

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

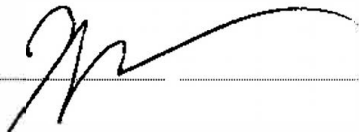
Respondents

Affidavit of: Leon Chung
Address: 161 Castlereagh Street, Sydney NSW 2000
Occupation: Solicitor

Certificate identifying Exhibit

This is the Certificate identifying Exhibit "LC-4" annexed to the Affidavit of Leon Chung
dated 17 September 2024

Witness,



Date: 17 September 2024

| | |
|--------------------|---|
| Filed on behalf of | Energy Resources of Australia Ltd ABN 71 008 550 865, Applicant |
| Prepared by | Leon Chung |
| Law firm | Herbert Smith Freehills |
| Tel 02 9225 5716 | Fax |
| Email | leon.chung@hsf.com |

Address for service
(include state and postcode) Level 34
161 Castlereagh St
Sydney NSW 2000

From: [Scott, Nicholas](#)
To: minister.king@industry.gov.au; laurence.coleman@industry.gov.au; Kym.Moore@industry.gov.au
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Laird, Kayla](#)
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Tuesday, 6 August 2024 11:16:15 PM
Attachments: [240806 NTP to Minister \(Cth\).pdf](#)

Dear all

We **attach**, by way of service, a notice to produce returnable at 3:00pm on 8 August 2024.

We will provide a sealed copy once available.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

Form 61
Rule 30.28(1)

Notice to produce

No. NSD 1056 of 2024

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

To the First Respondent

Definitions

In this Notice to Produce:

- **Advice Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.
- **Document** has the meaning set out in the Dictionary to the *Evidence Act 1995 (Cth)* and includes (for the avoidance of doubt) all correspondence, memoranda, reports, notes, meeting minutes, submissions and other records (whether handwritten or electronic).
- **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Documents

The Applicant requires you to produce the following documents or things at the hearing in the proceeding at 3:00pm on 8 August 2024:

1. The original or one copy of all Documents evidencing or recording the Advice Decision.

| | | |
|---|---|-----|
| Filed on behalf of (name & role of party) | The Applicant, Energy Resources of Australia ABN 71 008 550 865 | |
| Prepared by (name of person/lawyer) | Leon Chung | |
| Law firm (if applicable) | Herbert Smith Freehills | |
| Tel | 02 9225 5716 | Fax |
| Email | Leon.chung@hsf.com | |
| | Level 34 | |
| Address for service | 161 Castlereagh St | |
| (include state and postcode) | Sydney NSW 2000 | |

2. The original or one copy of all Documents evidencing or recording the First Respondent's reasons for making or engaging in the Advice Decision.
3. The original or one copy of:
 - a. all Documents to which the First Respondent had regard for the purpose of making or engaging in the Advice Decision;
 - b. all Documents evidencing or recording any information to which the First Respondent had regard for the purpose of making or engaging in the Advice Decision; and
 - c. to the extent not otherwise covered in a and b, all Documents before the First Respondent at the time she made or engaged in the Advice Decision.
4. The original or one copy of all Documents evidencing or recording communications between:
 - a. the First Respondent and/or the Second Respondent, on the one hand; and
 - b. the Third Respondent and/or the Fourth Respondent, on the other hand,in relation to the Advice Decision and/or the Renewal Decision.

Date: 6 August 2024



Signed by Leon Chung
Solicitor for the Applicant

Note

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

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

From: [Scott, Nicholas](#)
To: vanessa.higgins@industry.gov.au
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Laird, Kayla](#)
Subject: FW: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Tuesday, 6 August 2024 11:21:05 PM
Attachments: [240806 NTP to Minister \(Cth\).pdf](#)

Dear Ms Higgins

Further to our earlier email, the email and attachment below were sent to Ms Moore this evening.

Sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

From: Scott, Nicholas

Sent: Tuesday, August 6, 2024 9:16 PM

To: minister.king@industry.gov.au; laurence.coleman@industry.gov.au;

Kym.Moore@industry.gov.au

Cc: Chung, Leon <Leon.Chung@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>;

Laird, Kayla <Kayla.Laird@hsf.com>

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

Dear all

We **attach**, by way of service, a notice to produce returnable at 3:00pm on 8 August 2024.

We will provide a sealed copy once available.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

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Form 61
Rule 30.28(1)

Notice to produce

No. NSD 1056 of 2024

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

To the First Respondent

Definitions

In this Notice to Produce:

- **Advice Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.
- **Document** has the meaning set out in the Dictionary to the *Evidence Act 1995 (Cth)* and includes (for the avoidance of doubt) all correspondence, memoranda, reports, notes, meeting minutes, submissions and other records (whether handwritten or electronic).
- **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Documents

The Applicant requires you to produce the following documents or things at the hearing in the proceeding at 3:00pm on 8 August 2024:

1. The original or one copy of all Documents evidencing or recording the Advice Decision.

| | | | |
|---|---|-----|--|
| Filed on behalf of (name & role of party) | The Applicant, Energy Resources of Australia ABN 71 008 550 865 | | |
| Prepared by (name of person/lawyer) | Leon Chung | | |
| Law firm (if applicable) | Herbert Smith Freehills | | |
| Tel | 02 9225 5716 | Fax | |
| Email | Leon.chung@hsf.com | | |
| | Level 34 | | |
| Address for service | 161 Castlereagh St | | |
| (include state and postcode) | Sydney NSW 2000 | | |

2. The original or one copy of all Documents evidencing or recording the First Respondent's reasons for making or engaging in the Advice Decision.
3. The original or one copy of:
 - a. all Documents to which the First Respondent had regard for the purpose of making or engaging in the Advice Decision;
 - b. all Documents evidencing or recording any information to which the First Respondent had regard for the purpose of making or engaging in the Advice Decision; and
 - c. to the extent not otherwise covered in a and b, all Documents before the First Respondent at the time she made or engaged in the Advice Decision.
4. The original or one copy of all Documents evidencing or recording communications between:
 - a. the First Respondent and/or the Second Respondent, on the one hand; and
 - b. the Third Respondent and/or the Fourth Respondent, on the other hand,in relation to the Advice Decision and/or the Renewal Decision.

Date: 6 August 2024



Signed by Leon Chung
Solicitor for the Applicant

Note

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

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

From: [Scott, Nicholas](#)
To: minister.monaghan@nt.gov.au; Anne.Tan@nt.gov.au; kylie.nelson@nt.gov.au
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Laird, Kayla](#)
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Tuesday, 6 August 2024 11:17:31 PM
Attachments: [240806 NTP to Minister \(NT\).pdf](#)

Dear all

We **attach**, by way of service, a notice to produce returnable at 3:00pm on 8 August 2024.

We will provide a sealed copy once available.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

Form 61
Rule 30.28(1)

Notice to produce

No. NSD 1056 of 2024

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

To the Third Respondent

Definitions

In this Notice to Produce:

- **Advice Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.
- **Document** has the meaning set out in the Dictionary to the *Evidence Act 1995 (Cth)* and includes (for the avoidance of doubt) all correspondence, memoranda, reports, notes, meeting minutes, submissions and other records (whether handwritten or electronic).
- **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Documents

The Applicant requires you to produce the following documents or things at the hearing in the proceeding at 3:00pm on 8 August 2024:

| | | |
|---|---|-----|
| Filed on behalf of (name & role of party) | The Applicant, Energy Resources of Australia ABN 71 008 550 865 | |
| Prepared by (name of person/lawyer) | Leon Chung | |
| Law firm (if applicable) | Herbert Smith Freehills | |
| Tel | 02 9225 5716 | Fax |
| Email | Leon.chung@hsf.com | |
| | Level 34 | |
| Address for service | 161 Castlereagh St | |
| (include state and postcode) | Sydney NSW 2000 | |

1. The original or one copy of all Documents evidencing or recording the Renewal Decision.
2. The original or one copy of all Documents evidencing or recording the Third Respondent's reasons for making the Renewal Decision.
3. The original or one copy of:
 - a. all Documents to which the Third Respondent had regard for the purpose of making the Renewal Decision;
 - b. all Documents evidencing or recording any information to which the Third Respondent had regard for the purpose of making the Renewal Decision; and
 - c. to the extent not otherwise covered in a and b, all Documents before the Third Respondent at the time he made the Renewal Decision.
4. The original or one copy of all Documents evidencing or recording communications between:
 - a. the First Respondent and/or the Second Respondent, on the one hand; and
 - b. the Third Respondent and/or the Fourth Respondent, on the other hand,in relation to the Advice Decision and/or the Renewal Decision.

Date: 6 August 2024



Signed by Leon Chung
Solicitor for the Applicant

Note

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

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

From: [Scott, Nicholas](#)
To: [Ng, Grace](#)
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#); [Nance, Emily](#); [Plitsch, Max](#); [Scott, Madisen](#); [Griffin, Brooke](#)
Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Wednesday, 7 August 2024 11:51:36 AM
Attachments: [240806 NTP to Minister \(Cth\).pdf](#)

Dear Colleagues

Further to the email below, I **attach**, by way of service, a sealed copy of the notice to produce that was filed yesterday.

We assume from your email that you have instructions to act for the Commonwealth Minister, but please let us know if that understanding is incorrect.

Sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

From: Scott, Nicholas

Sent: Tuesday, August 6, 2024 9:16 PM

To: minister.king@industry.gov.au; laurence.coleman@industry.gov.au;

Kym.Moore@industry.gov.au

Cc: Chung, Leon <Leon.Chung@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>;

Laird, Kayla <Kayla.Laird@hsf.com>

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

Dear all

We **attach**, by way of service, a notice to produce returnable at 3:00pm on 8 August 2024.

We will provide a sealed copy once available.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

From: [Scott, Nicholas](#)
To: Jennifer.Laurence@nt.gov.au
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#)
Subject: FW: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Wednesday, 7 August 2024 11:54:45 AM
Attachments: [240806 NTP to Minister \(NT\).pdf](#)

Dear Ms Laurence

Further to the email below, we now **attach** by way of service a sealed copy of the notice to produce filed last night.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

From: Scott, Nicholas

Sent: Tuesday, August 6, 2024 9:17 PM

To: minister.monaghan@nt.gov.au; Anne.Tan@nt.gov.au; kylie.nelson@nt.gov.au

Cc: Chung, Leon <Leon.Chung@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>;

Laird, Kayla <Kayla.Laird@hsf.com>

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

Dear all

We **attach**, by way of service, a notice to produce returnable at 3:00pm on 8 August 2024.

We will provide a sealed copy once available.

Yours sincerely

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

8 August 2024

T 08 8999 5226

Leon Chung
Partner
Herbert Smith Freehills
Level 34
161 Castlereagh Street
Sydney NSW 2000

Via email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Ors – Applicant’s Notice to Produce

I refer to the Applicant’s Notice to Produce (the **Notice**) dated 6 August 2024 served on the parties the same day.

With respect to paragraph [4] of the Notice, can the Applicant please clarify the scope of the words “*in relation to the Advice Decision and/or the Renewal Decision.*”

On one view, those words are very broad. By contrast, if the call for documents was in relation to communications occurring after the renewal application was made, and relating to the Decisions in those circumstances, the request could be complied with more expeditiously.

Subject to the Applicant’s response, the Third Respondent may seek to have the return date on the Notice extended in relation to paragraphs 3 and 4 at the hearing of the Applicant’s interlocutory application this afternoon.

Yours sincerely



Jennifer Laurence
Director Legal Services
Mining and Energy

cc Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
Solicitors for the First and Second Respondents
Via email: grace.ng@ags.gov.au

From: [Chung, Leon](#)
To: Jennifer.Laurence@nt.gov.au; [Ng, Grace](#)
Cc: [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Griffin, Brooke](#); [Scott, Nicholas](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#)
Subject: RE: NSD1056/2024: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Ors – Applicant’s Notice to Produce
Date: Thursday, 8 August 2024 4:00:40 PM
Attachments: [image001.jpg](#)

Dear Colleagues

We refer to communications in relation to the notices to produce issued in these proceedings.

We are instructed that our client was engaging with the government in relation to the prospects of a renewal application in January 2024. Accordingly, our clients are content for paragraph 4 of the Notice to Produce to the Third Respondent to be revised to read:

The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. the First Respondent and/or the Second Respondent, on the one hand; and*
- b. the Third Respondent and/or the Fourth Respondent, on the other hand, in relation to the Advice Decision and/or the Renewal Decision.*

Our clients are content that the same amendment be made to paragraph 4 of the Notice to Produce to the First Respondent, such that it reads:

The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. the First Respondent and/or the Second Respondent, on the one hand; and*
- b. the Third Respondent and/or the Fourth Respondent, on the other hand, in relation to the Advice Decision and/or the Renewal Decision.*

Please let us know your client’s position.

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

From: Jennifer Laurence <Jennifer.Laurence@nt.gov.au>

Sent: Thursday, August 8, 2024 1:42 PM

To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Ng, Grace <Grace.Ng@ags.gov.au>

Subject: NSD1056/2024: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Commonwealth) and Ors – Applicant’s Notice to Produce

Good Afternoon Leon

Please refer attached correspondence obo the Third and Fourth Respondents.

