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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL **NO NSD 1056 OF 2024**

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

FIRST AND SECOND RESPONDENTS' SUBMISSIONS OPPOSING LEAVE TO AMEND ORIGINATING APPLICATION

Filed on behalf of the First and Second Respondent
Minister for Resources and Minister for Northern Australia
Commonwealth of Australia

File ref: 24007108

Prepared by: Grace Ng
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*

Address for Service:
The Australian Government Solicitor
Level 10, 60 Martin Place, SYDNEY NSW 2000

Telephone: 02 9581 7320
Lawyer's Email: grace.ng@ags.gov.au

INTRODUCTION

1. The Applicant seeks leave to file and serve an Amended Originating Application (**AOA**) in the form annexed to the Affidavit of Leon Chung dated 17 September 2024. The First and Second Respondents (**Commonwealth parties**) submit that leave should be refused with respect to the proposed amendments to Ground 1 (procedural fairness), Ground 2 (legal unreasonableness) that concern the Advice Decision (**proposed amendments**) and proposed new Ground 3A.[1] The proposed amendments expand the scope of factual dispute in the proceeding in ways that materially prejudice the Commonwealth parties and risk delaying the proceeding. Moreover, in some respects, the amendments are defective in form and do not disclose any arguable basis to challenge the Advice Decision.

LEGAL PRINCIPLES

2. Leave to amend an originating application is to be considered under r 8.21 of the *Federal Court **Rules** 2011* (Cth). The onus lies on the party seeking leave to amend to persuade the Court that such leave should be given.[2] The power to grant leave should be exercised having regard to the overarching purpose in s 37M of the *Federal Court of Australia **Act** 1976* (Cth).[3] The principles articulated in relation to pleadings by the High Court in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 apply equally to amendment of an originating process.[4] In addition, it is well established that leave to amend should be refused if the amendment would be futile because the issue sought to be raised is obviously lacking in merit.[5]

SPECIFIC DEFECTS IN THE PROPOSED AMENDMENTS

Ground 1 – Procedural fairness

3. ***Particular 1(b)(i):*** – The precise allegation is that there was a denial of procedural fairness by reason of a failure "to give the Applicant an opportunity to comment on information (including credible, relevant and significant information) received by [the Commonwealth parties]". That is an orthodox

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1 The Third and Fourth Respondents (**NT parties**) do not oppose the addition of new proposed ground 7 (procedural fairness as directed to the Renewal Decision).

2 *University of Sydney v ObjectiVision Pty Ltd* [2016] FCA 1199 (***Objectivision***) at [62] (Burley J); *Richards v Hutchinson* [2023] FCA 1102 (***Richards***) at [65] (Collier J); *LFI Ventures Pty Ltd v Carter, in the matter of Australian Vocational Learning Institute Pty Ltd (in liq)* [2021] FCA 1555 (***LFI Ventures***) at [24]-[26] (Goodman J).

3 *Objectivison* at [61] (BurleyJ); *Richards* at [66] (Collier J); *LFI Ventures* at [25] (Goodman J).

4 *Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu (A Firm)* (2016) 332 ALR 199 at [125] (Gilmour, Perram and Beach JJ), approving *Tamaya Resources Ltd (in liq) v Deloitte Touche Tohmatsu* [2015] FCA 1098 at [127] (Gleeson J). Applied in *Objectivision* at [63] (Burley J).

5 *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322 at [19]-[21] (Gilmour and Foster JJ); applied in *Alpert v Commonwealth of Australia (Department of Defence) (No 2)* [2024] FCA 447 at [15] (Snaden J).

ground of judicial review providing that the information is also "adverse" in the relevant sense.[6] However, the difficulty with the particular (and the amendments to it) is that it fails to identify the relevant adverse "information". Rather, it simply lists 26 alleged sources of unidentified information. Unless the adverse information said not have been disclosed is identified, the Applicant's argument is doomed to failure in accordance with the principles in *VEAL*. In its current form, the particular also fails to meet its basic function of giving the Commonwealth parties fair notice of the case they have to meet. The Commonwealth parties cannot know what the Applicant contends is the adverse information that was not disclosed and therefore cannot adduce evidence going to that question.

4. This deficiency of particular 1(b)(i) is magnified because the list of the sources of information is prefaced by the non-exhaustive term "including" – suggesting the Applicant is seeking to preserve the right to advance some unarticulated case. Further, particular 1(b)(i)(Z) is impossibly broad as it is not possible for the Commonwealth parties to know what representations were made by "unidentified members of the public" (let alone determine what adverse information was conveyed by those representations).

