entered into by the Territory that were within power and the agreements in this case incorrectly assumed that the *Mining Act 1980* could apply independently to prescribed substances;

- in any event, insofar as the Self-Government Regulations authorised executive authority in relation to agreements or arrangements between the Commonwealth and the Territory, such agreements or arrangements could not avoid the need for statutory authority to enable the Territory to grant interests in land.

The Respondents' Case

The respondents (except for the Minister and the Commonwealth) were separately represented: Mr Walker SC and Mr Gageler appeared for the Minister and the Commonwealth; Mr Young QC and Mr Mukhtar appeared for ERA; and Mr Sullivan QC and Ms Webb appeared for the Northern Territory. Thus three separate sets of submissions were

made on behalf of the respondents. While there were differences of emphasis, for example in relation to the power of the Northern Territory legislature to bind the Commonwealth, in substance the submissions were to the same effect. For the purposes of this summary, therefore, I shall not refer to the submissions separately.

First, the respondents accepted that property in the prescribed substances covered by the Lease was, at the time the Lease was granted, vested in the Commonwealth. They also accepted that no authority was granted in respect of the Jabiluka Project Land pursuant to s 41 of the *Atomic Energy Act* and, indeed, could not have been granted because the project was not to be conducted on behalf of or in association with the Commonwealth.

However, the respondents contended that s 41 of the *Atomic Energy Act* was merely facultative and was not intended to be an exhaustive statement of the circumstances in which the mining of prescribed substances could be authorised. It was not so expressed and the background circumstances did not suggest that it should be given such an interpretation. The section simply did not address the question of mining or uranium by private interests, not associated with the Commonwealth.

In this connection, the respondents argued that to construe s 41 of the *Atomic Energy Act* in this way created no difficulties for the operation of the *Land Rights Act.* Sections 41 and 44 of the *Land Rights Act*, as the legislation stood in 1982, were intended to provide for the specified consents and for payments by the Commonwealth only where mining of a prescribed substance is to take place on behalf of or in association with the Commonwealth.

Secondly, the grant of legislative power to the Territory under s 6 of the *Self-Government Act* was of sufficient breadth to support Territory mining legislation which authorised exploitation of prescribed substances, property in which was vested in the Commonwealth. There was nothing to prevent the Commonwealth from authorising dealings with its property by conferring the necessary powers on a Territory legislature or upon the Executive Government of a Territory. *Cudgeon Rutile* did not stand for any contrary proposition. Even if there were any doubt, ss 35(4) and 41(4) of the *Atomic Energy Act* specifically contemplated and authorised Territory legislation granting rights in prescribed substances, notwithstanding that property in those substances was vested in the Commonwealth.

Thirdly, the *Mining Act 1980* was a valid exercise of the legislative power conferred on the Territory by s 6 of the *Self-Government Act.* There was no basis for reading s 69(4) of the *Self-Government Act* as withdrawing legislative authority that would otherwise have been conferred on the Territory. The *Mining Act 1980*, at the relevant time, authorised the grant of leases in respect of uranium vested in the Commonwealth, provided certain conditions were met. Those conditions were satisfied.

Fourthly, the *Self-Government Regulations* conferred executive authority on the Territory Minister to execute the Jabiluka Project Lease as an exercise of executive authority of the Territory.

THE *ATOMIC ENERGY ACT*

The Scope of s 41(1)

The first question is whether, at the date of the Jabiluka Project Lease, s 41(1) of the *Atomic Energy Act* was the only provision under which a grant of an entitlement to mine and recover prescribed substances from the Jabiluka Project Land could be made. In Mr Basten's submission, the legislation implemented a policy of Commonwealth control of uranium resources, because of uranium's indispensable role in the production of nuclear energy, both for defence and peaceful purposes. The *Atomic Energy Act* achieved this objective by authorising the exploitation of uranium and other prescribed substances by means only of operations conducted on behalf of or in association with the Commonwealth, pursuant to s 41(1), or by the exercise of the other powers granted under the Act.

Although Mr Basten relied on the legislative history of the *Atomic Energy Act*, the appropriate starting point is the language of the *Atomic Energy Act* as it stood in 1982. It will be remembered that s 41(1) empowered the Minister where, in his or her opinion, a prescribed substance was present on or under land, to

> *"authorise a person, or 2 or more persons engaged in a joint venture, to carry on, on behalf of or in association with the Commonwealth, operations in accordance with this section on the land".*

The person so authorised was empowered to enter and take possession of the land and to carry on mining activities upon or under the land: s 41(2). An authority was not to be conferred in relation to land within a State without the consent of the State, unless the

authority was conferred for defence purposes: s 41(2B). Section 41(4) stated that, except as provided by the regulations, s 41 was not intended to exclude or limit the operation of a State or Territory law "capable of operating concurrently" with s 41. These provisions, considered in their context, create a number of difficulties for the applicant's argument.

The first difficulty facing the applicant is that s 41(1) of the *Atomic Energy Act* was expressed as a grant of power to the Minister to authorise mining operations on behalf of or in association with the Commonwealth. Neither s 41(1), nor any other provision of the *Atomic Energy Act,* expressly prohibited the mining of prescribed substances otherwise than in accordance with an authority granted under s 41(1). In short, the language of s 41(1) itself is not apt to create (in Mr Basten's words) a "mandatory requirement" for the exploitation of uranium ore in a Territory. Had Parliament intended to prohibit all mining of uranium or prescribed substances in a Territory otherwise than in accordance with an authority granted under s 41(1) of the *Atomic Energy Act,* it would have been easy to say so. In particular, had Parliament intended to prohibit mining of prescribed substances except on behalf of or in association with the Commonwealth, it would have been easy to say so. The applicant's argument requires a negative inference to be drawn from a provision empowering the Minister to grant an authority to carry on operations in particular circumstances.

The second difficulty confronting the applicant is that s 41(1) empowered the Minister to authorise operations on behalf of or in association with the Commonwealth relating to prescribed substances in **both** States and Territories (although an authority in a State could only be granted over the opposition of the State concerned in the circumstances specified in s 41(2B)). The significance of s 41(1) extending to both States and Territories is that the *Atomic Energy Act*, when read as a whole, clearly contemplated that the mining of uranium and other prescribed substances could take place in the States, under State law. The Act provided for regulations prohibiting the working of prescribed substances, except under a licence granted by the Governor-General (s 38(1),(2)), such licence to be granted only for the purposes identified in s 38(4) (defence, overseas trade, external affairs). But until the regulations were promulgated and acted upon, or until an authority was granted under s 41(1) in relation to a State, the States were free (so far as Commonwealth law was concerned) to permit mining of prescribed substances, including mining by private corporations or individuals. That the *Atomic Energy Act* contemplated that mining of uranium might take place under State law is shown by the fact that the functions of the Atomic Energy

Commission included co-operating with appropriate authorities of a State "in matters associated with...the discovery and mining in the State of uranium": s 17(1)(c). It is also shown by s 41(4), to which I shall return shortly.

It follows that s 41(1) was not intended to be the exclusive source of power for the mining of uranium in a State. Since s 41(1) did not distinguish between authorising mining operations in the States and in the Territories, it would seem to be strange if the sub-section were to be read as constituting a "mandatory requirement" for mining of prescribed substances in the Territories, but not for mining of prescribed substances in the States. If Parliament were prepared to contemplate the mining of uranium under State law, otherwise than on behalf of or in association with the Commonwealth, it is difficult to see why the policy underlying the legislation would require s 41(1) to be read as precluding equivalent action under Territory law.

Mr Basten countered the second difficulty by invoking the declaration in s 35(2) of the *Atomic Energy Act*, and its predecessor, s 6(1) of the *1946* Act. Section 35(2) provided that prescribed substances in a Territory at the date the Act commenced (15 April 1953), not being the property of the Commonwealth immediately before 11 September 1946 (the date of commencement of the *1946 Act*) were deemed to have become the property of the Commonwealth as from 11 September 1946. This declaration was consistent with the terms of s 6(1) of the *1946 Act*, which had declared all prescribed substances (as defined in s 3 of that Act) in a Territory to be the property of the Commonwealth. As Mr Basten pointed out, the *Atomic Energy Act* did not provide for all uranium deposits in a State to become the property of the Commonwealth, although the Commonwealth could acquire property in prescribed substances by taking possession of them under s 40 of the Act.

The applicant's reliance on s 6(1) of the *1946 Act* and s 35(2) of the *Atomic Energy Act* highlights the third difficulty facing her argument, namely, the effect of ss 35(4) and 41(4) of the *Atomic Energy Act.* Section 35(4), the counterpart to s 6(2) of the *1946 Act*, provided that the title of the Commonwealth to any prescribed substance was

> *"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."*

Mr Basten argued that s 35(4) should be confined to rights created between 11 September 1946 and 15 April 1953, the date of commencement of the *Atomic Energy Act*. Putting that argument to one side for the present, s 35(4) of the *Atomic Energy Act* and s 6(2) of the *1946 Act* clearly contemplated that Territory laws could grant rights in prescribed substances, notwithstanding that property in those substances had vested in the Commonwealth pursuant to s 35(2) of the *Atomic Energy Act* and s 6(1) of the *1946 Act.* In other words, the provisions contemplated that prescribed substances, property to which had vested in the Commonwealth, could be subject to rights granted under valid Territory laws. Such Territory laws would be made pursuant to other Commonwealth legislation. In the case of the Northern Territory the source of authority for Territory laws prior to self-government would have been the *Administration Act*. After self-government, the source would have been the *Self-Government Act.*

The subjection of Commonwealth title to rights granted under Territory law did not imply that the Commonwealth had relinquished all control over the exploitation of prescribed substances in the Territories. Section 35(4) of the *Atomic Energy Act*, like s 6(2) of the *1946 Act*, applied to rights granted under a law of a Territory "with express reference to that substance". There is a question as to whether the quoted words qualify "rights granted" or "law of the Territory". I am inclined to the view that it was the law of the Territory that had to be made "with express reference to that substance". This construction would give the Commonwealth greater opportunity to consider whether to exercise the powers of disallowance of Territory laws available to it (in the case of the Northern Territory) both before and after self-government: *Administration Act*, s 4W; *Self-Government Act*, s 9(1). It is consistent with the goal of close Commonwealth control of uranium resources in the Territories which lies at the heart of the *Atomic Energy Act*. Whichever construction of s 35(4) is adopted, the provision was consistent with the Commonwealth's ultimate control over prescribed substances, since it could take action under the *Administration Act* or the *Self-Government Act* to override action by or under a law of the Territory.

In any event, other measures were open to the Commonwealth to control the exploitation of prescribed substances in the Territories. Section 38 of the *Atomic Energy Act* provided for regulations prohibiting the working of minerals from which prescribed substances could be obtained, except under and in accordance with a licence. This section applied to minerals in the Territories, as well as the States (as to the States, see s 38(4)). And, of course, the

Parliament's power under s 122 of the *Constitution*, to make laws for the government of any territory surrendered by any State and accepted by the Commonwealth (as was the Northern Territory) provided the ultimate safeguard from the Commonwealth's perspective.

While s 35(4) of the *Atomic Energy Act* contemplated that Territory laws could grant rights in prescribed substances, the sub-section was not intended, in my view, to operate as an independent grant of power to the legislative authority for a Territory, to make laws providing for the grant of rights in prescribed substances. Rather, s 35(4) of the *Atomic Energy Act* removed a barrier that otherwise might have arisen to the operation of a Territory law, authorising the grant of rights in prescribed substances, by reason of the Commonwealth's title to all prescribed substances in that Territory. Any Territory law authorising the grant of such rights would have to find support in other legislation, such as s 6 of the *Self-Government Act.*

It is now necessary to turn to s 41(4) of the *Atomic Energy Act,* introduced in 1978. Although having some similarities to s 35(4), the two provisions addressed different questions. Section 35(4) considered the relationship between the Commonwealth's title to prescribed substances in a Territory and rights granted in those substances under the law of the Territory. Section 41(4) addressed the intended operation of s 41 itself and, in particular, the relationship intended between the power granted by s 41(1) and the State and Territory laws operating in the same field.

The formula employed in s 41(4) of the *Atomic Energy Act* was similar to that sometimes used in Commonwealth legislation to make it clear that the Commonwealth does not intend exclusively to cover a particular field. For example, s 75(1) of the *Trade Practices Act* 1974 (Cth) ("*TP Act"*) provides that Part 5 is "not intended to exclude or limit the concurrent operation of any law of a State or Territory". In *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, Mason J (with Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed) explained the operation of s 75(1) of the *TP Act* as follows (at 563-564):

> *"...a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own*

> *force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.*
>
> *It is of course by now well established that a provision in a Commonwealth statue evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed....But where there is no direct inconsistency, where inconsistency can only arise if the Commonwealth law is intended to be an exhaustive and exclusive law, a provision of the kind under consideration will be effective to avoid inconsistency by making it clear that the law is not intended to be exhaustive or exclusive."*

Section 41(1) of the *Atomic Energy Act* was enacted to enable operations in relation to prescribed substances in the States and Territories to be conducted on behalf of or in association with the Commonwealth. The sub-section was necessary to authorise such operations in the Territories, notwithstanding that the *1946 Act* and the *Atomic Energy Act* had declared that the Commonwealth held property in prescribed substances located in the Territories. Even a project conducted on behalf of or in association with the Commonwealth could not necessarily proceed in a Territory merely in reliance on the Commonwealth's property in prescribed substances. For example, the authorised operator might require the extensive powers conferred by s 41(2) of the *Atomic Energy Act*, such as the power to enter and take possession of land not owned by the Commonwealth, in order to carry out the project successfully.

In my opinion, s 41(4) of the *Atomic Energy Act* was intended to ensure that the power conferred on the Minister by s 41(1) would not be read as excluding the operation of otherwise valid State and Territory laws permitting the exploitation of prescribed substances, unless there was a "direct inconsistency" between s 41(1) and the State or Territory law. As *The Queen v Credit Tribunal* shows, a direct inconsistency occurs, for example, if a Commonwealth and Territory law make contradictory provision on the same topic, thereby rendering it impossible for both laws to be obeyed. There might have been such an inconsistency if the Commonwealth Minister had authorised operations on particular land in the Territory under s 41(1) of the *Atomic Energy Act* and the Territory had granted a mineral lease over the same land for the purpose of uranium mining. But in the absence of a conflict

of this kind, s 41(4) removed any barrier that s 41(1) might otherwise have created to the operation of a Territory law relating to the exploitation of uranium resources in that Territory. As I have explained, the Commonwealth retained other means of exercising control over the Territory's actions, such as disallowing a proposed Territory law or withholding the Commonwealth Minister's advice required by s 175 of the *Mining Act 1980* to the grant of a mineral lease in respect of prescribed substances. But s 41(4) removed any barrier that might have been created by s 41(1) to the grant of rights in prescribed substances under Territory law, save in very limited circumstances.

Sub-section 35(4): A Temporal Limitation?

Mr Basten, perceiving the difficulty that s 35(4) of the *Atomic Energy Act* posed for the applicant's argument, submitted that the sub-section was intended to have a very limited operation. He contended that s 35(4) should be read as restricted to interests created under Territory law between the date of commencement of the *1946 Act* (11 September 1946) and the date of commencement of the *Atomic Energy Act* (15 April 1953). Mr Basten relied on what he said was a significant change of wording between s 6(2) of the *1946 Act* and s 35(4) of the *Atomic Energy Act*. While the former provided that the title of the Commonwealth to any prescribed substance was to be subject to any rights granted under a law of a Territory "after the commencement of this Act", s 35(4) substituted a reference to "rights granted after 10 September, 1946". Moreover, Mr Basten suggested that the change of wording in s 6(2) of the *1946 Act* was deliberate and was designed to accommodate the broader, or at least potentially broader, definition of the expression "prescribed substance" in the *Atomic Energy Act.* In other words, s 35(4) was intended to provide for rights created under the law of a Territory, before the enactment of the *Atomic Energy Act,* in respect of minerals which became prescribed substances only by reason of the expanded definition in the *Atomic Energy Act*.

I do not think that s 35(4) contains an implicit temporal limitation of the kind suggested by Mr Basten. I do not attribute any significance to the substitution of a date in s 35(4) of the *Atomic Energy Act* for the expression "after the commencement of this Act". The substitution merely reflects the fact that, at the time the *Atomic Energy Act* was passed, the date of commencement of the *1946 Act* was known.

Nor do I attribute any significance to the use of the word "is" in s 35(4) of the *Atomic Energy*

Act. In my opinion, s 35(4) was clearly intended to have a prospective operation. It referred to rights granted "after 10 September 1946", without imposing a time limit on the granting of those rights. More importantly, s 35(4) preserved rights granted after 10 September 1946 in "any substance to which this section applies". The section applied not merely to a substance which was a prescribed substance at the commencement of the *Atomic Energy Act* (s 35(2)(a)), but to a substance which became a prescribed substance **after** the commencement of the Act (s 35(3)(a)). There is no textual basis for excluding from the scope of s 35(4) substances which the preceding sub-section expressly included in the expression adopted by s 35(4) itself. Had it been intended to confine s 35(4) in the manner suggested by Mr Basten, it would have been a very simple matter to insert the words "but before the date of commencement of this Act".

The Dual Scheme under the *Land Rights Act*

I have already referred to Mr Basten's argument that the "dual scheme" established under the *Land Rights Act* reinforced the applicant's argument that s 41 of the *Atomic Energy Act* was intended to be the exclusive source of authority for laws authorising the grant of rights in prescribed substances in the Northern Territory. Mr Basten contended that the affect of the respondents' arguments was that the Commonwealth could avoid the requirements of s 41 of the *Land Rights Act.* That section, it will be recalled, provided that the *Atomic Energy Act*, or any other Act authorising mining for minerals, did not apply so as to authorise the entry of any person on to Aboriginal land, unless the Governor-General declared that the Minister and the relevant Land Council had consented to the application of the Act, or that the national interest required the application of that Act.

In my opinion, the structure of the *Land Rights Act* is quite consistent with the view that s 41 of the *Atomic Energy Act* was intended to be (as the respondents put it) "facultative". One element of the dual scheme governed the case where an authorisation was granted under the *Atomic Energy Act,* or any other Act of the Commonwealth Parliament authorising mining. In such a case, both the Land Council and the Commonwealth had to consent to the application of the Act in relation to entry on to the land, unless the Governor-General proclaimed that the national interest required the application of the Act: *Land Rights Act,* s 41. The Land Council was entitled to agree with the Commonwealth for the giving of consent to the application, in consideration of the payment to the Land Council by the

Commonwealth of an agreed amount: s 44(1).

The second element of the dual scheme concerned the granting of a "mining interest" under a law of the Northern Territory. The definition of "mining interest", read in conjunction with the definition of "minerals", was wide enough to encompass a lease for the mining of prescribed substances: *Land Rights Act,* s 3(1). Where the lease of prescribed substances was granted under Territory law, the consent of the Minister and of the area's Land Council was required to the grant, unless the Governor-General declared that the national interest required the grant to be made: s 40(1). Thus, even if a lease for the mining of prescribed substances were granted under Territory law, the consents of the Minister and the Land Council were still required. Moreover, the *Land Rights Act* provided for the Land Council and the applicant for a mining interest to agree that the Land Council's consent should be given in return for payments **by the applicant**: s 43(1). Thus, the Land Council could require, subject to the provisions for arbitration in the *Land Rights Act,* payment in return for its consent, but a payment that was to be made by the applicant rather than by the Commonwealth. In these circumstances, I do not think it advances the analysis to characterise the respondents' argument as enabling the Commonwealth to avoid the requirements of ss 41 and 44 of the *Land Rights Act.* Rather, the *Land Rights Act* contemplated that rights to prescribed substances under Aboriginal land might be granted otherwise than under s 41 of the *Atomic Energy Act* or some other Commonwealth Act authorising mining.

In the present case, there was no dispute that the Commonwealth Minister gave his consent, as required by s 40(1)(a) of the *Land Rights Act.* Nor was there any dispute that the Northern Land Council consented to the proposed grant of the mineral lease by the Northern Territory, pursuant to s 43 of the *Land Rights Act.*

Legislative History

Mr Basten submitted that the legislative history of the *Atomic Energy Act* and of related legislation supported the applicant's contention that s 41(1) of the Act was intended to be the exclusive source of authority for the exploitation of prescribed substances located in a Territory. In my view, the legislative history, to the extent it is helpful, tends to support the contrary view.

The Minister's second reading speech for the *Atomic Energy (Control of Materials) Bill* 1946

stressed the general realisation in the international community that the problem of control of atomic energy had to be tackled "immediately and internationally": Cth Parl Deb, HR, 12 July 1946, at 2476. He continued *(ibid)*:

> *"It appears to be equally agreed...that, within each country, there should be public control of the basic raw materials and their treatment. That is, there must be governmental control of the holdings, development, manufacture, export or import of these substances. For any system of control of atomic energy must be based...upon the certainty that their use is in public hands responsive to public directions and policy."*

This statement is of limited value, if any, in interpreting s 41 of the *Atomic Energy Act* or, indeed, in construing the Act as it stood in 1982. The forerunner to s 41, s 13A of the *1946 Act*, was not introduced until 1952. Moreover, the Minister, in his second reading speech on the *1946 Bill* stated that, although the Commonwealth Parliament would be "recreant to its trust" if it did not exercise a general control or supervision over all Australian sources of uranium,

> *"[h]ow complete that supervision or control will require to be must be determined from time to time and according to circumstances. The present bill is an enabling measure which sets up the framework of control" (at 2477).*

This language is consistent with the acknowledgment in s 6(2) of the *1946 Act* that the title of the Commonwealth to prescribed substances would be subject to rights created under Territory law. It is also consistent with the fact that, as the Minister noted, legislation was already in place in South Australia controlling the exploitation of uranium in that State: *Mining Act Amendment Act* 1945 (SA), s 4, inserting Part 9A into the *Mining Act* 1930 (SA). In short, the legislation established a framework of controls, but did not create a regime whereby exploitation of the resource was to be undertaken exclusively by the Commonwealth.

Section 13A was introduced into the *1946 Act* by the *Atomic Energy (Control of Materials) Act* 1952 (Cth). As the second reading speech for the *1952 Bill* explained, it had "become necessary to take active steps to win the uranium" to be found in Australia, particularly in the Territories: Cth Parl Deb, HR, 21 May 1952, at 614. The then existing powers (*1946 Act*, ss 10-13) were thought not to be sufficiently clear-cut and specific for the purposes the

Government had in mind: *ibid.* Accordingly,

> *"[t]he purpose of the bill is to extend the powers conferred upon the Commonwealth by the* [1946 Act] *to make it more convenient for persons authorised by the Government to go upon land and mine uranium on behalf of the Commonwealth" (at 615).*

There is nothing in this material to suggest that s 13A was to be anything other than an enabling provision, intended to assist in the exploitation of a newly important resources. The framework of control, as far as Territories were concerned, was created by the vesting of property in the Commonwealth, the Commonwealth's control over Territory legislation and the specific powers conferred by the *1946 Act.*

As I have previously noted, the enactment of the *Atomic Energy Act* in 1953 was regarded as necessary by discoveries of uranium, particularly in the Northern Territory, and the perceived need to exploit those resources for defence and industrial purposes: Cth Parl Deb, HR, 19 March 1953, at 1390. In particular, the Minister's second reading speech noted (at 1391) that the Government had decided to develop the Rum Jungle area as quickly as possible "and that the best way to do so was to engage the services of an experienced and reputable Australian mining company". Once again, there is nothing in the Minister's speech to suggest that the legislation was intended to preclude exploitation of uranium resources otherwise than "on behalf of the Commonwealth" (the expression used in s 41(1) as originally enacted). On the contrary, the Minister reported (at 1392) that

> *"[t]he question of private prospecting and mining in Commonwealth territories has been under close examination by the Government for some time. At the request of the Government, the Atomic Energy Commission has now formulated proposals, embodying a policy for surveying and prospecting, designed to stimulate private prospecting and the opening up of fresh uranium fields by private enterprise. These proposals will be considered by the Government in the near future, and announcements will be made."*

As I have already pointed out, the *Mining Ordinance* of the Northern Territory was amended shortly after the enactment of the *Atomic Energy Act* specifically to authorise the Administrator to grant leases for the purposes of mining prescribed substances. This is of course consistent with the view that the *Atomic Energy Act* was not intended to preclude the grant of rights in prescribed substances under Territory law. As was pointed out in argument, it is clear from *Newcrest Mining v Commonwealth* (which concerned mining tenements in the

Coronation Hill area) that mining leases were granted in the Territory under the *Mining Ordinance*, so as to permit the mining of uranium: see, for example, the history of MLN 19, given by French J, at 348-349.

