NOTICE OF FILING

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File Title:	ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH) &ORS
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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.

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ENERGY RESOURCES OF AUSTRALIA LTD V MINISTER FOR & ORS
SUBMISSIONS OF ENERGY RESOURCES OF AUSTRALIA LTD IN RESPECT OF AMENDMENT

INTRODUCTION

1. By Interlocutory Application dated 17 September 2024, ERA applies for leave to file and serve an Amended Originating Application. The amendments primarily add further particulars to existing grounds. The amendments also add two new grounds, one involving an issue of law turning on the records of the decision (ground 3A) and another arising out of existing particulars (ground 7). The new particulars arise from the material produced to date by the Respondents. That material has shown that the Third Respondent received numerous written and oral submissions, over many months, containing information which was credible, relevant, adverse and significant. Those submissions were received ex parte, and their contents never disclosed to ERA. Some have been disclosed in the course of these proceedings; others remain secret (but may be revealed by upcoming production by the Commonwealth parties). To the extent that the submissions have been disclosed, they have been addressed in ERA's evidence, relevantly an affidavit of Mr Welsh dated 9 September 2024. Mr Welsh addresses the ex parte information, and explains ERA's state of mind in respect of that information.

2. The position of the Respondents in respect of amendment is as follows.

   (a) First and Second Respondents: object, based on "prejudice", "form" and "arguable basis", with no identification of the paragraph or paragraphs to which the objections attach.

   (b) Third and Fourth Respondents: neither consent nor oppose.

   (c) Fifth and Sixth Respondents: object, based on form, to 1(b)(1A), 1(b)(iii)(E) and (F) and 1(b)(vii) and possibly to 1(b)(i).

   (d) Seventh Respondent: consents.

3. ERA anticipates that a substantial component of the Respondents' form objection is that ERA has not particularised the content of the representations and issues the subject of its procedural fairness complaint. ERA has not done so because, for the most part, the content of the representations that were made against ERA remain secret, known to the Cth Minister, but not to ERA. It would be perverse, if not Kafkaesque, if a polity could act on ex parte representations

and then stultify a procedural fairness complaint by insisting that a challenger identify details of the secret representations. What ERA *has* done is have Mr Welsh work through the materials placed before the Cth Minister, identify issues raised in the adverse reprsentations put to the Cth Minister and address ERA's position in respect of those issues.

4. Leave to amend should be granted. It is in the interests of justice for ERA to be permitted to add further particulars, arising from material disclosed only in the course of the proceedings. Each of the amendments has a proper basis in law. There is no evidence of prejudice. ERA cannot be expected to provide particulars of representations it knows were made, but does not know the content of, not least when the content of those representations is known to the First and Second Respondent.

LEGAL PRINCIPLES

5. The Court is familiar with the principles governing amendment. The Court has power to grant leave to amend an originating application under FCR[1] 8.21(1), s 23 of the FCA Act[2] and the implied powers of the Court. In deciding whether to grant leave, the Court should consider the "overarching purpose" set out in s 37M(1) and (2) of the FCA Act, including the objective of facilitating the "just" resolution of disputes "according to law": s 37M(1). One occasion in which leave to amend can be granted is "to add … a new foundation in law for a claim for relief, that arises … out of the same facts or substantially as those already pleaded to support an existing claim for relief by the applicant": FCR 8.21(1)(g)(i). Relevant considerations include delay in applying for an amendment, the reasons for any delay and the merit of the amendments.[3]

PROPOSED AMENDMENTS

6. It remains unclear whether the First and Second Respondent object to everything and, if so, the basis of the objection to each paragraph. These submissions will therefore address each material amendment..

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1 *Federal Court Rules 2011* (Cth).
2 *Federal Court of Australia Act 1976* (Cth).
3 See, eg, *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

7. **1(b)(i)**. ERA adds further particulars articulating the identity of the people who made representations adverse to ERA's interests to the First and/or Second Respondents. The amendments clarify ERA's case, by providing *better* particulars of existing particular 1(b)(i). Save for the letters from the NLC and GAC (which appear in the Department's Brief to the Cth Minister) and the brief references in the "yellow" brief to the Cth Minister from her office, ERA does not know the precise content of the representations that were made. That is because they were secret. ERA has addressed the representations it *is* aware of in Mr Welsh's evidence.

8. **1(b)(iA)**. ERA adds a new particular of procedural unfairness. The allegation is that the Cth Minister failed to afford ERA an opportunity of being heard on the issues raised in the submissions and representations referred to in (i). ERA cannot identify the issues with precision, because for the most part the content of the representations remains unknown to it (but known to the Cth Minister). Mr Welsh's evidence addresses the issues raised in the representations the content of which have been divulged to date. ERA anticipates that if it does *not* advance the contention in this paragraph, it will nevertheless be put against it that, although the Cth Minister received ex parte submissions, ERA had a reasonable opportunity to be heard on the issues in those submissions. The Respondents cannot fairly reserve their right to put that contention, while preventing ERA from disputing it.