5. ***Particular 1(b)(iA):*** – Orthodox principles of procedural fairness include that where an obligation of procedural fairness is owed, it would ordinarily entail an obligation to allow a person affected the opportunity to "ascertain the relevant issues".[7] The difficulty with new particular 1(b)(iA) is that it does not identify any relevant issue. Rather, the particular seeks to rely on unspecified issues "raised" in the 26 sources of information identified in earlier particular 1(b)(i) and asserts an entitlement to a reasonable opportunity to be heard on all of them (whatever they may be). Once again, in order to demonstrate an arguable case, and to give the Commonwealth parties fair notice of that case, the relevant "issues" must be identified with specificity and in an exhaustive manner.

6. ***Particular 1(b)(ii):*** – Once again, the use of the non-exhaustive term "including" ought not be permitted. Further, the particular fails to identify an arguable ground of judicial review. The particular alleges that the Applicant should have been given a "reasonable opportunity" to be heard on the timing of the decision, the information that would be placed before the Minister, and what representations would be sought or received by the Minister. This allegation is doomed to failure for at least three reasons.

7. *First*, the Advice Decision was not governed by any procedural requirements mandated by statute, including any timeframe for making a decision. Accordingly, the Advice Decision was not governed

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6 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [16]–[17] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) (***VEAL***); *AB (a pseudonym) v Independent Broad-based Anti-corruption Commission* (2024) 98 ALJR 532 at [25] (the Court).

7 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32] (the Court).

by any procedural requirements mandated by statute, including any timeframe for making a decision. Nor was the Minister confined by statute in terms of the matters she was entitled to consider.[8] In those circumstances, there is no basis to conclude that the Applicant was entitled to be heard on matters of decision-making procedure.

8. *Secondly*, at least in a statutory context, procedural fairness may require an affected person to be alerted to a significant ***change*** in procedure relating to a decision.[9] However, the Applicant does not point to any relevant change in any previously notified procedure, it merely asserts a right to be heard at large.

9. *Thirdly*, and in any event, the Applicant's own evidence in the proceeding is that it met with the Minister in relation to the Advice Decision, it met multiple times with members of the Minister's staff and officers of the Department, and it engaged in written correspondence accompanying its renewal application.[10] The Applicant *could have* raised any procedural issue it wished to during these meetings or in written correspondence. It is untenable, and a waste of the Court's time, to suggest otherwise.

10. ***Particular 1(b)(iii):*** – The amendments to introduce sub-paragraphs (E) and (F) do not identify any arguable ground of review. The Applicant had no entitlement to control, or be heard in relation to, what information was considered by the Minister in making the Advice Decision. This amendment suffers from the same basic deficiency as particular 1(b)(ii) – any contention that the Applicant had an entitlement to be heard on procedural matters at large is doomed to failure.

11. ***Particular 1(b)(vi):*** – This paragraph has multiple deficiencies. *First,* the use of non-exhaustive term "inter alia" in both the chapeau and sub-paragraph (B) is objectionable for the same reasons as stated above in relation to the word "includes". This uncertainty is compounded by the fact that the representations alleged in sub-paragraph (A) are not identified.

12. *Secondly,* on their face, sub-paragraphs (A) and (B) do not identify any error or category of error. It is not obvious from the matters alleged how those matters (even if proven) would mean that there was

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8 *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 (***Mackellar***) at 375 (Deane J); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (***Peko-Wallsend***) at 39-42 (Mason J)

9 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [14], [34] (Gleeson CJ); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [64]-[69] (Gageler and Gordon JJ).

10 See e.g. Affidavit of Brad Welsh affirmed 7 August 2024 at [16], Exhibit BW-1, p 125-137 (renewal application and accompanying correspondence), [19], [21] (meeting on 6 February 2024, with Georgia Tree, First Respondent's advisor), [23] (meeting on 7 February 2024 with Kym Moore, Acting General Manager, Mining Branch, Department of Industry, Science and Resources (**DISR**)), [27] (telephone call in April 2024 with Kym Moore), [29] (letter dated 10 May 2024 from First Respondent inviting Applicant to attend meeting), [30]-[36] (meeting held on 26 June 2024 between First Respondent and Applicant, and discussions with Kym Moore and Georgia Tree), [37]-[38] (further meeting on 26 June 2024 with Kym Moore and DISR); Affidavit of Brad Welsh affirmed 9 September 2024 at [18], [35](c)-(e), [48](c) (meeting on 26 June 2024 between Applicant and First Respondent, and discussions with Kym Moore and Georgia Tree), [51](c)-(d) (undated discussions with Kym Moore).

a failure to "give reasonable and lawful consideration to the submissions advanced by the Applicant". Even if the Minister gave precedence to the matters in sub-paragraphs (A) and (B) over the representations of the Applicant (which is not admitted), that cannot possibly be unlawful. Those matters were not prohibited considerations[11] or a basis on which to establish unreasonableness.