Kind regards,

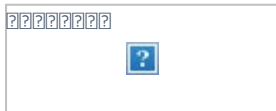
Jennifer Laurence

Director, Legal Services
Mining and Energy
Department of Industry, Tourism and Trade
5th Floor, Centrepoint Building, 48-50 Smith Street, Darwin
GPO Box 4550 Darwin NT 0801

t. 08 8999 5226

m. 0427 456 719

nt.gov.au



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Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1056/2024

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

Respondent

ORDER

JUDGE: JUSTICE KATZMANN

DATE OF ORDER: 08 August 2024

WHERE MADE: Sydney

**WITH THE CONSENT OF THE THIRD, FOURTH AND FIFTH RESPONDENTS,
AND IN THE ABSENCE OF OPPOSITION BY THE FIRST AND SECOND
RESPONDENTS, THE COURT ORDERS THAT:**

Interim stay

1. Upon the giving by the Applicant of the usual undertaking as to damages, until further order, the Renewal Decision, the effect of the Renewal Decision and enforcement or execution of the Renewal Decision, be stayed.

Document production

2. Paragraph 4 of the Notice to Produce issued to the First Respondent on 6 August 2024 be amended to read:

The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. *the First Respondent and/or the Second Respondent, on the one hand; and*
- b. *the Third Respondent and/or the Fourth Respondent, on the other hand,*
in relation to the Advice Decision and/or the Renewal Decision.

3. Paragraph 4 of the Notice to Produce issued to the Third Respondent on 6 August 2024 be amended to read:



The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. the First Respondent and/or the Second Respondent, on the one hand; and*
- b. the Third Respondent and/or the Fourth Respondent, on the other hand,*
in relation to the Advice Decision and/or the Renewal Decision.

Case Management

4. The matter be listed for case management before the docket judge, or if the matter is not docketed, the duty judge, at **9:30am on Monday, 19 August 2024** or at such other time as is convenient to the docket judge or duty judge in consultation with the parties.
5. Liberty to apply on 1 day's notice.

THE COURT NOTES THAT:

1. In these orders, **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Date orders authenticated: 8 August 2024


Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Schedule**

No: NSD1056/2024

Federal Court of Australia

District Registry: New South Wales

Division: General

| | |
|-------------------|--|
| 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 |

**VIQ SOLUTIONS****T:** 1800 287 274**E:** clientservices@viqsolutions.com**W:** www.viqsolutions.com.au**Ordered by:** Denise Moakler**For:** Herbert Smith Freehills Pty Limited (NSW)**Email:** denise.moakler@hsf.com**TRANSCRIPT OF PROCEEDINGS**

O/N H-1950286

FEDERAL COURT OF AUSTRALIA**NEW SOUTH WALES REGISTRY****KATZMANN J****No. NSD 1056 of 2024****ENERGY RESOURCES OF AUSTRALIA LTD****and****MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA
(COMMONWEALTH) and OTHERS****SYDNEY****4.30 PM, THURSDAY, 8 AUGUST 2024****Continued from 6.8.24****DAY 2****MR R. LANCASTER SC appears with MR D. HUME for the applicant****MS J.E. DAVIDSON appears for the 1st and 2nd respondents****MS E. JONES appears for the 3rd and 4th respondents****MS N. CASE appears for the 5th respondent**

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MR R. LANCASTER: May it please the court, I appear with MR HUME for the applicant.

HER HONOUR: Thank you, Mr Lancaster.

5

MS J.E. DAVIDSON: May it please the court, Davidson. I appear for the first and second respondents, your Honour.

HER HONOUR: Thank you, Ms Davidson.

10

MS E. JONES: If the Court pleases, my name is Jones, and I appear for the third and fourth respondents.

HER HONOUR: Thank you, Ms Jones.

15

MS N. CASE: May it please the court, my name is Case, and I appear for the fifth respondent.

HER HONOUR: Thank you, Ms Case. Mr Lancaster.

20

MR LANCASTER: Thank you, your Honour. The applicant moves for interim relief under the interlocutory application that was filed on 6 August. The – in accordance with Your Honour’s indication at the ex parte hearing - - -

HER HONOUR: Can I just ask you this question?

MR LANCASTER: Yes, your Honour.

HER HONOUR: Are you proposing that I sit into the wee hours of the morning, or how long are you proposing that today’s hearing extend?

30

MR LANCASTER: Your Honour, the circumstances are that I hope that it can be a brief appearance this afternoon. There is consent to the interim relief on the part of the third, fourth, and fifth respondents.

35

HER HONOUR: Can we just use their names, so that I can follow what you’re saying.

MR LANCASTER: Yes, so the Northern Territory Minister, the Northern Territory, and the Jabiluka Aboriginal Land Trust. So, then those three parties have indicated consent to the interim relief that’s sought. The Commonwealth Minister and the Commonwealth of Australia have indicated that they neither consent nor oppose the interim relief.

40

HER HONOUR: I see.

45

MR LANCASTER: And in those circumstances, I hope that your Honour will not need to sit into the night tonight.

HER HONOUR: Sounds good to me.

5

MR LANCASTER: Your Honour, I should, however, identify the application. We've prepared short minutes of order to reflect the consent or non-opposition position; can I hand them up. And I would propose to identify the affidavit material that we rely on for the application given that the Commonwealth parties neither
10 consent or oppose, although perhaps the extent to which your Honour will need to go into the detail of that I will be in your Honour's hands about. And also, I note that the applicant has, as your Honour indicated at the ex parte hearing filed written submissions explaining the position on the stay.

15 HER HONOUR: Yes. I haven't finished reading them; they came in just as I had to leave yesterday afternoon and I've been occupied all day in an appeal.

MR LANCASTER: Yes, your Honour.

20 HER HONOUR: But I've got a reasonable feeling for it, and I've read the affidavits that you filed – when was it? Yesterday?

MR LANCASTER: There are two affidavits of Leon Chung of 6 August 2024, and each of those affidavits has an exhibit, and there's an affidavit of Mr Brad Welsh of 7
25 August 2024, and Mr Welsh's affidavit also has an exhibit. And I tender the exhibits on the application and read those affidavits.

HER HONOUR: Very well then. So, that includes the confidential affidavit?

30 MR LANCASTER: It does, your Honour. The orders your Honour made on the 6th as to confidentiality subsist. I can indicate that the counterparty to the agreement, the Jabiluka Aboriginal Land Trust, as I understand communications between the solicitors, has not come to a final view about the extent of the appropriate order, if
35 any, as to the continuing confidentiality of those provisions, and in those circumstances, for our part, we don't propose any change in the orders your Honour has already made about confidentiality.

HER HONOUR: Save that I have to make a decision on your application as soon as possible.

40

MR LANCASTER: Yes, your Honour. And as soon as possible should, in the circumstances, take into account the fifth respondent's position as to the significance or otherwise of those matters to its confidential interests.

45 HER HONOUR: Sure. Perhaps, I might ask Ms Case a question about that. I will come back to that later.

MR LANCASTER: As I understand it, it's just a matter of a little more time for the fifth respondent to consider that matter.

HER HONOUR: Sure. So, the - - -

5

MR LANCASTER: So, for our part, we don't - - -

HER HONOUR: All right.

10 MR LANCASTER: I'm sorry, your Honour.

HER HONOUR: I had assumed that there are no objections to any parts of Mr Chung's affidavit, at least for present purposes. Am I correct, ladies?

15 MS DAVIDSON: For present purposes, yes, your Honour.

MS JONES: Yes, your Honour.

20 MS CASE: For present purposes and subject to the question of confidentiality, to which I understand the court will return.

HER HONOUR: Sure. Well, the affidavits of Leon Chung of 6 August 2024 and that of Brad Welsh of 7 August 2024 will be taken as read.

25 MR LANCASTER: Thank you, your Honour.

HER HONOUR: And I admit into evidence exhibit LC1, exhibit LC3. Do you really need to tender the confidential exhibit?

30 MR LANCASTER: I don't, your Honour.

HER HONOUR: All right.

35 MR LANCASTER: No, your Honour, I don't. And then there's an exhibit – I'm sorry, your Honour, I thought your Honour was going to Mr Welsh's BW1, his exhibit.

HER HONOUR: I beg your pardon. What do I need to know about these materials? Are you going to take me through them?

40

MR LANCASTER: If your Honour wishes me to. They are – to the extent they're - - -

HER HONOUR: Well, just - - -

45

MR LANCASTER: - - - relevant to the core of the interlocutory application, they're referred to in our written submissions. Perhaps, I could do it most efficiently by

referring your Honour to paragraphs there; is that an appropriate way to proceed? I'm quite willing to take your Honour through the affidavit in more detail, but in light of the respondents' position, that may not be necessary

5 HER HONOUR: Well, that's why I'm asking you. You're tendering all this material, when there's no objection to the order that you seek.

MR LANCASTER: It's so that it's formally before the court.

10 HER HONOUR: Right.

MR LANCASTER: And in light of the Commonwealth party's position of non-opposition, rather than active consent.

15 HER HONOUR: All right. Well, I will admit into evidence exhibit BW1, and you can take me to the material upon which you rely for the present application in due course. Is that a satisfactory approach?

20 MR LANCASTER: Yes, your Honour. If your Honour has the written submissions, Mr Welsh's material, which is additional to the material your Honour saw briefly on the ex-parte application of Mr Chung, is referred to in the balance and convenience section of the submissions, paragraph 69 to 76. And there are some specific references to Mr Welsh's affidavit in a number of those paragraphs, and that's really the extent of what I would take your Honour to for the purpose of today.

25 HER HONOUR: All right.

30 MR LANCASTER: Can I then, by reference to the proposed short minutes of order, just identify the structure of those. Paragraph 1 has some defined terms, some from the pleadings, and otherwise just matters of ordinary understanding of words, and then the interim stay is in paragraph 2. Paragraphs 3 to 6 concern the discrete issue of document production. The applicant has issued two notices to produce: one to the first respondent, the Commonwealth Minister, and the other to the third respondent, the decision-maker, the Northern Territory Minister. And after discussion between
35 the parties, we have agreed to narrow one of the categories to identify an appropriate starting date range.

40 And I hope that's acceptable to those respondents, because, in my submission, it's in the interest of the matter generally that these documents be produced as promptly as possible, so we know the legal landscape for setting down either a further interlocutory hearing or, as I'm about to suggest, an earlier final hearing.

HER HONOUR: An expedited hearing.

45 MR LANCASTER: Yes, and whether it's formally expedited or just earlier than would otherwise be the case in the court's docket. And so, the proposal is, on the applicant's part, that your Honour make the interim stay in terms of order 2 and then

that the matter be brought back relatively soon as per draft order 7 for directions for case management. Now, we put in a date next Thursday; there's no magic in that, and as it turns out, I think that's probably inconvenient for the respondents, so we would wish to meet their convenience there. And I think the circumstances are that

5 the business days here and there at the moment are not of the essence for any party in terms of the duration of the interim order, so our proposal is that the - - -

HER HONOUR: Well, I suppose, it really depends on how quickly, since – well, the interim order is – it's simply until further order now.

10

MR LANCASTER: Yes. At the moment, that could, of course, be specified to the case management date or to some later date, but at the moment, the interim stay is intended for a short period until the structure of the case going forward has a bit more clarity. And certainly, for our part, we're very much open to an early final

15 hearing, but we couldn't tell your Honour safely at the moment whether that will be a two-day case or a four-day case, because we don't know what these documents will say, and also we don't know if every issue will be in dispute on behalf of the respondents or whether there will be some common ground as to some of the issues.

HER HONOUR: Of course. Well, I will explore with your opponents what their attitude is to dates. Yes, and what else did you want to say to me?

20

MR LANCASTER: Your Honour, I don't want your Honour to think I'm skating over the substance of the application. Our comprehensive written submissions were designed to avoid that, and certainly, the balance of convenience paragraphs, referring to the affidavit, I hope, give your Honour a clear picture of what it is the interim relief is trying to avoid by way of adverse effect on the applicant and its interests and, for that matter, on some third-parties and their interests.

25

HER HONOUR: Well, since I haven't read this, do you want to take me through it now? I mean, I've got a pretty good idea of what it's likely to say.

30

MR LANCASTER: Yes.

HER HONOUR: But – yes, all right. So, I take it that the respondents' position, or at least the position of the Territory, the Territory Minister, and the Trust is that there is a primer facing case of or not.

35

MR LANCASTER: There hasn't been specific concession as to those matters, but they certainly consent to the interim relief so - - -

40

HER HONOUR: Well, that's consistent with that so - - -

MR LANCASTER: It is, but I wouldn't want to speak for the basis on which - - -

HER HONOUR: No, but what I'm trying to explore, really, is whether anyone wants reasons and if so, the extent to which I have to provide reasons. If nobody requires reasons, then I'm not going to create unnecessary work for myself.

5 MR LANCASTER: Yes. Well, perhaps I can invite your Honour to ask my learned friends that question because for our part, we do not.

MS DAVIDSON: For the Commonwealth Party's part, we do not, your Honour.

10 MS JONES: The position is the same as the Commonwealth from the Northern Territory.

HER HONOUR: And likewise with the fifth respondent, I assume.

15 MS CASE: Yes, those are my instructions also.

HER HONOUR: Well, in those circumstances, there's no reason, it seems to me, having regard to the attitude of the parties, why I shouldn't make the interim order.

20 MR LANCASTER: Thank you.

HER HONOUR: I can say that from the material that I have seen, I can see that there is at least an arguable case in relation to the denial of procedural fairness which is probably sufficient for the present purposes. And there was material even in Mr
25 Chung's affidavit that dealt with some of the matters, I think, that Mr Welsh goes into.

MR LANCASTER: Yes. That's true. The balance of convenience, yes, that's
30 right.

HER HONOUR: So, you formally give the undertaking for your client, the usual undertaking, as to damages?

MR LANCASTER: I do. Yes, I have those instructions to give that undertaking as
35 to damages.