9. **1(b)(ii)**. ERA adds further particulars, identifying procedures that it was not heard on. The amendments clarify ERA's case, by providing better particulars. The procedural issues identified relate to the time of the decision, what information would be placed before the Cth Minister and what representations were received by the Cth Minister. These points arise from the production to date, from which it has become evident that the Cth Minister decided to treat the issue as an urgent one (when it was not), and had placed before her and received highly prejudicial ex parte representations.

10. **1(b)(iii)(E), (F)**. ERA adds further particulars of the critical issues on which it was not heard, namely the material received by the Cth Minister ((E)) and the material placed before the Cth Minister ((F)). The distinction between the two is deliberate. It appears that the material placed before the Cth Minister was just a brief from the Department and a "yellow" brief from her office. The Departmental brief referred to, and incorporated, other material. But what was placed before her was a subset only of the material she had received.

11. **1(b)(vi)**. ERA adds a new particular of procedural fairness. The allegation is the Cth Minister failed to give reasonable and lawful consideration to the submissions advanced by ERA.[4] This allegation arises from the revelations, arising from compulsory production, that the Cth Minister had the Departmental brief, which included a copy of ERA's application, for under 80 minutes and, at the same time, was told that the Prime Minister and other senior colleagues wanted her to make a decision adverse to ERA. Those facts, coupled with what was already known, namely, that the Prime Minister was about to shortly deliver a marquee speech, found an inference that the Cth Minister did not give fair consideration to ERA's case.

12. **1(b)(vii)**. The word "of" is missing at the start of this particular. ERA has suggested to the Fifth and Sixth Respondents that it should be read in this way. Alternatively, this error can be corrected if and when the Amended Originating Application is filed. This particular confirms that ERA relies on Mr Welsh's affidavit of 9 September 2024 in support of its procedural fairness case.

13. **2(b)(ii)(G)-(N)**. ERA adds further and better particulars of its complaint that the Cth Minister's decision was legally unreasonable having regard to what the Cth Minister did not consider. Sub-paragraphs (G), (H), (I) and (N) are variations of what was already alleged in 2(b)(ii)(C) and 2(b)(iv). What was *not* considered appears from the material that has been produced to date and, in particular, the Departmental Brief and "yellow" brief. The merit of this contention will rise and fall based on the record before the Cth Minister.

14. **2(b)(iii)(C)**. ERA adds a further and better particular of its complaint that the Cth Minister's decision was legally unreasonable having regard to what the Cth Minister had regard to. The new particular asserts that the Cth Minister had regard to a desire to allow the Prime Minister to deliver a speech to the NSW State Labor Party conference. That speech was served in evidence when ERA commenced the proceeding, and reliance on it can come as no surprise to the Respondents. There has never been any suggestion that the Cth Minister might be called.

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4 *DWN042 v Republic of Nauru* (2017) 92 ALJR 146 at [17] (Keane, Nettle and Edelman JJ); *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at [24]; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; 210 FCR 505 at [389]; *Warren v Chief Executive Officer, Services Australia* [2024] FCAFC 73 at [93]-[95] (McElwaine J).

15. **2(b)(vi) and 3A**. ERA adds a new particular of legal unreasonableness and a new ground to the same effect. The contention is that the Cth Minister failed to proceed on the basis of correct legal principles, correctly applied.[5] The factual merit of this contention will rise and fall based on the Cth Minister's actual reasoning process (which, self-evidently, has always been in issue) and whether beliefs the Cth Minister actually formed were erroneous in law (which is an issue of law).

16. **6**. The amendments add a new "label" to the same error of the NT Minister. The error is in refusing to renew, despite there being a right of renewal under condition 2. The alleged error is one by the First and Second Respondents, and they do not object to this amendment.

17. **7**. The amendments contend that procedural unfairness of the First and Second Respondents' decision-making infects the procedural fairness of the Third and Fourth Respondents' decision-making. The underlying legal proposition is that if a decision-maker (eg the NT Minister) is obliged to afford procedural fairness and that decision-maker involves a third party in the decision-making process, then deficiencies in the process adopted by the third party can affect whether the primary decision-maker can be said to have afforded procedural fairness. The alleged error is one by the First and Second Respondents, and they do not object to this amendment.

R LANCASTER SC **D HUME** **M ELLICOTT**

COUNSEL FOR ENERGY RESOURCES OF AUSTRALIA LTD
20 SEPTEMBER 2024

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5 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at [78]l *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [76] (Gageler J); *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [29] (Kiefel CJ, Gageler and Keane JJ); *CEU22 v Minister for Home Affairs* [2024] FCAFC 11 at [29] (Wigney, Thawley and Wheelahan JJ).