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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' OUTLINE OF SUBMISSIONS ON THE APPLICATION OF SECTON 78B OF THE JUDICIARY ACT 1903 (CTH)

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

File ref: 24007108

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PART I INTRODUCTION

1. On Friday, 25 October 2024, the Commonwealth parties notified the other parties and the Court of an intention to issue notices pursuant to s 78B of the ***Judiciary Act*** *1903* (Cth). Notices were issued later on the same evening.

2. These submissions are made by the First and Second Respondent (the **Commonwealth parties**) to assist the Court in respect of the application of s 78B of the *Judiciary Act* 1903 (Cth). These submissions are not intended to be argumentative or express a final view on how any constitutional issue should be determined. Rather, the identified constitutional issues are considered only to assist the Court in determining whether s 78B of the Judiciary Act is engaged.

3. These submissions address, in turn: (i) the requirements of s 78B; (ii) the constitutional issues identified in the s 78B notice; (iii) in light of (i) and (ii), whether the hearing can progress on Monday, 28 October 2024.

PART II THE REQUIRMENTS OF SECTION 78B

(a) Section 78B(1) - "Arising under the Constitution or involving its interpretation"

4. The duty of the Court in s 78B(1) is engaged where a cause pending "involves a matter arising under the Constitution or involving its interpretation."

5. The mere assertion of the existence of a constitutional point is not enough to engage s 78B. As a matter of substance, a true constitutional point must really arise. It must be *bona fide* and non-colourable: *Re Finlayson; ex parte Finlayson* (1997) 72 ALJR 73 at 74; *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at [14]; *Re Chisholm & ors* (HCA No S155 of 2003, 2 June 2003, lines 202-203). See also *Green v Jones* [1979] 2 NSWLR 812, 818B; *Narain v Parnell* (1986) 9 FCR 479, 488-489 (Burchett J); *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at 297; *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 at [67].

6. A case will involve the interpretation of the Constitution (and thus will require s 78B notices) if 'the interpretation of [the Constitution] is "essential or relevant" to the question of statutory interpretation'. It does not matter if the case might be resolved on some alternative, non-constitutional basis. If the application or interpretation of one or more provisions of the Constitution is "essential or relevant" to resolving but one argument of several advanced by a party,

then a constitutional point has been raised in a way that engages s 78B: see *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315, 326-327, a case that was not about s 78B, but about similar words ('a cause arising under the Constitution or involving its interpretation') in s 40 of the *Judiciary Act*.

7. *Boath v Wyvill* (1989) 85 ALR 621 suggests that an argument about the legislative competence of State parliaments will require a s 78B notice (see also the discussion in *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [21]). The same logic would not necessarily mean that an argument about the legislative capacities of the Northern Territory Legislative Assembly would always require a notice, if the argument was solely about what the self-government legislation means. However, where the asserted limit on the legislative power conferred by that legislation is identified by reference to constitutional limits on State legislative power, there is a strong argument that this is a matter involving the interpretation of the Constitution even if not arising under it.

(b) Section 78B(1) – "a reasonable time has elapsed"

8. There is very little authority on what constitutes "reasonable time" for the purposes of s 78(1).

9. In *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 416 at [51]-[57], Anderson J held that a reasonable time not yet elapsed in respect of a notice relevant to a judicial review claim that was issued nine days prior to a hearing. However, his Honour also held that reasonable time had elapsed in respect of a second notice relevant to a *habeas corpus* claim that was issued one day later (i.e. 8 days prior to the hearing). This suggests that the nature of the claim and, perhaps, the nature of the issue, bear upon the determination of the reasonable time period required by s 78B(1).

10. In *MZAHH v Federal Circuit Court of Australia & Ors* [2016] HCATrans 177 (2 August 2016) Bell J held that 3 days was not sufficient notice.

11. In ***On Call*** *Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 2)* [2010] FCA 258 at [13], Bromberg J found it would not be a "reasonable time" if notices were issued on 24 February 2010 in advance of a hearing scheduled to commence on 1 March 2010. In *Duarte & Morse* [2019] FamCAFC 93 at [52], the Full Court of the Family Court considered a s78B notice issued on 26 June 2017 for a hearing on 2 and 3 August 2017 was "reasonable".

12. In *Sagacious Legal Pty Ltd v Westfarmers General Insurance Ltd (No 3)* [2010] FCA 428, Rares J had heard argument not realising that notice had not been given to one Attorney-General (it had been given to the others). By the time His Honour considered the impact of that error, the outstanding notice had been served and a response was received the same day. Rares J rejected the argument that had the true position been known to him at the start of the hearing, he would have had to adjourn, both because that argument overlooked the possibility of obtaining fast responses from the Attorney-General (at [10]), and because in any event His Honour did not agree that there was properly a constitutional issue in the case (at [17]).