HER HONOUR: All right. So, you can proceed on the basis that I will grant the order, Ms Davidson, that is the order that's proposed in the draft that was handed to me: namely that upon the giving by the applicant of the usual undertaking as to
40 damages, until further order the renewal decision the effect of the renewal decision and enforcement or execution of the renewal decision be stayed. And I take it from what you've said that you don't want to be heard against that proposition.

MS DAVIDSON: I don't seek to be heard against it. The form of the order has
45 changed from what was proposed and this form of order was provided to my friends on this side of the bar table as we arrived in court.

HER HONOUR: I see.

MS DAVIDSON: Thus the Commonwealth's position and my instructions were based in relation to the – based on the earlier form of the order. I understand that
5 what is now sort is until further order and I don't seek to be heard on that, but my instructions relate, and the Commonwealth's position did relate to the earlier form of the order.

HER HONOUR: And did that include until the hearing of the interlocutory
10 injunction?

MS DAVIDSON: Well, it did. It was linked to, I think, order 10 of what was initially proposed.

HER HONOUR: I see. What do you have to say, while you're on your – well, you were on your feet, about the date by which the matter should come back before the court?

MS DAVIDSON: I agree with my friend that it would be sensible for it to be listed
20 for further directions. I would respectfully ask that that not be on 15 August and my friend, I think, is willing to accommodate that, but in respect of the notices to produce, the Commonwealth's position would be whilst it's grateful for the clarification in respect of paragraph 4 of the notice issued to the first respondent, that proposed orders 5 and 6 should not be made at this point. The reason being that the
25 Commonwealth will correspond, as I understand it, this afternoon – this was intended to happen before your honour came on the bench and hasn't quite – in respect of the time for when production is possible and what can be done.

It understands that desirability of production as soon as possible and certainly
30 doesn't seek to delay proceedings, but I don't have instructions now, bearing in mind that some searches will be required in relation to paragraph 4 and, indeed, paragraph 3 as to a particular date by which I can indicate to your Honour now that the Commonwealth parties could comply. It's certainly not the intention that it be allowed to go off in the never-never, but it would be more appropriate, in my
35 submission, for those orders in respect of time for compliance be made at the next occasion, that is at the directions hearing if compliance hasn't occurred by then.

HER HONOUR: Are you content with that, Mr Lancaster?

MR LANCASTER: Yes, your Honour.

HER HONOUR: All right. Well, I will strike out 5 and 6 from these orders. The next thing is the question of the confidentiality order – the non-publication order. Ms Case, how long do you need to consider your position on that?

MS CASE: I think overnight we could consider the detail. It's only occurred to me this afternoon that, some confidential material is contained in the non-confidential affidavits so - - -

5 HER HONOUR: I don't think that's right because – and Mr Lancaster will correct me if I'm wrong – to the extent that the particular agreement is referred to in the non-confidential affidavits, it reflects the fact that not every aspect of the agreement was to be confidential. Confidentiality only attaches to certain parts of the agreement. That's right, isn't it, Mr Lancaster?

10

MR LANCASTER: Yes. To be frank, we haven't done an audit with these concerns in mind – of the confidentiality provisions, but - - -

15 HER HONOUR: If you're going to pursue an application that the material, which is currently the subject of an interim order, not be published, you will need to put on an affidavit to support that.

MR LANCASTER: Yes.

20 HER HONOUR: Unless you're simply relying on the material thus far, and that may be problematic, and the fifth respondent, the Trust, may want to be heard about it anyway; they may want to put on some evidence. But if I'm told within the next 24 hours, by close of business tomorrow, that the application will not be pursued, I will simply revoke the interim order.

25

MR LANCASTER: For our part, we certainly - - -

HER HONOUR: I just need to be informed about that.

30 MR LANCASTER: Yes. We can inform your honour's chambers of that by close of business tomorrow, if that's appropriate.

MS CASE: Yes. I think that's tolerable for the fifth respondent.

35 HER HONOUR: Excellent. All right. So, what about the next listing date?

MR LANCASTER: Opening gambit would be Monday the 19th, your Honour.

HER HONOUR: Right. What do the respondents say about that?

40

MS DAVIDSON: That's suitable for me, your Honour.

MS JONES: It's suitable, your Honour.

45 MS CASE: That's suitable as well, your Honour. Thank you

HER HONOUR: At 9 or 9.30?

MR LANCASTER: I think the usual time would be appropriate; 9.30.

5 HER HONOUR: 9.30. Well, what I'm going to try and do is see if the matter can be docketed straight away. It seems to me to be an appropriate course to take.

MR LANCASTER: Yes. Thank you, your Honour.

10 HER HONOUR: And if it can, you will be informed of that. If not, then it will have to go to the duty judge – I suppose – on that day.

MR LANCASTER: Thank you, your Honour.

15 HER HONOUR: All right. And when are you looking to – is it too early to say when you're looking to have the matter heard?

20 MR LANCASTER: Well, as promptly as the court can accommodate, and in fairness to the respondents, but given what I said earlier about the uncertain scope of the final hearing at this stage – we, any - - -

HER HONOUR: Well, you hope to be in a position to assess that on the – or to inform the court on the 19th?

25 MR LANCASTER: By the 19th, we should have a clearer picture of that, because there have been fruitful discussions between the parties on procedural matters already, and we expect that can continue.

30 HER HONOUR: Excellent. Thank you. Is there anything else anyone wants to raise?

MR LANCASTER: No. Thank you, your Honour.

HER HONOUR: Then, I will make the following orders:

- 35 (1) Upon the giving by the applicant of the usual undertaking as to damages, until further order, the renewal decision, the effect of the renewal decision, and enforcement or execution of the renewal decision, be stayed.
- 40 (2) Paragraph 4 of the notice to produce issued to the first respondent on 6 August 2024, be amended to read as follows, “The original or one copy of all documents, evidence, or recording communications occurring on or after 1 January 2024 between the first respondent and/or the second respondent, on the one hand, and the third respondent and/or the fourth respondent, on the other hand, in relation to the advice decision and/or the renewal decision.”
- (3) Paragraph 4 of the notice to produce issued to the third respondent on 6 August 2024 be amended to read, “The original or one copy of all documents, evidence,

and any recording communications occurring on or after 1 January 2024 between the first respondent and/or the second respondent, on the one hand, and the third respondent and/or the fourth respondent, on the other hand, in relation to the advice decision and/or the renewal decision.”

- 5 (4) The matter will be listed for case management before the docket judge, or if the matter is not docketed, the duty judge at 9.30 am on 19 August 2024 or as is convenient to the docket judge or duty judge in consultation with the parties.

Are you content with that?

10 MR LANCASTER: Yes, your Honour. Thank you.

MS DAVIDSON: Yes, your Honour.

MS JONES: Yes, your Honour.

15

HER HONOUR: Thank you. And I grant liberty to any party to apply on one day's notice. I'm going to – can I just say this? I could see that this order has been amended fairly quickly, so the only defined term that remains in the order is the renewal decision – in the proposed orders is the renewal decision - - -

20

MR LANCASTER: Yes, your Honour.

HER HONOUR: - - - isn't that right?

25 MR LANCASTER: Yes.

HER HONOUR: So, I note that in these orders “renewal decision” has the meaning set out in the originating application filed in the proceeding on 6 August 2024, and just for the benefit of those who are attending in person and listening to this hearing, it's a reference to the decision of the Northern Territory Minister not to renew the applicant's lease over the Jabiluka mine. Correct?

30

MR LANCASTER: Yes, your Honour.

35 HER HONOUR: Thank you.

MR LANCASTER: May it please the court.

HER HONOUR: Yes, thank you. Please adjourn.

40

MATTER ADJOURNED at 4.56 pm UNTIL MONDAY, 19 AUGUST 2024

From: [Scott, Nicholas](#)
To: [Loughland, Amelia](#); [Trilby Donald](#); [Ng, Grace](#); [Jennifer Laurence](#); [Griffin, Brooke](#); [Chung, Leon](#)
Cc: [Dominic Gomez](#); [Zhu, Haiqiu](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#)
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Friday, 9 August 2024 3:38:53 PM

Dear Colleagues

We refer to the Notices to Produce dated 6 August 2024 and to the impending case management hearing in this matter on 19 August 2024.

As you'll appreciate, prompt production of the documents sought by those Notices to Produce is an important precursor to identifying future programming steps in the matter.

We had understood that, save for the final category in each Notice to Produce (which has now been amended), there was no difficulty with immediate production.

To ensure that the matter can move forward efficiently, we respectfully request production under categories 1-3 of the Notices to Produce immediately and production under revised category 4 as soon as practicable.

Yours sincerely

Nicholas Scott

Senior Associate

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From: [Melissa Forbes](#)
To: [Scott, Nicholas](#)
Cc: [Chung, Leon](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#)
Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors
Date: Friday, 9 August 2024 7:08:08 PM

Thank you Nicholas. I will come back to you when possible.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

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From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Friday, 9 August 2024 3:45 PM
To: Melissa Forbes <Melissa.Forbes@nt.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Subject: FW: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors

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Dear Ms Forbes

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From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Friday, August 9, 2024 1:39 PM
To: Loughland, Amelia <Amelia.Loughland@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Ng, Grace <Grace.Ng@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>

Cc: Dominic Gomez <GomezD@nlc.org.au>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>

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Yours sincerely

Nicholas Scott

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To: [Ng, Grace](#); [Griffin, Brooke](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#)
Cc: [Dominic Gomez](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#)
Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]
Date: Tuesday, 13 August 2024 8:49:59 AM

Dear Colleagues

We repeat our request for production under categories 1-3 of the Notices to Produce immediately and production under revised category 4 as soon as practicable. We would be grateful if the parties can please advise when production will occur, noting that at the hearing on 8 August 2024 counsel for the First Respondent stated that the First Respondent understands the desirability of production as soon as possible and that it does not seek to delay proceedings (T27.29-30).

Kind regards
Haiqiu

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From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Friday, August 9, 2024 3:39 PM
To: Loughland, Amelia <Amelia.Loughland@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Ng, Grace <Grace.Ng@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>
Cc: Dominic Gomez <GomezD@nlc.org.au>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors

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Yours sincerely

Nicholas Scott

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From: [Melissa Forbes](#)
To: [Zhu, Haiqiu](#)
Cc: [Ng, Grace](#); [Griffin, Brooke](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#)
Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]
Date: Tuesday, 13 August 2024 10:45:20 AM

Dear Haiqiu,

The Third and Fourth Respondents (**Territory Parties**) are in the process of compiling documents sought under the notice to produce. The Territory Parties are not yet in a position to produce documents, nor advise when production will occur, other than to say that it will be as soon as possible.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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Sent: Tuesday, 13 August 2024 8:20 AM

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Cc: Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>

Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]

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Kind regards
Haiqiu

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From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Friday, August 9, 2024 3:39 PM
To: Loughland, Amelia <Amelia.Loughland@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Ng, Grace <Grace.Ng@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>
Cc: Dominic Gomez <GomezD@nlc.org.au>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors

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Yours sincerely
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From: [Chung, Leon](#)
To: [Melissa Forbes](#); [Ng, Grace](#); [Griffin, Brooke](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#)
Cc: [Scott, Nicholas](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#)
Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]
Date: Tuesday, 13 August 2024 12:04:54 PM

Dear Colleagues

We refer to the Advice Decision, the Renewal Decision (each as defined in the Originating Application), the Notices to Produce served on 7 August 2024 on the First and Third Respondent respectively and our email of 9 August 2024.

The Notices to Produce seek basic documents in respect of the two decisions, most or all of which should be readily available and capable of immediate production. By way of example, the advice given by the First Respondent to the Third Respondent plainly exists, must be to hand and, in fact, was promised to be produced by the First Respondent's office by 29 July 2024. Two weeks have since passed. We note that on 8 August 2024, counsel for the First Respondent stated that the First Respondent understands the desirability of production as soon as possible and that it does not seek to delay proceedings (T27.29-30).

Save for paragraph 4 of the Notices (which was subsequently amended, without objection, to address your clients' concerns) your clients did not raise any concerns, prior to or during the hearing before the Duty Judge last Thursday, about immediate production of the documents sought. None have been raised subsequently.

Production of these documents immediately is critical to the prompt and efficient programming of the matter.

We request production immediately and, in any event, by no later than 4pm today.

In the event that substantive production is not given by 4pm, we hold instructions to apply to the docket judge for an urgent relisting of the matter. We will rely on this communication, and prior communications, on the issue of costs.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

T +61 2 9225 5716 M +61 407 400 291 F +61 2 9322 4000

www.herbertsmithfreehills.com

From: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Sent: Tuesday, August 13, 2024 10:45 AM

To: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Cc: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen

<Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>

Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]

Dear Haiqiu,

The Third and Fourth Respondents (**Territory Parties**) are in the process of compiling documents sought under the notice to produce. The Territory Parties are not yet in a position to produce documents, nor advise when production will occur, other than to say that it will be as soon as possible.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Sent: Tuesday, 13 August 2024 8:20 AM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>

Cc: Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>

Subject: RE: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors [HSF-AUS01.FID5840327]

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Colleagues

We repeat our request for production under categories 1-3 of the Notices to Produce immediately and production under revised category 4 as soon as practicable. We would be grateful if the parties can please advise when production will occur, noting that at the hearing on 8 August 2024 counsel for the First Respondent stated that the First Respondent understands

the desirability of production as soon as possible and that it does not seek to delay proceedings (T27.29-30).

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqiu.Zhu@hsf.com
www.herbertsmithfreehills.com.au

From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Friday, August 9, 2024 3:39 PM
To: Loughland, Amelia <Amelia.Loughland@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Ng, Grace <Grace.Ng@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Chung, Leon <Leon.Chung@hsf.com>
Cc: Dominic Gomez <GomezD@nlc.org.au>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors

Dear Colleagues

We refer to the Notices to Produce dated 6 August 2024 and to the impending case management hearing in this matter on 19 August 2024.