I have previously explained the nature of the 1978 and 1980 amendments to the *Atomic Energy Act*, in particular to s 41, brought about in consequence of the then Government's decision to develop the Ranger deposit. I shall not repeat the explanation. Mr Basten contended that the decision to amend the *Atomic Energy Act* showed that the Act was never intended to support mining of uranium on a commercial basis and that amendments were required to ensure that the Ranger project could proceed.

The *Second Ranger Report* and the second reading speeches for the bills amending the *Atomic Energy Act* demonstrate that doubts about whether the Ranger project could be authorised under s 41(1) of the *Atomic Energy Act* (in its unamended form) led to the amending legislation. But the fact that the Government of the day chose this legislative route, rather than attempt to achieve the same result under Territory law, does not demonstrate that the *Atomic Energy Act* was intended to be the exclusive source of power for the exploitation of uranium resources in the Northern Territory. The protracted inquiry into the Ranger project and the desire of the Ranger joint venturers for security of tenure doubtless influenced the Government to take the view that the *Atomic Energy Act* "could provide an appropriate basis for mining operations at Ranger": Cth Parl Deb, HR, 10 April 1978, at 1294. This decision was implemented by legislation amending the *Atomic Energy Act*, including the statutory fiction ultimately upheld in *Northern Land Council v The Commonwealth (No 1).*

There is nothing in the amendments to the *Atomic Energy Act*, nor in the extraneous materials, to suggest that rights could not be granted in respect of prescribed substances under Territory law. Indeed, at the time the 1978 and 1980 amendments to the *Atomic Energy Act* were debated and enacted by the Parliament, the *Mining Ordinance* (which continued in force after self-government until repealed in 1982) specifically provided for leases of prescribed substances. Section 7A of the *Mining Ordinance*, which had come into force in 1979, required the Territory Minister to exercise his or her powers in respect of prescribed substances in accordance with the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act*. Leases providing for the mining of prescribed substances had been

granted under Territory law and, as *Newcrest Mining* shows, were in force in the Northern Territory. This state of affairs was reflected in an observation by the Minister introducing the *Atomic Energy Amendment Bill (No 2)* 1978, that the holders of an authority under the *Atomic Energy Act* should not be disadvantaged in respect of security of tenure "in comparison with prospective competitors": Cth Parl Deb, HR, 16 November 1978, at 2920. This was a reference to leases granted to companies or individuals under Territory law.

THE TERRITORY'S POWERS TO AFFECT PRESCRIBED SUBSTANCES

The Issue

The second question is whether the *Mining Act* 1980 was capable of operating so as to enable the Territory Minister to grant a lease in respect of prescribed substances. Had I accepted the applicant's submission on the construction of the *Atomic Energy Act*, it would have been necessary to approach the second question on the basis that the *Atomic Energy Act* provided the exclusive source of power to authorise the exploitation of prescribed substances within the Territory. However, in view of the conclusion I have reached, the second question must be approached on the basis that the *Atomic Energy Act* did not necessarily preclude the grant of rights in respect of prescribed substances under Territory law.

The applicant argued that, even if her submission on the construction of the *Atomic Energy Act* were not accepted, nonetheless a law of the Territory could not grant rights in respect of prescribed substances. As I followed Mr Basten's submissions, the steps in the argument were these:

- The Commonwealth acquired property in prescribed substances in the Northern Territory through the operation of the *1946 Act* and the *Atomic Energy Act.* It retained that property at all times through the statutory provisions and dealings I have already described. Under the principle stated in *Cudgeon Rutile*, the Commonwealth's interest in the prescribed substances could be disposed of only pursuant to a power conferred by statute.
- The *Self-Government Act,* despite the grant of legislative power in s 6, did not confer power on the Territory legislature to make laws with respect to prescribed substances vested in the Commonwealth. This was because s 69(4) of the *Self-Government Act,* which vested all interests of the Commonwealth in respect of minerals in the Territory as from the commencement date of the Act, expressly excepted "prescribed substances within

the meaning of the *Atomic Energy Act*". The exception was intended to limit the legislative power of the Territory.

- Even if the *Cudgeon Rutile* principle did not apply to minerals in which the Commonwealth had property, s 69(4) of the *Self-Government Act* evinced an intention that the Territory should not be able to legislate with respect to Commonwealth property in prescribed substances. In the case of inconsistency between a Commonwealth law and a Territory law, the former prevails.

The respondents relied on the grant of power to the Northern Territory legislature, in s 6 of the *Self-Government Act*, "to make laws for the peace order and good government of the Territory". They contended that this grant of "plenary" power empowered the Territory to make laws authorising the grant of rights in prescribed substances, notwithstanding that the Commonwealth retained property in those substances after the *Self-Government Act* came into force.

Section 6 of the *Self-Government Act*

Section 6 of the *Self-Government Act* was enacted pursuant to the powers conferred on the Commonwealth Parliament by s 122 of the *Constitution*. The effect of the *Self-Government Act*, as *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, shows, was to create a legislature separate from the Commonwealth Parliament

> *"so that the exercise of its legislative power, although derived from the Commonwealth Parliament, is not an exercise of the Parliament's legislative power":*

Svikart v Stewart (1994) 181 CLR 548, at 562.

The authorities establish that the scope of the power conferred by s 6 is broad. In *Capital Duplicators*, a case concerned with s 22(1) of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth), the joint judgment by Brennan, Deane and Toohey JJ said this (at 281):

> *"Enactments are made under a power to make laws 'for the peace, order and good government' of the Australian Capital Territory. Such a power has been recognised as a plenary power, as this Court pointed out in* Union Steamship Co of Australia Pty Ltd v King *[(1988) 166 CLR 1, at 9] 'even in an era when*

> *emphasis was given to the character of colonial legislatures as subordinate law making bodies'. The terms in which s 22 confers power on the Legislative Assembly show - to adapt the language of* Powell v Apollo Candle Co *[(1885) 10 App Cas 282, at 289] - that the Parliament did not intend the Legislative Assembly to exercise its powers 'in any sense [as] an agent or delegate of the...Parliament, but...intended [the Legislative Assembly] to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself'".*

Their Honours cited with approval a passage from the judgment of Wilson J in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, at 279, addressing the scope of s 6 of the *Self-Government Act:*

> *"Section 6 invests the Legislative Assembly with power to make laws for the peace, order and good government of the Territory, a power which in my opinion, subject to the limits provided by the Act, is a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States. The constitution of the Territory as a self-government community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute."*

See also *Wake v Northern Territory* (1996) 109 NTR 1 (S Ct NT/FC), at 7-8.

In *Svikart v Stewart*, the joint judgment (Mason CJ, Deane, Dawson and McHugh JJ) made it clear that a Territory legislature, acting under provisions such as s 6 of the *Self-Government Act*, could legislate with respect to activities taking place on Commonwealth owned land. Their Honours said this (at 563):

> *"As* Capital Duplicators Pty Ltd v Australian Capital Territory *shows, there may be some qualifications to the power to make laws under s 122 which are to be found elsewhere in the Constitution, but which as yet remain unidentified but, putting to one side the special considerations applicable to the 'seat of government', there is nothing elsewhere in the Constitution which would inhibit s 122 so as to prevent it conferring power upon a Territory legislature to legislate with respect to Commonwealth places in a Territory. And if s 52(i), which is the source of the exclusive power to make laws with respect to Commonwealth places, does not confine the Parliament's power under s 122 because the places referred to are places in a State, then there is no reason why, in a Territory, a separate legislature should not have power conferred upon it by the Parliament to legislate with respect to places acquired by the Commonwealth within the Territory."*

As Black CJ and Foster J pointed out in *The Commonwealth v Newcrest Mining (WA) Ltd* (1995), 58 FCR 167 (FCA/FC), at 180, there may be a difference between laws which govern behaviour of individuals on Commonwealth land and laws which affect title adversely to the Commonwealth. Mr Basten relied on that distinction in the present case.

The power conferred by s 6, although broad, is not unlimited. Section 6 itself is expressed to be "[s]ubject to this Act", meaning that it must give way if inconsistent with or repugnant to any provision of the Act: *Commonwealth v Newcrest Mining*, at 181, per Black CJ and Foster J. A more general principle was stated by Brennan J (with whom Deane and Kelly JJ agreed) in *Webster v McIntosh* (1980) 49 FLR 317 (FCA/FC), at 320-321:

> *"The power to make Ordinances conferred by s 12 [of the Seat of Government (Administration) Act 1910 (Cth)] does not authorise the making of an Ordinance which is repugnant to an Act of Parliament...and s 12 does not sustain an Ordinance if it becomes repugnant to a later Act of the Parliament. To the extent to which an Ordinance is repugnant to an Act, the Ordinance has no operation".*

The principle applies notwithstanding the passage of the *Self-Government Act*: *The Queen v Kearney; Ex parte Japanangka* (1984) 158 CLR 395, at 418-419, per Brennan J; *Attorney-General for the Northern Territory v Hand* (1989) 25 FCR 345 (FCA/FC), at 366-367, per Lockhart J, at 386, per Beaumont J, at 402-403, per von Doussa J.

Section 69(4) of the *Self-Government Act*

In the light of these restrictions on the scope of s 6 of the *Self-Government Act,* the critical question is whether s 69(4) of the *Self-Government Act* qualified the grant of legislative power conferred on the Northern Territory legislature by s 6 of the *Self-Government Act.* In support of the applicant's contention that it did so, Mr Basten relied on the reasoning of Black CJ and Foster J in *Commonwealth v Newcrest Mining.* Mr Basten submitted that their Honours' reasoning on this point was unaffected by the successful appeal to the High Court from the decision of the Full Court.

One question in *Newcrest Mining* was whether a right of renewal of a lease, a right conferred by the *Mining Ordinance* of the Northern Territory, applied to leases granted under the

Mining Ordinance, where the land subject to the lease had been acquired by the Commonwealth from the Territory pursuant to s 70 of the *Self-Government Act.* The reasoning of their Honours is contained in the following passage (at 182):

> *"Section 69, broadly speaking, operates to vest in the Northern Territory, as the newly created polity, all land within its boundaries which, at the time of self-government, was in the ownership of the Commonwealth. Section 70, again speaking broadly, enables the Commonwealth to reacquire, within one year, and without compensation to the Territory, any part of that land for an approved public purpose. So far as the interests of third parties in the land are concerned, those interests previously held from the Commonwealth before self-government, become held from the Territory thereafter. In the case of land reacquired by the Commonwealth under s 70 those very same interests are then to be held from the Commonwealth. In each case they are to be held 'on the same terms and conditions' as those on which they were previously held. The meaning and content of this expression will be considered later.*
>
> *All these provisions are made pursuant to the Commonwealth's legislative power under s 122 of the Constitution. Under that power it can validly legislate fore the acquisition of property of the Territory and of private individuals without the requirement imposed in relation to the property of the State or of persons within a State by s 51(xxxi) of the Constitution. No 'just terms' relating to compensation or otherwise are required. We are unable to characterise these sections as mere conveyancing provisions. In our view, their proper construction requires the conclusion that the Commonwealth legislature, in passing s 70, was evincing a legislative intention of providing exhaustively for the rights and obligations of the Commonwealth in respect of reacquired lands, and of persons holding previously acquired interests in those lands. It was not intended that the Northern Territory legislature would thereafter be competent to deal with those lands or those interests by its own legislation under s 6, nor that the continuance, by force of s 57(1) and (3), of pre-existing legislation of the nature of the Mining Ordinance, would have any effect upon those lands and those interests."*

In the High Court, Gummow J, a member of the majority, analysed the operation of the *Self-Government Act* in terms with which Toohey, Gaudron and Kirby JJ agreed. Gummow J did not find it necessary to consider the effect of s 70(6) of the *Self-Government Act*, as Black CJ and Foster J had done in the Full Court. His Honour took the view that the subsection could not apply to the land which the Commonwealth had acquired in that case. This conclusion flowed from the fact that the notice of acquisition in *Newcrest Mining v Commonwealth* was published under s 70(3) of the *Self-Government Act* a few days before s 69 came into force. (Section 70 of the *Self-Government Act* came into force earlier than the other provisions of the Act.) So far as the land covered by the notice of acquisition was concerned, there had

never been any "interests...held from the Territory immediately before the acquisition" within the meaning of s 70(6). This was because the Territory had not come into existence as a separate entity until the major provisions of the *Self-Government Act* had come into force and thus it did not exist at the date of publication of the notice of acquisition. (There may be a question as to whether Gummow J's reasoning gives full effect to s 70(4) of the *Self-Government Act*, which provided that the notice was not to take effect until immediately after the commencement of s 69, but this question need not be pursued here.)

Gummow J, although not addressing the approach to s 70(6) taken by Black CJ and Foster J, made a general observation (at 1405) that ss 69 and 70

> *"were directed not to the abrogation of or subtraction from existing private rights created by or pursuant to laws continued in force by s 57 [of the Self-Government Act]. Rather their primary concern was with the adjustment of rights between the Commonwealth and its creation, the new polity established by the Self-Government Act."*

This observation does not appear to be consistent with the view of Black CJ and Foster J, that s 70 was intended to provide exhaustively, *inter alia*, for the rights and obligations of persons holding previously acquired interests in lands acquired by the Commonwealth. If this is the correct reading of Gummow J's judgment, it is difficult to see how s 70 could be regarded as an exhaustive statement of the rights and obligations of third parties.

Notwithstanding this apparent inconsistency, I am prepared to assume for the purposes of this case that the reasoning of Black CJ and Foster J relating to s 70(6) of the *Self-Government Act* is unaffected by the approach taken by the majority of the High Court in *Newcrest Mining v Commonwealth.* Even so, I do not think that their conclusion, that s 70(6) limits the scope of s 6 of the *Self-Government Act,* requires that s 69(4) have the same effect.

Section 69(4) of the *Self-Government Act* vested in the Territory all Commonwealth interests in minerals, subject to an exception for prescribed substances. The sub-section was enacted against the background of an established legislative regime, whereby the Commonwealth's property in prescribed substances co-existed with Territorial legislation authorising the creation of rights in relation to those substances. The exception in s 69(4) preserved the position obtaining prior to self-government, namely, that the Commonwealth retained

property in prescribed substances by force of the *1946 Act* and the *Atomic Energy Act.* Prior to self-government, as I have explained, the Commonwealth's title to prescribed substances was subject to rights granted under Territory laws with express reference to those substances. This subjection flowed from the terms of s 35(4) of the *Atomic Energy Act*, which continued to apply after the *Self-Government Act* came into force. It was reinforced by s 41(4) of the *Self-Government Act*. In these circumstances, in my opinion, there is no basis for attributing to Parliament the intention that s 69(4) withheld from the Territory legislature precisely that law-making authority in relation to prescribed substances as the Territory legislature had prior to self-government. Section 69(4) merely preserved the title of the Commonwealth in prescribed substances. Just as that title was subject to the law-making authority of the Territory prior to self-government, so it was thereafter.

The Commonwealth's Executive Powers

The respondents disputed the applicant's contention that the Commonwealth could dispose of interests in its own property only pursuant to statutory authority. Mr Walker, on behalf of the Minister and the Commonwealth, submitted that the Commonwealth has executive power under s 61 of the *Constitution* to dispose of or otherwise deal with property vested in the Commonwealth. He distinguished *Cudgeon Rutile,* as concerning statutory provisions specifically vesting the control and management of the "waste lands of the Crown" in Colonial legislatures: see *Williams v Attorney-General* (1913) 16 CLR 404, at 448-456, per Isaacs J; *Commonwealth v Tasmania* (1983) 158 CLR 1, at 208-212, per Brennan J. He said that the power to dispose of "waste lands" was quite different from the Commonwealth's power to deal with its own property and that the *1946 Act* and the *Atomic Energy Act* had vested property in prescribed substances in the Commonwealth. Mr Young, on behalf of ERA, developed similar submissions.

In view of the conclusions I have reached, I do not think it is necessary to explore these issues. Even if the applicant's contention, that legislative authority is required for a valid disposition of property vested in the Commonwealth, is correct, in my view such authority was provided by the combined operation of the *Atomic Energy Act*, the *Self-Government Act* and the *Mining Act 1980*.

Territory Laws Affecting Commonwealth Title

I have referred to Mr Basten's reliance on the tentative distinction drawn by Black CJ and

Foster J in *Commonwealth v Newcrest Mining,* between Territory laws governing the behaviour of individuals on Commonwealth land and Territory laws which affect title adversely to the Commonwealth. Their Honours did not need to develop the distinction, or the basis for it in their judgment. However, they had referred earlier in their reasons to the judgment of Wilcox J in *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274 (FCA/FC), at 297, Wilcox J there applied what he described as the "fundamental principle that the Crown in right of a State or Territory cannot bind the Crown in right of the Commonwealth". Wilcox J cited in support remarks of Fullagar J in *Commonwealth v Bogle* (1953) 89 CLR 229, at 259-260, where his Honour expressed the view, *inter alia,* that the Parliament of a State could not lawfully prescribe the uses which might be made by the Commonwealth of its own property.

The remarks of Fullagar J in *Commonwealth v Boyle* have recently been critically analysed by the High Court in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 71 ALJR 1254: see especially at 1269-1270, per Dawson, Toohey and Gaudron JJ at 1275-1276, per McHugh J. Moreover, there is a question, raised but not resolved in *Newcrest Mining v Commonwealth,* whether the principles governing the power of a State Parliament to enact legislation binding the Commonwealth apply to Territory legislation which purports to bind the Commonwealth. As French J said in *Newcrest Mining v Commonwealth,* at 409, in each case "the constitutional context is different".

I do not think that these questions need to be resolved in the present case. It is open to the Commonwealth Parliament, in the exercise of the power conferred by s 122 of the *Constitution,* to empower a Territory legislature to enact legislation creating or authorising the creation of rights adverse to the Commonwealth's title to land or minerals in the Territory. As I have explained, ss 35(4) and 41(4) of the *Atomic Energy Act,* read with s 6 of the *Self-Government Act,* had this effect in relation to prescribed substances vested in the Commonwealth. In particular, s 35(4) of the *Atomic Energy Act* specifically removed any barrier that otherwise might have prevented the Territory legislature granting rights adverse to the Commonwealth's title, provided the Territory legislation was "with express reference to [prescribed substances]". In those circumstances, in my opinion, the conferral of plenary legislative power by s 6 of the *Self-Government Act* was sufficient to give power to the Northern Territory legislature, subject to the constraints in the *Self-Government Act* (such as the Governor-General's power of disallowance), to enact a law granting or authorising the

grant of rights in prescribed substances adverse to the property of the Commonwealth.

Whatever construction is adopted of the words "with express reference to that substance", in s 35(4) of the *Atomic Energy Act*, I think they are satisfied in the present case. The Jabiluka Mining Lease was expressed to be granted pursuant to the *Mining Act 1980*. Section 60 empowered the Minister, in his discretion, to grant an applicant a mineral lease for a term of twenty-five years. However, s 175 of the *Mining Act 1980* provided that, subject to an irrelevant exception but notwithstanding anything else in the Act, the Minister was to exercise his powers in accordance with the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act*, and not otherwise. The account of events preceding the execution of the Lease shows that the Territory Minister's powers were exercised in accordance with the advice of the Commonwealth Minister. No issue has been taken in relation to the forty-two year term of the Lease.

If the words in s 35(4) of the *Atomic Energy Act* were intended to refer to legislation "with express reference to [prescribed substances]", the *Mining Act 1980* satisfied that description. If the words were intended to refer to the grant of a lease itself, the Jabiluka Project Lease, satisfied the description. The Lease explicitly granted the lessees the right to mine uranium and other prescribed substances as defined in the *Atomic Energy Act.* I did not understand Mr Basten to submit to the contrary.

EXECUTIVE AUTHORITY

The final question is whether the Territory Minister had executive authority to execute the Jabiluka Project Lease on behalf of the Northern Territory. The respondents relied on the grant of executive authority to the Ministers of the Territory made by reg 4 of the *Self-Government Regulations*, the terms of which have been set out earlier. In particular, the respondents relied on reg 4(5)(b) and (f). For convenience, I set out those provisions again:

> *"(5) The Ministers of the Territory are also to have executive authority under section 35 of the Act in respect of the following matters:*
> ...
>
> *(b) matters in respect of which duties, powers, functions or authorities are expressly imposed or conferred by or under another Act in force in the Territory, or by or under an enactment or an agreement or arrangement referred to in paragraph (f), on the Administrator or a*

Minister or officer of the Territory;

...

(f) agreements and arrangements between the Territory and the Commonwealth or a State or States, including the negotiations and the giving effect to any such agreement or arrangement by the Territory by way of enactment, regulations or other instrument, or otherwise."

I do not think it is correct to read reg 4(5)(b) as conferring executive authority on a Territory Minister in relation to any matter in respect of which duties, powers, functions or authorities are imposed, conferred by or under an enactment. The word "enactment" is, in my opinion, qualified by the requirement that it be an enactment "referred to in paragraph (f)". This is indicated by the absence of a comma after the word "enactment". More importantly, the broader reading would undercut the elaborate scheme set out in reg 4.

However, pars (b) and (f), read together, conferred the necessary executive authority on the Territory's Minister for Mines and Energy to execute the Jabiluka Project Lease. The agreement between the Commonwealth and the Northern Territory of February 1982 required that in all matters under the *Mining Act 1980* relating to prescribed substances in the Territory the Territory Minister would exercise and perform all duties, powers and functions in accordance with the advice of the responsible Commonwealth Minister and not otherwise. Section 175 of the *Mining Act 1980* (which came into force shortly after the agreement) gave effect to the agreement, by requiring the Territory Minister, in respect of a prescribed substance, to exercise his or her powers in accordance with the advice of the Commonwealth Minister. This linkage between the agreement and the enactment reflected the link between the agreement of March 1979, which was to the same effect, and s 7A of the *Mining Ordinance,* introduced in January 1979.

The Territory Minister had executive authority (to use the awkward language of reg 4(5)(b)) in respect of matters in respect of which duties, powers or functions were imposed or conferred by or under an enactment of the kind referred to in par (f). The *Mining Act 1980* was such an enactment, because it gave effect to the agreement of February 1982 between the Commonwealth and the Territory. Section 175 of that Act imposed duties on the Territory Minister in relation to the grant of a lease of prescribed substances. The Jabiluka Project Lease was a lease of this description. Thus the execution of the Jabiluka Project Lease was a

matter in respect of which duties and functions were imposed or conferred by a Territory enactment of the kind referred to in reg 4(5)(f).

Mr Basten's principal argument against this conclusion was that executive authority could not be conferred on Territory Ministers in respect of matters relating to prescribed substances, since the *Mining Act 1980* could not validly address such matters. For reasons given earlier, I do not accept that argument.

