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.

Submissions of Fifth and Sixth Respondents
on Interlocutory Application to amend Originating Application

Federal Court of Australia No. NSD1056 of 2024

District Registry: New South Wales

Division: General

Energy Resource of Australia Ltd

Applicant

Minister for Resources and Minister for Norther Australia (Commonwealth) and Others (named in the Schedule)

Respondents

1. In accordance with the orders made on 16 September 2024, the Fifth and Sixth Respondents (the **NLC Parties**) informed the Applicant (**ERA**) that they do not consent to the application to amend the originating application in the form of annexure A to the affidavit of Leon Chung dated 17 September 2024.

2. That followed the exchange of the annexed letters from the NLC Parties (18 September 2024) inviting ERA to re-plead proposed amended sub-pars [1(b)(i)], [1(b)(iA)], [1(b)(iii)(E)–(F)] and [1(b)(vii)], and ERA's response (19 September 2024) declining to do so.

3. While an originating application for judicial review is not a *pleading* as defined (FCR Sch 1 dictionary), it nonetheless serves the functions of defining the issues for trial and stating the case that is to be met at trial,[1] as is made

[1] Hence, r 16.21 can be invoked by analogy in relation to grounds specified in an application: *HK Systems v Minister for Home Affairs* (2008) 169 FCR 46 at [33] (Weinberg J) on former O 11 r 6 (now r 16.21) citing *Whim Creek Consolidated NL v Colgan* (1989) 25 FCR 50 (Lee J).

Filed on behalf of Fifth and Sixth Respondents
Prepared by Dominic Gomez, Legal Branch, Northern Land Council
Law firm
Tel 08 8920 5100 Fax
Email gomezd@nlc.org.au
Address for service 45 Mitchell Street
Darwin NT 0800

plain by the requirements of r 8.05(4)–(5). So, for example, unparticularised and vague assertions of error may be dismissed.[2] Here, the proposed amendments seek to add new claims for relief or new foundations in law for the claims for relief. The power to grant leave for that purpose exists where the new claims or grounds arise out of the same facts or substantially the same facts as those already pleaded to support an existing claim for relief: FCR r 8.21(1)(g).

4. The functions of an originating application to define the issues for trial and to state the case that is to be met at trial are especially important here as ERA appears to advance a most unusual case of alleged error by reference to matters beyond that which was before the Commonwealth Minister (see memoranda in annexures P1 and Q to the statement of agreed facts) and where there will be factual contests, including cross-examination, at trial.

5. The points made in the NLC letter of 18 September 2024 (annexed) that the proposed amendments, if allowed, are likely to cause prejudice, embarrassment or delay are self-evident on reading those parts of the proposed amended originating application. These short observations may be added.

6. *First*, asserting unfairness in not being given an opportunity to be heard on "the issues" simpliciter in [1(b)(iA)], in contrast to "the relevant or critical issues on which the decision was likely to turn" as appears in [1(b)(iii)], introduces confusion, and the former assertion discloses no cause of action. Procedural fairness may require the party affected to be given the opportunity of ascertaining the <u>relevant</u> issues.[3]

7. *Second*, without identification of what are "<u>the</u> [relevant] issues", the Respondents are unable to assess whether they can point to or adduce evidence that ERA was given the opportunity of ascertaining those issues, or whether it otherwise knew or ought to have known of those issues. Nor can they assess whether a failure to be given the opportunity of ascertaining those issues, if

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2 E.g. *NWWJ v Minister for Immigration* [2020] FCAFC 176 at [37] (Perram, Derrington and Stewart JJ)

3 *Commissioner of Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-1 (Northrop, Miles and French JJ); approved in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [29] (the Court).

that occurred, was material to the advice given by the Commonwealth Minister to the Territory Minister expressed in the letter of 25 July 2024 (annexure R to the statement of agreed facts).

8. *Third*, the preceding observations apply equally to the reference in [1(b)(iii)(E)–(F)] and [1(b)(vii)] to "material" without identification of what is "the [relevant] material".

9. *Fourth*, ERA's procedural unfairness case commenced with identification of the "the relevant or critical issues on which the decision was likely to turn" as appears in [1(b)(iii)], reflecting the terms of the advice given by the Commonwealth Minister to the Territory Minister passed on to ERA (see annexures R and Y to the statement of agreed facts), being, in short form, (1) extending Kakadu Park, (2) the views of the NLC and traditional Aboriginal owners, (3) the likelihood that traditional Aboriginal owners would not consent to mining, and (4) the prospect of mining. Despite ERA seeking and obtaining an expedited hearing, and having put on its evidence in chief, it now seeks to expand it case to unspecified "issues" and "material" in sub-pars [1(b)(iA)], [1(b)(iii)(E)–(F)] and [1(b)(vii)], with sub-par [1(b)(i)] referring to "submissions and /or representations by or on behalf of" persons or entities listed in (A) to (Z) without particulars. To compound things, ERA's response of 19 September 2014 (annexed) foreshadows further expansion.