As you'll appreciate, prompt production of the documents sought by those Notices to Produce is an important precursor to identifying future programming steps in the matter.

We had understood that, save for the final category in each Notice to Produce (which has now been amended), there was no difficulty with immediate production.

To ensure that the matter can move forward efficiently, we respectfully request production under categories 1-3 of the Notices to Produce immediately and production under revised category 4 as soon as practicable.

Yours sincerely
Nicholas Scott
Senior Associate
Herbert Smith Freehills
T +61 8 9211 7336 E Nicholas.Scott@hsf.com
www.herbertsmithfreehills.com



Department of
**THE ATTORNEY-GENERAL
AND JUSTICE**

Solicitor for the Northern Territory

Level 2 Old Admiralty Tower
68 The Esplanade, Darwin, NT,
0800

Postal address
GPO Box 1722
Darwin NT 0801
[E **Melissa.Forbes@nt.gov.au**](mailto:Melissa.Forbes@nt.gov.au)

T 08 8935 7872

TRM No. 20242140

13 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors – Notice to produce

1. I refer to the above proceeding, in which I act for the third and fourth respondent (**Territory Parties**). I also refer to the applicant's **Notice** to produce filed 7 August 2024, your emails of 9 and 13 August in relation to the Notice, and my email of 13 August 2024 in relation to the same.
2. As advised in my email of 13 August 2024, the Territory Parties are not yet in a position to produce the documents listed in the Notice. You will be aware that one of my instructors is on leave today.
3. Your client's notice did not meet the five day notice period necessary for the documents to be required to be produced on the date in the notice (8 August 2024). The filed version of the notice lists 21 August 2024 as the date for "Return of subpoena".
4. Your client ultimately did not press for orders specifying a time for compliance at the directions hearing on 8 August 2024, leaving that matter to be dealt with at the next listing if necessary. It can be raised and addressed at any listing on 21 August 2024 or at the directions hearing on 22 August 2024, if production has not occurred. In the circumstances, an urgent relisting is unnecessary.
5. I reiterate that the Territory Parties are working to compile the documents referred to in the notice and will produce them as soon as possible. I hope to produce some documents to you tomorrow, and expect for further production to occur prior to 21 August 2024.

Yours sincerely
**SOLICITOR FOR THE
NORTHERN TERRITORY**



**Melissa Forbes
Principal Lawyer**



Our ref. 24007108

13 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

Australian Government Solicitor
Level 10, 60 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
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www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors NSD1056/2024 – Notice to produce

1. We refer to the above proceeding, the applicant's notice to produce of 6 August 2024 directed to the first respondent (**Notice**) and the hearing before Justice Katzmann on 8 August 2024.
2. We refer also to your emails of 9 August 2024 of 3.39pm, 13 August 8.20am and 12.05pm.

Notice to produce – paragraphs 1 and 2

3. The Commonwealth respondents are in the process of collating material relevant to the issues arising in these proceedings, and documents which may be responsive to the Notice.
4. We are presently in a position to produce (subject to privilege claims which are indicated by the redactions) the Ministerial Decision Brief dated 25 July 2024 which includes the Advice Decision. We believe these together respond to paragraphs 1 and 2 of the Notice.

Departmental staff names and contact details

5. We seek your agreement to redact the names of departmental staff which appear in the documents falling within the scope of the Notice, who do not hold any responsibility for advising the Minister, for example those who are named as contact officers in briefing documents. The names of those staff members do not appear to be relevant to your client's grounds of application.
6. We propose to release the names of the senior-level staff, for example the senior executive service level staff who clear the contents of Ministerial briefing documents and who provide recommendations and advice to the Minister.

7. We further seek your agreement to redact the telephone numbers and email addresses of departmental staff, as that information also does not appear to be relevant to your client's grounds of application.


Notice to produce – paragraph 3

8. We continue to take instructions as to whether there is any material captured by paragraph 3 of the Notice beyond the documents referred in [4] of our letter above. The basis of your understanding, as stated in your email of 9 August 2024, that "there was no difficulty with immediate production" under this category is unclear. As was submitted by the Commonwealth respondents at the hearing on 8 August 2024, searches are required. These are continuing. Assuming any such material exists, immediate production is not possible.

Notice to produce – paragraph 4

9. We are also considering your request in relation to documents captured by paragraph 4 of the Notice as amended by Justice Katzmann's orders of 8 August 2024, and will write separately about this.
10. We would be grateful to receive your response to [5] and [7] by 5.00pm on 15 August 2024.

Yours sincerely,



Grace Ng
Senior Executive Lawyer
T 02 9581 7320 M 0417 991 508
Grace.Ng@ags.gov.au

cc.

Third and Fourth Respondent: Jennifer Laurence
Fifth Respondent: Trilby Donald



Our ref. 24007108

15 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

Australian Government Solicitor
Level 10, 60 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777
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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors NSD1056/2024 – Notice to produce

1. We refer to the above proceeding, the applicant's notice to produce of 6 August 2024 directed to the first respondent (**Notice**) and our letter of 13 August 2024.
2. We are writing in relation paragraph 3 of the Notice.
3. We are instructed that the only documents responsive to paragraph 3 of the Notice, which were not already produced to you on 13 August 2024, are **enclosed**.
4. As with our previous production, we have indicated privilege claims by the redactions. We have also applied redactions in line with the approach set out in [5] and [7] of our 13 August 2024 letter. In addition to the approach at [5], we have also redacted the personal email address of the Minister as such information is also not considered to be relevant to the grounds of review.
5. We continue to consider your request in relation to documents captured by paragraph 4 of the Notice as amended by Justice Katzmann's orders of 8 August 2024, and will write separately about this.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Grace Ng', written over a light blue horizontal line.

Grace Ng
Senior Executive Lawyer
T 02 9581 7320 M 0417 991 508
Grace.Ng@ags.gov.au

cc.

Third and Fourth Respondent: Jennifer Laurence
Fifth Respondent: Trilby Donald

IN CONFIDENCE - INTERNAL MO USE ONLY

OFFICE OF THE HON MADELEINE KING MP

| | | | |
|--|-------------|-----------------|----------------------------|
| Topic | Jabiluka | | |
| Brief No. | MS24-000911 | Adviser | Marie Illman Ben Latham |
| Date Received | 24/07/2024 | Due Date | 26/07/2024 |
| Yellow date | 25/07/2024 | | |
| <input type="checkbox"/> ROUTINE <input checked="" type="checkbox"/> <u>URGENT</u> | | | |

ADVISER COMMENTS:

- There are four options: 1. Renew the mineral lease, 2. Don't renew the mineral lease, 3. Tell Minister Monaghan to make the decision but to consider certain factors, 4. Withhold your advice until after the NT re-makes the minerals titles legislation.
- The advice is binding and must be adhered to by Minister Monaghan.
- [REDACTED]
- [REDACTED] – although it's doubtful that Rio Tinto would fund ERA's challenge due to public backlash.
- The offices of the PM, Ministers Plibersek and Burney, Senator McCarthy and MP Gosling have been notified – all would like the mineral lease to end so Jabiluka can be incorporated into Kakadu National Park.
- MP Scrymgeour would like the decision to be made after the NT Election on 24 August to avoid political attacks and to investigate the ramifications for Ranger rehabilitation, but will support any decision that's made.

COMMUNICATIONS OPPORTUNITIES:

- As discussed.

IN CONFIDENCE - INTERNAL MO USE ONLY**ADVISER RECOMMENDATIONS:**

- That the Minister signs the letter for Option 2 (Attachment F), i.e. advising Minister Monaghan to refuse the Jabiluka Mineral Lease renewal application.

CHIEF OF STAFF COMMENTS:**MINISTER'S COMMENTS:**

Latham, Ben

From: Latham, Ben
Sent: Thursday, 25 July 2024 4:21 PM
To: King, Madeleine; Coleman, Laurence
Subject: FW: MS24-000911 [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]
Attachments: MS24-000911.docx; Attachment A - NT Minister's request for advice (003).pdf; Attachment B - ERA renewal application and supporting materials.pdf; Attachment C - Northern Land Council submissions (002).pdf; Attachment D - Context and key policy considerations.docx; Attachment E - Letter - Option 1 - approve with conditions.docx; Attachment F - Letter - Option 2 - refuse application for renewal.docx; Attachment G - Letter - Option 3 - advice on relevant considerations.docx; Attachment H - Legal considerations.docx; Attachment I - AGS advice - 23 July 2024.pdf

Ben Latham
Parliamentary Adviser
Office of the Hon Madeleine King MP
Minister for Resources
Minister for Northern Australia

M [redacted] | E [redacted]

OFFICIAL: Sensitive
Legal privilege

From: Moore, Kym <[redacted]>
Sent: Thursday, July 25, 2024 4:12 PM
To: Illman, Marie <[redacted]>; Latham, Ben <[redacted]>
Cc: Chesworth, Peter <[redacted]>; [redacted] <[redacted]>
Subject: MS24-000911 [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]

OFFICIAL: Sensitive//Legal-Privilege

Hi Marie and Ben,

Its coming through in PDMS now but please see attached with draft watermarked letters.

-Kym

Kym Moore
A/ General Manager | Mining

M [redacted] | [redacted] | E [redacted]@industry.gov.au

Executive Assistant: Jenny Thomas | E [redacted]s@industry.gov.au | P [redacted]

Worth noting: I work flexibly. I'm sending this message now because it suits me. Don't feel obliged to read, action or respond out of normal work hours. If something is urgent – I'll call ahead.

OFFICIAL: Sensitive
Legal privilege

From: DLO King <[REDACTED]>
Sent: Thursday, 25 July 2024 5:03 PM
To: King, Madeleine
Cc: DLO King; Coleman, Laurence; Latham, Ben
Subject: MS24-000911 - Jabiluka Mineral Lease Renewal Application [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege]
Attachments: MS24-000911.pdf

OFFICIAL: Sensitive//Legal-Privilege

Good Afternoon Minister

Please find attached submission relating to the Jabiluka Mineral Lease Renewal Application for your review and approval.

Advice will be sent separately – the letter recommended for signing is at bookmark attachment F.

Thank you

Cassandra Turnbull
Departmental Liaison Officer
The Hon Madeleine King MP
Minister for Resources
Minister for Northern Australia
Phone [REDACTED] | Email [REDACTED]
industry.gov.au ABN 74 599 608 295

Our purpose is to help the government build a better future for all Australians through enabling a productive, resilient and sustainable economy, enriched by science and technology.

We are collaborative, innovative, respectful and we strive for excellence.



Acknowledgement of Country

Our department recognises the First Peoples of this Nation and their ongoing cultural and spiritual connections to the lands, waters, seas, skies, and communities.

We Acknowledge First Nations Peoples as the Traditional Custodians and Lore Keepers of the oldest living culture and pay respects to their Elders past and present. We extend that respect to all First Nations Peoples.

OFFICIAL: Sensitive
Legal privilege



Department of
**THE ATTORNEY-GENERAL
AND JUSTICE**

Solicitor for the Northern Territory

Level 2 Old Admiralty Tower
68 The Esplanade, Darwin, NT,
0800

Postal address
GPO Box 1722
Darwin NT 0801
E Melissa.Forbes@nt.gov.au

T 08 8935 7872

TRM No. 20242140

15 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors – Notice to produce

1. I refer to the above proceeding, and the Applicant's **Notice** to produce issued to the Third Respondent and filed 7 August 2024.
2. In respect of Categories 1 and 2 of the Notice, the Third Respondent produces a Ministerial Brief signed by the Third Respondent on 26 July 2024, and attachments. The Third Respondent claims privilege over paragraph 9 of the Ministerial Brief, which is redacted.
3. The Third Respondent does not anticipate producing further documents in respect of Categories 1 and 2.
4. I hope to be in a position to give further production by close of business on 19 August 2024.

Yours sincerely

**SOLICITOR FOR THE
NORTHERN TERRITORY**

A handwritten signature in blue ink, appearing to read "Melissa Forbes", written over the printed name and title.

**Melissa Forbes
Principal Lawyer**

From: [Zhu, Haiqiu](#)
To: [Ng, Grace](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [GomezD@nlc.org.au](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Griffin, Brooke](#)
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]
Date: Friday, 16 August 2024 5:09:36 PM

Dear Ms Ng

We refer to your letter of 15 August 2024 and its enclosures.

We would be grateful if you would also produce the documents attached to the emails enclosed at pages 4 and 5 of your letter.

In our view, each of these attachments forms part of the email, and so are also responsive to paragraph 3 of our client's Notice to Produce dated 6 August 2024.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqiu.Zhu@hsf.com

www.herbertsmithfreehills.com.au

From: Ng, Grace <Grace.Ng@ags.gov.au>
Sent: Thursday, August 15, 2024 2:16 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]

OFFICIAL

Dear Mr Chung,

Please see **attached** our letter of today, and enclosure.

Regards

Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

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OFFICIAL

From: Ng, Grace
Sent: Tuesday, 13 August 2024 1:23 PM
To: 'Chung, Leon' <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
Subject: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [AGSDMS-DMS.FID5245026]

Dear Mr Chung,

Please see **attached** our letter of today's date, and enclosure.

Should your client apply to the Court as foreshadowed in your email of 12.05pm today, please ensure a copy of our letter is made available to the Court.