COSTS

I invited the respondents' counsel to address the question of whether some allowance should be made, in any costs order, for the fact that the respondents appeared to have substantially the same interests in the issues addressed in this judgment (as distinct from the Estoppel Questions). Mr Sullivan pointed out that the interests of the parties were not necessarily identical because, for example, the Commonwealth and the Northern Territory did not share precisely the same approach to the capacity of the Territory legislature to bind the Commonwealth. It is also necessary to take into account the observation of Burchett J in *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166, at 169, that

> *"a respondent with a real interest in the issue an applicant chooses to contest is not disentitled from incurring the expense of appearing to defend the matter because someone else also appears."*

I think it was reasonable for each of the respondents to appear in the proceedings and to take an active part. However, I think that some modest allowance should be made in the costs order to reflect the fact that greater co-ordination among the respondents could have reduced the overlap in their submissions, without disadvantaging any of them. Had this been done, the time required for preparation and presentation of the cases may well have been reduced. In saying this, I do not intend to be critical of the submissions made by the respondents; each was detailed and helpful. But I think justice would be done if the applicant were required to pay seventy-five per cent of the costs of each respondent.

CONCLUSION

For the reasons I have given, the applicant's challenge to the validity of the Jabiluka Project Lease fails. The consequence is that the application should be dismissed. The orders previously made for the separate determination of the Estoppel Questions cannot detract from

this conclusion, since the issues to be decided separately related only to alternative defences pleaded by ERA. For the reasons I have already given, the applicant should be ordered to pay seventy-five per cent of the costs of each respondent.

I propose to stand the matter over for seven days. This will enable any party wishing to make an application to do so before the orders are pronounced.

I certify that this and the preceding fifty-eight (58) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville

Associate:

Dated: 11 February 1998

Counsel for the Applicant:	Mr J Basten QC with Mr N J Williams
Solicitor for the Applicant:	Bruce Donald
Counsel for the First and Second Respondents:	Mr B Walker SC with Mr S Gageler
Solicitor for the First and Second Respondents:	Australian Government Solicitor
Counsel for the Third Respondent	Mr N J Young QC with Mr N Mukhtar
Solicitor for the Third Respondent:	Corrs Chambers Westgarth
Counsel for the Fourth Respondent:	Mr A J Sullivan QC with Ms R Webb
Solicitor for the Fourth Respondent:	Freehill Hollingdale & Page
Date of Hearing:	16 & 17 December 1997
Date of Judgment:	11 February, 1998.

A

MARGARULA v MINISTER FOR RESOURCES AND ENERGY and Others *

Beaumont, Lindgren and Emmett JJ

B

New South Wales District Registry

29, 30 June, 21 August 1998

Mines and Minerals — Aboriginal custodian — Validity of mining lease in prescribed substances — Lease granted by Northern Territory pursuant to Mining Act 1980 (NT) — Relationship between operation of Mining Act 1980 (NT) and Atomic Energy Act 1953 (Cth) — Whether, pursuant to Atomic Energy Act 1953 (Cth), a right in relation to a prescribed substance may be granted under a law of the Northern Territory — Whether Mining Act 1980 (NT) authorised grant of lease binding on Commonwealth in respect of prescribed substance — Whether Territory's Legislative Assembly has power to deal with Commonwealth property — Whether it should be presumed that Territory's Legislative Assembly intended to confer on Minister administering Mining Act 1980 (NT) power to dispose of interests vested in Commonwealth — Whether Mining Act 1980 (NT) inconsistent with Lands Acquisition Act 1955 (Cth) — Whether s 35(4) of Atomic Energy Act 1953 (Cth) continued to apply after Northern Territory (Self-Government Act) 1978 (Cth) — Whether Commonwealth had executive authority to agree to the grant of the lease — Whether prescribed substances constitute a "place" acquired by the Commonwealth for public purposes — If so, whether Mining Act 1980 (NT) consequently beyond power — Whether Northern Territory (Self-Government) Regulations 1978 (NT) inconsistent with Northern Territory (Self-Government) Act 1978 (NT) — Constitution of the Commonwealth, ss 52(i), 122 — Acts Interpretation Act 1901 (Cth), ss 38(1), 49A(1) — Atomic Energy Act 1953 (Cth), ss 35, 41 — Lands Acquisition Act 1955 (Cth), ss 5AA, 51 — Mining Act 1980 (NT), ss 4, 60, 175 — Northern Territory (Self-Government) Act 1978 (Cth), ss 6, 9, 57, 69, 70 — Northern Territory (Self-Government) Regulations 1978 (Cth), reg 4.

C

D

E

F

Constitutional Law — Place — Whether uranium a place for purposes of Constitution of the Commonwealth, s 52(i).

Words and Phrases — Place — Constitution of the Commonwealth, s 52(i).

On 12 August 1982 a mineral lease was granted under s 60 of the *Mining Act* 1980 (NT) by the Northern Territory of Australia to the predecessors in title of Energy Resources of Australia Ltd, which permitted the exploitation of deposits of uranium ore in land at Jabiluka. Margarula claimed to be the Aboriginal traditional principal custodian of the land leased, and contended that the lease was invalid. Uranium was the property of the Commonwealth and a prescribed substance under

G

* [EDITOR'S NOTE: An application for special leave to appeal to the High Court was refused on 20 November 1998.]

the *Atomic Energy Act* 1953 (Cth). Section 35(4) of the *Atomic Energy Act* provided that the title of the Commonwealth was subject to any rights granted after 10 September 1946, by or under a law of the Territory, with express reference to the substance, but no other rights. Section 175 of the *Mining Act* dealt with prescribed substances under the *Atomic Energy Act* and permitted the Territory Minister to exercise power only in accordance with the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act*. In relation to uranium mining an agreement had been made in 1982 between the Commonwealth and the Territory. The principal issues on the appeal by the custodian to the Full Court were whether the *Mining Act* bound the Commonwealth; whether s 35(4) was a valid source of authority; whether the authority to grant uranium leases under s 35(4) had been lost as a result of the *Northern Territory (Self-Government) Act* 1978 (Cth); whether s 175 of the *Mining Act* was inconsistent with the *Lands Acquisition Act* 1955 (Cth); whether the Commonwealth had authority to enter into the 1982 agreement; whether uranium was a place for the purposes of s 52(i) of the Constitution of the Commonwealth and within the exclusive jurisdiction of the Commonwealth; whether pars (b) and (f) of reg 4(5) of the *Northern Territory (Self-Government) Regulations* 1978 (NT) which permitted Territory Ministers to enter into agreements with the Commonwealth or a State were repugnant to the scheme of the *Northern Territory (Self-Government) Act*.

Held, (1) As to the scope and construction of the *Mining Act*:

(a) the Act binds the Crown in right of both the Commonwealth and the Northern Territory. (204D)

Newcrest Mining (WA) Ltd v Commonwealth (No 2) (1993) 46 FCR 342, followed.

(b) the Commonwealth is entitled via s 35(4) of the *Atomic Energy Act* to authorise the Northern Territory to grant uranium leases under the *Mining Act*. (205A-C)

(c) the Northern Territory had power to grant uranium leases prior to self-regulation and the *Northern Territory (Self-Government) Act* did not operate to remove that power. (205E-F)

(d) there is no inconsistency between s 175 and any Commonwealth legislation. (210C)

(2) The Commonwealth had executive authority to enter into the 1982 agreement and to agree to the grant of the lease. (210D-E)

(3) Uranium is not a place for the purposes of s 52(i) of the Constitution of the Commonwealth. (210E-F)

Svikart v Stewart (1994) 181 CLR 548, followed.

(4) Regulation 4(5)(b) and (f) of the *Northern Territory (Self-Government) Regulations* are valid. (213E-F)

Turner v Owen (1990) 26 FCR 366; *Dainford Ltd v Smith* (1985) 155 CLR 342, distinguished.

R v Duncan; Ex parte Australian Iron & Steel Pty Ltd (1983) 158 CLR 535; *Gould v Brown* (1998) 193 CLR 346, followed.

Discussion by the Court of the nature of Commonwealth and Territory powers in relation to property, and the consequences of Northern Territory self-regulation as regards Commonwealth property.

Appeal against decision of Sackville J (unreported, Federal Court, 11 February 1998), dismissed.

CASES CITED

The following cases are cited in the judgment:

Allders International Pty Ltd v Commissioner of State Revenue (Vic) (1996) 186 CLR 630.

Arts, Heritage and Environment, Minister for v Peko-Wallsend Ltd (1987) 15 FCR 274.

A *Baxter v Ah Way* (1909) 8 CLR 626.
Booth v Wyvill (1989) 85 ALR 621.
Butler v Attorney-General (Vic) (1961) 106 CLR 268.
Capital Duplicators Pty Ltd v Australian Capital Territory (1992) 177 CLR 248.
Commonwealth v Newcrest Mining (WA) Ltd (1995) 58 FCR 167.
Dainford Ltd v Smith (1985) 155 CLR 342.
Gould v Brown (1998) 193 CLR 346.
Margarula v Minister for Resources and Energy (unreported, Federal Court, Sackville J,
B No NG 448 of 1997, 11 February 1998).
Morton v United Steamship Company of New Zealand Ltd (1951) 83 CLR 402.
Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513.
Newcrest Mining (WA) Ltd v Commonwealth (1993) 46 FCR 342.
Primary Industries, Minister for v Davey (1993) 47 FCR 151.
R v Duncan; Ex parte Australian Iron & Steel Pty Ltd (1983) 158 CLR 535.
R v Kearney; Ex parte Japanangka (1984) 158 CLR 395.
Residential Tenancies Tribunal (NSW), Re (1997) 190 CLR 410.
South Australia v Tanner (1989) 166 CLR 161.
C *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330.
Svikart v Stewart (1994) 181 CLR 548.
Technical Products Pty Ltd v State Government Insurance Office (Qld) (1989) 167 CLR 45.
Turner v Owen (1990) 26 FCR 366.
Wake v Northern Territory (1996) 109 NTR 1.

D APPEAL

J Basten QC and *N Williams* and *S Lloyd*, for the appellant.

B Walker SC and *S Gageler*, for the first and second respondents.

N Young QC and *N Mukhtar*, for the third respondent.

A Sullivan QC and *R Webb*, for the fourth respondent.

E *Cur adv vult*

21 August 1998

THE COURT.

Introduction

This is an appeal from orders made by a judge of the Court dismissing
F proceedings which challenged the validity of a mineral lease (the Lease) granted in 1982 by the Northern Territory of Australia (the Territory), the fourth respondent, to predecessors in title of Energy Resources of Australia Limited (ERA), the third respondent. The Lease permitted the exploitation of deposits of uranium ore in lands at Jabiluka (the Lands). Yvonne Margarula, the appellant and the applicant for relief at first instance, claimed to be the principal custodian of the Lands by Aboriginal tradition. There was no dispute that she had standing to sue. Nor was there any dispute about the material facts,
G all of which are documented. The matters in issue were questions of law. The appellant challenged the power of the Territory's Minister for Mines and Energy to grant the Lease. It is common ground that the Commonwealth Minister for Resources and Energy, the first respondent, and the Minister administering the *Atomic Energy Act* 1953 (Cth), did not grant any lease to ERA, or its predecessors, under that Act. In order to understand the issues in

the appeal, it will be necessary to describe the factual background and the legislative context.

The subject property

Most of the leased land is comprised within NT Portion 2253. The fee simple estate in the land comprised within NT Portion 2253 is vested in the Jabiluka Aboriginal Land Trust and is Aboriginal land for the purposes of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (the Land Rights Act). This land (the Jabiluka Project Land), of about 6,758 ha, was granted to the Jabiluka Aboriginal Land Trust by the Governor-General on 25 June 1982. Reserved and excepted from the grant was, inter alia, a reservation to the Commonwealth of the right to minerals vested in the Commonwealth. By Memorandum of Transfer dated 21 July 1982, the Commonwealth transferred to the Territory its rights to minerals in upon or under NT Portion 2253, with the exception of prescribed substances within the meaning of the *Atomic Energy Act*, which were reserved to the Commonwealth.

The Lease

The Lease, described as ML N1, was granted to ERA's predecessors in title by the Territory's Minister for Mines and Energy pursuant to the *Mining Act* 1980 (NT) on 12 August 1982. The Territory

> "... grant[ed] ... a lease of ... [the] land [there] described ... and [the] mines and deposits of uranium ore and other prescribed substances [see below] together with the minerals associated or combined therewith so that they must necessarily be mined in the mining of any such uranium ore or other prescribed substances in or under the leased land, together with the rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining, *excepting and reserving* out of this lease the rights of ingress, egress and regress hereinafter provided [see below]; to hold ... the same for the term of ... [42] years from the date hereof for the purpose of mining thereon for uranium ore and other prescribed substances but no other mineral or gold unless ... associated or combined in the leased land with the uranium ore or other prescribed substances ... and for all purposes necessary effectually to carry on such mining operations thereon ...".

By cl 1(f), the lessees covenanted,

> "unless prohibited by law, to permit and protect completely the exercise of free ingress, egress and regress at all times by persons who reside in the Jabiluka Project Area [being the leased lands] or who are from time to time authorised in that behalf under the laws in force in the Territory, to, from and across the leased land except those areas which, because mining, treatment or transport operations are being specifically conducted on them and the presence of those persons on them will cause safety hazards to personnel, operations or equipment, are designated by the lessees as restricted areas;".

By cl 7(a), it was provided that "prescribed substance" means "prescribed substance within the meaning of the *Atomic Energy Act* 1953 of the Commonwealth".

The Atomic Energy Act

By this Act, as amended in 1978, it is provided that "prescribed substance" means (a) uranium, thorium, any element having an atomic number greater than 92 or any other substance declared by the Regulations to be capable of being used for the production of atomic energy or for research into matters connected with atomic energy; and (b) any derivative or compound of a substance to which (a) applies (s 5(1)). The Act binds the Crown in right of the Commonwealth and of the Northern Territory (s 6).

Part III of the Act (ss 34-43) deals with "Control of Materials" relevantly as follows:

- By s 34 (as amended in 1978), it is provided that the powers conferred by Pt III shall be exercised, inter alia — "(f) in relation to substances situated in or recovered from, or things done or proposed to be done in or in connection with, a Territory".
- Section 35 deals with the title of the Crown to prescribed substances in Territories, whether 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, whether alienated from the Crown or not (s 35(1)).
- Section 35 applies to several kinds of "prescribed substances" as follows:

  First, a substance at the commencement of the Act in April 1953 which 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 (Cth), is declared to have become the property of the Commonwealth on that date (s 35(2)).

  (By s 6 of the 1946 Act, all prescribed substances were thereby declared to be the property of the Commonwealth, subject to any rights granted after the commencement of that Act, by or under the law of any Territory, with express reference to the substance, but to no other rights. The 1946 Act was repealed by the 1953 Act.)

  Secondly, a substance which became a prescribed substance after the commencement of the 1946 Act which was not, immediately before the date on which it became a prescribed substance, the property of the Commonwealth, becomes, by force of the Act, the property of the Commonwealth on that date (s 35(3)).
- *However, the title of the Commonwealth is subject to any rights granted after 10 September 1946, by or under a law of a Territory, with express reference to that substance, but to no other rights (s 35(4)).*
- Section 36 imposes a duty to notify the Minister upon any person who discovers a prescribed substance. Section 37 empowers the Minister to obtain information in that connection.
- By s 38, as amended in 1978, provision is made for the control of prescribed substances by regulations made under the Act. The regulations may prohibit activities in this regard, except under a licence granted under this section. By s 38(5), it is provided that s 38 and the regulations shall not be construed as intended to exclude or limit the operation of any provision of a law of a Territory that is capable of operating concurrently with this section and the regulations.

The Northern Territory (Self-Government) Act 1978 (Cth) and Northern Territory (Self-Government) Regulations 1978 (Cth)

The mining of uranium in the Territory was dealt with by Regulations made under this Act (the Self-Government Act). Before going to the Regulations, some of the provisions of the Act should be mentioned.

Part IV of the Act (ss 31-42) deals with "Administration".

The Office of Administrator is dealt with by s 32. By s 32(3), subject to the Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of powers and functions other than powers and functions relating to matters specified under s 35) in accordance with such instructions as are given to him by the Commonwealth Minister.

The Executive Council of the Territory is established by s 33(1) to advise the Administrator in the Government of the Territory in relation to matters in respect of which the Territory Ministers have executive authority under s 35.

The transfer of functions to the Territory Executive is dealt with by s 35, which provides that the Regulations (made by the Governor-General under s 75 of the Act) may specify the matters in respect of which the Territory Ministers are to have executive authority.

Regulation 4(1) provides that, subject to reg 4(2), the Territory Ministers are to have executive authority under s 35 in respect of the following matters, inter alia: "Mining and minerals ..."

By reg 4(2), matters specified in reg 4(1)(a) shall not be construed as including or relating to: "the mining of uranium or other prescribed substances within the meaning of the *Atomic Energy Act* 1953 ..." The application of reg 4(2) is dealt with by reg 4(6).

Additional executive authority under s 35 is conferred by reg 4(5)(b) and (f) which provides that the Territory Ministers are also to have such authority in respect of, inter alia, the following:

> "(b) matters in respect of which duties, powers, functions or authorities are expressly imposed or conferred by or under another Act in force in the Territory, or by or under an enactment or an agreement or arrangement referred to in paragraph (f), on the Administrator or a Minister or officer of the Territory;
>
> ...
>
> (f) agreements and arrangements between the Territory and the Commonwealth ... including the negotiation and the giving effect to any such agreement or arrangement by the Territory by way of enactment, regulations or other instrument, or otherwise;"

Regulation 4(6) provides that reg 4(2) does not apply to a matter specified in reg 4(1) if the matter is also included in the matters specified in reg 4(5).

Other provisions of the Self-Government Act were referred to in argument and are mentioned below.

The provisions of the Mining Act

Section 60(1)(a) of this Act authorises the Territory Minister, subject to the Act, in his or her discretion, to grant to an applicant a mineral lease for, inter alia, the mining of the mineral or minerals specified in the lease document.

In this Act, "mineral" is defined to mean, inter alia, a substance from time to time prescribed as a mineral (s 4(1)).

A Section 175 deals with prescribed substances under the *Atomic Energy Act*. Notwithstanding anything elsewhere contained in the *Mining Act* or its Regulations, in respect of such a substance, the Territory Minister (a) *shall exercise his powers in accordance with, and give effect to, the advice of the Commonwealth Minister administering s 41 of the Atomic Energy Act; and (b) shall not exercise his powers otherwise than in accordance with such advice (s 175(1)).*

B **The 1982 Agreement between the Commonwealth and the Territory in relation to mining uranium**

This Agreement, entered into on 8 February 1982, and partially amended on 12 May 1982, materially provided as follows:

- Whenever the *Mining Act* applies in relation to prescribed substances, the Territory Minister shall exercise or perform the duties, powers, functions and authorities imposed or conferred on the Minister by or under the
C *Mining Act* (cl 2).
- In all matters under the *Mining Act* relating to prescribed substances situated in the Territory, the Territory Minister:
  (a) shall exercise or perform his duties, powers, functions and authorities in accordance with, and give effect to, the advice of the Commonwealth Minister, and
  (b) shall not exercise or perform his duties, powers, functions and authorities otherwise than in accordance with that advice (cl 3).
D - The Territory Minister shall ensure that, in any mineral lease for the mining of a prescribed substance granted under the *Mining Act*, there is specified, in terms approved by the Commonwealth Minister, all relevant matters relating to the determination, variation, assessment, and the royalty to be paid (cl 4(b)).

The decision at first instance

E At first instance, the appellant's application sought the following substantive relief:

> "1. An order prohibiting [the Minister] from granting approval in writing to [ERA] pursuant to reg 11 of the Customs (Prohibited Exports) Regulations, to export ... goods obtained by mining carried out on land held by the Jabiluka Aboriginal Land Trust ...
> 2. A declaration that the [Commonwealth of Australia] is the owner of the uranium and other prescribed substances ... within the land at
F Jabiluka ... and has granted no valid interest to any other person or body in respect to the uranium."

The appellant's statement of claim then made the following allegations:

> "3. ... ERA is the lessee under a mineral lease ... which ... purports to grant to ERA an interest in uranium ore and other prescribed substances in the Jabiluka Lands (the uranium).
> 4. The uranium is a prescribed substance ... and all interests in respect
G of the uranium were at all material times and now remain vested in the [Commonwealth] pursuant to s 35 of the [*Atomic Energy Act*].
> 5. No interest in the uranium has been granted, transferred or assigned by the [Commonwealth] by any instrument or law to the Northern Territory of Australia, to ERA nor to its predecessors in title under the mineral lease.

A

...

8. On 12 August 1982, the Northern Territory of Australia purported to grant to the predecessors in title of ERA a lease ...
9. Neither the Northern Territory of Australia nor its Minister for Mines and Energy had at the date of execution of the mineral lease ... any valid authority under ... any ... law of the Commonwealth to execute the purported lease, nor to grant to any person any entitlement to mine and remove the uranium from the Jabiluka Lands.
10. ERA does not have any valid lease or authority to mine and remove the uranium from the Jabiluka Lands.

B

...

13. The [Minister] has no power or authority to grant to ERA an approval in writing to export from Australia the uranium which is vested in the [Commonwealth] and to which ERA has no lawful right, title or interest."

C

The substance of the appellant's case at the trial was that neither the Territory, nor its Minister, had any valid authority under the *Atomic Energy Act*, or any other law of the Commonwealth, to execute the Lease, nor to grant to any person any entitlement to mine and remove the uranium from the land comprised within NT Portion 2253. On behalf of the appellant, several complex arguments were advanced in support of this contention, some of which are no longer pursued; and some new arguments were put before us.

D

His Honour rejected the challenge to the validity of the Lease (*Margarula v Minister for Resources and Energy* (unreported, Federal Court, Sackville J, No NG 448 of 1997, 11 February 1998). The primary judge held that there was nothing in the *Atomic Energy Act* to suggest that rights could not be granted in respect of prescribed substances under Territory law. His Honour further held that the *Mining Act* was capable of operating so as to enable the Territory Minister to grant a lease in respect of prescribed substances; and that the Territory Minister had executive authority to execute the Lease on behalf of the Territory.

E

The argument before us on the appeal was limited to the allegations made in pars 9 and 10. However, the final assertion in par 13, which supports the relief sought in the application, is not necessarily dependent upon the validity of the lease but could be supported by the allegations in pars 4 and 5 which are true. However, in the course of pretrial procedures, the primary judge apparently noted an agreement between the parties that the questions for determination of the proceedings (other than certain estoppel questions, which were deferred) were limited to the seven questions stated by his Honour as follows:

F

"(a) Whether the entitlement to mine, recover and remove prescribed substances from NT Portion 2253 [the Jabiluka Trust Land] could only be granted by the Commonwealth of Australia under the *Atomic Energy Act*?

(b) Whether the *Mining Act* was a law of the Northern Territory of Australia capable of operating concurrently with the *Atomic Energy Act* so as to entitle the Minister for Mines and Energy of the Northern Territory of Australia to grant a lease of and a right to mine prescribed substances?

G

(c) Whether the *Atomic Energy Act* as in force on 12 August 1982 on its true construction excluded the operation of a law of a Common-

wealth Territory purporting to grant or authorise the grant of a leasehold mining interest in uranium or other 'prescribed substance' within the meaning of that Act, in such a Territory?

(d) Whether the Northern Territory of Australia was entitled to grant a lease conveying a proprietary interest in prescribed substances within the [Jabiluka Trust Land] which are the property of the Commonwealth of Australia and not the property of the Northern Territory of Australia?

(e) Whether the *Northern Territory (Self-Government) Act* on its true construction conferred legislative power on the Legislative Assembly of the Northern Territory with the assent as provided by that Act to enact legislation enabling or authorising the grant of a leasehold mining interest in uranium or other prescribed substance in the Northern Territory?

(f) Whether the *Northern Territory (Self-Government) Act* and the *Northern Territory (Self-Government) Regulations* on their true construction enabled the conferral of executive authority on the Minister for Mines and Energy of the Northern Territory to grant the Mineral Lease ML N1 dated 12 August 1982 in the circumstances set forth in pars 17 to 20 inclusive of the Defence of [the Minister and the Commonwealth] and subpars 5.6 to 5.9 inclusive of [ERA's] Defence?

(g) If the answer to question 2(f) is yes, whether such executive authority was conferred in the circumstances set forth in [those] paragraphs?"