(c) Section 78(2)(c) – "matters severable"

13. Section 78(2)(c) permits the Court, notwithstanding s 78B(1), to "continue to hear evidence and argument concerning matters severable from any matters arising under the Constitution or involving its interpretation".

14. In ***On Call***, Bromberg J adopted what might be called a strict approach to deciding whether a matter was severable. His Honour held, at [11] that the words "matter" and "matters" in s 78(2)(c) had the same meaning as the word "matter" in Chapter III of the Constitution, i.e. a justiciable controversy. As a result, severance was not available just because an "issue" was severable from other issues in the case, rather the severable matter had to relate to a different judicial controversy.

15. A slightly different approach was taken by Perram J in ***Quirk*** *v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 833. His Honour, without making reference to the decision in *On Call*, held at [8]-[10]:

> The constitutional arguments about freedom of speech are capable of being put independently from the other aspects of the case. I do not see that any submission about the constitutional arguments could depend on what happens in the general protections part of the case or any other part of the case for that matter.
>
> In seeking to ascertain the metes and bounds of the concept of severance under s 78B(2)(c), it seems to me to be legitimate to take into account what the purpose of the provision is in the context of this proceeding. That purpose is to permit the Attorneys-General to make submissions on the constitutional argument. It is also to permit submissions to be made by them which impact on the constitutional question (for example, that upon its proper construction a suggested invalidity of a provision does not arise).

> Thus, it seems to me that Mr Walker's submission is, with respect, the wrong way around. The question is not whether the constitutional argument is foundational for the general protections case. The question is whether the general protections case is foundational for the constitutional argument.

16. As to the discretion to hear a severable matter prior to a constitutional issue, there is "a strong public interest in the Court hearing and determining the severable questions without further delay": *Oreb v Professional Services Review Committee No 298* [2004] FCA 1408 at [21]. However, by the same token, the Court has recognised that it may be undesirable to split a case, and the wishes of the parties are a factor in determining whether an issue, even if severable, should be heard separately: *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [24].

THE CONSTITUTIONAL ISSUES IDENTIFIED IN THE S 78B NOTICE

(a) Controversy in the proceeding about the source of the Commonwealth Minister's power

17. As the Court was advised on 25 October 2024, an issue arises in these proceedings as to the source of the power of the First Respondent (the **Commonwealth Minister**) to give advice on the renewal of the mining licence known as "Jabiluka MLN1". In short:

    (a) The Applicant says that the Commonwealth Minister give advice, either as an exercise of "the non-statutory executive power given by ss 61 and 64 of the *Constitution',* or a power implied from s 35(2) of the *Atomic Energy Act* 1953 (Cth), or a power implied from s 187(1) of the *Minerals' Title Act* 2010 (NT): Applicant's opening submissions at [47] (CB B17); and

    (b) The Commonwealth parties contend that the Minister in giving the advice was exercising a non-statutory, non-prerogative capacity conferred by s 61 of the *Constitution*: Commonwealth Parties' opening submissions at [7] (CB B37).

18. This controversy led to the Applicant making the following submission in opening submissions in reply:

> The correct position is that any source of power (including any non-statutory executive power) was constrained by and no broader than the powers given by s 35(2) of the *Atomic Energy Act* and s 187(1) of the *Mineral Titles Act*. That is because, first, those sections confer power to give advice, <u>but do so subject to constraints</u>; secondly, non-statutory executive power is <u>subject to statutory control</u>; and thirdly, Parliament cannot have intended to

> confer a power subject to limits which could be circumvented by exercise of non-statutory executive power. At the very least, the non-statutory executive power is subject to the constraints attending the statutory powers, as the Cth appears to accept (emphasis added).

19. Leaving to one side the *Atomic Energy Act,* the Applicant's position therefore seems to be that either the Commonwealth Minister was exercising a power conferred by the *Minerals Title Act* or, alternatively, a non-statutory executive power that was confined or regulated in some way by the *Minerals Titles Act.*

20. The constitutional issues that this submission gives rise to are considered below. However, the forensic importance of the point in the current proceedings seems to be that the Applicant wishes to advance a proposition that, whatever the source of power for the Minister's advice, the *Minerals Titles Act* conditions the requirements of procedural fairness and legal reasonableness associated with the giving of that advice. Whether that contention is correct is also significant for other grounds. For example, it is contended in the Amended Application that the Commonwealth Minister "failed to proceed on the basis of correct legal principles, correctly applied" (CB A7 at [2(b)(v)], [3A]). The determination of the "correct legal principles", as well as the determination of whether the Minister's advice involved jurisdictional error even if it did involve an error of law, could turn on whether the Commonwealth Minister was exercising power conferred by statute and, if so, which one.