Regards

Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7320 M 0417 991 508
grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: [Ng, Grace](#)
To: [Zhu, Haiqiu](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [Gomezd@nlc.org.au](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Griffin, Brooke](#)
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [HSF-AUS01.FID5840327] [AGSDMS-DMS.FID5245026]
Date: Friday, 16 August 2024 5:29:09 PM

Dear Ms Zhu,

The attachments to both the email of Ben Latham and the email of Cassandra Turnbull correspond to the documents (being the brief to the Minister and attachments) which we produced on 13 August 2024. The exception is Attachment I, which was not produced on the basis of legal professional privilege.

Please contact me if you require further information.

Regards

Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7320 M 0417 991 508
grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Sent: Friday, 16 August 2024 5:10 PM
To: Ng, Grace <Grace.Ng@ags.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Ms Ng

We refer to your letter of 15 August 2024 and its enclosures.

We would be grateful if you would also produce the documents attached to the emails enclosed at pages 4 and 5 of your letter.

In our view, each of these attachments forms part of the email, and so are also responsive to paragraph 3 of our client's Notice to Produce dated 6 August 2024.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqiu.Zhu@hsf.com
www.herbertsmithfreehills.com.au

From: Ng, Grace <Grace.Ng@ags.gov.au>
Sent: Thursday, August 15, 2024 2:16 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]

OFFICIAL

Dear Mr Chung,

Please see **attached** our letter of today, and enclosure.

Regards

Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
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OFFICIAL

From: Ng, Grace
Sent: Tuesday, 13 August 2024 1:23 PM
To: 'Chung, Leon' <Leon.Chung@hsf.com>

Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [AGSDMS-DMS.FID5245026]

Dear Mr Chung,

Please see **attached** our letter of today's date, and enclosure.

Should your client apply to the Court as foreshadowed in your email of 12.05pm today, please ensure a copy of our letter is made available to the Court.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

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Our ref. 24007108

19 August 2024

Leon Chung
Herbert Smith Freehills
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SYDNEY NSW 2000

Australian Government Solicitor
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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com


Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors NSD1056/2024 – Category 4 of the notice to produce

1. We refer to your client's notice to produce of 6 August 2024 directed to the first respondent (**Notice**).
2. In particular, we refer to category 4 of the Notice, as amended by Justice Katzmann's orders 8 August 2024, which is drafted in identical terms to category 4 of the notice to produce directed to the Third Respondent, of the same date.
3. We seek your client's agreement to the following approach to production of documents under, and amendment to the scope of, category 4:
 - a. The First and Third Respondents will produce only one copy of any document identified as falling within the scope of category 4 of the notices, rather than each Minister separately producing documents. That is, the First Respondent would not be required to produce copies of documents that have otherwise been produced or are proposed to be produced by the Third Respondent and vice versa.
 - b. Rather than seeking documents 'in relation to' the decisions, the terms of category 4 be narrowed to focus on the relevant documents that underpin the making of the advice decision and/or renewal decision. We propose that category 4 be amended to email or written correspondence, meeting minutes and records of telephone conversations between the Commonwealth and Territory Respondents that directly relate to the making of the advice decision and/or renewal decision.
 - c. The timeframe specified in paragraph 4 be amended from 1 January 2024 (inserted by order of the Court on 8 August 2024) to 1 February 2024. Relevant to this amendment, we note that the first meetings referred to in the affidavit of Mr Brad Welsh were in February 2024. If you agree to this amendment, we would circulate a proposed consent order to amend the order made on 8 August 2024.

4. If your client agrees to this approach, we anticipate that the First Respondent would produce documents under category 4 in advance of the case management hearing listed on 22 August 2024.
5. We would be grateful to receive your response by midday on 20 August 2024.

Yours sincerely,



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cc.

Third and Fourth Respondent: Melissa Forbes, Melissa.forbes@nt.gov.au

Fifth Respondent: Trilby Donald, DonalT@nlc.org.au



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TRM No. 20242140

19 August 2024

Leon Chung
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By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors – Notice to produce

1. I refer to the above proceeding, and the Applicant's **Notice** to produce issued to the Third Respondent and filed 7 August 2024.
2. The Third Respondent's documents in response to paragraph 3 of the Notice are enclosed. A list of those documents is included with this letter. Only documents not already produced are produced now.
3. The Third Respondent claims client legal privilege over the whole of Ministerial 58:MIN24:1058 dated 17 July 2024, and does not produce it now.
4. In addition, the Third Respondent claims client legal privilege over paragraphs within Ministerial 58:MIN24:1073 dated 23 July 2024 (at 12 in the list); the paragraphs within 58:MIN24:1073 over which client legal privilege is claimed are redacted.
5. We will write to you separately regarding paragraph 4 of the Notice.

Yours sincerely
**SOLICITOR FOR THE
NORTHERN TERRITORY**

A handwritten signature in black ink, appearing to read "Melissa Forbes", written over the typed name and title.

**Melissa Forbes
Principal Lawyer**

Third Respondent's Category 3 documents

| | | |
|-----|------------|--|
| 1. | 20/02/2024 | Bundle of correspondence Northern Territory Government and Yvonne Margarula (Gundjeihmi Aboriginal Corporation (GAC)) |
| 2. | 14/03/2024 | Letter GAC to Chief Minister re renewal of Jabiluka Mineral Lease |
| 3. | 27/03/2024 | Email Northern Territory Department of Industry, Tourism and Trade (DITT) to Minister's office re process following application by ERA for renewal of lease |
| 4. | 12/04/2024 | Meeting Brief for Minister Monaghan for meeting on 19 April 2024 |
| 5. | 09/04/2024 | Letter GAC to Chief Minister re renewal of Jabiluka Mineral Lease attaching summary of legal issues |
| 6. | 24/04/2024 | Letter Chief Minister to GAC |
| 7. | 08/05/2024 | NLC Submission re renewal of MLN1 |
| 8. | 10/05/2024 | Email DITT to Minister's office re update in respect of renewal application and gazettal process |
| 9. | 05/07/2024 | Meeting Brief for Minister Monaghan for meeting on 8 July 2024 |
| 10. | 09/07/2024 | Letter from GAC re renewal of MLN 1 |
| 11. | 17/07/2024 | Letter P Garrett AM & Professor D Henry AM to Minister Monaghan |
| 12. | 23/07/2024 | Ministerial 58:MIN24:1073 - advice from Commonwealth Minister pursuant to s 187 [REDACTED] |



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Senior Executive Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
Sydney NSW 2000
By email: Grace.Ng@ags.gov.au

20 August 2024
Matter 82783241
By Email

Melissa Forbes
Director, Legal Services
Department of Industry, Tourism and Trade
5th Floor, Centrepont Building, 48-50 Smith
Street
Darwin NT 0801
By email: Melissa.Forbes@nt.gov.au

Copy to:
Dominic Gomez
Principal Legal Officer
Northern Land Council
45 Mitchell Street
Darwin NT 0801
By email: GomezD@nlc.org.au
Copy to: donalt@nlc.org.au

Dear Colleagues

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

We refer to:

- the notices to produce served on 6 August 2024 as amended by Justice Katzmann on 8 August 2024 (together, the **Notices to Produce**);
- the hearing before her Honour on 8 August 2024; and
- the letter sent on behalf of the First and Second Respondents on 19 August 2024, which set out a proposal for production in response to category 4 of each of the Notices to Produce.

1 Response to proposal

Before turning to our client's position in respect of paragraph [3], we note the following matters.

First, our client contends that the Advice Decision was unlawful because (inter alia) it was reached in denial of procedural fairness. There was a denial of procedural fairness in all the circumstances, including because apparently credible, relevant and significant information in respect of the Advice Decision received by the First and Second Respondents was not disclosed to our client.

Secondly, the question of whether there has been a denial of procedural fairness is not assessed wholly retrospectively, after a final decision is reached. Procedural fairness governs what a decision-maker must do in the course of the decision-making process,

Doc 2060392871.1



and the duties apply to the process by which a decision will be reached. These principles are well-established: see, eg, *Applicant VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [14]-[18].

Thirdly, the information, communications and documents bearing on whether the First and Second Respondents discharged their duties in the circumstances of this case are not confined to information, communications and documents which “underpinned” the Advice Decision. In deciding whether there was a denial of procedural fairness, attention must be directed to the process *before* a decision, underpinned by certain information, is reached.

Fourthly, it is apparent from one of the two documents produced by the First and Second Respondents to date, the Department’s briefing note with identifier MS24-000911, that the First and Second Respondents received a body of information, including adverse information, in respect of the Advice Decision, not all of which was attached to MS24-000911. That information was both oral and written. By way of example, Attachment D to the brief to the First Respondent referred to the views of “other interested parties” which were conveyed:

Other interested parties

50. On 17 July 2024 the Hon Peter Garrett AM and Professor Don Henry AM (both associated with the Australian Conservation Foundation) co-wrote a letter to you advocating for refusal of the Application on environmental and cultural grounds (refer MC24-003421).

51. The department has received 3 emails from members of the public advocating for the refusal of the Application out of respect for the Mirarr.

These documents were not attached to MS24-000911. The letter referred to at [50] was produced by the Third Respondent in response to the Notice to Produce.

Fifthly, it is also apparent from the other of the two documents produced by the First and Second Respondents to date, the yellow memo from the office of the First Respondent dated 25 July 2024, that there was information before the First Respondent at the time of making the Advice Decision beyond that set out in the Department’s briefing paper. That information included views, adverse to our client, expressed by other Members of Parliament.

Sixthly, it is also apparent from the documents which have been produced to date that the First to Fourth Respondents started receiving information in respect of the decisions under challenge before February 2024. For example:

- the Third and Fourth Respondents were directly consulting with the Gundjeihmi Aboriginal Corporation (**GAC**) concerning MLN1 and the prospect of its renewal from at least late 2022 to early 2023. The CEO of the GAC wrote to the-then Northern Territory Minister for Mining and Industry on 8 March 2023 stating that: “*Thank you for the opportunity to discuss the correspondence from Yvonne Margarula, dated 22 December 2022. By way of follow up, we request consideration be given to a notice under s.114 Mineral Titles Act that the Jabiluka Project Area land will become special reserved land on the day the mineral title ceases to be in force*”;¹
- on 10 January 2024, Yvonne Margarula wrote a letter on behalf of the GAC to the Prime Minister of Australia which referred to meetings between other

¹ See “Bundle of Correspondence between Chief Minister and GAC” produced by the Third Respondent on 19 August 2024, Attachment 2.



Federal Ministers and the GAC in February 2023, and made direct representations concerning the expiry of MLN1;²

- on 18 January 2024, Yvonne Margarula wrote letters on behalf of GAC to both the Chief Minister of the Northern Territory and the-then Northern Territory Minister for Mining concerning the expiry of MLN1 and making representations to the Northern Territory Government;³ and
- on 20 February 2024, the Chief Minister of the Northern Territory responded to Yvonne Margarula's letters and confirmed that that the Northern Territory Government would "continue to engage on this topic with you".

It is of course possible that there were substantially more communications passing between various parties in respect of the Advice Decision and the Renewal Decision before February 2024 (and indeed before January 2024). The nature of the process to date means that the procedural course is known to your clients, but not ours.

With this background, we turn now to our client's position in respect of paragraph [3] of your letter.

Our client's position in respect of paragraph [3] of the letter is as follows:

- 1 Our client agrees to the proposal at paragraph [3(a)] so long as each of the First and Third Respondents accept that production by one of them in response to the relevant notice to produce is taken to be production by the other for the purpose of that paragraph and for the purpose of these proceedings.
- 2 Our client does not agree to the proposal at paragraph [3(b)]. As you know, that category in effect seeks records of communications between those responsible for making the challenged decisions in relation to the decisions. That category should not be confined to information which "underpinned" the Advice Decision. To so confine the category would depend on the misconception that procedural fairness is assessed retrospectively.
- 3 Our client does not agree to the proposal at paragraph [3(c)] to limit further the scope of the category to capture only evidence of communications occurring from 1 February 2024. For the reasons set out above, it is on the cards (indeed likely) that information, including prejudicial information, started being received by the First to Fourth Respondents before 1 February 2024. We note that the categories for production circulated in the short minutes on 19 August 2024 are not date-limited.

2 Production by the First and Third Respondents

As noted above, for the purposes of the hearing on 8 August before Justice Katzmann, our client agreed to narrow the scope of paragraph 4 of the Notices to Produce in the expectation that this would enable the First and Third Respondents to produce documents in response to that category expeditiously. In this regard, we note that counsel for the First Respondent stated during that hearing that:

It [the First Respondent] understands that desirability of production as soon as possible and certainly doesn't seek to delay proceedings, but I don't have instructions now, bearing in mind that some searches will be required in relation to paragraph 4 and, indeed, paragraph 3 as to a particular date by which I can indicate to your Honour now that the Commonwealth parties could comply.⁴

² See "Bundle of Correspondence between Chief Minister and GAC" produced by the Third Respondent on 19 August 2024, Attachment 4.

³ See "Bundle of Correspondence between Chief Minister and GAC" produced by the Third Respondent on 19 August 2024 at page 2 and Attachment 1.

⁴ Transcript of Hearing on 8 August 2024 at T27:31-35.



The First and Third Respondents have now had 10 days to conduct searches in response to amended paragraph 4 but have not produced any documents in response to that paragraph. Our client would have expected any further issues with the scope of the paragraph to have been raised at a significantly earlier stage.

In those circumstances, and having regard to the lack of production by the First and Third Respondents to paragraph 4, our client intends to call on the Notices to Produce (as further limited in accordance with paragraph 3(a) of the letter) at the Return of Subpoena hearing listed before the Registrar on 21 August 2024.