It appears to have been accepted by the appellant that if those questions were answered unfavourably to her, the application should be dismissed. In any event, the appeal proceeded upon that assumption.

The appellant's grounds of appeal

The appellant now appeals upon these grounds:

(1) Properly construed, s 60 of the *Mining Act* did not extend to the grant of a right to mine in relation to prescribed substances held in an estate in fee simple in the Territory; and in particular did not extend to the grant of the Lease.

(2) If, contrary to the appellant's construction, s 60 purported to authorise the Territory Minister to grant the Lease, then s 60 exceeded the legislative power conferred on the Territory's Legislative Assembly by the Self-Government Act. Alternatively, s 60 was invalid because exclusive legislative power with respect to prescribed substances (being places acquired by the Commonwealth for public purposes within the meaning of s 52(i) of the Constitution) was vested in the Commonwealth.

(3) If valid, s 60 of the *Mining Act* was not an enactment giving effect to an agreement within reg 4(5)(b) and (f) of the Self-Government Regulations.

(4) Properly construed, the *Mining Act* did not confer the necessary executive authority on the Territory Minister to grant the Lease; alternatively, if the Act should be so construed, it was inconsistent with the limitation on executive authority imposed by reg 4(2) of the Self-Government Regulations.

Conclusions on the appeal

It will be convenient to deal with the issues in the appeal in the sequence adopted in the appellant's written submissions.

Scope of the Mining Act on its true construction

As has been noted, the question arises whether, on its proper construction, the *Mining Act* authorises the grant of a lease in relation to Commonwealth property. In this connection, the respondents rely upon, inter alia, the provisions of s 175 of the *Mining Act*. It will be recalled that s 175 provided that, in respect of a prescribed substance within the meaning of the *Atomic Energy Act*, the Territory Minister: (a) shall exercise his powers in accordance with, and give effect to, the advice of the Commonwealth Minister administering s 41 of the *Atomic Energy Act*; and (b) shall not exercise his powers otherwise than in accordance with such advice.

On behalf of the appellant it is submitted that the presumption that the *Mining Act* was not intended to bind the Crown in right of the Commonwealth meant that the Territory's Legislative Assembly did not intend to confer power on the Territory Minister administering the *Mining Act* to dispose of interests vested in the Commonwealth.

In our opinion, the *Mining Act* was clearly intended to bind the Crown in right of both the Commonwealth and the Territory. Section 60 of that Act authorised the grant by the Territory of a mineral lease for the mining of the mineral or minerals specified in the lease document. "Mineral" was defined (s 4(1)) so as to include a "naturally occurring ... inorganic element or compound ... obtainable from land by mining ...". This would include a "prescribed substance" within the meaning of the *Atomic Energy Act*. In this context, s 175 specifically regulated the manner in which the Territory Minister was to exercise his powers in respect of these prescribed substances. Further, s 175 made specific reference to the *Atomic Energy Act*. That Commonwealth Act both vested the prescribed substances in the Commonwealth (s 35(2)) and made the Commonwealth's title "subject to any rights granted ... by or under the law of a Territory of the Commonwealth, with express reference to that substance ..." (s 35(4)). We agree with the first and second respondents' submission that s 175 could not be given any meaningful operation unless s 60 were interpreted as authorising the grant of a mineral lease binding on the Commonwealth in respect of a prescribed substance.

We also agree with the submission of the fourth respondent that the Territory's Legislative Assembly had power to legislate in relation to the Northern Territory in a manner that binds the Commonwealth and its property for the reasons given by French J in *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342 at 408-410: cf *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 per Wilcox J at 297; but see now, in the case of a State, *Re Residential Tenancies Tribunal (NSW)* (1997) 190 CLR 410 at 445-448, 455-458. Even if there were any limit on the legislative power in the Territory to deal with Commonwealth property without its consent, the Commonwealth has evidenced its consent here, conditionally at least, in the provisions of s 35(2) and (4) of the *Atomic Energy Act* and of reg 4(1), (2)(a), (5) and (6) of the Self-Government Regulations (read in the light of s 35 of the Self-Government Act): see, as to Commonwealth consent, *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 per Mason J at 357.

A The learned primary judge said (at pp 55-56):

> "It is open to the Commonwealth Parliament, in the exercise of the power conferred by s 122 of the Constitution, to empower a Territory legislature to enact legislation creating or authorising the creation of rights adverse to the Commonwealth's title to land or minerals in the Territory. As I have explained, ss 35(4) and 41(4) of the *Atomic Energy Act*, read with s 6 of the Self-Government Act, had this effect in relation to prescribed substances vested in the Commonwealth. In particular, s 35(4) of the *Atomic Energy Act* specifically removed any barrier that otherwise might have prevented the Territory legislature granting rights adverse to the Commonwealth's title, provided the Territory legislation was 'with express reference to [prescribed substances]'. In those circumstances, in my opinion, the conferral of plenary legislative power by s 6 of the Self-Government Act was sufficient to give power to the Northern Territory legislature, subject to the constraints in the Self-Government Act (such as the Governor-General's power of disallowance), to enact a law granting or authorising the grant of rights in prescribed substances adverse to the property of the Commonwealth.
>
> Whatever construction is adopted of the words 'with express reference to that substance', in s 35(4) of the *Atomic Energy Act*, I think they are satisfied in the present case."

We agree.

His Honour went on to find that the events preceding the execution of the Lease showed that the Territory Minister's powers were exercised in accordance with the advice and consent of the Commonwealth Minister. There was ample documentary evidence to justify that finding. The primary judge said (at p 56):

> "If the words in s 35(4) of the *Atomic Energy Act* were intended to refer to legislation 'with express reference to [prescribed substances]', the *Mining Act* satisfied that description. If the words were intended to refer to the grant of a lease itself, the Jabiluka Project Lease, satisfied the description. The Lease explicitly granted the lessees the right to mine uranium and other prescribed substances as defined in the *Atomic Energy Act*."

Again, we agree.

On behalf of the appellant it is submitted that it should not be presumed that the Legislative Assembly did intend to confer on the Minister administering the *Mining Act* power to dispose of interests vested in the Commonwealth. To do so, the argument runs, would have been for the Territory to "arrogate" to itself a power to dispose of Commonwealth property, a title to which was expressly reserved by s 69(4) of the Self-Government Act; and, the submission runs, implicit in that provision is a constraint on the power of the Territory to legislate for a contrary result.

For reasons we give later, we have difficulty accepting the argument.

Section 69 of the Self-Government Act deals with transfers of property from the Commonwealth to the Territory. All interests of the Commonwealth in land in the Territory, other than interests referred to in s 69(5), are, by force of s 69, vested in the Territory (s 69(2)). On, or as soon as practicable after, the date when a matter is specified under s 35, the Commonwealth Minister shall transfer or cause to be transferred to the Territory, inter alia, certain limited interests in land (not minerals) held by the Commonwealth, being interests that,

in the Minister's opinion, were so held for the purposes of the Commonwealth in connection with that matter (s 69(5)). We will refer to s 69(4) below.

Section 70 deals with the acquisition of certain land by the Commonwealth vested in the Territory under s 69(2). The Commonwealth Minister may, from time to time, recommend to the Governor-General that any interest in land vested or to be vested in the Territory by s 69(2) be acquired from the Territory by the Commonwealth (s 70(1)). Upon acquisition of an interest by the Commonwealth, all interests held from the Territory are, by force of s 70, held from the Commonwealth on the same terms and conditions as those on which they were held from the Territory (s 70(6)).

Section 69(4) provides:

> "(4) 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 ... regulations ...) are, by force of this section, vested in the Territory on that date."

In support of this submission, the appellant relies upon observations as to the effect of ss 69 and 70 by Black CJ and Foster J in *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167 at 182 that they should not be characterised "as mere conveyancing provisions", and that, in passing s 70, the legislature —

> "... was evincing a legislative intention of providing exhaustively for the rights and obligations of the Commonwealth in respect of re-acquired lands, and of persons holding previously acquired interests in those lands. It was not intended that the Northern Territory legislature would thereafter be competent to deal with those lands or those interests by its own legislation under s 6 ..."

However, as the primary judge correctly pointed out in the present matter, these observations must now be considered in the light of the remarks made by Gummow J (with the agreement of Toohey, Gaudron and Kirby JJ) in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 625-626 that ss 69 and 70:

> "... were directed not to the abrogation of or subtraction from existing private rights created by or pursuant to laws continued in force by s 57 [of the Self-Government Act]. Rather their primary concern was with the adjustment of rights between the Commonwealth and its creation, the new polity established by the Self-Government Act."

The primary judge went on to say (at pp 53-54):

> "Section 69(4) of the Self-Government Act vested in the Territory all Commonwealth interests in minerals, subject to an exception for prescribed substances. The subsection was enacted against the background of an established legislative regime, whereby the Commonwealth's property in prescribed substances co-existed with Territorial legislation authorising the creation of rights in relation to those substances. The exception in s 69(4) preserved the position obtaining prior to self-government, namely, that the Commonwealth retained property in prescribed substances by force of the 1946 Act and the *Atomic Energy Act*. Prior to self-government ... the Commonwealth's title to prescribed substances was subject to rights granted under Territory laws with express reference to those substances. This subjection flowed from the terms of s 35(4) of the *Atomic Energy Act*, which continued to apply after the Self-

A Government Act came into force. It was reinforced by s 41(4) of [that] Act."

Section 41 of the *Atomic Energy Act* authorised the mining of prescribed substances on behalf of, or in association with, the Commonwealth in certain circumstances. Except as provided by the regulations, this section shall not be construed as intended to exclude or limit the operation of any provision of a law of a State or Territory that is capable of operating concurrently with this section (s 41(4)).

B His Honour proceeded to conclude that (at p 54):

"... there is no basis for attributing to Parliament the intention that s 69(4) withheld from the Territory legislature precisely that law-making authority in relation to prescribed substances as the Territory legislature had prior to self-government. Section 69(4) merely preserved the title of the Commonwealth in prescribed substances. Just as that title was subject to the law-making authority of the Territory prior to self-government, so it

C was thereafter."

It is contended for the appellant that this conclusion fails to take proper account of s 57 of the Self-Government Act.

We cannot accept this for the reasons we give below.

Section 57 deals with continuance of laws. Subject to the Act, all "existing laws" of the Territory have the same operation as they would have had if the Act had not been enacted, subject to alteration or repeal by or under an enactment (s 57(1)). An "enactment" means (a) a law passed by the

D Legislative Assembly under the Self-Government Act; or (b) an Ordinance continued in force under the Self-Government Act (s 4(1)). An "existing law" means (a) any law in force in the Territory immediately before the Act's commencing date, *other than an Act* or an instrument (not being an Ordinance or an instrument made under an Ordinance) made under an Act; or (b) an Ordinance then in force (s 57(3)).

It is true, as the appellant contended, that the operation of the *Atomic Energy*

E *Act* was not the subject of the operation of s 57(1): the word "Act" in s 57(3)(a) means an Act of the Commonwealth: see *Acts Interpretation Act* 1901 (Cth), s 38(1); *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 per Gibbs CJ at 403.

It is then said for the appellant that, even if it be accepted that s 35(4) of the *Atomic Energy Act*, as in force immediately prior to 1 July 1978, recognised that a right in relation to a prescribed substance might be granted under "the

F law of a Territory", that Act did not itself create such an authority. The appellant next says that after self-government, the status of the Territory changed, as did the manner in which the Commonwealth laws applied to the Territory. The argument instanced the amendment of provisions of the *Lands Acquisition Act* 1955 (Cth) (LAA). Part VII of the LAA (ss 51-54) was concerned with "Dealings in Land Vested in the Commonwealth". Section 51 dealt with mining leases and licences. The Governor-General may authorise the grant of a lease or licence to a person to mine for metals or minerals on land,

G situate in a State, which is vested in the Commonwealth (s 51(1)). Subject to such exemptions and modifications as are prescribed, the laws of the State in which the land is situate relating to mining shall, so far as applicable, apply to a lease or licence under s 51 and to mining carried on under the lease or licence (s 51(2)).

Section 5(1) of the LAA provides that, unless a contrary intention appears,

"land" includes an "interest in land"; and such an "interest" means (a) a legal or equitable estate or interest in the land; or (b) a right, power or privilege over, or in connection with, the land. A

The LAA was amended in 1978 by inserting s 5AA dealing with the application of the LAA to the Northern Territory, whereby a reference in the LAA to a State shall be read as including a reference to the Territory (s 5AA(a)).

The appellant submits that since, under the LAA, the authority to grant a mineral lease is vested in the Governor-General, and whilst it is possible (but unlikely) that the grant authorised by the Governor-General might include a grant made by another Australian polity, it would not be consistent with this provision for a grant to be authorised by a Commonwealth Minister or a Territory Minister. Accordingly, the argument runs, upon the introduction of s 5AA to the LAA, the provisions of the *Mining Act* became inconsistent with, or repugnant to, a Commonwealth law, namely the LAA. This inconsistency results in the *Mining Act* being unavailable after self-government to allow a Territory Minister to grant the Lease. B C

It is said, for the appellant, that this conclusion is also consistent with the view that s 57 of the Self-Government Act, at least by implication, does not permit the terms of s 35(4) of the *Atomic Energy Act* to continue to operate in relation to "a law of the Territory" so as to permit interests to be granted in the future under the *Mining Act*: either (a) there is an implied repeal of s 35(4); or (b) the phrase "the law of a Territory" in s 35(4) "had a meaning", as at the date of its enactment, which did not encompass laws of a territory where a separate polity had been established with a degree of independence, and with a status different from the Commonwealth's. D

It follows, the argument goes, as a matter both of interpretation and of authority, that it is not appropriate to limit the operation of s 69(4) of the Self-Government Act, in its relation to s 6 in the manner adopted by the primary judge. To the contrary, the correct approach is to give s 6 full and appropriate effect by reading it, in accordance with its opening words — "subject to this Act". If, as the High Court held in *Newcrest*, ss 69 and 70 were directed to the adjustment of rights between the Commonwealth and the new polity it created, then it cannot be that the Territory has the power to legislate inconsistently with the scheme of the Self-Government Act so as to vary the adjustment of rights effected by that Act. E

We have difficulty accepting the appellant's arguments, both on the construction and the scope of the *Mining Act* and on the related suggestion of inconsistency or repugnancy. In our opinion, the approach taken by the primary judge in this area was correct. As the first and second respondents have submitted, his Honour's conclusion that the observations of Black CJ and Foster J in *Newcrest* as to the operation of s 70(6) cannot apply to s 69(4) for three reasons: F

(i) Unlike s 70(6), 69(4) had a specific temporal operation — s 69(4) applied once and for all on 1 July 1978 to vest Commonwealth interests in minerals in the Territory, and the reservation of prescribed substances was no more than a reservation from the interests in minerals vested in the Territory at that time by force of the section. By contrast, s 70(6) had an ongoing effect — it continues, in a "transmogrified" form, certain interests in property following the re-acquisition of property from the Territory by the Commonwealth under s 70(4). G

(ii) The reservation of prescribed substances by s 69(4) excludes prescribed substances entirely from the regime created by ss 69 and 70.

(iii) The terms of the reservation make clear that the provisions of the *Atomic Energy Act* were to continue to apply to prescribed substances in the Territory after the commencement of self-government on 1 July 1978, including the specific provision in s 35(4) making the Commonwealth's title to a prescribed substance "subject to any rights granted ... by or under the law of a Territory, with express reference to that substance".

We further agree with his Honour that, whilst s 35(4) may not have been intended as an independent grant to the Territory of power to legislate for the grant of rights in prescribed substances, nonetheless, s 35(4) "removed a barrier" to the operation of a Territory law that otherwise might have arisen, authorising the grant of rights in prescribed substances in that Territory. Yet, as his Honour noted, any Territory law authorising the grant of such rights would have to find support in other legislation, for instance, the general assembly's power to make laws granted by s 6 of the Self-Government Act.

The appellant's argument that s 69(4) of the Self-Government Act had a limiting effect on the Territory's legislative power depends on a finding of repugnancy, and implied repeal by s 69(4), of s 35(4) of the *Atomic Energy Act*, something which, in the case of statutes in affirmative terms is "a very rare thing", since there is "a very strong presumption that the ... legislature did not intend to contradict itself": *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 per Fullagar J at 275-276; *South Australia v Tanner* (1989) 166 CLR 161 at 171. As was submitted on behalf of the third respondent, it does not follow that a section which merely preserves the Commonwealth's retention of property in uranium beyond the grant of self-government makes it repugnant for the Territory to legislate with respect to uranium. Unlike s 70, which altered the source of mineral leases so that they were held from the Commonwealth, s 69(4) did not alter the ownership of prescribed substances. The root of the Commonwealth's title to prescribed substances continued to be s 35 of the *Atomic Energy Act*; and as s 35(4) expressly provided, that title was "subject to any rights granted ... by or under a law of a Territory, with express reference to that substance, but to no other rights". Properly construed, the evident purpose of s 69(4) was to preserve the title of the Commonwealth in prescribed substances, and to ensure there was no implied repeal of s 35 of the *Atomic Energy Act*.

Although the appellant's argument referred to s 57 of the Self-Government Act, we agree with the first and second respondent's submission that s 57 was not needed in order to preserve the operation of s 35(4) of the *Atomic Energy Act*: s 35(4) continued to apply after the commencement of self-government of its own force; nor was it repealed, expressly or by implication, by any provision of the Self-Government Act. As the third respondent contended, nothing in s 57 prevents the continued operation of the *Atomic Energy Act*, or neutralises the intention evinced by s 35(4) or 41(4) of that Act; they continue to have the same operation after self-government; and nothing in s 57 alters the inter-relationship between Commonwealth and Territory laws.

Further, in our view, there is no inconsistency between s 51 of the LAA (read with s 5AA) and s 60 of the *Mining Act*. Section 51 is clearly facultative and, in any event, should be read in the light of s 35(4) of the specific provisions of the *Atomic Energy Act*.

Moreover, as the third respondent argued, it appears that s 51 was intended

to apply only in relation to land that is vested in the Commonwealth by virtue of the LAA, and to be concerned only with facilitating the exploitation of minerals on land vested in the Commonwealth. These lands were vested in the Jabiluka Aboriginal Land Trust under the Land Rights Act, and the prescribed substances are, or were, vested in the Commonwealth by virtue of s 35 of the *Atomic Energy Act*, subject to any rights granted under Territory laws; in any case, the authority given under s 51 is to grant a lease to mine "on" land, connoting, in our view, mining "on" land as such, and not mining on "an interest in land"; and the Commonwealth's special statutory interest in the prescribed substances under the *Atomic Energy Act* is not readily recognisable as a property law interest.

In short, as has been said, s 51 is purely facultative. Section 51(2) indicates that s 51 is not intended to cover the field or to exclude State or Territory laws. It is well established that the Commonwealth may confer upon a Territory the legislative or executive power to affect Commonwealth interests in property: see *Svikart v Stewart* (1994) 181 CLR 548; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

In our opinion, there is no inconsistency between s 175 of the *Mining Act* and any Commonwealth legislation. As the third respondent submitted, s 175 does not, in its terms, purport to destroy or detract from the right of the Commonwealth to maintain or enjoy its property in uranium. To the contrary, its language imposes on the Territory Minister the imperative of acting only on the advice of the Commonwealth Minister; and the exercise of authority under s 175 is consistent only with Commonwealth ownership of prescribed substances.

Commonwealth executive authority

In our opinion, the Commonwealth plainly had executive authority to (a) enter into the Agreement dated 8 February 1982 and (b) to agree to the grant of the Lease. The source of that authority is, of course, s 61 of the Constitution, confirmed specifically in this instance by the provisions of s 35 of the *Atomic Energy Act*, read with s 69(4) of the Self-Government Act.

The Commonwealth's exclusive power to legislate with respect to "places acquired by the Commonwealth for public purposes" (Constitution, s 52(i))

The appellant contends that because the Commonwealth held an estate in fee simple in the prescribed substances, they constituted a "place acquired by the Commonwealth for public purposes" within the meaning of s 52(i); and that since the Commonwealth has the exclusive power to make laws with respect to the place, the *Mining Act* is beyond power.

The appellant accepts that this argument cannot be pursued in this Court unless the High Court decision in *Svikart*, can be distinguished. But, in our view, it is difficult to see any basis for holding that it should be distinguished for present purposes. Brennan J there held (at 566) that s 52(i) did not include places in the Territory. Mason CJ, Deane, Dawson and McHugh JJ held (at 560) that s 52(i) simply confers on the Commonwealth Parliament a legislative power which is exclusive of the States.

In any event, as the first and second respondents submitted, there are other difficulties with the appellant's argument.

First, neither the land in respect of which the Lease was granted, nor any part

A of it, was a s 52(i) "place" at the time of the grant of the Lease on 12 August 1982. By then, the fee simple in part of the land had been granted (on 25 June 1982) to the Jabiluka Aboriginal Land Trust under s 12 of the Land Rights Act, and the fee simple in the residue of the land the subject of the Lease had been transferred to the Territory on 21 July 1982. In each instance, the Commonwealth reserved to itself all right, title and interest in prescribed substances. Even if it could be assumed that the whole of the land had originally been acquired by the Commonwealth for a s 52(i) "public purpose", B it ceased to be a "Commonwealth place" when it ceased to be within the ownership or possession of the Commonwealth before the grant of the Lease: cf *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630 per McHugh, Gummow and Kirby JJ at 675.

Secondly, the appellant's argument assumes that the acquisition or retention by the Commonwealth of an "interest" in "land" which otherwise is owned in fee simple by another, can be characterised as a "Commonwealth place" for C the purposes of s 52(i). But, in that context, a "place" is a geographic area: see *Svikart* at 565; *Allders* at 639, 656. As the third respondent submitted, here there has been a severance of the interest in the uranium from the ownership held by the Aboriginal Land Trust in the lands, and a severance from the other minerals under that land which are owned by the Territory. In no sense has the Commonwealth acquired the land under which the uranium is deposited so as to make the land its place.

D *Executive authority of the Territory Minister*

On behalf of the appellant, it is submitted that a scheme for the division of executive authority is contained within the Self-Government Act, that is: (a) authority which is conferred by regulation on Territory Ministers; and (b) authority which remains with the Commonwealth, to be exercised by the Governor-General, the Federal Minister or the Territory Administrator, acting under the Minister's direction. According to the argument, pars (b) and (f) of E reg 4(5) of the Self-Government Regulations are inconsistent with this scheme since:

- The attempt to confer power on Territory Ministers to "enlarge" their executive authority by reaching agreements with the Commonwealth or a State amounts to an invalid subdivision of the powers conferred upon the Governor-General by ss 35 and 55 of the Self-Government Act.

F It will be recalled that by s 35 it is provided that the Regulations "may specify the matters in respect of which the Ministers of the Territory are to have executive authority".

Section 55 provides, in the usual way, that the Governor-General "may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act". It is said, for the appellant, that the effect of pars (b) and (f) is that they G purport to confer authority, the scope of which is to be determined by the scope of the agreements or arrangements which the Minister enters into; but that such a provision is neither "required" nor "permitted", nor "necessary" nor "convenient" as s 55 requires; so that, the argument runs, pars (b) and (f) "vary or depart from the positive provisions" of the Self-Government Act and "go outside the field of operation which the Act

marks out for itself'': *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410.

- Paragraphs (b) and (f) of reg 4(5) are not the ''specification'' of a ''matter'' within s 35 because (i) the agreements by which the scope of the Minister's authority was not then required to be made publicly available (but were subsequently required — see *Northern Territory (Self-Government) Regulations (Amendment)* 1985 (Cth) — which, however, did not exist at the time the Regulations came into force and thus did not apply at the material time; and (ii) there may be a consequent expansion of the independent legislative authority of the Legislative Assembly.

  Then the appellant says that, even if pars (b) and (f) are valid or should be read down so as to pick up only matters otherwise within the authority of Territory Ministers under reg 4(1), they did not authorise the Agreement dated 8 February 1982; and they did not, alone or in combination with s 175 of the *Mining Act*, confer authority to grant the Lease.