10. It is therefore questionable whether the proposed amendments seek to add new claims for relief or new foundations in law for the claims for relief that arise out of the same facts or substantially the same facts as those <u>already</u> pleaded to support an existing claim for relief so as to engage FCR r 8.21(1)(g). But even if that were so, the application to amend by ERA hardly meets the overarching purpose of civil litigation to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible (FCA s 37M) that informs whether leave ought be granted (FCR r 8.21(1)(g)).

20 September 2024

Sturt Glacken
Alexander Solomon-Bridge

Schedule

Federal Court of Australia No. NSD1056 of 2024

District Registry: New South Wales

Division: General

Respondents

Second Respondent	Commonwealth of Australia
Third Respondent	Minister for Mining and Minster 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

18 September 2024

Leon Chung
Partner
Herbert Smith Freehills
Level 34, 161 Castlereagh Street
SYDNEY NSW 2000
By email: **Leon.Chung@hsf.com**
(Copy to: Nicholas.Scott@hsf.com; Haiqiu.Zhu@hsf.com; Kayla.Laird@hsf.com)

Copied to:
Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
Sydney NSW 2000
By email: **Grace.Ng@ags.gov.au**
(Copy to: Brooke.Griffin@ags.gov.au; Madisen.Scott@ags.gov.au; Emily.Nance@ags.gov.au; Samuel.Nitschke@ags.gov.au)

Melissa Forbes
Principal Lawyer
Solicitor for the Northern Territory
Level 2, 68 The Esplanade
Darwin NT 0800
By email: **Melissa.Forbes@nt.gov.au**
(Copy to: Jennifer.Laurence@nt.gov.au; Julian.VanLingen@nt.gov.au; Taylah.Cramp@nt.gov.au)

Falzon Legal
Lawyer
5 Gregory Place
Jabiru NT 0886
By email: anna@annafalzonlegal.com.au
(Copy to: ***susan_osullivan@outlook.com***)

Dear Colleagues

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors – Proposed Amended Originating Application

We refer to the draft proposed Amended Originating Application provided with the Applicant's interlocutory application (annexure LC-A to the affidavit of Leon Chung affirmed 17 September 2024) served on 17 September 2024 at 8:54pm ACST and to the orders made by Kennett J on 16 September 2024 by which the Respondents must communicate to the Applicant whether or not they consent to a grant of leave in respect of the filing of that proposed Amended Originating Application.

We have considered the proposed amendments and wish to raise the following issues ahead of the time fixed by the orders with a view to the Applicant considering if it is prepared to re-plead the current draft:

1. *New sub-paragraphs 1(b)(i) and (iA)* allege that the Commonwealth Minister and the Commonwealth failed to give the Applicant an opportunity to he heard on "the issues raised in the submissions and representations referred to in subparagraph (i)" and sub-par (i), as amended, refers to "submissions and/or representations by or on behalf of" persons or entities listed in (A) to (Z) without particulars of the submissions or representations.

   New (iA) does not state what are "the issues" in respect of which there was an alleged failure to give the Applicant an opportunity to be heard and that deprived the Applicant of natural justice. These should be identified with an adequate level of precision so that the Respondents can consider what evidence they might wish to lead on materiality and whether the Applicant was aware of "the issues". It is not fair for the Respondents to have to search and comb through material to infer or speculate as to what are "the issues" upon which the Applicant might rely, which is compounded by amended sub-par (i) not having any particulars of the representations. We also ask the Applicant to consider the desirability of providing particulars of the "submissions and/or representations" in sub-par (i)(A) to (Z), but our chief concern is the failure to state "the issues" within new sub-par (iA).

2. *New sub-paragraphs 1(b)(iii)(E) and (F)* are apt to cause confusion and prejudice given that the chapeau refers to the "relevant or critical issues on which the decision was likely to turn", but (E) and (F) refer to "material". To refer to "material" does not, without more, identify (fairly or at all) the alleged relevant or critical issue on which the decision was likely to turn, that are presumably contained within the "material". Again, it is unfair for the respondents to have to search and infer or speculate as to what the relevant alleged "critical issues" are. This is compounded by the lack of particularisation of the "material".

   Separately, the intended difference and field of operation between (E) and (F) is unclear – is there a difference between "material received" and "material placed before" the Commonwealth Minister and the Commonwealth? Is one intended to be limited to certain briefing materials and the other not, and if so in what way is the latter limited? Does that material go beyond material referred to elsewhere e.g. in sub-paragraph 1(b)(i)(A) to (Z) that refers to "submissions and/or representations" from person or entities?

3. *New sub-paragraph 1(b)(vii):* The proposed amendment reads:

   > In making the Advice Decision, the First Respondent and/or the Second Respondent denied the Applicant procedural fairness and natural justice, because: … the material referred to in the Affidavit of Brad Welsh affirmed 9 September 2024.

   Whatever the intended allegation, identifying the affidavit without more is embarrassing and prejudicial to the Respondents.

We invite the Applicant to provide a revised draft which accounts for and remedies the matters identified above. Should that be done satisfactorily, we hope to be in a position to then consent to the amendments as finalised and thereby avoid unnecessary further use of the parties' and Court's resources.