Yours sincerely

Leon Chung
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leon.chung@hsf.com

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From: [Zhu, Haiqiu](#)
To: [Ng, Grace](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [Gomezd@nlc.org.au](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Griffin, Brooke](#)
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]
Date: Tuesday, 20 August 2024 2:36:30 PM

Dear Ms Ng

Our client's position is that communications should be produced in their entirety – that is, including any attachments.

We appreciate that this may result in the production of attachments separately produced elsewhere from time-to-time, but it is appropriate for our client to be able to consider that themselves. We note by way of illustrative example:

- The email from Mr Latham dated 25 July 2024 appears to attach a series of Word and PDF documents, while the “Ministerial Brief” that was originally produced was a single consolidated PDF file.
- One of the documents included in that brief (see the letter from GAC dated 9 April 2024 at pages 27 and 28 of the brief) does not appear to include the attachment to that document, while the version that was produced by the Third Respondent does include the attachment.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

Herbert Smith Freehills

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From: Ng, Grace <Grace.Ng@ags.gov.au>
Sent: Friday, August 16, 2024 3:29 PM
To: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
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Dear Ms Zhu,

The attachments to both the email of Ben Latham and the email of Cassandra Turnbull correspond to the documents (being the brief to the Minister and attachments) which we produced on 13 August 2024. The exception is Attachment I, which was not produced on the basis of legal professional

privilege.

Please contact me if you require further information.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

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From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Sent: Friday, 16 August 2024 5:10 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Ms Ng

We refer to your letter of 15 August 2024 and its enclosures.

We would be grateful if you would also produce the documents attached to the emails enclosed at pages 4 and 5 of your letter.

In our view, each of these attachments forms part of the email, and so are also responsive to paragraph 3 of our client's Notice to Produce dated 6 August 2024.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

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Sent: Thursday, August 15, 2024 2:16 PM
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OFFICIAL

Dear Mr Chung,

Please see **attached** our letter of today, and enclosure.

Regards

Grace Ng
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Subject: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [AGSDMS-DMS.FID5245026]

Dear Mr Chung,

Please see **attached** our letter of today's date, and enclosure.

Should your client apply to the Court as foreshadowed in your email of 12.05pm today, please ensure a copy of our letter is made available to the Court.

Regards

Grace Ng

Senior Executive Lawyer

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TRM No. 20242140

20 August 2024

Leon Chung
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Level 34
161 Castlereagh Street
SYDNEY NSW 2000

By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors

1. I refer to the above matter and to the Notice to Produce issued to the Third Respondent and filed on 7 August 2024.
2. The Notice to Produce requires the production of the documents referred to in the Notice by 9:30am (AEST) on 21 August 2024, 14 days after the Notice to Produce was issued.
3. Despite that short timeframe, I note that the Third Respondent has now produced to the Applicant the documents in paragraphs [1]-[3] of the Notice to Produce.
4. In relation to paragraph [4], the Third Respondent anticipates being in a position to produce some of the documents in that category by 9:30am tomorrow. However, the Third Respondent does not anticipate being in a position to produce all of the documents within that category by then.
5. In that respect, we note that the paragraph seeks production of a broad category of documents. Amongst other matters, the paragraph:
 - (a) captures any communications between two bodies politic (the Second and Fourth Respondents), which would include any public servant regardless of their relationship with the First and Second Respondent or the impugned decisions;
 - (b) uses broad words of relationship (“in relation to”); and
 - (c) does not use any other words of limitation to create a nexus with the impugned decisions.
6. In circumstances where the Third Respondent has substantially complied with the Notice, the Third Respondent seeks your client’s consent to vary the date for compliance in the Notice to Produce – in relation to paragraph [4] only – to close of business on 23 August 2024.

7. Noting the time for compliance expires at 9:30am tomorrow, I would be grateful for your early response.

Yours sincerely
**SOLICITOR FOR THE
NORTHERN TERRITORY**

A handwritten signature in black ink, appearing to read 'Melissa Forbes', written over the printed title 'SOLICITOR FOR THE NORTHERN TERRITORY'.

**Melissa Forbes
Principal Lawyer**

From: [Zhu, Haiqiu](#)
To: [Melissa Forbes](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Loughland, Amelia](#); [Ng, Grace](#); [Griffin, Brooke](#); [Scott, Madisen](#); [Nance, Emily](#); [Plitsch, Max](#); [Jennifer Laurence](#); [Anna Shackell](#); [Trilby Donald](#); [Gomezd@nlc.org.au](#); [desley.motlop@nlc.org.au](#)
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327]
Date: Tuesday, 20 August 2024 7:12:51 PM

Dear Ms Forbes

We refer to your letter of today's date. As flagged in our letter today, our client intends to call on the Notices to Produce to the First and Third Respondent at the Return of Subpoena listed before the Registrar tomorrow morning at 9.30am.

In light of your letter we will seek confirmation from the Third Respondent at tomorrow's Return of Subpoena that production under paragraphs [1]-[3] of the Notice to Produce is complete, and seek orders that paragraph [4] be stood over to the COB 23 August 2024 on the basis that such production as is available is produced tomorrow morning and the balance by 23 August.

In response to paragraph [6] of your letter, we would be grateful if full production under paragraph [4] of the Notice to Produce is made by the morning of 23 August 2024.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqiu.Zhu@hsf.com
www.herbertsmithfreehills.com.au

From: Melissa Forbes <Melissa.Forbes@nt.gov.au>
Sent: Tuesday, August 20, 2024 4:17 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Madisen.Scott@ags.gov.au; Emily Nance <emily.nance@ags.gov.au> <emily.nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>
Subject: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce

Dear Mr Chung,

Please see attached correspondence of today's date. I would be grateful for your early attention.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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Department of
**THE ATTORNEY-GENERAL
AND JUSTICE**

Solicitor for the Northern Territory

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0800

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T 08 8935 7872

TRM No. 20242140

20 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors

1. I refer to:

- a. the Applicant's proposed orders provided by email on 19 August 2024;
- b. the correspondence from Australian Government Solicitor (**AGS**) of the same date, on behalf of the First and Second Respondents (**Commonwealth Respondents**), in relation to **Category 4** in the **Notices** to produce issued to the First and Third Respondents; and
- c. the Applicant's correspondence dated 20 August 2024.

2. The Third and Fourth Respondents:

- a. are generally agreeable to the Applicant's timetabling orders, subject to the breadth of the request for documents as described in Part B, paragraph 1 (**Category B1**);
- b. consider it would facilitate the streamlined production of documents if the Category B1 description was aligned with the Category 4 description, and the documents were produced together; and
- c. are otherwise agreeable to the approach proposed by the Commonwealth Respondents in respect of Category 4 in each of the Notices, as proposed in the correspondence of 19 August 2024.

Category B1

3. The Third and Fourth Respondents do not oppose production and wish to facilitate the expeditious resolution of the proceedings. However, Category B1 – as presently expressed – is overbroad and uncertain.
4. In particular, it is not tied to the grounds and does not contain appropriate limitations to ensure a nexus between the document categories and the limited subject matter of this proceeding,

being the exercise of power by the First and Third Respondents. Amongst other things, the proposed categories:

- a. capture any communications to or from Fourth Respondent, which would include any public servant regardless of their relationship with the Third Respondent;
- b. does not specify any timeframe for the communications which reflects the impugned exercises of power;
- c. relates to the “anticipated or potential application” for renewal, which is not defined; and
- d. does not specify any nexus to the decision-maker or (in some cases) to the impugned decisions.

Notice categories

5. Since receipt of the Notice, the Third and Fourth Respondents have used their best endeavours to produce documents to the Applicant in a timely manner, noting that this matter has proceeded in an expedited way. This has included providing staggered production of documents captured by Categories 1, 2 and 3 of the Notice on 15 and 19 August 2024.
6. The Third and Fourth Respondents are continuing with searches for and review of documents that may be captured by Categories 4.
7. However, as is apparent from wording of the proposed orders, Category 4 overlaps substantially with Category B1.
8. In that circumstance, it is the Third and Fourth Respondents’ preference that production under Category 4 is dispensed with, and documents falling within Category B1 (as amended) are produced pursuant to orders proposed to be made on 22 August 2024.

Amendments to proposed orders

9. Consistent with the above, I enclose amendments to the proposed orders which seek to:
 - a. dispense with production under Category 4 of the Notice;
 - b. narrow Category B1 to the same date range as proposed by the Commonwealth Respondents;
 - c. exclude the Ministerial Brief document 58:MIN24:1058, over which client legal privilege is claimed; and
 - d. limit Communications to and from the Northern Territory to those to or from the Department of Industry, Tourism and Trade.
10. In proposing those amendments, it is the Third and Fourth Respondents’ intention to provide the substance of what the Applicant seeks from the production orders while keeping the matter progressing in an expedited way.

11. We would be happy to discuss those proposed changes, if that would assist. If some agreement cannot be reached about the categories, the Third and Fourth Respondents reserve their rights to seek a narrower form of orders from the Court and/or to seek to extend the timeframe for production.

Yours sincerely

**SOLICITOR FOR THE
NORTHERN TERRITORY**

A handwritten signature in black ink, appearing to be 'Melissa Forbes', written over the typed name and title.

**Melissa Forbes
Principal Lawyer**



Our ref. 24007108

21 August 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

Australian Government Solicitor
Level 10, 60 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors NSD1056/2024 – Category 4 of the notice to produce

1. We refer to your letter of 20 August 2024.
2. Your client's Notice to Produce (**Notice**) was lodged on 6 August 2024, and accepted for filing on 7 August 2024. It specified a return date of 3pm on 8 August 2024. The Notice did not therefore comply with the *Federal Court Rules 2011*, which contemplate that at least 5 days' notice be given for compliance (see rr 24.13 and 30.28(3)). The filed version of the Notice refers to 21 August 2024 as the date for "Return of Subpoena."
3. Notwithstanding, the Commonwealth respondents have approached the Notice sensibly and in good faith, noting your client's expressed wish to have the matter dealt with swiftly.
4. Documents responsive to paragraph 1, 2 and 3 were produced by the First Respondent on 13 and 15 August 2024. We are instructed that those documents represent the entirety of the material which was before the Minister at the time of making the decision. This production also complies with the obligation on the Minister as the decision maker, as set out in the Federal Court's *Administrative and Constitutional Law and Human Rights Practice Note*. We will note this today at the listing before for the Registrar.
5. Our clients have also conducted searches of communications held by the Department of Industry, Science and Resources, the Minister and her office. Having considered the matters in your letter, we are instructed that production of documents identified in these searches will extend to include communications from 1 January 2024.
6. The Commonwealth respondents' proposal as to the narrowing of paragraph 4 in our letter of 19 August 2024 was made in an attempt to ensure that the searches required to comply with the broadly-worded paragraph 4, would not become unduly burdensome or time-consuming.

7. To be clear, the Commonwealth respondents have not refused to produce documents responsive to paragraph 4 of the Notice. Indeed, our letter of 19 August 2024 foreshadowed, and the Commonwealth respondents are working to produce, documents in response to paragraph 4 before the case management hearing on 22 August 2024.
8. Our clients are also considering the further, extensive requests for production of documents made by your client on 15 August 2024 and 19 August 2024.
9. Should your client wish to ventilate the issue of the Commonwealth respondents' compliance before the Registrar tomorrow, we will rely on this and our letters of 13, 15 and 19 August 2024 to show that all reasonable efforts have been made to date to comply with your client's Notice to Produce and, should it be required, to seek an extension of time for compliance with paragraph 4.
10. In light of the above, and noting the recent correspondence sent to Ms Forbes in relation to the Third and Fourth Respondent, we hope that the Applicant will extend the same courtesy to agree to production of any documents responsive to paragraph 4 of the Notice being stood over to 23 August 2024. For the avoidance of doubt, the Commonwealth respondents will produce documents responsive to paragraph 4 of the Notice identified in the searches referred to in paragraph 5 above ahead of the case management hearing on 22 August 2024.

Yours sincerely,



Grace Ng
Senior Executive Lawyer
T 02 9581 7320 M 0417 991 508
Grace.Ng@ags.gov.au

cc.

Third and Fourth Respondent: Melissa Forbes, Melissa.forbes@nt.gov.au

Fifth Respondent: Trilby Donald, DonalT@nlc.org.au

**VIQ SOLUTIONS****T:** 1800 287 274**E:** clientservices@viqsolutions.com**W:** www.viqsolutions.com.au**Ordered by:** Janie Grigor**For:** Herbert Smith Freehills Pty Limited (NSW)**Email:** janie.grigor@hsf.com**TRANSCRIPT OF PROCEEDINGS**

O/N H-1954523

FEDERAL COURT OF AUSTRALIA**NEW SOUTH WALES REGISTRY****MS C. HAMMERTON-COLE, Judicial Registrar****No. NSD 1056 of 2024****ENERGY RESOURCES OF AUSTRALIA LTD****and****MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA
(COMMONWEALTH) and OTHERS****SYDNEY****10.01 AM, WEDNESDAY, 21 AUGUST 2024****MR N. SCOTT appears for the applicant****MS G. NG appears for the 1st and 2nd respondents****MS M. FORBES appears for the 3rd and 4th respondents**

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THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

MR N. SCOTT: May it please the court, Registrar. My name is Scott. I appear for
5 the applicant, Energy Resources of Australia, who is also the issuing party.

MS G. NG: May it please the court. N-g for the first and second respondents.

10 THE REGISTRAR: Thank you.

MS M. FORBES: May it please the court. Forbes, appearing for the third and
fourth respondents.