It is further submitted for the appellant that even if the Regulations validly extended to this Agreement, it did not, of itself, impose or confer ''duties, powers, functions or authorities''; rather, the Agreement concerns the manner of performance of duties, powers, functions and authorities imposed or conferred by or under the *Mining Act*.

We have difficulty accepting the appellant's arguments.

As was submitted on behalf of the first and second respondents, the subject-matter of the executive authority conferred by par (f) to negotiate and enter into inter-governmental agreements is, in truth, objectively defined, and is not dependent upon the subjective opinion or intentions of a Territory Minister: the existence of an inter-governmental agreement is an objective fact by reference to which authority is conferred and its scope defined: *Baxter v Ah Way* (1909) 8 CLR 626 per Isaacs and Higgins JJ at 641, 645-646. The definition of the authority is thus objectively stated, even if its execution can depend upon the Minister's intention or action at the time. In our view, there was no sub-delegation of the regulation-making power, and no failure to ''specify'' the relevant ''matters'': see *Booth v Wyvill* (1989) 85 ALR 621 at 630-632.

Although strongly relied upon by the appellant, the decision in *Turner v Owen* (1990) 26 FCR 366 is, we think, distinguishable. There, a regulation purported to prohibit the importation of goods ''which, *in the opinion of the Minister*, are of dangerous character . . .'' (emphasis added). It was held that the informal and subjective nature of this decision-making process went beyond what the empowering statute contemplated. But, as has been said, the present process is structured differently and involves the application of objective criteria.

The appellant also relied in this connection upon the reasoning of Mason J and of Brennan J in *Dainford Ltd v Smith* (1985) 155 CLR 342 at 352, 362. But, in our view, the case is distinguishable as concerned with a different subject, namely, whether a by-law made under Home Unit legislation appropriating the use of some of the common property was invalid if it left that property for later identification. In any event, Mason J and Brennan J were in the minority on this point, the majority (Gibbs CJ, Wilson and Dawson JJ) holding the by-law valid (at 351, 358 and 367).

Nor can we perceive any inconsistency with the scheme of the self-government legislation. On the contrary, to confer upon Territory Ministers authority to negotiate and enter into inter-governmental arrangements is not

A only appropriate, but in some areas necessary for practical reasons: see *R v Duncan; Ex parte Australian Iron & Steel Pty Ltd* (1983) 158 CLR 535 per Mason J at 560; *Gould v Brown* (1998) 193 CLR 346 per Kirby J at 476-479. The conferral of power to give effect to such an arrangement is logical and no more than consequential. It is also to be borne in mind that the Commonwealth retains ultimate control over the situation: by s 9(1) of the Self-Government Act, the Governor-General may disallow any law within six months after the
B Administrator's assent: *Wake v Northern Territory* (1996) 109 NTR 1 at 14. The Governor-General also, of course, has the power to repeal or amend the Regulations. The existence of ultimate control in the Commonwealth is reflected in the course of the dealings between the Territory and the Commonwealth here: the Territory acted on the direction of the Commonwealth, in all relevant respects, including the terms of the Lease; royalty is payable to the Commonwealth, not the Territory (Lease, Fourth Schedule, cl 1(a)) and nothing the Territory has done affects the Commonwealth's
C ownership or title in the uranium.

We agree with the first and second respondents' submissions that par (b) does not require that the function or power exercised by a Territory Minister be itself conferred by an inter-governmental arrangement. It is sufficient that there be an arrangement by or under which duties are imposed on a Territory Minister. The executive authority conferred is not limited to the performance of those duties: the authority is expressed so as to extend to matters "in respect
D of" which duties are imposed; and the phrase "in respect of" has "a very wide meaning": *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 per Brennan, Deane and Gaudron JJ at 47. In our opinion, the imposition by the Agreement of duties on the Territory Minister concerning the exercise of the Minister's powers under the Mining Act is sufficient to bring that exercise of power within par (b) as a matter "in respect of" which the duties are imposed. That Act, being a Territory law, is an "enactment" for this purpose: see Self-Government Act s 4(1); *Acts*
E *Interpretation Act*, s 46(1).

The primary judge said (at 58):

> "The Territory Minister had executive authority (to use the awkward language of reg 4(5)(b)) in respect of matters in respect of which duties, powers or functions were imposed or conferred by or under an enactment of the kind referred to in par (f). The *Mining Act* was such an enactment, because it gave effect to the agreement of February 1982 between the
F Commonwealth and the Territory. Section 175 of that Act imposed duties on the Territory Minister in relation to the grant of a lease of prescribed substances. The Jabiluka Project Lease was a Lease of this description. Thus the execution of the Jabiluka Project Lease was a matter in respect of which duties and functions were imposed or conferred by a Territory enactment of the kind referred to in reg 4(5)(f)."

We agree.

G It is further contended for the appellant that the Regulations are inconsistent with s 49A(1) of the *Acts Interpretation Act*, which provides as follows:

> "49A(1) Where an Act authorizes ... provision to be made for or in relation to any matter by regulations, the regulations may, unless the contrary intention appears, make provision for or in relation to that matter by applying, adopting or incorporating, with or without modification —

(a) the provisions of any Act, or regulations, as in force at a particular time or as in force from time to time; or
(b) any matter contained in any other instrument or writing as in force or existing at the time when the . . . regulations take effect;

but, unless the contrary intention appears, regulations shall not, except as provided by this sub-section, make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.''

On behalf of the appellant it is submitted that pars (b) and (f) purport to confer authority by reference to the contents of such agreements or arrangements as may exist from time to time in the future, but do not exist when the Regulations take effect, yet the empowering act contains no express provision to allow this.

We cannot accept the argument.

The evident object of operation of s 49A is to ensure that, as a general rule, regulations may not be so cast as to incorporate another instrument as in force from time to time; that is, regulations may not depend upon the ambulatory content of another instrument: *Minister for Primary Industry v Davey* (1993) 47 FCR 151 per Black CJ and Gummow J at 157. But, as the first and second respondents submitted, pars (b) and (f) do not, either as a matter of form or of substance, apply, adopt or incorporate anything contained in an inter-governmental agreement or arrangement: the ''matter'' that is the subject of pars (b) and (f) is one that is specified in those paragraphs themselves, that is, the conferring of executive authority in respect of all agreements of the kind then identified that may be made.

Orders

Appeal dismissed with costs.

Orders accordingly

Solicitor for the appellant: *Bruce Donald.*

Solicitor for the first and second respondents: Australian Government Solicitor.

Solicitors for the third respondent: *Corrs Chambers Westgarth.*

Solicitors for the fourth respondent: *Freehill Hollingdale & Page.*

DAVID MACLEAN

[SUPREME COURT OF THE NORTHERN TERRITORY]

MARGARULA v MINISTER FOR RESOURCE DEVELOPMENT and Another

Thomas J

21-23 July, 16 October 1998

Administrative Law — Judicial review — At common law — Ministerial authorisation to "carry out mining on a mine" — Application for authorisation to commence construction works — Whether minister has discretion to refuse to grant authorisation where applicant holds existing mining lease — Whether minister has power to authorise separate stages of mining project — Whether definition of the "environment" correctly construed — Whether minister wrongly ignored the cultural and spiritual environment — Whether minister failed to take into account all relevant considerations — Evidence that access road cuts across sacred site — Whether all sites of anthropological and cultural significance identified — Whether beliefs of traditional owners considered — Uranium Mining (Environment Control) Act 1979 (NT), s 13, — Mining Act 1980 (NT), s 60.

The parties tendered an agreed statement of facts, the contents of which are set out in full in the judgment.

The plaintiff was the senior traditional owner of a portion of land described as "the Jabiluka land", previously transferred in fee simple by the Commonwealth to the Jabiluka Aboriginal Land Trust. The trust's interest in the land was subject to express reservation to the Commonwealth and the Northern Territory of all mineral rights.

The second defendant, Energy Resources of Australia Ltd (ERA), was the operator of the Ranger uranium mine. ERA planned to transport uranium ore from the Jabiluka project, to milling facilities at the Ranger project. ERA procured the assignment of the mineral lease over a parcel of land which included the Jabiluka land. That lease was expressed to be for the purposes of mining uranium ore, and for "all purposes necessary effectually to carry on mining operations".

However, the rights to commence mining operations at the Jabiluka project could not be assigned without the consent of the Northern Land Council. The Northern Land Council subsequently consented to the assignment to ERA of operating rights at the Jabiluka project, on condition that any milling of Jabiluka ore at the Ranger facilities required the Northern Land Council's consent, according to the directions from the traditional owners of the Ranger land. The traditional owners, including the plaintiff, refused to provide that consent.

ERA sought the authorisation of the Minister for Resource Development (the Minister) to construct a security fence around a portal area to the Jabiluka site, and to upgrade and extend the access track to the portal area. In April 1998, ERA made a further application to construct the portal, access decline and associated infrastructure for the Jabiluka project. Such applications were brought and considered under s 13 of the *Uranium Mining (Environment Control) Act* 1979 (NT), which is extracted in the judgment.

Ministerial authorisation was ultimately granted, without permission to

commence extraction or milling activities, on 2 June 1998. The Court dismissed the plaintiff's application for an interlocutory injunction to restrain ERA from commencing work pursuant to the authorisation.

The plaintiff sought orders in the nature of certiorari and prohibition, and declaratory relief against the Minister. The plaintiff also sought to injunct ERA from acting pursuant to the Minister's authorisation. The bases for the plaintiff's application were that the Minister:

(a) had misdirected himself in finding that he had no discretion to refuse to grant ERA's authorisation, in circumstances where ERA already held a mineral lease;

(b) had wrongly construed the Act as enabling him to grant authorisation to only one stage of the mining project;

(c) had wrongly construed the meaning of the word "environment" in s 13 of the *Uranium Mining (Environment Control) Act* as not including the cultural and spiritual environment of the lease area and its surroundings; and

(d) failed to take into account relevant considerations in his decision to grant the authorisation, and in the conditions imposed upon the issuing of the authorisation.

Held: (1) Apart from the exception provided for in s 13(3) of the *Uranium Mining (Environment Control) Act*, the Minister cannot refuse to grant an authorisation to an applicant to carry out mining on a mine, if the effect of the refusal would be to prevent mining otherwise authorised by a law in force in the Northern Territory.

(2) There is no basis for any distinction between an "entitlement" to mine and "authority" to mine for the purposes of s 13 of the *Uranium Mining (Environment Control) Act*. Where an Act or agreement confers an authorisation on a person to do an act or thing which he or she is otherwise not entitled to do, the Act or agreement entitles that person to do that Act or thing.

Ex parte Johnson; Re MacMillan (1947) 47 SR (NSW) 16, followed.

(3) The reference in s 13 of the *Uranium Mining (Environment Control) Act* to "carry out mining on a mine" means any one of the activities which constitute mining. The Minister is entitled to grant authorisation under s 13 of the Act in stages rather than just on a "whole project basis".

(4) Section 18 of the *Uranium Mining (Environment Control) Act* sets out exhaustively the matters to which the Minister shall have regard including the sources of any advice to be given in relation to any application for authorisation under s 13 of the Act.

(5) Before a decision may be quashed by certiorari, it must be shown that the Minister fell into an error of law which caused him to ignore relevant material or to rely upon irrelevant material.

Craig v South Australia (1995) 184 CLR 163, applied.

APPLICATION

This was an application for an order for certiorari, declaratory and injunctive relief in relation to the authorisation of the commencement of construction and associated infrastructure works at the Jabiluka mining project.

W T Houghton QC and *D S Mortimer*, for the plaintiff.

R J Webb, for the first defendant.

J H Karkar QC, *N Mukhtar* and *R S Hay*, for the second defendant.

Cur adv vult

16 October 1998

THOMAS J. This is an application by the plaintiff to the Court for an order of certiorari to quash the decision of the first defendant who made a decision on

2 June 1998 authorising the second defendant to carry out the construction of a portal and access decline at the Jabiluka project together with associated infrastructure. Expressed more fully, the plaintiff seeks:

"1.1 ... prerogative and declaratory relief against the first defendant, and injunctive relief against the second defendant. The plaintiff's claim arises out of the granting by the first defendant on 2 June 1998 of an authorisation to the second defendant to carry out the construction of a portal and access decline at the Jabiluka project, together with associated infrastructure. These works constitute the first stage of construction of the uranium mine at the Jabiluka project.

1.2 The plaintiff challenges the decision of the first defendant to grant the authorisation on the following bases:

(a) That the Minister seriously misdirected himself at law in wrongly construing s 13(4) of the *Uranium Mining (Environment Control) Act* 1979 (NT) as removing his discretion under s 13(2) to *refuse* to grant an authorisation in circumstances where the applicant for an authorisation holds a mineral lease which authorises the applicant to carry out 'mining' as that word is defined in the lease and in the *Mining Act* 1980 (NT).

(b) That the Minister wrongly construed s 13(2) as enabling him to grant an authorisation to only one stage of a project for the mining of uranium, rather than as a power to grant an authorisation on a 'whole project basis', subject to the alterations to the authorisation pursuant to s 15 of the *Uranium Mining (Environment Control) Act*.

(c) That the Minister wrongly construed the meaning of the word 'environment' in s 13 of the *Uranium Mining (Environment Control) Act* as not including the cultural and spiritual environment of the lease area and its surroundings.

(d) That the Minister failed to take into account relevant considerations in:

(i) his decision to grant the authorisation; alternatively

(ii) in the conditions which he imposed upon issuing the authorisation."

Details of the relief sought by the plaintiff, as set out in the amended statement of claim dated 16 June 1998, is as follows:

"AS AGAINST THE FIRST DEFENDANT:

A. An order in the nature of certiorari against the first defendant, to quash his decision made 2 June 1998 pursuant to s 13 of the *Uranium Mining (Environment Control) Act* 1979 to grant an authorisation to ERA.

B. A declaration that s 13(4) of the *Uranium Mining (Environment Control) Act* 1979 does not remove the Minister's discretion to refuse an authorisation under s 13(2) in every circumstance where an applicant holds a mineral lease which authorises the applicant to carry out mining.

C. A declaration that the lawful exercise of the power conferred by s 13 of the *Uranium Mining (Environment Control) Act* 1979 in relation to uranium mining within the Jabiluka mineral lease:

(a) is required to be exercised once only, pursuant to an application dealing with the whole of a project for the mining of uranium; and

(c) cannot be exercised in stages upon separate applications by an intending miner.

D. An order in the nature of prohibition against the first defendant, to restrain him from granting any further authorisation pursuant to s 13 of the *Uranium Mining (Environment Control) Act* 1979 until the submission by ERA of an application for authorisation pursuant to s 13 of the *Uranium Mining (Environment Control) Act* 1979 dealing with the whole of the proposed project for the mining of uranium in Jabiluka mineral lease area.

E. Costs.

F. Such further or other order as the courts deems fit.

AS AGAINST THE SECOND DEFENDANT:

A. An interlocutory and permanent injunction restraining it from acting upon the s 13 authorisation dated 2 June 1998.

B. Costs.

C. Such further or other order as the Court sees fit.''

At the outset of the proceedings the parties submitted an agreed statement of facts dated 20 July 1998. This document was tendered as exhibit P3 which, omitting the formal parts and the preamble, reads as follows:

''1. By a deed made on 25 June 1982 under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (NT), the Governor-General granted to the Jabiluka Aboriginal Land Trust an estate in fee simple in an area of land (the Jabiluka land) in the Northern Territory identified as portion 2253. The grant was subject to an express reservation to the Commonwealth and the Northern Territory of the rights to any mineral on or below the land [see attachment 1].

2. The Jabiluka land is held by the Jabiluka Aboriginal Land Trust for the benefit of groups of Aboriginals entitled by Aboriginal tradition to the use and occupation of the Jabiluka land.

3. Yvonne Margarula is a member of the Mirrar people, who are the 'traditional Aboriginal owners' of the Jabiluka land, as defined in the *Aboriginal Land Rights (Northern Territory) Act*. She is identified by the Northern Land Council as the senior traditional owner of the Jabiluka land.

4. Section 43 of the *Aboriginal Land Rights (Northern Territory) Act* (as in force prior to 5 June 1987) permits a land council to agree to give its consent to the granting of a mining interest in respect of Aboriginal land on terms and conditions. By an agreement made on 21 July 1982 (the section 43 agreement) the Northern Land Council consented to the grant of a mineral lease to Pancontinental Mining Ltd and Getty Oil Development Co Ltd over an area of land which included the Jabiluka land for the purpose of mining uranium ore [see attachment 2].

5.1 On 12 August 1982, the Northern Territory granted to Pancontinental and Getty a mineral lease No MLN1 of about 7275 hectares of land (the Jabiluka project area) and all deposits of uranium ore and prescribed substances in or under the land. The lease was for an initial term of 42 years with an option to renew for a further 10 years, and expressed to be for the purposes of mining uranium ore and other

prescribed substances, and for 'all purposes necessary effectually to carry on mining operations' [see attachment 3].

5.2 The mineral lease is expressed to be granted pursuant to the *Mining Act* of the Northern Territory. Section 60 of the *Mining Act* (which came into operation on 1 July 1982) empowers the Territory Minister to grant a mineral lease for a period not exceeding 25 years. However, Pancontinental and Getty had applied for a special mineral lease under the (subsequently repealed) *Mining Ordinance* (NT), which could be granted for a term of 42 years [see attachment 3A]. The transitional provisions in s 191(15) and (15B) of the *Mining Act* enabled the Minister under s 60 to grant a mineral lease for a term not exceeding the 42-year term for which the special mineral lease could have been granted.

5.3 In accordance with s 175 of the *Mining Act*, the mineral lease was granted by the Territory Minister on the advice of the Commonwealth Minister administering the *Atomic Energy Act* 1953 (Cth) [see attachment 3B].

5.4 In *Margarula v Minister for Resources and Energy* (unreported, Federal Court, NG 448 of 1997, 11 February 1998) Justice Sackville held that the mineral lease had been validly granted under s 60 of the *Mining Act*, and in accordance with the advice of the Commonwealth minister [see attachment 3C]. The plaintiff appealed that decision. On 30 June 1998, the Full Court of the Federal Court reserved its judgment on the appeal.

6. The land which comprises the Jabiluka project area covers entirely the Jabiluka land, with an additional northern portion (Northern Territory portion 2283) which is vested in the Northern Territory [see attachment 4].

7. No mining operations were undertaken by Pancontinental and Getty in the Jabiluka project area, although in July 1979 they had prepared an environmental impact statement as required by the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) which described the proposed design and operation of a uranium mine and treatment facilities on the Jabiluka project area. The principal features of their proposal included an underground mine, and an ore treatment plant on the site.

8. On 6 August 1991, Energy Resources of Australia Ltd (ERA) purchased the mineral lease for the Jabiluka project area and related assets from Pancontinental and others. ERA remains the holder of the mineral lease. ERA also operates the Ranger uranium mine, which is an open cut mine with established facilities for the milling, treatment and processing of uranium ore. The Mirrar are also the traditional Aboriginal owners of the land on which the Ranger uranium mine is conducted.

9. Clause 27 of the section 43 agreement allowed Pancontinental and Getty to assign their rights under the agreement, but stated that Pancontinental could not assign its rights as operator of the Jabiluka project without the consent of the Northern Land Council. On 21 August 1991, the lessees assigned all of their right, title and interest under the section 43 agreement to ERA, except for Pancontinental's rights as operator of the project [see attachment 5]. On the same date, ERA made a deed poll in favour of the Northern Land Council, undertaking to assume and comply with all of the obligations under the section 43 agreement [see attachment 6].

10. By an agreement made between the Northern Land Council and

ERA on 24 December 1991, the Northern Land Council consented to an assignment to ERA of Pancontinental's rights as operator of the project on the condition that in order for Jabiluka uranium ore to be milled on the Ranger project area, the Northern Land Council had to give its consent according to directions from the traditional Aboriginal owners of the Ranger project area [see attachment 7].

11. In 1992, ERA completed a feasibility study into uranium mining at Jabiluka and developed its own mining strategy for the area. In essence, ERA proposed a mining operation which took advantage of existing Ranger infrastructure, and on a reduced scale to the project previously planned by Pancontinental. ERA proposed that no processing of ore would take place at the Jabiluka mine site. All ore would be trucked from Jabiluka by road train for processing at the existing Ranger facilities.

12. On 14 May 1996, ERA was designated as the proponent of the Jabiluka project under the *Environment Protection (Impact of Proposals) Act* [see attachment 8].

13. Under the *Environmental Protection (Impact of Proposals) Act* and the administrative procedures made under that Act, a draft environmental impact statement was released for public examination on 17 October 1996 and to which public submissions were invited by 31 January 1997. Eighty-five public submissions were received. The draft environmental impact statement is a substantial document, and ERA prepared an executive summary of its contents [see attachment 9].

14. After a period of public comment, ERA submitted a supplement to the draft environmental impact statement to the Federal and Territory Government on 17 June 1997. This supplement, together with the draft environmental impact statement, constituted the final environmental impact statement. ERA prepared an overview of the supplement [see attachment 10].

15. The environmental impact statement contained, amongst other things, two proposed alternative arrangements for the milling of the uranium ore extracted from the Jabiluka mine. The first option (and ERA's preferred option) is to truck the ore from Jabiluka to the existing Ranger project area for milling at the Ranger processing facilities. This is known as the Ranger mill option. The second option, akin to Pancontinental's original proposal, is to construct new processing facilities within the Jabiluka mineral lease and to mill the ore at Jabiluka. This is known as the Jabiluka mill option.

16. In a letter dated 22 August 1997, the Federal Minister for the Environment, Senator Robert Hill, stated to the Federal Minister for Resources and Energy, Senator Warwick Parer, amongst other things, his views and recommendations after his department had completed an assessment of the environmental impact statement [see attachment 11].

17. In August 1997, ERA submitted an application under cl 3.2 of the 1982 agreement for a change in the concept of design and operation of the Jabiluka project [attachment 12]. The change in concept proposal was ultimately submitted to a committee convened in accordance with cl 3.2 of the section 43 agreement for consideration.

18. In a letter dated 8 October 1997 the Minister for Resources and Energy, Senator Warwick Parer, advised ERA of his views concerning the

outcome of ERA's designation as the proponent of the Jabiluka project, together with attachments [see attachment 13].

19. By letter dated 24 October 1997 the Northern Land Council informed ERA that the traditional owners refused to give consent to Jabiluka uranium ore being milled at Ranger. The traditional owners who instructed the Northern Land Council to refuse consent were the plaintiff and the Mirrar Gundjehmi people of whom she is the senior traditional owner [see attachment 14].

20. The plaintiff has deposed on oath in an affidavit in these proceedings, stating: 'I and my people withheld our consent to milling of Jabiluka ore at Ranger last year. Neither I nor my people have or intend in the future to change that decision.'

21. By letter dated 11 March 1998 ERA applied to the first defendant, the Minister for Resource Development for the Northern Territory, for authorisation under s 13 of the *Uranium Mining (Environment Control) Act* to construct a security fence around the Jabiluka portal area [see attachment 15].

22. By letter dated 19 March 1998, ERA applied to the Minister for authorisation under s 13 of the *Uranium Mining (Environment Control) Act* to construct a section of new access track between the Oenpelli Road and the portal site to avoid the restricted area associated with the Boyweg site as advised by the Northern Land Council. Permission was also sought to upgrade parts of the access track [see attachment 16].

23. On 27 March 1998 the Minister authorised the construction of the security fence and the relocation and upgrade of the access road on certain conditions [see attachment 17]. By letter dated 28 April 1998, the Northern Land Council stated its concerns about the authorisation to construct a security fence and to relocate and upgrade the access road [see attachment 18].