(b) The Constitutional issues potentially raised

21. Three constitutional issues are identified in the notice issued by the Commonwealth under s 78B.

22. *First,* if the Minister exercised a non-statutory, non-prerogative executive capacity, is the legislative power of the Northern Territory to regulate the exercise of that capacity limited by reference to the constitutionally implied immunity of the Commonwealth recognised in ***Spence*** *v Queensland* (2019) 268 CLR 355; *Commonwealth v* ***Cigamatic*** *Pty Ltd (in liq)* (1962) 108 CLR 372 and *Re Residential Tenancies Tribunal (NSW) and* ***Henderson****; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

23. *Secondly,* could a Northern Territory Act "unilaterally and without the consent of the Commonwealth" vest in the Commonwealth Minister a power to give advice impliedly derived from s 187 of the *Mineral Titles Act*". This issue effectively makes the alternative assumption to issue one, in that it considers a possible statutory basis for the Commonwealth Minister's power to give advice.

24. *Thirdly,* if the Legislative Assembly has purported to confer by s 187 of the *Mineral Titles Act* a power on the Commonwealth Minister to give advice, and to subject the exercise of that power to limits, does that infringe the constitutionally implied immunity of the Commonwealth recognised in *Cigamatic*, *Henderson* and *Spence* in circumstances where the Commonwealth Minister could have given the same advice in the exercise of a non-statutory, non-prerogative capacity?

25. The Commonwealth does not contend that any direct issue arises as to the scope of the Commonwealth's power with respect to Territories in s 122.

26. As the notice issued under s 78B itself accepts, it is possible to characterise the issues raised, or at least some of them, as issues of statutory construction rather than the direct application of constitutional principle. That is, the issues might be characterised as relating to the scope of the powers of the parliament of the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth). However, even if the issues are conceptualised in those terms, the question of construction may itself give rise to a constitutional issue since: (a) the Court would need to determine whether, as a matter of construction, the Commonwealth parliament had intended to confer on the Northern Territory parliament powers that are wider or less restricted than the powers of a state parliament; and (b) in order to determine that issue, the powers of a state parliament to pass laws in terms of s 187 of the *Minerals Title Act* would need to be considered. That is because, prima facie, the legislative authority of the Northern Territory parliament is "of the same quality as … that enjoyed by the legislatures of the States": *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170 at 279.

27. The Commonwealth parties note that the application of *Cigamatic* and *Henderson* to a law of the Northern Territory was considered in *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1 at [82]-[91] (see especially the five principles stated at [83]-[88]). It may be noted in that case that the reasoning of the Court directly engaged with the relevant constitutional principles.

28. The application of the immunity recognised in *Cigamatic*, *Henderson* and *Spence* is not merely a theoretical matter in this case. The immunity extends beyond prerogative power and is capable of protecting all powers and privileges of the Commonwealth under s 61 of the Constitution: *Henderson* at 442. Further, there would be a real issue in this case whether the *Mineral Titles Act* was a law "which purport[s] to alter the Commonwealth's unique executive capacities, or which otherwise

operate[s] differentially upon the Commonwealth compared to its subjects": *Aboriginal Areas Protection Authority v Director of National Parks* [2022] NTSCFC 1 at [89].

PART III PROGRESSING THE MATTER

29. If the Court accepts that the present proceeding involves "a matter arising under the Constitution or involving its interpretation" the Court has a duty to adjourn the matter.

30. Although it is ultimately a matter for the Court, the Commonwealth's present position is that the case does involve a matter involving the interpretation of the Constitution because any determination of the scope and limitations upon the legislative power of the Northern Territory will likely closely map the same limitations on the legislative powers of the states.

31. As to the issue of a "reasonable time" for notice to the Attorneys-General, based on the case law considered above, it is difficult to see that the issuing of a notice on a Friday evening prior to a hearing scheduled to commence on Monday could satisfy the requirement.

32. As to the issue of severance, the Commonwealth is also in the Court's hands. However, the Commonwealth would accept that severance would likely not be available on the approach taken by Bromberg J in *On Track*. Even on the less strict approach of Perram J in *Quirk*, it might be said that in this case, the procedural fairness and unreasonableness cases form the foundation of the Constitutional matter that arises, such that those matters are not severable.

33. Even though, practically speaking, the cross-examination could probably proceed without any bearing on the constitutional issue, that could only occur after the case was opened. It would be expected that in opening the applicant and the Commonwealth parties will adhere to their opening and reply submissions as to the source of the Commonwealth Minister's power to give advice, and it is that issue that gives rise to the constitutional questions identified in the notice.

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28 October 2024