15 THE REGISTRAR: All right. Thank you. Yes, Mr Scott, would you like to start?

MR SCOTT: Yes, Registrar. Registrar, there was a notice to produce issued on 6
August to the first and third respondents. So - - -

20 THE REGISTRAR: Yes.

MR SCOTT: reference, that's the Commonwealth Minister, and then a separate
notice to the Minister from the Northern Territory. Category 4 of that notice was
amended by Katzmann J on 8 August 2024. I understand that there haven't been
documents produced my client - - -

25 THE REGISTRAR: Okay.

MR SCOTT: - - - through the solicitors. So, really, the purpose of today, at least
30 from ERA's perspective, is, first, to confirm that, at least from the perspective of
each of the Commonwealth and Northern Territory Minister, that production in
response to categories 1 to 3 is complete, which I understand it is, but we would be
grateful for that confirmation. In respect of category 4, with respect, there's some
confusion, at least from our client's part, as to what's proposed there. Broadly
35 speaking, I understand that work has certainly been ongoing from each of the
relevant respondents to compile documents in response to that category, and that
would – those documents be produced by the end of this week. Certainly, from our
client's part, we don't oppose that course. It may be that, I understand, separately to
this, the matter is listed for case management before Kennett J tomorrow.

40 THE REGISTRAR: Yes.

MR SCOTT: The third respondent, being the Northern Territory Minister, I think,
has at least raised in correspondence the prospect of compliance with category 4
being dispensed with. Certainly, our client's perspective, at this point, is that we
45 would oppose that course, but it may be - - -

THE REGISTRAR: Okay.

MR SCOTT: - - - that what happens with category 4 is effected tomorrow.

THE REGISTRAR: Right.

5

MR SCOTT: So the short point of all of that would be that it might be prudent for the matter to be re-listed again next week. In the event that category 4 no longer needs to be complied with for whatever reason, then the parties can approach the court to seek to vacate next week by consent. But - - -

10

THE REGISTRAR: Yes.

MR SCOTT: - - - if category 4 continues on foot, at least for our client's part, we would hope that production would be complete on that by the end of this week, and - - -

15

THE REGISTRAR: Okay.

MR SCOTT: - - - the court can be updated, and that's that.

20

THE REGISTRAR: Okay. All right. Yes, thank you, Mr Scott. Ms Ng, would you like to go next?

MS NG: Thank you, Registrar, and thank you to my friend for that indication of their position. May I first just note that in response to Mr Scott's request, we can confirm that as far as the Commonwealth respondents are concerned, we consider that production against paragraphs 1, 2 and 3 to be complete. That was confirmed in and I'm happy to confirm that today. I would note those are materials that, ordinarily, the Minister, as a decision-maker in judicial review proceedings, would be obliged to produce, in any event so that has been complied with.

25

30

THE REGISTRAR: Okay.

MS NG: In relation to paragraph 4, Mr Scott is correct. There has been production and discussion between – I apologise – not “production” in paragraph 4, but there has been discussion between the parties.

35

THE REGISTRAR: Right, yes.

MS NG: We do anticipate some production to occur today and possibly the balance of that by the end of this week. There are - - -

40

THE REGISTRAR: Okay.

MS NG: - - - some inquiries still being made.

45

THE REGISTRAR: Okay.

MS NG: I also agree with Mr Scott's indication that the category 4 may well be overtaken by developments tomorrow before Kennett J.

5 THE REGISTRAR: Okay.

MS NG: I suppose that's a long way of saying that the proposal now put to stand-over, I think, in the paragraph 4 to next week would appear to be sensible, and the parties can confer in light of what occurs tomorrow before his Honour.

10

THE REGISTRAR: All right. Thank you. Yes, Ms Forbes.

MS FORBES: Thank you, Registrar. The Territory's position is substantially the same as the Commonwealth's.

15

THE REGISTRAR:

MS FORBES: We were – yes, we agree that category 4 may be dealt with by his Honour tomorrow, and in the alternative, we were hoping to seek a short extension from you today, but we're happy with the course that's been proposed by our friends.

20

THE REGISTRAR: Okay, all right. So I'm content to make an order then that the notices to produce be stood over then to the next return of subpoena list at 9.30 am on the 28th of August. I can also make an order that you have leave to approach chambers with respect to any consent orders that might be sought, particularly in the event that that listing is not required. Were there any other orders then that you were seeking today?

25

MR SCOTT: Not orders as such, Registrar. I should just make perhaps two points, just to be clear, given - - -

30

THE REGISTRAR: Yes.

MR SCOTT: - - - there will be different counsel I anticipate appearing tomorrow in this matter

35

THE REGISTRAR: I see, yes.

MR SCOTT: I should say, obviously, ERA's position at the moment is that it presses category 4 - - -

40

THE REGISTRAR: Yes.

MR SCOTT: - - - in its present form. It understands that the continued utility of that category has been raised in correspondence, so it may ultimately be superseded by events tomorrow.

45

THE REGISTRAR: Okay.

MR SCOTT: Second point – and I’m grateful to my friend Ms Ng’s indication that production in response to category 4 would be occurring hopefully by the end of this week, and I understand, at least from correspondence, that that’s the same for the Northern Territory Minister, even though the matter will be listed next week. The only other two matters that our client was seeking to raise is, while we certainly are very grateful for the fact that documents have been produced directly to our client as opposed to needing to go through the court, I am conscious that, at least in one case, there’s been a document that’s been withheld from production on the basis that it’s wholly privileged - - -

THE REGISTRAR:

MR SCOTT: - - - so it may be that the appropriate course, at least in that type of case, is that that’s produced to the court in a sealed envelope, as it would be - - -

THE REGISTRAR: Okay.

MR SCOTT: - - - otherwise - - -

THE REGISTRAR: Yes.

MR SCOTT: - - - just, at least, to have a paper trail in respect of that. There’s otherwise been some queries raised in correspondence about the extent to which attachments to communications need to be produced, even though they may reproduce documents that have otherwise been produced, but I’m confident that the parties can at least resolve that through correspondence. But I just raise that now in case it - - -

THE REGISTRAR: Okay.

MR SCOTT: - - - becomes an issue next Wednesday.

THE REGISTRAR: Yes, Okay. Ms Ng or Ms Forbes, is there anything you wish to say in response to that?

MS NG: It may be appropriate for us to take discussions further with Mr Scott regarding the privilege - - -

THE REGISTRAR: Yes.

MS NG: that he’s referring to. I’m not entirely clear whether he’s referring to my clients or to the Northern Territory clients and respondents. Certainly I’m aware there are privilege claims, I think, made for all of us, but some are parts of documents. But perhaps we can discuss separately what the most efficient way of dealing with that is.

THE REGISTRAR: Okay, all right, thank you. So in addition to that order then, are you seeking that I make any notation included with the orders, or is the position that that's unnecessary, and that perhaps it is best left to further discussions amongst the parties?

MR SCOTT: Unless it's a – well, we're guided by my friends in some respects. For our part, we'd be seeking at least, that production in response to category 4 will occur by this Friday, so 23 August, appreciating that the matter is listed before his Honour Kennett J tomorrow. But it's not necessarily a formal order, but certainly that – from our client's perspective – that fairly reflects at least the position that the parties have reached. But if my friends take a different view, we would be grateful.

THE REGISTRAR: Yes. Ms Ng or Ms Forbes?

MS NG: For my part, I would submit that the position is already clearly put in correspondence that my friend has, and a notation is not necessary in this case.

THE REGISTRAR: All right. Yes. Ms Forbes, did you have anything to add?

MS FORBES: Sorry. No, nothing further. Thank you.

THE REGISTRAR: Okay. All right. Thank you. Look, I will refrain for now – given this remains a live issue – I will refrain from making any particular notation. It may be that on the next occasion there's a need for that, depending on where you get to and what eventuates tomorrow before Kennett J. So all I will do for the purpose of today then is simply to make that order that the notices to produce be adjourned to the next return of subpoena list at 9.30 am on 28 August.

MR SCOTT: May it please the court.

THE REGISTRAR: All right. Sorry, and I think I did say as well, an order that you have leave to approach chambers, as well, in relation to any consent orders. So I will include that, as well. All right. Thank you, everyone. You're excused.

MS NG: Thank you, Registrar.

MATTER ADJOURNED at 10.11 am ACCORDINGLY



Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
Sydney NSW 2000
By email: Grace.Ng@ags.gov.au

21 August 2024
Matter 82783241
By Email

Melissa Forbes
Director, Legal Services
Department of Industry, Tourism and Trade
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Copy to:
Dominic Gomez
Principal Legal Officer
Northern Land Council
45 Mitchell Street
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Copy to: donalt@nlc.org.au

Dear Colleagues

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

We refer to:

- the notices to produce served on 6 August 2024 as amended by Justice Katzmann on 8 August 2024 (together, the **Notices to Produce**);
- the documents produced to date by your respective clients pursuant to the Notices to Produce; and
- the hearing before Registrar Hammerton-Cole on 21 August 2024 (**Subpoena Hearing**).

1 Production under paragraphs 1-3

We are grateful for the confirmation provided by the First and Third Respondents that production in response to paragraphs 1-3 of the Notices to Produce has been completed.

2 Production under paragraph 4

We note that at the Subpoena Hearing, the First and Third Respondents acknowledged that production in response to paragraph 4 would occur by 23 August 2024, subject to any order to the contrary by his Honour Justice Kennett.

Doc 2060392871.2



3 Production of privileged material

As noted during the Subpoena Hearing, our client is grateful for the direct production of documents in response to the Notice to Produce, and we are content for that to continue to occur to facilitate the expeditious progression of this matter.

However, we note that in some cases parts of documents have been redacted, or documents withheld from production altogether, apparently on the basis of legal professional privilege. For example, we note the Third Respondent has withheld a document entitled "Ministerial 58:MIN24:1058" from production, but without providing any other identifying information which would enable our client properly to test that claim.

In those circumstances, and as noted during the Subpoena Hearing, we consider that where documents are wholly withheld from production or are redacted on the basis of legal professional privilege, these should be produced in unredacted form in a sealed packet to the Court, consistent with usual practice as set out in [7.5] of the Subpoenas and Notices to Produce Practice Note (GPN-SUBP). This will allow the applicant to consider any claims for privilege.

Yours sincerely

Leon Chung
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Federal Court of Australia

District Registry: New South Wales Registry

Division: General

No: NSD1056/2024

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

ORDER

JUDGE: Justice Kennett

DATE OF ORDER: 22 August 2024

WHERE MADE: Sydney

THE COURT ORDERS THAT:

Joinder of party

1. Pursuant to r 9.05 of the *Federal Court Rules 2011* (Cth), the Northern Land Council be joined as the sixth respondent to these proceedings.

Document production

2. The parties (other than the fifth and sixth respondents) confer on the question of the production of documents and provide agreed or competing short minutes of order, together with short written submissions on areas of disagreement, by 5.00 pm AEST on 27 August 2024.

Evidence

3. From the date of this order, the legal representatives for the parties confer and attempt to agree on and produce a document entitled "Agreed Facts" which sets out agreed facts within the meaning of s 191 of the *Evidence Act 1995* (Cth).
4. By 23 August 2024, the Applicant serve any draft Agreed Facts document.
5. By 2 September 2024, the parties confer and file and serve any Agreed Facts document.
6. By 9 September 2024, the Applicant file and serve any further evidence on which it intends to rely.



7. By 23 September 2024, each of the Respondents file and serve any evidence on which they intend to rely.
8. By 30 September 2024, the Applicant file and serve any evidence in reply on which it intends to rely.

Written submissions

9. By 4 October 2024, the Applicant file and serve its written outline of opening submissions not to exceed 30 pages.
10. By 18 October 2024, each of the Respondents file and serve their written outline of opening submissions not to exceed 30 pages.
11. By 23 October 2024, the Applicant file and serve written opening submissions in reply not to exceed 15 pages.

Application book and bundle of authorities

12. By 23 October 2024, the Applicant file and serve an electronic and hardcopy application book for the hearing of the originating application in accordance with the practice note.
13. By 23 October 2024, the Applicant file and serve electronic and hardcopy versions of an agreed bundle of authorities.

Hearing of originating application

14. The originating application dated 6 August 2024 be listed for final hearing on 28 October 2024 at 10.15 am AEDT with an estimate of 4 days.

Date orders authenticated: 22 August 2024


Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Schedule**

No: NSD1056/2024

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

| | |
|-------------------|---|
| 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 |

From: [Griffin, Brooke](#)
To: [Chung, Leon](#)
Cc: [Scott, Nicholas](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); [Scott, Madisen](#); [Nance, Emily](#); [Ng, Grace](#)
Subject: Production: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]
Date: Thursday, 22 August 2024 6:04:32 PM
Attachments: [24000822 Category 4.1 24007108.pdf](#)

OFFICIAL

Dear Mr Chung

Please see attached a production under paragraph 4 of the Notice to Produce dated 7 August 2024 as amended by the orders of Katzmann J of 8 August 2024.

Regards

Brooke

Brooke Griffin

Senior Executive Lawyer
Australian Government Solicitor
T 08 926 81158
brooke.griffin@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: [Loughland, Amelia](#)
To: [Ng, Grace](#); [Melissa Forbes](#); [Griffin, Brooke](#); [Jennifer Laurence](#); [Anna Shackell](#); [Nance, Emily](#); [Scott, Madisen](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#)
Subject: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]
Date: Thursday, 22 August 2024 4:27:09 PM
Attachments: [NSD1056-2024 - Document production categories for agreement.docx](#)

Dear Colleagues

Conferral

To assist with the conferral process in order 2 of Kennett J's orders, we attach a document which sets out the applicant's position and the position of the first-fourth respondents to the extent known. We otherwise confirm we are content for the parties' counsel to confer directly.