24. By letter dated 22 April 1998, the Federal Minister for Resources and Energy designated ERA as a proponent in relation to the Jabiluka mill alternative for the purposes of the *Environmental Protection (Impact of Proposals) Act* [see attachment 19]. By letter dated 27 April 1998 the Minister for the Environment advised ERA that a public environment report would be required in relation to the Jabiluka mill alternative [see attachment 20]. A public environment report is a step under the administrative procedures of the *Environmental Protection (Impact of Proposals) Act*. The Department of the Environment publicly invited interested persons and organisations to make written submissions by 1 June 1998 on the draft guidelines prepared by Environment Australia and the Northern Territory Department of Lands, Planning and Environment [see attachment 21]. These guidelines outlined the issues to be addressed in the public environment report.

25. On 23 April 1998, ERA applied to the Northern Territory Minister for Resource Development for an authorisation under s 13 of the *Uranium Mining (Environment Control) Act* 1979 to construct a portal and access decline and associated infrastructure at the Jabiluka project. The application does not seek authorisation to commence the extraction of uranium ore or its milling or other treatment [see attachment 22].

26. By letter from the Northern Land Council to the Minister dated

1 May 1998, the Northern Land Council stated its objections to the Minister granting an authorisation to ERA [see attachment 23]. By letter of 5 May 1998, the Acting Minister for Resource Development responded to the Northern Land Council's letter [see attachment 24].

27.1 Mining at the Ranger uranium mine has taken place with authorisations being granted under s 13 of the *Uranium Mining (Environment Control) Act* on a staged basis, as well as variations under s 15 of that Act. Between May 1979 and August 1982, ERA sought and obtained approvals under the *Uranium Mining (Environment Control) Act*, some under s 13 and some under s 15. The majority were s 13 approvals for a range of specific activities concerning the development of the mine, for example, siteworks, the retention pond, the tailings dam and ore treatment facilities. There were also approvals for variations arising from works for which s 13 authorisations had been granted.

27.2 In 1982, all of those approvals, whether under s 13 or s 15, were consolidated into a single s 13 authorisation designated as A/82/3. At that stage there was a complete mining project underway. From 1982 to 1998 ERA made applications under the *Uranium Mining (Environment Control) Act*. As a matter of form, there being no special application form, the applications sought approval under the Act. The approvals have been expressed by the Minister as being granted under s 15. Taking into account the number of variations, the total number of authorisations and variations was at least 100.

28. On 7 May 1998, by a majority, the committee that was convened under cl 3.2 of the section 43 agreement approved each of the changes in concept of design and operation which ERA had submitted [see attachment 25]. The approval was subject to certain conditions which included ERA entering into a deed poll in favour of the Northern Land Council as attached to the determination. On 26 May 1998, ERA signed the deed poll. Under the deed poll, ERA agreed to realign the access road to a route acceptable to the Northern Land Council in order to avoid the Boiwek-Almudj complex of sacred sites as advised by the Northern Land Council [see attachment 26].

29. Under cover of a facsimile transmission dated 21 May 1998, the Northern Land Council stated its views to the secretary of the Department of Mines and Energy about ERA's application for authorisation to construct a portal and decline [see attachment 27].

30. On Friday, 22 May 1998, the plaintiff sought and obtained an ex parte interim injunction from Justice Marshall of the Federal Court of Australia in Melbourne restraining the Minister from granting the s 13 authorisation for the construction of the portal and decline and associated infrastructure [see attachment 28].

31. By letter dated 26 May 1998, the supervising scientist advised the Director of Mines, Department of Mines and Energy, that he had no objection to ERA's authorisation being approved subject to certain stated conditions [see attachment 29].

32. On 27 May 1998, the defendants applied to discharge the injunction and to transfer the proceedings to this Court under the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NT). On Thursday, 28 May 1998, Justice

Marshall transferred the proceedings to this Court, and extended the injunction until 5 pm on Monday, 1 June 1998 [see attachment 30].

33. On Monday, 1 June 1998, the parties consented to orders of this Court to dissolve the injunction upon an undertaking by ERA that if the authorisation was granted it would give the plaintiff seven business days notice of its intention to commence work under the authorisation [see attachment 31].

34. On 2 June 1998, the secretary of the Department of Mines and Energy provided to the Minister a memorandum, together with attachments, concerning ERA's application for an authorisation to construct the portal and access decline and association infrastructure [see attachment 32].

35. On 2 June 1998, the first defendant informed Senator Hill, the Federal Minister to the Environment, and Senator Warwick Parer, Minister for Resources and Energy of his intention to approve ERA's application [see attachment 33].

36. On 2 June 1998, the first defendant granted an authorisation to ERA to undertake the works for the portal and access decline and associated infrastructure [see attachment 34]. ERA cannot extract or mill uranium without such activities being authorised under s 13 of the *Uranium Mining (Environment Control) Act* by the Minister.

37. On 2 June 1998, ERA gave the plaintiff such notice of its intention to commence work in accordance with its undertaking [see attachment 35].

38. Between late May 1998 and late June 1998, there was correspondence between the Northern Land Council and ERA concerning, amongst other things, the relocation of the access road [see attachment 36].

39. On 10 June 1998, the plaintiff applied for an interlocutory injunction restraining ERA from commencing work pursuant to the authorisation. The application was heard by Mr Justice Bailey on Friday, 12 June 1998. His Honour dismissed the application and ordered the plaintiff to pay ERA's costs. The Minister made no application for costs [see attachment 37]."

I now turn to deal with each of the plaintiff's challenges:

(a) That the Minister seriously misdirected himself at law in wrongly construing s 13(4) of the Uranium Mining (Environment Control) Act 1979 as removing his discretion under s 13(2) to refuse to grant an authorisation in circumstances where the applicant for an authorisation holds a mineral lease which authorises the applicant to carry out "mining" as that word is defined in the lease and in the Mining Act 1980 (NT).

Section 13 of the *Uranium Mining (Environment Control) Act* provides as follows:

"(1) The owner or manager of a mine, or a person otherwise entitled under a law in force in the Territory to carry out mining on a mine, may apply in writing to the Minister for an authorization.

(2) Subject to this Act, the Minister may by notice in writing served on the applicant for the authorization determine an application under subsection (1) by —

(a) granting, either conditionally or unconditionally; or

(b) refusing to grant;

the authorization only if he is satisfied that the grant of the authorization, or the refusal to grant the authorization, as the case may be, will assist in protecting the environment from harmful effects of mining.

(3) The Minister may refuse to determine an application under subsection (1) unless plans, reports, specifications, designs, management plans or other documents specified by him to the person who made the application are provided to him.

(4) The Minister shall not refuse to grant an authorization if the effect of the refusal would be to prevent mining authorized by or under another law in force in the Territory unless the refusal is a refusal referred to in subsection (3).''

The plain meaning of the words in s 13(4) is that the Minister cannot refuse to grant an authorisation if the effect of such refusal would be to prevent mining otherwise authorised. The only exception is as provided in s 13(3). The discretion given to the Minister under s 13(2) is expressly made ''subject to this Act'' which includes s 13(4). The provisions of s 62B(2)(f) of the *Interpretation Act* 1980 (NT) allows the Court to consider the Second Reading Speech made by the Minister to the Legislative Assembly. In the Second Reading Speech (at 820-821 of the Parliamentary Record), the Minister said:

> ''Basic to the bill is the requirement that no mining may take place in the region without authorisation from the minister who may impose wide-ranging and rigid conditions upon the grant of any authorisation. . . .
>
> However, I would point out that the Minister may not act to refuse to permit mining or to permit mining to continue if it is otherwise authorised. In other words, although he may attach onerous conditions to the grant of an authorisation to mine, the bill cannot be used to prevent uranium mining altogether.''

In the matter before the Court, mining on the Jabiluka project area is authorised under the mineral lease granted under the *Mining Act*, s 60. I reject the argument by counsel for the plaintiff, Mr Houghton QC, that there is a distinction between ''entitlement'' to mine and ''authority'' to mine. The mineral lease (attachment 3 in exhibit P4) grants a lease over the uranium deposit expressly for the purpose of mining uranium ''and for all purposes necessary effectually to carry on such mining operations thereon or therein including'': a list of activities relating to mining operations.

In any event, where an Act or agreement confers an authorisation on a person to do an act or thing which he or she is otherwise not entitled to do, the Act or agreement entitles that person to do that act or thing: *Ex parte Johnson; Re MacMillan* (1947) 47 SR (NSW) 16 at 18 per Jordan CJ; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 257.

There is no conflict between the provisions of s 60 of the *Mining Act* and s 13 of the *Uranium Mining (Environment Control) Act*. Accordingly, the principle as expressed in the maxim and advanced by the plaintiff ''generalia specialibus non derogant'' does not apply.

I do not accept the argument by counsel for the plaintiff that the Minister misdirected himself in law as to interpretation of s 13(4) of the *Uranium Mining (Environment Control) Act*.

The second ground for challenging the Minister's decision is:

(b) That the Minister wrongly construed s 13(2) as enabling him to grant an authorisation to only one stage of a project for the mining of uranium,

rather than as a power to grant an authorisation on a "whole project basis", subject to the alterations to the authorisation pursuant to s 15 of the Uranium Mining (Environment Control) Act.

I do not accept this submission. The definition of "mine" in s 2 of the *Uranium Mining (Environment Control) Act* commences with the words "means a place within the region where any operation has been, is being or will be carried on ...". Section 13(1) of the *Uranium Mining (Environment Control) Act* would enable the owner of a mine already in existence to apply for further authorisation. The definition of "mining" under s 2 of the *Uranium Mining (Environment Control) Act* sets out the stages of a mining project. Section 13(1) refers to "carry out mining on a mine". This must mean any one of the activities which constitute mining. The persons referred to in s 13(1) must be able to seek authorisation for one or more stages of a project for the mining of uranium. Support for the construction of the Act as enabling the grant of an authorisation in stages is also contained in ss 8 and 9 of the *Uranium Mining (Environment Control) Act.*

In the Second Reading Speech to the Assembly, the Minister states (at 821) when speaking about the need for the legislation: "... in order that the Northern Territory government may be in a position to regulate and control work on the Ranger project." This necessarily implies an ongoing role by the government through the appropriate Minister and the concommitant ability to grant an authorisation to only one stage of the project rather than restricting the power to grant an authorisation on a "whole project basis". The plaintiff's argument that the Minister can modify or revoke authorisations pursuant to s 15 of the *Uranium Mining (Environment Control) Act* does not persuade me that it follows there can be only one authorisation "on a whole project basis". I agree with the observation made by Bailey J on 12 June 1998 in this matter, regarding the plaintiff's application for an interlocutory injunction (transcript at 62):

> "In my view it would be absurd to think that the Minister was required to give a single authorisation covering matters stretching potentially for years into the future, and then rely on s 15 alterations to update matters on an ad hoc basis."

The plaintiff places reliance on the fact that the word "authorisation" appears in the singular in the *Uranium Mining (Environment Control) Act.* Section 24(b) of the *Interpretation Act* 1980 (NT) states:

> "In an Act —
>
> ...
>
> (b) words in the singular shall include the plural and words in the plural shall include the singular."

Other relevant provisions of the *Interpretation Act* in support of the construction that the Minister may issue an authorisation for one or more stages of a project for the mining of uranium are contained in ss 41(1) and 42.

Attachment 32 in exhibit P4, being a memorandum from the secretary, Department of Mines and Energy to the Minister for Resource Development dated 2 June 1998 states, inter alia (at 4):

> "The practice of granting a number of authorisations in the lead up to full scale mining activities provides for the orderly sequential development of mining operations, enables the application of best practicable technology,

and ensures that an appropriate management response is made to changing circumstances over time . . . .''

I consider this to be a correct interpretation of the intent of the legislation and the Minister is entitled to grant authorisation in stages rather than just on a ''whole project basis''.

The third basis for challenge is:

(c) That the Minister wrongly construed the meaning of the word ''environment'' in s 13 of the Uranium Mining (Environment Control) Act as not including the cultural and spiritual environment of the lease area and its surroundings.

Section 18 of the *Uranium Mining (Environment Control) Act* sets out the matters that the Minister is to take into account in considering whether to grant an authorisation. Section 18 provides as follows:

> ''(1) In considering whether to grant an authorization or exercise any other power or perform any duty under this Act, the Minister shall have regard to —
>
> (a) any prescribed agreement as that agreement relates to the matter in respect of which the authorization is sought;
> (b) any advice furnished under sub-section (2) or (3);
> (c) the terms of any Special Mineral Lease issued under the *Mining Act* applying to the mine; and
> (d) where the application or authorization relates to the storage or use of explosives —
>
> (i) within the Ranger project area — the location of Mount Brockman and any Aboriginal sacred sites on or near that place; and
> (ii) in every case — the location of any tailings dam, retention pond or evaporation pond.
>
> (2) The Minister may, if he thinks fit, request —
>
> (a) the Minister of State for the Commonwealth for the time being administering section 41 of the *Atomic Energy Act* 1953 of the Commonwealth;
> (b) the parties to any prescribed agreement relating to a mine in respect of which it is proposed to grant, alter or revoke an authorization; and
> (c) the supervising scientist within the meaning of the *Environment Protection (Alligator Rivers Region) Act* 1978 of the Commonwealth;
>
> to furnish him with advice.
>
> (3) The Minister may, if he thinks fit, request the person applying for an authorization or, where it is proposed to alter or revoke an authorization, the person to whom the authorization was granted to furnish him with advice within the time specified in the request.''

The plaintiff has not demonstrated that the Minister failed to take these matters into account. The plaintiff complains that the Minister confined his consideration to the ''physical environment'' and ignored the cultural and spiritual environment of the lease area and its surroundings.

This assertion by the plaintiff is not supported on the evidence. An examination of the memorandum to the Minister (attachment 32) and the authorisation (attachment 34) do not support the interpretation of the Minister's

considerations as stated by the plaintiff. Schedule 4 to the authorisation (attachment 34 at 5-6) reads as follows:

"SCHEDULE 4 ENVIRONMENTAL STUDIES

4.1 in order to protect the environment, the operator of the mine shall ensure that the following studies are approved by the Director and are completed to the greatest extent practicable before the commencement of any works that might compromise the integrity of the data;

4.1.1 flora and fauna surveys: including detailed surveys of the proposed haul road route and mine site with a focus on threatened species and species covered by the China-Australia Migratory Bird Agreement and the Japan-Australia Migratory Bird Agreement;

4.1.2 *cultural heritage: including an assessment of current values of the site*;

4.1.3 archaeology and European heritage: including detailed surveys for the proposed haul road route and mine site and confirmation of existing information for the surrounding area;

4.1.4 soil and geotechnical: including an assessment of the proposed haul road route and mine site; and

4.1.5 hydrogeology: including determination of the nature of connection between shallow and deep aquifers: potential impacts on soaks and sacred sites." (Emphasis mine.)

Pursuant to s 18(2) of the *Uranium Mining (Environment Control) Act* the Minister requested the Northern Land Council to furnish him with advice in respect of the second defendant's application for authorisation. The Northern Land Council acts in the interests of Aboriginal traditional owners. The functions of the Northern Land Council in this respect, are set out in s 23 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). The Northern Land Council furnished advice by correspondence dated 1 May 1998 and 21 May 1998. Copies of these letters are attachments 23 and 27 respectively in exhibit P4. There is no reference in these documents to any advice about the impact of the proposed works on the cultural and spiritual environments of the lease area and its surroundings.

I am satisfied that the Minister complied with the matters to which he is required to have regard under the provisions of s 18 of the *Uranium Mining (Environment Control) Act*. In addition 4.1.2 of the schedule to the authorisation (attachment 34 to exhibit P4) makes it clear that there are conditions relating to the "cultural heritage" to be complied with by the operator of the mine in addition to the conditions relating to the physical environment.

The plaintiff has not demonstrated any basis for her claim that the Minister acted under an error of law and accordingly there is no basis for the Court to intervene.

The fourth ground is:

(d) That the Minister failed to take into account relevant considerations in:

(i) his decision to grant the authorisation; alternatively

(ii) in the conditions which he imposed upon issuing the authorisation.

The principles to be applied in considering whether the ground of failure to take into account a relevant consideration, and the related ground of taking into account irrelevant considerations, has been made out are set out in *Minister for*

Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 at 39-42 per Mason J.

This involves the principle that the "ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision". The plaintiff in her amended statement of claim alleges the Minister failed to take into account the three considerations as set out in particulars (a), (b) and (c) in par 32 of the amended statement of claim which are as follows:

> "32. Alternatively to par 31(c), if the first defendant did not err in his construction of the meaning of the word 'environment', he failed to take into account relevant considerations in:
>
> (a) his decision to grant the authorisation; alternatively
> (b) in the conditions which he imposed upon issuing the authorisation.
>
> Particulars of relevant considerations
>
> (a) Failing to take account of evidence that the route of the proposed access road cuts across a scared site (the Boyweg site) and that there was no agreement between ERA and traditional owners or the Northern Land Council on an alternative route;
> (b) Failing to take consider (sic) whether all sites of possible anthropological and cultural significance had been identified in the area before the area was disturbed and baseline data on these sites could no longer be collected;
> (c) Failing to consider the traditional owners' beliefs about the consequences, for them and for others, which flow from the disturbance of the Boyweg site."

I deal with each of these particulars as follows:

(a) *Failing to take account of evidence that the route of the proposed access road cuts across a sacred site (the Boyweg site) and that there was no agreement between ERA and traditional owners or the Northern Land Council on an alternative route.*

With regard to this matter the Minister was given advice in a memorandum dated 2 June 1998 from the secretary, Department of Mines and Energy (attachment 32 in exhibit P4). At attachment L to that memorandum, the secretary advised, in relation to par 3.6 of the Northern Land Council's comments, that: "This matter has now been settled and ERA is not required to realign the access track."

This advice was correct. Evidence in support of this advice being correct is contained in the affidavit of Mr Gareth Lewis an anthropologist with the Northern Land Council sworn 20 July 1998 (par 19, exhibit P6) regarding the position prior to Mr Lewis' second meeting with the traditional owners, on 2 June 1998:

> "19. On the first occasion (29 April 1998), the instructions given to me for the access track not to be realigned on the basis that the existing track had already disturbed the area, and that realignment would only cause further damage to country."

Further evidence that this advice to the Minister was correct, is contained in letter dated 19 June 1998 from Mr Brett Midena, principal legal adviser to the

Northern Land Council, to solicitors for the second defendant (attachment 36 in exhibit P4). The letter which is headed JABILUKA MINING PROJECT states inter alia:

> "As matters have transpired, we received instructions from the relevant traditional Aboriginal owners at yesterday's meeting to the effect that the access track is not required to be moved. You may therefore regard this letter as written permission for your client to enter the Boiwek-Almudj complex of sacred sites for the purpose of gaining access across the project area by means of with (sic) the existing access route.
>
> In addition, the traditional Aboriginal owners have instructed us that they wish to be able to have access on a once weekly basis to the minesite for the purposes of an inspection. We would be grateful for your confirmation that this can be accommodated.
>
> We confirm that permits will be issued for work in connection with the Jabiluka project to the extent that that has been authorised under the *Uranium Mining (Environment Control) Act*. David Rourke of our Jabiru office will be in touch with your client to ascertain the order of priority of the various permit applications which have been submitted."

The Minister did not fail to take this matter into consideration. He was correctly advised that the matter had been resolved.

(b) *Failing to take consider (sic) whether all sites of possible anthropological and cultural significance had been identified in the area before the area was disturbed and baseline data on these sites could no longer be collected.*

The Northern Land Council did not in its submissions to the Minister (attachments 23 and 27 in exhibit P4) make any reference to these matters as factors which should have been taken into account.

There is no credible evidence before this Court to support an assertion that the Minister was required to do anything further. There is no credible evidence before this Court that the Minister did fail to take the matters into consideration.

(c) *Failing to consider the traditional owners' beliefs about the consequences, for them and for others, which flow from the disturbance of the Boyweg site.*

This allegation is also not supported by any credible evidence to this Court.

The plaintiff did not make any submissions, with respect to this allegation, to the Minister. The plaintiff cannot now complain about a failure on the part of the Minister to take into consideration matters that were never put to him by the plaintiff, its trustee or agents. Had the plaintiff placed any matters of concern before the Minister then the Minister could have taken into account any relevant information in addition to the matters he was required to have regard to under s 18 of the *Uranium Mining (Environment Control) Act*. However, the Minister was not under an obligation to initiate inquiries: *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 178.

I agree with the submission made by Ms Webb, counsel for the first defendant, that s 18 sets out exhaustively the matters to which the Minister *shall have regard* including the sources of any advice to be given in relation to the application.

The principle that I apply in deciding whether to quash the decision of the Minister by certiorari because he committed an error of law is established in the

authority: *Craig v South Australia* (1995) 184 CLR 163 at 179. It must be shown that the Minister fell into an error of law which caused him to ignore relevant material or to rely on irrelevant material.

For the reasons already stated, I am not able to find the Minister committed an error of law.

In order to quash the decision of the Minister by certiorari, the plaintiff must demonstrate that the Minister:

(a) fell into jurisdictional error; or

(b) committed an error of law, within jurisdiction, which is demonstrable on the face of the record.

The plaintiff has not demonstrated that the Minister fell into either of the above errors.

On the evidence before this Court the Minister did take into account the views of the Northern Land Council, the Commonwealth Minister, the supervising scientist and those put in the environmental impact statement. The environmental impact statement was prepared in July 1979 by the second defendant's predecessor in title. The environmental impact statement was provided to the Northern Land Council before the Northern Land Council entered into the section 43 agreement on 21 July 1982: see affidavit of Kenneth William Lonie, general manager operations for Energy Resources Australia Ltd sworn 10 June 1998, par 11-12 (exhibit D3). Mr Lonie deposes to the fact that the section 43 agreement required Pancontinental to comply with the environmental requirements for the Jabiluka project set out in the Third Schedule to the agreement. The environmental impact statement was referred to in the section 43 agreement, cl 3.1 (attachment 2 in exhibit P4). In his affidavit sworn 10 June 1998, Mr Lonie deposes to the fact that the environmental impact statement was subject to public and governmental scrutiny (par 23). The environmental impact statement concluded (at 35):

> "No items of cultural significance have been identified in the area to be impacted by the mine site and haul road, as site facilities and the haul road have been located to avoid such disturbance. Stringent controls will be placed on mine site personnel to ensure that sites are not inadvertently disturbed, including instant dismissal if found in areas designated for protection. Controls will be implemented to ensure that dust emissions do not affect any art sites."

I set out pars 28, 29 and 30 from the aforementioned affidavit of Kenneth William Lonie:

> "28. ERA has done all of the studies and matters which the Minister for Resources and Energy, Senator Parer, required to be done prior to the commencement of the construction of the portal and access decline. There are other works or actions that need to be done, but they do not concern the portal and decline construction. They concern the mining of the ore, and milling operations. There are also works which cannot be done (but which concern activities other than the portal and decline), for example, work concerning baseline data collection, ie to establish the environmental conditions which exist before the operation starts, to enable subsequent comparisons to determine if there has been any environmental impact. ERA cannot do such works because the Northern Land Council has refused to give its permission to ERA to enter upon the leased area and perform the monitoring works.

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> "28. ERA has done all of the studies and matters which the Minister for Resources and Energy, Senator Parer, required to be done prior to the commencement of the construction of the portal and access decline. There are other works or actions that need to be done, but they do not concern the portal and decline construction. They concern the mining of the ore, and milling operations. There are also works which cannot be done (but which concern activities other than the portal and decline), for example, work concerning baseline data collection, ie to establish the environmental conditions which exist before the operation starts, to enable subsequent comparisons to determine if there has been any environmental impact. ERA cannot do such works because the Northern Land Council has refused to give its permission to ERA to enter upon the leased area and perform the monitoring works.

29. There is a group called the Minesite Technical Committee which is made up of representatives of the Territory Government, the Federal Government, the Northern Land Council and ERA. That Committee recently determined that all those works required to be undertaken prior to the construction of the decline and portal, as required by Senator Parer, have been completed.

30. As far as the office of the supervising scientist is concerned, the supervising scientist has stated in a letter to ERA and the Alligator Rivers Region Advisory Committee that he has no objection to work proceeding on the portal and decline access. Now produced and shown to me marked 'G' is a copy of a letter dated 26 May 1998 in which that statement is made.''