We seek a response as soon as possible to allow reflection before the requirement to notify objection at midday that day. If necessary, we would be happy to accommodate any extension of the times currently fixed under the orders dealing with this aspect.

Yours faithfully,

Dom Gomez
Principal Legal Officer
Northern Land Council

HERBERT
SMITH
FREEHILLS

Dominic Gomez
Principal Legal Officer
Northern Land Council
45 Mitchell St
Darwin NT 0800
By email: GomezD@nlc.org.au

Trilby Donald
Northern Land Council
45 Mitchell St
Darwin NT 0800
By email: DonalT@nlc.org.au

Copy to:
Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
Sydney NSW 2000
By email: Grace.Ng@ags.gov.au
Copy to: Brooke.Griffin@ags.gov.au;
Madisen.Scott@ags.gov.au;
Emily.Nance@ags.gov.au;
Samuel.Nitschke@ags.gov.au

Melissa Forbes
Principal Lawyer Solicitor for the Northern
Territory Level 2, 68 The Esplanade
Darwin NT 0800
By email: Melissa.Forbes@nt.gov.au
Copy to: Jennifer.Laurence@nt.gov.au;
Julian.VanLingen@nt.gov.au;
Taylah.Cramp@nt.gov.au

Falzon Legal
Lawyer 5 Gregory Place
Jabiru NT 0886
By email: anna@annafalzonlegal.com.au
Copy to: susan_osullivan@outlook.com

19 September 2024
Matter 2783241
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 letter of 18 September 2024 and respond as follows.

Given your clients' complaints relate to particulars, having regard to the current timetable and also having regard to the nature of our client's response (as set out below), rather than preparing a further amended originating application, it seems more efficient for responses to your clients' complaints to be provided by way of further particulars. This letter does so.

As a general comment, we observe that a central part of our client's case is that the First Respondent received numerous ex parte representations in respect of the renewal of MLN1. The content of most of those ex parte representations has yet to be divulged. Self-evidently, we cannot provide particulars of what was said in those ex parte communications or the issues that were raised in them. It is apparent from the circumstances that most, perhaps all, of the ex parte communications were adverse to ERA. By way of example, we refer you to paragraphs 15 and 16 of our client's submissions dated 27 August 2024 in respect of document production, which set out people that the evidence suggests made oral representations to the First Respondent. In each case, the identity of the party that made the representations suggests that the representations were adverse. The First Respondent has been directed to provide disclosure and, following that production, light may be shed on what was said orally and in writing to the First Respondent, and the issues that were raised. We raise this as a preliminary point because we do not think it is reasonable to require our client to identify with precision (or at all) what was said, and what issues were raised, in communications to which it was not a party. The very difficulty in knowing what was said, when it was said and by whom it was said by is part of the lack of procedural fairness of which our client complains.

1 Sub-paragraphs 1(b)(i) and (1A)

Although your client's letter refers to sub-paragraphs 1(b)(i) and (1A), we understand the complaint to be directed to (1A), not (b)(i). In particular, the complaint is that the application does not particularise the "issues" that were raised.

Each of the representations made and referred to in sub-paragraph 1(b)(i) were made ex parte. Many were oral. To the extent our client is aware of the existence of the representations, it has become aware of them only because of compulsory production in these proceedings. The content of most of the representations remains known at least to the First and/or Second Respondent, but not to our client. Our client is not in a position to identify the issues that were raised in correspondence the contents of which have not been divulged.

So far as the representations were in writing and the content of those representations has been disclosed by reason of compulsory production in these proceedings, we refer you to MS24-000911 and the letters in that document from the Sixth Respondent (8 May 2024) and the Gundjeihmi Aboriginal Corporation (14 March 2024, 9 April 2024 and 9 July 2024) and the "yellow" brief from the First Respondent's office to her dated 25 July 2024.

The issues that were raised in those representations on which ERA relies are each addressed in the Affidavit of Brad Welsh dated 9 September 2024. We refer you to that affidavit.

2 Sub-paragraphs (iii)(E) and (F)

There is a difference between material received by the First Respondent and material placed before the First Respondent. As best our client presently knows, the material placed before the First Respondent was MS24-000911 and the "yellow brief". However, it is apparent that the First Respondent received far more information in respect of renewal than that – hence sub-paragraph 1(b)(i), which identifies persons who made representations to the First Respondent in respect of renewal.

In respect of the issues raised in MS24-000911 and the "yellow" brief on which the Applicant relies, these are addressed in the Affidavit of Brad Welsh dated 9 September 2024. In respect of the issues raised by other communications, the content of those communications remains unknown to the Applicant. The Applicant is not in a position to identify what issues they raised.

More generally, we note that the objection to the expression "critical issues" is not an objection to the amendment.

3 Sub-paragraph (1)(b)(vii)

The word “of” is missing before “the material”. We are content to correct that in the filed version of the amended originating application, and we request that you read the originating application in the manner identified.

Having regard to the above, we request that you indicate as soon as possible whether you consent to the filing of the draft Amended Originating Application.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

+61 2 9225 5716
+61 407 400 291
leon.chung@hsf.com

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