13. *Thirdly,* sub-paragraphs (A) and (B) introduce new factual allegations that will require inquiry, including potential inquiries of the Prime Minister, two current Ministers, and one former Minister (and their offices). This gives rise to obvious prejudice to the Commonwealth parties and the potential for delay. The Commonwealth parties' agreement at the directions hearing on 22 August 2024 to an expedited final hearing was contingent on the grounds of review not shifting in any material way.[12] The new factual issues raised by those contentions are significant and put at risk the hearing date. Indeed, the Applicant has served already served two notices to produce dated 16 September 2024 apparently relating to the proposed amendments. Those notices – if they stand – will require searches to be conducted by a wide range of Commonwealth officers and entities.

14. *Fourthly*, the allegation in sub-paragraph C is bound to fail. The relevant briefing note provided to the Minister for the purposes of the Advice Decision was 7 pages long and included 68 pages of attachments.[13] The contention that for the Minister to give this material "not more than 79 minutes" consideration rendered the decision unlawful is doomed to failure.[14] This is especially so in circumstances where on the Applicant's own case the Minister was engaged with the issues relevant to the Advice Decision making well before to the time it was made: see particulars (1)(b)(i), (iii)-(vi).

15. *Fifthly*, sub-paragraph D is untenable. There was no obligation on the Minister to give a separate statement of reasons.[15] Her failure to do so cannot demonstrate that the Advice Decision was legally unreasonable or procedurally unfair (even if it is assumed the power she was exercising is non-statutory and that an exercise of non-statutory executive capacity in the circumstances of this case is conditioned by those requirements). Rather, in the absence of a statement of reasons, the Applicant must show that the substantive outcome was unreasonable in the factual context presented.[16]

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11 *MacKellar* at 365 (Deane J); *Peko-Wallsend* at 39-40 (Mason J).

12 Transcript of Case Management Hearing on 22 August 2024 at TT6.30-6.40 and TT11.8-11.17.

13 Statement of Agreed Facts dated 4 September 2024, [32], Annexure P1, pp 179-253.

14 cf *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [126]-[128] (the Court).

15 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 662 (Gibbs CJ); *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [43] (French CJ, Crennan, Bell, Gageler and Keane JJ).

16 *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J); *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [45] (Allsop CJ, Robertson and Mortimer JJ).

16. ***Particular 1(b)(vii):*** – The subparagraph is vague and confusing. It does not identify the material facts said to give rise to a denial of procedural fairness (including by reference to any specific paragraphs in the affidavit of Brad Welsh affirmed on 9 September 2024).

Ground 2 - Unreasonableness

17. ***Particular 2(b)(ii):*** – The Commonwealth parties do not oppose the proposed inclusion of sub-paragraphs (G)-(M) (although the arguments are very weak). However, sub-paragraph (N) is in a different category. It introduces a new factual question because determining "the national interest" may involve broad competing policy considerations which could be the subject of evidence.

18. ***Particular 2(b)(iii):*** – Sub-paragraph (C) raises the same new factual issue causing prejudice and potential delay as that considered in respect of particular 1(b)(vi)(B) in paragraph 13 above.

19. ***Particular 2(b)(vi):*** – The sub-paragraph adopts the objectionable, non-exhaustive term "including". To the extent that sub-paragraphs (A)-(D) make allegations regarding the First Respondent's subjective state of mind, these matters are new factual issues which require investigation, will cause prejudice and may lead to delay.

Ground 3A

20. ***Ground 3A:*** – New ground 3A is objected to on the same basis as Particular 2(b)(vi) (see paragraph 19 above).

CONCLUSION

21. For the above reasons, the Commonwealth parties submit that leave should be refused relating to the proposed amendments. The Applicant should pay the costs of the interlocutory application.

Date: 20 September 2024

Patrick Knowles
Tenth Floor Chambers

Joanna Davidson
6th Floor Selborne Wentworth Chambers

Anthony Hall
12 Wentworth Selborne Chambers

Counsel for the First and Second Respondents