I refer also to attachment 29 in exhibit P4 in which the supervising scientist, Mr Peter Bridgewater, in a letter to the Director of Mines dated 26 May 1998, stated inter alia:

''... I agree with the conclusion of the MTC that the studies being undertaken by ERA will deliver sufficient information to meet Senator Parer's requirements and, where appropriate, the intent of the Minister for the Environment's recommendations.''

The authorisation granted by the Minister is subject to environmental requirements including cultural heritage: see authorisation dated 2 June 1998 and Sch 4.1.2 to authorisation — attachment 34.

The discretion to grant an authorisation is vested in the Minister. The plaintiff and other persons in the community may not agree with the Minister's decision. Provided the Minister does not commit a jurisdictional error or an error of law within jurisdiction, which is demonstrable on the face of the record, his decision cannot be impugned.

No such error has been shown.

The plaintiff's application to quash the decision of the Minister by certiorari is refused. Accordingly, a declaration will not be appropriate: *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545 at 571 and 583; *Dorf Industries Pty Ltd v Toose* (1994) 127 ALR 654 at 667.

The order of the Court is that the plaintiff's claim is dismissed and judgment entered for the defendants.

The parties are granted liberty to apply on the question of costs.

Application for order for certiorari, declaratory and injunctive relief dismissed, judgment for the defendants

Solicitors for the plaintiff: *Dalrymple & Associates.*

Solicitor for the first defendant: Northern Territory Attorney-General's Department.

Solicitors for the second defendant: *Cridlands.*

JARROD WHITE

29. There is a group called the Minesite Technical Committee which is made up of representatives of the Territory Government, the Federal Government, the Northern Land Council and ERA. That Committee recently determined that all those works required to be undertaken prior to the construction of the decline and portal, as required by Senator Parer, have been completed.

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The order of the Court is that the plaintiff's claim is dismissed and judgment entered for the defendants.

The parties are granted liberty to apply on the question of costs.

Application for order for certiorari, declaratory and injunctive relief dismissed, judgment for the defendants

Solicitors for the plaintiff: *Dalrymple & Associates.*

Solicitor for the first defendant: Northern Territory Attorney-General's Department.

Solicitors for the second defendant: *Cridlands.*

JARROD WHITE

From:	Zhu, Haiqiu
To:	Gordon Grieve; Kirsty McGinlay; Caterina Meduri; Chung, Leon
Cc:	Stone, Philippa; Scott, Nicholas
Subject:	RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840] [HSF-AUS01.FID5952778]
Date:	Saturday, 21 September 2024 10:51:11 AM
Attachments:	image001.png image002.png image003.png 2024.09.21 Letter to Piper Alderman.pdf

Dear Colleagues

Further to the below, please see **attached** correspondence.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

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From: Chung, Leon <Leon.Chung@hsf.com>
Sent: Thursday, September 19, 2024 3:46 PM
To: GGrieve@piperalderman.com.au; kimcginlay@piperalderman.com.au; cmeduri@piperalderman.com.au
Cc: Stone, Philippa <Philippa.Stone@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Colleagues

Please see **attached** correspondence.
Yours sincerely

Leon Chung
Partner
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From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Tuesday, September 17, 2024 6:12 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>
Subject: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Mr Chung,

Please find **attached** a letter dated 17 September 2024 .

Kind regards
Kirsty McGinlay
Lawyer

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Gordon Grieve
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ggrieve@piperalderman.com.au

21 September 2024
Matter 82783241
By Email

Dear Mr Grieve

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

We refer to your letter dated 17 September 2024, our letter dated 19 September 2024 and the videoconference held on 20 September 2024.

At our videoconference, we outlined some queries our client had in relation to the matters set out in your letter, and you indicated that your clients would address those queries and write to us further on the proposed cause of action and the remedy that would follow if successful.

As foreshadowed, we set out below our client's initial observations on the proposed expansion of our client's Originating Application dated 6 August 2024 (**Originating Application**) to include an additional ground on the basis of non-derogation of right:

1 As you know, the failure by the Commonwealth and NT parties to have proper regard to condition 2 is squarely in issue and already forms a key part of our client's case:

- Our client already contends (via ground 6 of the Originating Application) that the NT Minister erred by failing to consider and determine the renewal application by reference to and application of condition 2 of Jabiluka MLN1. This includes reliance on s 203 of the *Mineral Titles Act 2010* (NT) (see particular 6(b)).
- Our client also contends (via ground 2 of the Originating Application) that the Commonwealth respondents failed to have regard to or give the weight lawfully required to (among other things) condition 2 of Jabiluka MLN1 and the potential for Jabiluka MLN1 to be renewed beyond 10 years.
- Condition 2 is also relied on against the NT Minister in support of ground 5 of the Originating Application (see particular 5(d)) and against the Commonwealth parties in support of ground 3 of the Originating Application (see particular 3(c)).

In advancing this these grounds, our client will contend that the NT Minister was obliged, by reason of Condition 2 and on its proper construction, to renew Jabiluka MLN1.

2 If our client succeeds on at least ground 6 at trial, it logically follows that the NT Minister's decision not to renew should be set aside, and the NT Minister must then determine our client's renewal application by applying condition 2 of Jabiluka MLN1. In those circumstances, we had a query as to how advancing a separate ground, based on a private law cause of action, would add anything to the existing application.

3 Relatedly, if a cause of action based on non-derogation of right were to be advanced and succeed, it seems to us that our client's additional remedy would be damages. However, if our client succeeds on ground 6, it would logically follow (as noted above) that Jabiluka MLN1 should be renewed, and so it is not apparent what damage there is and what material additional benefit the proposed claim would provide. You indicated you would write to provide us with more information on this point and outline your thinking.

4 There is a question as to whether the principles you refer to could assist in a case such as the present. The two possible outcomes appear to be either that the NT Minister's decision was valid (in which case the lease has not been renewed) or it was invalid (in which case the lease remains afoot, and there is no apparent utility in further causes of action). If the NT Minister's decision is valid, it is because it is valid *despite* condition 2. The question, then, is whether the principles you have identified could give some additional right, imposing liabilities on the NT Minister, even though the intention of the Northern Territory Parliament must on this hypothesis have been that the NT Minister could validly make a decision in the face of, and contrary, to condition 2. If you are aware of any case law which supports how the principles you have identified could have work to do in a context like the present, we would be very grateful to receive and consider it.

5 The matter is listed for final hearing on 28 October 2024. As you will appreciate, the timetable leading up to that hearing is very tight. In the event our client were to seek leave to add an additional ground in the terms proposed, and leave were granted, it seems to us that the price of any amendment would be the vacation of the trial. Having regard to the matters set out above, our client does not presently consider this to be in the interests of ERA or shareholders.

Further, our client has filed an interlocutory application to seek leave to amend the Originating Application. Among other things, it is proposed that particular 2(b) will be expanded also to refer expressly to s 203 of the *Mineral Titles Act 2010* (NT).

Our client remains committed to prosecuting these proceedings and advancing the interests of its shareholders fiercely. In doing so, our client is keen to maintain a cooperative and constructive dialogue with its minority shareholders, including your clients. In that regard, we look forward to receiving the further information foreshadowed concerning the matters set out above.

Otherwise, as you will appreciate, our client does not accept that there is a basis for your clients to seek to intervene in the proceedings pursuant to ss 236 and 237 of the *Corporations Act 2001* (Cth). It is, and remains, best placed to prosecute any available legal arguments.

Yours sincerely

Leon Chung
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Kirsty McGinlay

From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Sent: Saturday, 21 September 2024 10:48 AM
To: Caterina Meduri; Chung, Leon
Cc: Stone, Philippa; Scott, Nicholas; Laird, Kayla; Gordon Grieve; Kirsty McGinlay
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840] [HSF-AUS01.FID5952778]
Attachments: 2024.09.21 Second Letter to Piper Alderman.pdf

Dear Colleagues

Please see **attached** correspondence in response to your letter of 19 September.

Kind regards
Haiqiu

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From: Caterina Meduri <cmeduri@piperalderman.com.au>
Sent: Thursday, September 19, 2024 10:58 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Stone, Philippa <Philippa.Stone@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Gordon Grieve <GGrieve@piperalderman.com.au>; Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Leon

Please find attached our letter dated 19 September 2024.

Regards

Caterina Meduri
Partner

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From: Chung, Leon <Leon.Chung@hsf.com>
Sent: Thursday, September 19, 2024 3:46 PM

To: Gordon Grieve <GGrieve@piperalderman.com.au>; Kirsty McGinlay <kimcginlay@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>
Cc: Stone, Philippa <Philippa.Stone@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Colleagues

Please see **attached** correspondence.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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www.herbertsmithfreehills.com.au

From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Tuesday, September 17, 2024 6:12 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>
Subject: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]

Dear Mr Chung,

Please find **attached** a letter dated 17 September 2024 .

Kind regards

Kirsty McGinlay
Lawyer

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Gordon Grieve
Partner
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Level 23 Governor Macquarie Tower
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ggrieve@piperalderman.com.au

21 September 2024
Matter 82783241
By Email

Dear Mr Grieve

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

We refer to your letter dated 19 September 2024 and the videoconference held on 20 September 2024.

We are carefully considering the matters raised in your letter concerning the position of the Seventh Respondent and will respond as soon as possible.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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Our Ref: GTG.452215
Your Ref: 82783241

22 September 2024

By Email: leon.chung@hsf.com

Mr L Chung
Herbert Smith Freehills Level 34, 16 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Others
Federal Court of Australia Proceedings No.1056/2024

1. We refer to:

   1.1 our letter dated 17 September 2024 (**17 September 2024 Letter**);

   1.2 your letter dated 19 September 2024;

   1.3 our videoconference on 20 September 2024; and

   1.4 your letter dated 21 September 2024 (**21 September 2024 Letter**).

2. We have adopted the defined terms in our previous correspondence.

Relief sought in current proceedings

3. In paragraphs 1 and 2 of your 21 September 2024 Letter, you state in effect that, by reason of the relief your client seeks as framed, the NT Minister was obliged to renew Jabiluka MLN1. Paragraph 2 of your 21 September 2024 Letter operates on the assumption that the NT Minister will make a decision to renew Jabiluka MLN1 if your client is successful in obtaining the relief that it seeks.

4. The relief that your client seeks is set out in its Originating Application under the heading “Orders sought”. There are 8 prayers for relief. Notwithstanding what is stated at particular (f) to Ground 6 and, for that matter, paragraph 2 of your 21 September 2024 Letter, your client does not seek an order requiring the NT Minister to renew MLN1 in accordance with Condition 2 (such an order essentially being in the nature of a mandatory injunction). Instead, the relief is limited to, in effect, impugning the Renewal Decision (and Advice Decision) and a declaration that that MLN1 “remains in force” (despite the end of its original 42-year term). Even should your client be wholly successful in obtaining that relief from the Court, the decision whether to renew

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MLN1 would fall to be determined again by the NT Minister with both the timing and terms of that decision being by no means certain.

5. For the reasons set out below, the cause of action of a non-derogation or wrongful derogation from a grant that our clients contend your client advance in the Proceedings, would see a remedy that MLN1 be extended in accordance with Condition 2, without further intervention by the NT Minister.

Cause of action and remedy

6. In paragraph 3 of your letter you state, in effect, damages would be the additional remedy for a cause of action based on a wrongful derogation from a grant, and in view of the relief your client currently seeks (which, as we set out above, we think is misconceived), it is not clear what additional benefit it would provide.

7. Firstly, we repeat what we set out above in relation to the effect of the remedy your client seeks and the effect of our client arguing that there has been a wrongful derogation from a grant argument. On the basis that a common interest privilege subsists between our respective clients given the relationship between them, we enclose a copy of the advice our clients obtained from Mr Alan Sullivan KC as to the basis of this cause of action and his views that ERA would have good prospects of succeeding if this was advanced in the Proceedings. In the event that common interest privilege were not to subsist between our clients, we otherwise provide Mr Sullivan KC's advice on a strictly confidential basis and for the specific and limited purpose of enabling your client to apprehend and assess the proposed argument (and without waiving privilege). In either case, Mr Sullivan's advice must not be shared beyond your client. Where the advice is redacted, that is only to reflect parts of the advice that are not necessary for your client to understand the proposed argument.

8. Secondly, the cause of action is itself a wrongful derogation, or non-derogation, from a grant, for a which the appropriate remedy is a mandatory injunction to restrain the wrongful derogation from a grant.

9. We refer to the decisions of *Cable v Bryant* [1908] 1 Ch 259 where a cause of action for a wrongful derogation of a grant has been pleaded and a mandatory injunction granted as the relief.

10. In that case, a lessee had been granted a lease of a stable retaining adjoining premises and the lessor had erected hoarding close to the stable wall, entirely closing the ventilators. The tenant was seeking an injunction against the lessor permitting the hoarding to remain. The Court found that when a lease is granted, the lessor cannot derogate from the grant he has made by any act which shall render the subject of the grant unfit from a reasonable point of view for the purpose for which it is granted. Ultimately, the injunction was granted.

11. More recently in *Homebush Abattoir Corporation v Bermria Pty Ltd* (1991) 22 NSWLR 605, the NSW Court of Appeal upheld a decision that used the non-derogation of grant obligation to impose on the landlord an obligation to repair cold storage facilities on the demised premises.

PiperAlderman

Utility of cause of action

12. Having regard to the above, we consider that Condition 2 of MLN1 required the NT Minister, when considering the renewal application, to have renewed MLN1 in accordance with the contractual duty imposed by Condition 2 of MLN1 and to not have regarded himself bound, by reason of section 187 of the Mineral Titles Act, to act in accordance with the Commonwealth Minister's advice.

13. This type of private law remedy operates on the basis of the contract between the relevant parties, i.e. the NT Minister and ERA. This cause of action and remedy, if successful, would result in MLN1 being renewed, without further intervention by the NT Minister or the Commonwealth Minister.

14. In sum, the advantage of your client advancing a non-derogation of grant argument in the Proceedings is that it would ground relief in the nature of a mandatory injunction requiring the NT Minister to renew MLN1 for a term of 10 years. This is because, should the NT Minister fail to do so, the NT Minister would wrongfully derogate from the grant of MLN1. Such an outcome can be contrasted with the outcome sought presently in the Proceedings, being that the Renewal Decision is set aside with the NT Minister having the ability to make it afresh (whatever that decision might be). It is plainly in the interests of your client, as it is in the interests of our clients, that the NT Minister renew MLN1 as soon as possible and the non-derogation of grant argument is, respectfully, a more effective means of achieving that outcome.

Next steps

15. We trust that the above resolves the questions raised in your 21 September 2024 Letter as to the utility that the wrongful derogation from a grant cause of action has in these proceedings.

16. Please let us know by 23 September 2024 whether ERA will expand its Originating Application to include this cause of action. We otherwise repeat the contents of our 17 September 2024 Letter in relation to seeking steps to bring this cause of action in the event that ERA does not do so in the Proceedings.

17. If you would like to discuss the contents of this letter further, please do not hesitate to contact us.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner
Enc.

Kirsty McGinlay

From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Sent: Monday, 23 September 2024 7:56 PM
To: Caterina Meduri; Chung, Leon
Cc: Stone, Philippa; Scott, Nicholas; Gordon Grieve; Laird, Kayla
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840] [HSF-AUS01.FID5952778]
Attachments: 2024.09.23 Letter to Piper Alderman.pdf

Dear Colleagues

Please see **attached** correspondence.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

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From: Caterina Meduri <cmeduri@piperalderman.com.au>
Sent: Sunday, September 22, 2024 10:06 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Stone, Philippa <Philippa.Stone@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Gordon Grieve <GGrieve@piperalderman.com.au>
Subject: RE: Letter to ERA dated 17 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [HSF-AUS01.FID5952778] [PA-A.144898.452215.FID1327840]

Dear Leon

Please find attached our letter dated 22 September 2024.

Regards

Caterina Meduri
Partner

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PiperAlderman

... inMailX Truncated Message ...

Gordon Grieve
Partner
Piper Alderman
Level 23 Governor Macquarie Tower
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23 September 2024
Matter 82783241
By Email

Dear Mr Grieve

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

We refer to your letter dated 22 September 2024 and our previous communications on this issue.

We note that:

- on 16 September 2024 his Honour Justice Kennett made orders setting out a timetable for an interlocutory application by ERA to amend its originating application (**Orders**);
- on 17 September 2024 and prior to receipt of your letter of that date, pursuant to the Orders ERA filed an Interlocutory Application seeking leave to file an Amended Originating Application, which included a draft of that Amended Originating Application;
- on 20 September 2024, pursuant to the Orders ERA and each of the Respondents who did not consent to the amendment provided written submissions on the Interlocutory Application;
- the hearing of the Interlocutory Application is listed for tomorrow, 23 September 2024 before Justice Kennett.

In such circumstances where the Court has received an Amended Originating Application and the issues as between the parties in relation to that application have crystallised for the purposes of the hearing, we do not consider that it is conducive to the determination of the Interlocutory Application or in ERA's interests to introduce a further amendment before tomorrow.

However, we are continuing to consider the matters raised in your letter concerning the inclusion of a claim in respect of wrongful derogation from grant and will respond as soon as possible.

Yours sincerely

Leon Chung
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Herbert Smith Freehills

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Our Ref: GTG.452215
Your Ref:

23 September 2024

By Email: minister.maley@nt.gov.au

The Minister for Mining and Energy
PO Box 524
Howard Springs NT 0835

Attention: The Hononarary Mr Gerard Maley MLA

Dear Hon Gerard Maley MLA

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Others
Federal Court of Australia Proceedings No. 1056/2024 (the Proceedings)

1. We refer to our letter dated 18 September 2024 in which we asked for a response by 20 September 2024 (**18 September 2024 Letter**). We have not yet received a response.

2. Defined terms in this letter have the same meaning as in our 18 September 2024 Letter.

3. Having regard to the timetable set by Justice Kennet on 22 August 2024, your evidence in the Proceedings is to be served today.

4. Given the hearing of the Proceedings scheduled to commence on 28 October 2024, please let us know by 24 September 2024 whether you intend to raise the matters set out in our 18 September 2024 Letter as part of the position you take in the Proceedings. Your position on these matters, and the issues in the Proceedings generally, affect our clients' interest. Any position you take in response to the matter as raised in our 18 September 2024 Letter could affect steps we may need to take in respect of the Proceedings, including seeking to be a party.

5. We are available to discuss the contents of our 18 September 2024 Letter with you and your legal advisers if that would assist.

6. All of our clients' rights are reserved.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner

Copy to: Solicitor for the Northern Territory
Level 2, 68 The Esplanade, Darwin NT 0800
By Email: melissa.forbes@nt.gov.au

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Our Ref: GTG.452215
Your Ref:

24 September 2024

By Email: leon.chung@hsf.com

Mr L Chung
Herbert Smith Freehills
Level 34, 16 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Others
Federal Court of Australia Proceedings No.1056/2024

1. We refer to our previous correspondence in our letters dated 17, 19 and 22 September 2024 and your letters dated 21 and 23 September 2024.

2. Defined terms in this letter have the same meaning as our previous correspondence referred to above.

3. In your letter dated 23 September 2024 you state, in effect, that you are continuing to consider the matters raised in our previous correspondence and will respond as soon as possible notwithstanding your concerns about the delay to the current timetable if ERA was to seek to amend its Originating Application to include this cause of action.

4. Given the contents of your letter dated 23 September 2024, and that you are yet to respond to our letter dated 19 September 2024, we consider that you should confirm as soon as possible whether ERA will seek to amend its Originating Application to include these arguments.

5. This letter summarises the arguments that our clients believe that ERA should pursue in the Proceedings, as set out in our letters dated 17, 19 and 22 September 2024 and the urgency by which the amendments to the ERA's Originating Application must be made.

Non-Derogation from a Grant cause of action

6. Our letters dated 17 and 22 September 2024 set out the cause of action of a non-derogation or wrongful derogation from a grant that our clients contend that your client should advance in the Proceedings to ensure that MLN1 is extended in accordance with Condition 2, without further intervention by the NT Minister.

Lawyers

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7. By ERA advancing a non-derogation of grant argument in the Proceedings, there is a clear advantage in that it would ground relief in the nature of a mandatory injunction requiring the NT Minister to renew MLN1 for a term of 10 years, thereby more effectively achieving the purpose of the Proceedings, thus removing an argument as to whether the NT Respondents and the Commonwealth Respondents afforded procedural fairness or otherwise.

Estoppel cause of action

8. As set out in our 19 September 2024 Letter, the First Instance Decision and the Appeal Decision demonstrate that the issue of the validity of MLN1 (including Condition 2) has previously been an issue the subject of determination by the Federal Court.

9. Accordingly, we consider that ERA should argue that Ms Margarula should be estopped, whether by way of *res judicata,* issue estoppel or *Anshun* estoppel, from advancing the Inconsistency with Statutory Regime Argument because it goes to an issue in the First Instance Decision and the Appeal Decision which Ms Margarula did not raise. Furthermore, Ms Margarula, as a party to the Supreme Court Decision, agreed to the Statement of Agreed Facts in the Supreme Court Decision which set out the basis of how MLN1 was validly granted to pursuant to the statutory regime at the time.

10. We also consider that, subject to the evidence that has been led by the Commonwealth Respondents and the NT Respondents (which we do not currently have access to), ERA should consider whether the Commonwealth Respondents and the NT Respondents should also be estopped for the same reasons as Ms Margarula to the extent that they assert an argument that the terms of MLN1 are inconsistent with the statutory regime.

Delay to seeking judicial review cause of action

11. In our letter dated 19 September 2024 we also state that, even if a *res judicata* argument and/or *Anshun* estoppel were to fail, ERA should argue that the Inconsistency with Statutory Regime Argument is, properly characterised, an application for judicial review of the grant of MLN1, which has been made just over 42 years after the date of the grant.

Importance of ERA amending its Originating Application

12. It is plainly in your client's interests, as it is in our clients' interests, that ERA amend its Originating Application to include the causes of action set out above so that MLN1 can be renewed as soon as possible. As we have previously stated, we are of the view that the arguments detailed above and in our letters of 17, 19 and 22 September 2024 are a more efficient way of achieving that outcome than the basis on which ERA seeks relief currently and, based on the evidence which we understand has been filed to date in the Proceedings, we do not consider that these causes of action would require any additional evidence to be filed and thus would not disturb the current timetable.

13. We understand your concerns regarding the current timetable however, if ERA does not run these arguments in these proceedings, principles of *res judicata,* issue estoppel or

Anshun estoppel may prevent ERA or our clients from running these arguments in future.

Next Steps

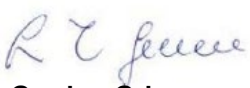
14. Please let us know by 27 September 2024 whether ERA will expand its Originating Application to make the arguments set out above.

15. ERA's position on these matters, and the issues in the Proceedings generally, affect our clients' interest and if ERA does not pursue these causes of action, we anticipate receiving instructions to seek to intervene in the Proceedings by way of an application pursuant to sections 236 and 237(1) of the Corporations Act.

16. We are available to discuss the contents of our previous correspondence and this letter with you if required.

17. All of our clients' rights are reserved.

Yours faithfully
Piper Alderman



Gordon Grieve
Partner

Kirsty McGinlay

From: Jennifer Laurence <Jennifer.Laurence@nt.gov.au>
Sent: Friday, 27 September 2024 2:14 PM
To: Kirsty McGinlay; Gordon Grieve; Caterina Meduri
Cc: Melissa Forbes
Subject: NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors - Correspondence to the NT Minister
Attachments: DME Letter to Piper Alderman 27092024.pdf

Good Afternoon Kirsty
Please find attached correspondence from today's date.

Kind regards,

Jennifer Laurence
Director Legal Services
Mines and Energy
Department of Mining and Energy

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27 September 2024

Gordon Grieve
Partner
Piper Alderman
Level 23 Governor Macquarie Tower 1 Farrer
Place Sydney NSW 2000

Via email: ggrieve@piperalderman.com.au

Dear Mr Grieve

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors

Thank-you for your letters dated 18 and 23 September 2024 to the Northern Territory Minister for Mining and Energy, the Hon Gerard Maley MLA. Minister Maley has requested that I respond to your correspondence on his behalf.

I note you act for Zentree Investments Limited and Packer & Co Ltd who are shareholders of the Applicant, Energy Resources of Australia Ltd, in the abovementioned proceedings commenced in the Federal Court of Australia on 6 August 2024.

As your clients are not parties to the proceedings and all parties are legally represented and subject to orders made by the Federal Court regarding the conduct of those proceedings, it is not appropriate for the Minister to respond separately to the matters raised in your correspondence.

I note you have raised those matters with the solicitors on the record for the Applicant. That is the proper course of action for your clients to take and I encourage you to continue to liaise with the Applicant's solicitors to the extent you see it necessary to safeguard your clients' interests.

Yours sincerely

Jennifer Laurence
Director Legal Services
Mining and Energy

Kirsty McGinlay

From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Sent: Friday, 27 September 2024 3:48 PM
To: Kirsty McGinlay; Gordon Grieve; Caterina Meduri
Cc: Chung, Leon; Stone, Philippa; Scott, Nicholas; Laird, Kayla
Subject: RE: Letter to ERA dated 24 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [HSF-AUS01.FID5952778]
Attachments: 2024.09.27 Letter to Piper Alderman.pdf

Dear Colleagues

Please see **attached** correspondence.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

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www.herbertsmithfreehills.com.au

From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Tuesday, September 24, 2024 7:04 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>
Subject: Letter to ERA dated 24 September 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1329184]

Dear Mr Chung,

Please find **attached** a letter dated 24 September 2024.

Kind regards

Kirsty McGinlay
Lawyer

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E: kimcginlay@piperalderman.com.au
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PiperAlderman

Gordon Grieve and Caterina Meduri
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27 September 2024
Matter 82783241
By Email

Dear Colleagues

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

We refer to:

- your letters dated 17 September, 19 September, 22 September and 24 September 2024;
- our letters dated 19 September, 21 September and 23 September 2024; and
- our teleconference dated 20 September 2024.

1 Summary of ERA's position

Our client has now carefully considered the matters raised in your various letters to date, including the attachment to your letter dated 22 September and the further summary of the issues raised by your clients by letter dated 24 September 2024.

As we have previously indicated, our client is committed to prosecuting these proceedings fiercely. In doing so, it is prepared to consider and if appropriate pursue any available arguments vigorously – provided there is a reasonable basis for doing so, and that such a course is in the interests of the company and its shareholders and does not distract from the proper and efficient prosecution of this matter.

Ultimately, our client has determined that it is neither in the best interests of the company, nor conducive to the proper and efficient prosecution of this matter, for our client to seek to:

- amend its originating application by adding a claim based on non-derogation of grant; or
- argue that Ms Margarula should be estopped or otherwise prevented from advancing certain submissions in opposition to our client's claim.

We set out our client's reasons for each of these conclusions below.

2 Non derogation from grant

As to the first point, regarding the proposed additional cause of action based on non-derogation from grant, our client has formed the view set out in section 1 above for the following reasons:

- As set out in our letter dated 21 September 2024, and as your clients appear to accept, the failure by the Commonwealth and the NT parties to give effect to the right of renewal given by condition 2 of MLN1 is squarely in issue and forms a key part of ERA's case. Our client intends to pursue that argument fiercely. Indeed, further to our last letter, we note that our client's originating application

has now been expanded to include an additional particular which refers to s 203 of the *Mineral Titles Act 2010* (NT) (particular 2(b)(ii)(M)).

- Our client's view remains that, if it is successful in establishing that the NT Minister wrongly failed to consider and determine the renewal application by applying condition 2, then it logically follows that the NT Minister's decision must be set aside, and the NT Minister must determine the application in accordance with condition 2.
- Notwithstanding the matters set out in your letter dated 22 September 2024, our client respectfully considers it to be doubtful that the principles concerning non-derogation of grant apply to a situation such as the present. In any event, even if they do apply, our client considers it very unlikely that the Court would be prepared to make an order (e.g. in the nature of specific performance or a mandatory injunction) requiring the NT Minister to renew the lease. This includes because:
  - such an order would be premature, in that the NT Minister would be entitled to have regard to the question of compliance with MLN1 in the period between the purported (and wrongful) refusal to renew MLN1 and the date of the final orders in the proceeding; and
  - if the refusal of the renewal application is set aside, then the NT Minister will be required to determine that application according to law, and (assuming ERA succeeds on the condition 2 argument) there is no reason to believe that the NT Minister would fail to do so.
- Further, it seems to our client that the price for advancing an additional cause of action based on non-derogation of grant would be the vacation of the existing trial dates, in return for a cause of action which would not add anything to our client's existing case and which would not provide any material additional benefit.

3 Estoppel and delay

As to the second point, regarding the proposal that our client seek to argue that Ms Margarula should be estopped or otherwise prevented from advancing certain submissions in the proceeding, our client has formed the view set out in section 1 above for the following reasons:

- Even if there was a reasonable basis to contend that Ms Margarula is estopped from making particular submissions in the proceeding, this would not preclude the other parties to the proceeding from doing so. To the extent your client contends otherwise (at paragraph [25] of your letter dated 19 September 2024), we do not understand that submission to extend to all of the respondents to the proceeding. Therefore, seeking to restrain or otherwise prevent Ms Margarula from making particular submissions runs the risk of unnecessarily elevating those issues and distracts from the prosecution of these proceedings, without any practical gain.
- Further, and in any event, the previous proceedings to which you refer did not determine the validity or enforceability of condition 2. Nor did they determine the question of whether condition 2 binds the NT Minister upon a renewal application, and indeed any challenge to that effect in the context of the previous proceedings (which were more than 25 years before the lease's expiry) would likely have been premature. In those circumstances, it does not appear to our client that there is a strong basis for arguing that Ms Margarula is estopped from contending that condition 2 is inconsistent with the relevant statutory regime (whether on a *res judicata*, issue estoppel or *Anshun* basis).

- It also does not appear to our client that any argument concerning Ms Margarula's delay would be reasonably arguable. The application for judicial review has been brought by our client, and it is the only party which seeks relief. Ms Margarula does not herself seek any relief (for example, a declaration). It does not appear to our client that, by simply seeking to defend our client's application for judicial review, Ms Margarula would be taken to have launched her own application for judicial review of the grant of MLN1 such that there is any relief which should be denied. The time for determining the question of whether condition 2 binds the NT Minister in the context of a renewal decision or whether it amounts to an improper fetter is when the renewal decision comes to be made. It seems to our client that the present proceedings are the appropriate forum for resolving that issue.

4 Conclusions

We trust that addresses the matters raised in your clients' correspondence to date.

Although our client has determined not to advance the matters raised in that correspondence, consistent with our observations in section 1 above it remains willing to consider (and, if appropriate, deploy) all reasonably available arguments in support of its claim. This includes deploying previous proceedings concerning MLN1 where possible and forensically desirable (for example, it presently proposes to refer to the agreed facts in *Margarula v Minister for Resource Development* (1998) 147 FLR 377 at 380 and note that clause 2 was in those proceedings described as "an option to renew for a further 10 years" without demur by the Court).

However, while our client will of course consider all reasonably available arguments properly and in a measured way, it does not consider that the imposition of deadlines under threat of a court application facilitates constructive engagement or the proper prosecution by ERA of the ongoing proceedings.

Otherwise, as set out in our previous correspondence, our client reiterates that there is no basis for your clients to seek to intervene in the proceedings pursuant to ss 236 and 237 of the *Corporations Act 2001* (Cth). Our client is, and remains, best placed to prosecute any available legal arguments.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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+61 407 400 291
leon.chung@hsf.com

Our Ref: GTG.452215
Your Ref:

PiperAlderman

3 October 2024

By Email: leon.chung@hsf.com

Mr L Chung
Herbert Smith Freehills Level 34, 16 Castlereagh Street
SYDNEY NSW 2000

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Others
Federal Court of Australia Proceedings No. 1056/2024

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1. We refer to the correspondence dated 17, 19, 20, 21, 22, 23, 24 and 27 September 2024 and our videoconference on 20 September 2024.

2. We have adopted the defined terms in our previous correspondence.

Refusal to amend Originating Application

3. In section 1 of your letter dated 27 September 2024 (**27 September 2024 Letter**), you state that you do not consider that it is in the best interests of ERA for it to amend its Originating Application to include a cause of action for a non-derogation from a grant or the estoppel arguments.

4. For the reasons set out in our letters referred to above and the reasons set out in this letter, we do not agree.

Non-derogation from a grant

5. In subparagraph 1 and 2 of section 2 of your 27 September 2024 Letter, you state, in effect, that ERA intends to fiercely pursue an argument that the Commonwealth parties and NT parties failed to give effect to the right of renewal given by Condition 2 of MLN1. You also state that if this is proven, then it logically follows that the NT Minister's decision must be set aside, and the NT Minister must determine the application in accordance with Condition 2 and that, for these reasons, you do not consider that '*the principles concerning non-derogation of grant apply to a situation such as the present*'.

6. As set out in our letter dated 22 September 2024, even if your client is wholly successful in obtaining the relief currently sought, the decision whether to renew MLN1 would fall to be determined again by the NT Minister with both the timing and terms of that decision being by no means certain. The relief that your client seeks in its Originating Application dated 6 August 2024 (noting that on 23 September 2024 we requested that you provide us with a copy of amended Originating

Application but we have not yet received a response to our request) does not include an order that MLN1 be renewed in accordance with Condition 2.

7. We remain of the view that, if ERA amends its Originating Application to include the wrongful derogation from a grant cause of action and seek a mandatory injunction to restrain the wrongful derogation from the grant, there are strong prospects that an order would be made with the effect that MLN1 would be renewed in accordance with Condition 2 without the need for further intervention by any government body.

8. In subparagraph 3 of section 2 of your 27 September 2024 Letter, you state, in effect, that the granting of an order (in the nature of specific performance or a mandatory injunction) is unlikely as such an order would be premature as:

   8.1 the NT Minister would be entitled to consider whether ERA had complied with MLN1 during the period between the Refusal Decision and the date of the final orders in the proceedings; and

   8.2 if the Renewal Decision is set aside, the NT Minister would be required to determine the renewal application according to law.

9. We do not agree that the matters in paragraph 8.1 are correct as there is already evidence (or at least an agreed factual position) in the Proceedings demonstrating that there has been compliance with MLN1. In this regard, we refer to pages 149 to 150 of the Statement of Agreed Facts filed on 4 September 2024 in the Proceedings which demonstrates that on 20 March 2024, ERA applied for a renewal and stated that it had complied with all of the provisions of the Mining Act and MLN1. Further, at page 152 of the Statement of Agreed Facts, there is a letter from the NT Minister to the Commonwealth Minister which states, in effect, that the NT Minister considered that ERA had complied with the conditions of MLN1 and the Mineral Titles Act.

10. Insofar as the matters in paragraph 8.2 are concerned, we disagree that this step would even be necessary for the reasons described in paragraph 7 above. Further, a contractual right was conferred on ERA by way of Condition 2 that MLN1 be renewed for a period of up to 10 years as long as it complied with the Mining Act and the conditions to which MLN1 is subject. As set out in paragraph 8.1 above, those matters were complied with.

11. Having regard to the matters in paragraph 10 above, we consider that ERA should write to the NT Minister for Mining and Energy, now the Honorary Mr Gerard Maley MLA, and ask that he under sections 187 and 43 of the Mineral Titles Act, being the provisions pursuant to which his predecessor took advice from the First Respondent and decided not to renew MLN1:

   11.1 repeal, rescind or revoke his predecessor's actions:

      (a) to have sought advice from the First Respondent pursuant to section 187 of the Mineral Titles Act; and

      (b) not to renew MLN1 on the basis that he followed the First Respondent's advice; and

11.2 renew MLN1 on the basis that ERA complied with the terms of Condition 2.

12. We have written to the NT Minister to this effect and he has not been willing to take these steps. We enclose copies of that correspondence.

13. In subparagraph 4 of section 2 of 27 September 2024 Letter, you state, in effect, that advancing the non-derogation of a grant cause of action would result in no material benefit to ERA's existing case and instead would result in the vacation of the existing trial dates.

14. Having regard to the matters set out in paragraph above, we consider that there is a clear benefit in ERA pursuing the non-derogation of a grant cause of action as ERA would, as a result, be entitled to injunctive relief, both of a prohibitory and mandatory nature, in aid of its right not to have MLN1 derogated from. We also note that whilst the Originating Application would need to be amended, we do not presently consider that further evidence would be required in order to pursue what is a strictly legal argument and thus the present timetable need not be disturbed.

15. Ultimately, whilst we understand your concerns regarding the upcoming hearing date, if ERA does not run this argument in the proceedings, the principle of *Anshun* estoppel may prevent our clients from running these arguments in the future.

Estoppel and delay

16. In subparagraph 1 of section 3 of 27 September 2024 Letter, you state, in effect, that there is a risk to contending that Ms Margarula is estopped from making particular submissions as it may unnecessarily elevate those issues and distract from the prosecution of the proceedings without any practical gain.

17. We consider that there is a clear practical gain in pursuing this argument in the Proceedings as Ms Margarula is ultimately contending having regard to paragraph 27 of her submissions seeking to be joined to the proceedings, in effect, that MLN1 is inconsistent with the relevant statutory regime in the Mining Act and the Mineral Titles Act and the lease should not be renewed. Therefore, for Ms Margarula to be heard on these grounds, it could ultimately be detrimental to ERA's claim for MLN1 to be renewed.

18. In subparagraph 2 of section 3 of 27 September 2024 Letter, you state, in effect, that the previous proceedings referred to in our letter dated 19 September 2024 did not determine the validity or enforceability of Condition 2 and therefore there is not a strong basis for making the argument that Ms Margarula is estopped.

19. As stated in our letter dated 19 November 2024, in the First Instance Decision and the Appeal Decision, the validity of MLN1 was squarely in in issue. As Sackville J explained in the First Instance Decision (relevantly):

> *"These proceedings concern the validity of a mineral lease granted in 1982 by the Northern Territory of Australia, to permit the exploration of deposits of uranium ore."*

20. Ultimately, Ms Margarula's challenge to the validity of MLN1 failed as Sackville J found MLN1 to be valid. In the Appeal Decision, the Full Court dismissed the appeal. In addition, the High Court refused an application for special leave to appeal the Appeal Decision. It is therefore clear that in these judgments, the validity of MLN1 was squarely in issue and determined. As a result, Ms Margarula should be estopped from advancing the Inconsistency with Statutory Regime Argument.

21. We also draw your attention to cl 5.1(d) of the Jabiluka Long Term Care and Maintenance Agreement, between ERA, the "Traditional Aboriginal Owners" (being the persons included in Schedule 1, including Ms Margarula) and the Northern Land Council (**Care and Maintenance Agreement**). It provides:

> *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 Care and Maintenance Agreement was executed as a deed on 25 February 2005 (see the execution block).

22. We consider that it is at least reasonably arguable that Ms Margarula is estopped by deed from disputing the validity of MNL1 in this proceeding. Should the Northern Land Council embrace Ms Margarula's arguments and dispute the validity of MNL1, it too would be estopped by deed. We cannot see any reason why ERA should forego its rights under the Care and Maintenance Agreement by not seeking to enforce cl 5.(1)(d) in the precise circumstances that it envisaged - that is, an action seeking to prejudicially affect MNL1.

23. In subparagraph 3 of section 3 of 27 September 2024 Letter, you state, in effect, that any argument concerning Ms Margarula's delay would be reasonably arguable as Ms Margarula does not herself seek any relief.

24. Having regard to the matters set out in paragraph 17 above and by making the Inconsistency with Statutory Regime Argument, we disagree with the proposition that she is not seeking relief which would have the effect that MLN1 not be renewed, and accordingly we repeat the matters in our letter dated 19 September 2024 regarding her being prevented from pursuing this.

Next steps

25. We trust the above causes ERA to reconsider the utility that the wrongful derogation from a grant cause of action, as well as the estoppel arguments, have in these proceedings.

26. Please let us know by 3 October 2024 whether:

    26.1 ERA will expand its Originating Application to include the wrongful derogation from a grant cause of action;

26.2 ERA will write to the NT Minister inviting him to exercise his contractual rights under MLN1 and renew the lease; and

26.3 ERA will argue that Ms Margarula should be estopped from making the Inconsistency with Statutory Regime Argument.

27. We otherwise repeat the contents of our letters dated 17, 19, 22 and 24 September 2024 Letter in relation to seeking steps to bring this cause of action in the event that ERA does not do so in the Proceedings.

28. If you would like to discuss the contents of this letter further, please do not hesitate to contact us.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner

Our Ref: GTG.452215
Your Ref:

4 October 2024

By Email: minister.maley@nt.gov.au

The Minister for Mining and Energy
PO Box 524
Howard Springs NT 0835

Dear Hon Gerard Maley MLA

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Others Federal Court of Australia Proceedings No. 1056/2024 (the Proceedings)

1. We refer to the letter dated 27 September 2024 (**27 September 2024 Letter**) in which Ms Jennifer Laurence, the Director of Legal Services for the Department of Mining and Energy responded on your behalf to our letters dated 18 September 2024 (**18 September 2024 Letter**) and 23 September 2024 (**23 September 2024 Letter**).

2. In the letter from Ms Laurence, she effectively states that '*it is not appropriate for the Minister to respond*' to our correspondence as we are not parties to the proceedings. While we understand that our clients are not party to the proceedings, our clients have an interest in the proceedings as they are shareholders of the Applicant, Energy Resources of Australia Ltd (**ERA**), who is a contractual counter-party in MLN1.

3. The position expressed in Ms Laurence's letter has a negative effect on our clients' interests in view of the request in our 18 September 2024 Letter where we asked you, as the Minister for Mining and Energy, to exercise your statutory powers, as described below, to to renew MLN1 in accordance with Condition 2, that is, for the period of 10 years.

4. As set out in our letter dated 18 September 2924, we consider that your predecessor improperly exercised his power to seek advice from the First Respondent pursuant to section 187 of the Mineral Titles Act and, as a result, failed to renew MLN1 in circumstances where section 203 of the Mineral Titles Act takes precedence. The effect of this is that, as Condition 2 pre-dates the requirement in section 187 of the Mineral Titles Act, MLN1 should have been renewed in accordance with Condition 2 of MLN1 notwithstanding any advice from the First Respondent to your predecessor to which section 187 of the Mineral Titles Act would otherwise apply.

5. Therefore, we again request that you should, in accordance with section 43 of the Interpretation Act:

    5.1 repeal, rescind or revoke your predecessor's actions:

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(a) to have sought advice from the First Respondent pursuant to section 187 of the Mineral Titles Act; and

(b) not to renew MLN1 on the basis that he followed the First Respondent's advice; and

5.2 renew MLN1 on the basis that ERA complied with the terms of Condition 2.

6. In the 27 September Letter, Ms Laurence states that we can liaise with the Applicant's solicitors on these matters. Despite the steps that we are taking steps to do so, we request that you give consideration to this letter and to our previous communications on this matter.

7. We are available to discuss this further with you and your legal advisers should you need clarification.

8. All of our clients' rights are reserved.

Yours faithfully
Piper Alderman

Gordon Grieve
Partner

Copy to: Solicitor for the Northern Territory
Level 2, 68 The Esplanade, Darwin NT 0800
By Email: melissa.forbes@nt.gov.au

Kirsty McGinlay

From: Chung, Leon <Leon.Chung@hsf.com>
Sent: Friday, 4 October 2024 12:03 PM
To: Kirsty McGinlay
Cc: Gordon Grieve; Caterina Meduri; Tom Woolford; Milica Lazarevic; Stone, Philippa; Scott, Nicholas; Zhu, Haiqiu; Laird, Kayla
Subject: RE: Letter to ERA dated 3 October 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1329184]
Attachments: 2024.10.04 Letter to Piper Alderman.pdf

Dear Colleagues

Please see **attached** correspondence

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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From: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Sent: Thursday, October 3, 2024 10:40 AM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>; Tom Woolford <TWoolford@piperalderman.com.au>; Milica Lazarevic <mlazarevic@piperalderman.com.au>
Subject: RE: Letter to ERA dated 3 October 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1329184]

Dear Mr Chung,

Please find **attached** our letter dated 3 October 2024 with our deadline corrected at paragraph 26.

Kind regards

Kirsty McGinlay
Lawyer

T: +61 2 9253 3873
E: kimcginlay@piperalderman.com.au
W: piperalderman.com.au

From: Kirsty McGinlay
Sent: Thursday, October 3, 2024 10:23 AM
To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>; Tom Woolford <TWoolford@piperalderman.com.au>; Milica Lazarevic <mlazarevic@piperalderman.com.au>
Subject: Letter to ERA dated 3 October 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1329184]

Dear Mr Chung,

Please find **attached** a letter dated 3 October 2024.

Kind regards

Kirsty McGinlay
Lawyer

T: +61 2 9253 3873
E: kimcginlay@piperalderman.com.au
W: piperalderman.com.au

Gordon Grieve and Caterina Meduri
Partners
Piper Alderman
Level 23 Governor Macquarie Tower
1 Farrer Place
ggrieve@piperalderman.com.au

4 October 2024
Matter 82783241
By Email

Dear Colleagues

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors

We refer to your letters dated 3 October 2024.

As we have previously communicated, our client will consider all reasonably available arguments properly and in a measured way. However, our client does not consider a demand that it respond to your letter one business day after receipt, on the same day as our client's written submissions are due to be filed and served and in circumstances where trial is due to start in just over three weeks, to be reasonable or constructive.

In those circumstances, we will respond in due course. To assist us in doing so, please provide a copy of the correspondence referred to in paragraph 12 of your letter (a copy of which was not enclosed).

Otherwise, our client reiterates that it is committed to prosecuting these proceedings, and advancing the interests of the company and its shareholders, fiercely. It is, and remains, best placed to prosecute any available legal arguments.

Leon Chung
Partner
Herbert Smith Freehills

+61 2 9225 5716
+61 407 400 291
leon.chung@hsf.com

Kirsty McGinlay

From: Kirsty McGinlay
Sent: Friday, 4 October 2024 4:03 PM
To: 'Chung, Leon'
Cc: Gordon Grieve; Caterina Meduri; Tom Woolford; Milica Lazarevic; Stone, Philippa; Scott, Nicholas; Zhu, Haiqiu; Laird, Kayla
Subject: RE: Letter to ERA dated 3 October 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1327840]
Attachments: Letter dated 18 September 2024.pdf; Letter dated 23 September 2024.pdf; Letter dated 27 September 2024.pdf

Dear Mr Chung,

Please find **attached** copies of the correspondence referred to at paragraph 12.

Kind regards

Kirsty McGinlay
Lawyer

T: +61 2 9253 3873
E: kimcginlay@piperalderman.com.au
W: piperalderman.com.au

PiperAlderman

From: Chung, Leon <Leon.Chung@hsf.com>
Sent: Friday, October 4, 2024 12:03 PM
To: Kirsty McGinlay <kimcginlay@piperalderman.com.au>
Cc: Gordon Grieve <GGrieve@piperalderman.com.au>; Caterina Meduri <cmeduri@piperalderman.com.au>; Tom Woolford <TWoolford@piperalderman.com.au>; Milica Lazarevic <mlazarevic@piperalderman.com.au>; Stone, Philippa <Philippa.Stone@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>
Subject: RE: Letter to ERA dated 3 October 2024 - ERA v Minister for Resources Proceedings NSD1056/2024 [PA-A.144898.452215.FID1329184]

Dear Colleagues

Please see **attached** correspondence

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

T +61 2 9225 5716 M +61 407 400 291 E Leon.Chung@hsf.com
www.herbertsmithfreehills.com.au