Notice to Produce

We refer to the letter from the Third and Fourth Respondents dated 20 August 2024.

As to paragraph 4 of the Notice to Produce issued to the Third Respondent on 6 August 2024 (**NTP**), we agree that those documents would ordinarily fall within the broader category of documents sought by our client by paragraph 1 of the draft orders.

However, as you know, our client has expressly sought to carve out documents responsive to paragraph 4 of the NTP from that broader category. This addresses your client's apparent concern about "simply want[ing] to avoid having to produce the same documents twice" (ts 13).

The NTP was served more than two weeks ago. We understand from your letter dated 20 August 2024 that it can be complied with by close of business tomorrow (noting that our client has not yet received any initial production in response to that category, which we understood from your letter was to occur before 9:30am yesterday). We do not understand there to be any objection to it.

In those circumstances, it remains our client's view that production in response to paragraph 4 of the NTP should occur by tomorrow, rather than being held back to respond to our client's further document requests which are currently the subject of conferral and which are not yet the subject of formal court orders.

Yours sincerely

Amelia

Amelia Loughland

Solicitor

Herbert Smith Freehills

T +61 2 9322 4166 M +61 459 192 861 E Amelia.Loughland@hsf.com

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From: [Griffin, Brooke](#)
To: [Chung, Leon](#)
Cc: [Scott, Nicholas](#); [Loughland, Amelia](#); [Zhu, Haiqiu](#); [Melissa Forbes](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); [Scott, Madisen](#); [Nance, Emily](#); [Ng, Grace](#)
Subject: RE: Production: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]
Date: Friday, 23 August 2024 7:11:24 PM
Attachments: [PART 4.2 \(002\) Redacted.pdf](#)

OFFICIAL

Dear Mr Chung

Further to my email below, please see attached the remainder of the documents to be produced under paragraph 4 of the Notice to Produce dated 7 August 2024 as amended by the orders of Katzmann J of 8 August 2024.

Regards

Brooke

Brooke Griffin
Senior Executive Lawyer
Australian Government Solicitor
T 08 926 81158
brooke.griffin@ags.gov.au

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From: Griffin, Brooke
Sent: Thursday, 22 August 2024 4:02 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Ng, Grace <Grace.Ng@ags.gov.au>
Subject: Production: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]

OFFICIAL

Dear Mr Chung

Please see attached a production under paragraph 4 of the Notice to Produce dated 7 August 2024 as amended by the orders of Katzmann J of 8 August 2024.

Regards

Brooke

Brooke Griffin

Senior Executive Lawyer

Australian Government Solicitor

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From: [Melissa Forbes](#)
To: [Loughland, Amelia](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Ng, Grace](#); [Griffin, Brooke](#); [Anna Shackell](#); [Scott, Madisen](#); [Emily Nance \(emily.nance@ags.gov.au\)](#); [Plitsch, Max](#); [Jennifer Laurence](#); [Julian van Lingen](#)
Subject: RE: TRM: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]
Date: Friday, 23 August 2024 9:47:55 AM
Attachments: [NSD1056-2024 - Notice to Produce \(3R\) - Cat 4 \(tranche 1\) REDACTED - 23.08.2024.zip](#)

Dear Ms Loughland,

My understanding regarding the conferral in respect of categories of documents and timeframes for production following yesterday's case management hearing differs from yours; given the Territory Respondents' proposal to dispense with production of Category 4 documents I understood that to have been included in the matters for conferral.

Nevertheless, I provide a first tranche of documents pursuant to Category 4 of the Notice to produce. At this time, the Third Respondent has taken the same approach to redaction as the Commonwealth.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Thursday, 22 August 2024 3:57 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Subject: TRM: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]

CAUTION: This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Colleagues

Conferral

To assist with the conferral process in order 2 of Kennett J's orders, we attach a document which sets out the applicant's position and the position of the first-fourth respondents to the extent known. We otherwise confirm we are content for the parties' counsel to confer directly.

Notice to Produce

We refer to the letter from the Third and Fourth Respondents dated 20 August 2024.

As to paragraph 4 of the Notice to Produce issued to the Third Respondent on 6 August 2024 (**NTP**), we agree that those documents would ordinarily fall within the broader category of documents sought by our client by paragraph 1 of the draft orders.

However, as you know, our client has expressly sought to carve out documents responsive to paragraph 4 of the NTP from that broader category. This addresses your client's apparent concern about "simply want[ing] to avoid having to produce the same documents twice" (ts 13).

The NTP was served more than two weeks ago. We understand from your letter dated 20 August 2024 that it can be complied with by close of business tomorrow (noting that our client has not yet received any initial production in response to that category, which we understood from your letter was to occur before 9:30am yesterday). We do not understand there to be any objection to it.

In those circumstances, it remains our client's view that production in response to paragraph 4 of the NTP should occur by tomorrow, rather than being held back to respond to our client's further document requests which are currently the subject of conferral and which are not yet the subject of formal court orders.

Yours sincerely

Amelia

Amelia Loughland

Solicitor

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Grace Ng
Senior Executive Lawyer
Australian Government Solicitor
Level 10, 60 Martin Place
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By email: Grace.Ng@ags.gov.au

27 August 2024
Matter 82783241
By Email

Melissa Forbes
Director, Legal Services
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Copy to:
Dominic Gomez
Principal Legal Officer
Northern Land Council
45 Mitchell Street
Darwin NT 0801
By email: GomezD@nlc.org.au
Copy to: donalt@nlc.org.au

Dear Colleagues

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

We refer to:

- the notices to produce served on the First and Third Respondents on 6 August 2024 (as amended by her Honour Justice Katzmann on 8 August 2024) (together, the **Notices to Produce**);
- the documents produced by the First and Third Respondents pursuant to the Notices to Produce; and
- the parties' correspondence concerning the Notices to Produce, including the letter from the First Respondent dated 13 August 2024, our email response of the same date and our letter dated 21 August 2024.

1 Approach to redactions

As you know, many of the documents produced by the First and Third Respondents have been heavily redacted.

We had understood from previous correspondence that some redactions would be made to produced documents to mask: (1) the names and contact details of certain departmental staff; and (2) matters the subject of a claim for legal professional privilege (we address these matters further below).

However, based on our review of the documents produced to date, it appears that redactions may also have been made on other grounds. By way of example, we refer to

Doc 2060468556



the following five documents (which have been attached to this letter for ease of reference):

- 1 Attachment A:¹ This email appears to record a discussion between Mr Welsh and a representative from the First Respondent's Department. It also appears to record that representative's observations arising from that discussion. Those observations were then shared with the Chief of Staff to the Third Respondent. The redactions which have been made appear in the context of otherwise apparently relevant content.
- 2 Attachment B:² This document appears to comprise the "minutes" of a meeting, which was attended by representatives from both the Second Respondent and the Fourth Respondent. The majority of this document has been redacted, including nearly half of the material under the heading "Jabiluka".
- 3 Attachment C:³ This is an email from Ms Moore to Ms Tan (copied to Ms Turnbull). Although it has been almost totally redacted, the email appears to relate to correspondence between the First Respondent and the Third Respondent concerning amendments to the Intergovernmental Agreement.
- 4 Attachment D:⁴ With one exception, the entirety of this file note has been redacted. Further, as addressed below, the person who prepared this file note and the parties to the "call" are not apparent from the face of the document.
- 5 Attachment E:⁵ This text message refers to the finalisation of a "lease extension package". It has otherwise been totally redacted. Further, as addressed below, the parties to this text message and when it was sent are not apparent from the face of the document.

In each of the above examples, the ground (or grounds) upon which those redactions have been made has not been disclosed and is not apparent to our client. We also note that a number of these documents either comprise or record communications between two different bodies politic; namely, the Second Respondent and the Fourth Respondent.

In those circumstances, we request that the First and Third Respondents identify, with precision, the basis upon which each of the redactions have been made in the documents produced by them to date (not limited to the examples identified above).

For completeness, we note that our client's view is that documents which are otherwise responsive to the Notices to Produce should not be redacted on the basis of perceived irrelevance. As you will appreciate, the redaction of documents for "relevance" tends to strip them of their context and their comprehensibility, and the parties may also take differing views about the relevance of material. Further, our client has not consented to that course, and nor has the Court permitted the producing parties to mask documents in that way. Therefore, if there are in fact documents which have been redacted for relevance, we request that they be re-produced with those redactions removed.

2 Identifying particulars

As set out in our email of 13 August 2023, our client is generally content for the names and personal details of certain departmental staff to be redacted. However, it is concerned about the extent of the redactions which have been made.

¹ Email from Senior Adviser – Resources to Ms Mappas dated 20 February 2024.

² Document entitled "Ranger Intergovernmental Taskforce on Closure (RITC), Minutes" dated 1 May 2024.

³ Email from Kym Moore to Anne Tan dated 20 June 2024.

⁴ File note entitled "20 June 2024 – call to Denise".

⁵ Undated text message from "Anne" to "Kim".



In many cases, entire email addresses and signatures have been redacted. This has left our client unable to determine the role of the relevant party to the email or other document, or even whether they worked for the Commonwealth or the Northern Territory Government. For example, it is not apparent to our client whether the person who sent the email to Ms Turnbull on 3 June 2024 worked for the Commonwealth (and, if so, in what capacity) or some other person (see Attachment F).

In the circumstances, while our client remains content at this stage for reasonable redactions to names and personal details, we request that your clients at least identify for the documents produced to date:

- the position title of the sender of the relevant email or other communication, whether that person was a Minister, in a political office or in a Department (and, if so, which one); and
- whether any redacted email addresses are Commonwealth, Northern Territory Government or third party email addresses.

Further, to the extent your respective clients have produced documents in the form of file notes and text messages (see, eg, Attachments D and E), we also request that they identify the parties to the communications reflected in those documents and when those communications occurred.

3 Privilege

Finally, as foreshadowed in our letter of 21 August 2024 and during the return of subpoena hearing before Registrar Hammerton-Cole (ts 5), our client's view remains that any documents the subject of a claim of legal professional privilege should be produced in unredacted form to the Court, in accordance with the usual practice set out in the relevant Practice Note.⁶

We would be grateful if you would confirm your client has done this. Our client intends to formally call on the notices at the next return of subpoena to confirm the position.

* * *

We look forward to hearing from you.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills
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leon.chung@hsf.com

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⁶ See Subpoenas and Notices to Produce Practice Note (GPN-SUBP) at [7.3]-[7.5], [11.2].

**VIQ SOLUTIONS****T:** 1800 287 274**E:** clientservices@viqsolutions.com**W:** www.viqsolutions.com.au**Ordered by:** Janie Grigor**For:** Herbert Smith Freehills Pty Limited (NSW)**Email:** janie.grigor@hsf.com**TRANSCRIPT OF PROCEEDINGS**

O/N H-1955551

FEDERAL COURT OF AUSTRALIA**NEW SOUTH WALES REGISTRY****MS T. RUBINSTEIN, National Registrar****No. NSD 1056 of 2024****ENERGY RESOURCES OF AUSTRALIA LTD****and****MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA
(COMMONWEALTH) and OTHERS****SYDNEY****10.00 AM, WEDNESDAY, 28 AUGUST 2024****MS A. LOUGHLAND appears for the applicant****MS G. NG appears for the 1st and 2nd respondents****MS M. FORBES appears for the 3rd and 4th respondents**

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MS A. LOUGHLAND: Yes, good morning, Registrar, my name is Loughland, L-o-u-g-h-l-a-n-d, initial A., appearing for the applicant.

THE REGISTRAR: Thank you, Ms Loughland, please go ahead.

5

MS G. NG: May it please the court. Ms Ng; I appear for the Commonwealth respondents, being the first and second respondents in the proceeding. ‘

THE REGISTRAR: Thank you. May I ask that you repeat your last name. I didn’t catch it, I’m sorry.

10

MS NG: Registrar, it is spelled N-g and pronounced Ng.

THE REGISTRAR: Thank you.

15

MS M. FORBES: May it please the court. Forbes, appearing for the third and fourth respondents.

THE REGISTRAR: All right. Please go ahead, Ms Loughland.

20

MS LOUGHLAND: Thank you, Registrar. So my client, the applicant, served a notice to produce on each of the Commonwealth Minister and the Northern Territory Minister, being the first and third respondents in these proceedings, on 6 August. The scope of category 4 was then amended by orders by the duty judge on 8 August. So just to give a bit of context here, the respondents have been directly producing documents to my client and have confirmed that production in response of categories 1 to 3 is now complete, from their perspective. The reason why the registrar adjourned the notices to produce over to today was for two reasons. The first was to allow the respondents additional time to produce documents in response to category 4.

25

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We were told at the hearing last week that that could be completed by the end of last week. And then secondly, because there was still a live issue as to whether category 4 would still be required to be complied with, given that the matter was listed before Kennett J, who is the docket judge in this matter, on the 22 August, and because my client was seeking production of further categories of documents at that hearing. So at that hearing before Kennett J, his Honour didn’t deal with the document production categories, but ordered the parties to file submissions and confer on those matters, and I confirm that that occurred last night. But so today I’m calling on the notices to produce again because of two particular issues with production; if I could just briefly address those, Registrar?

35

40

THE REGISTRAR: Please.

MS LOUGHLAND: So the first issue is production in response to category 4. As I’ve just indicated, at the hearing before the registrar last week, the respondents both indicated that their production in response to category 4 could be completed by 23

45

August, being last Friday, and that was confirmed to us in correspondence. Subsequently, we received two tranches of documents from the Commonwealth Minister and one tranche from the Northern Territory Minister, late last week. And so, as to the first matter, we would be grateful for an update from my friends as to
5 whether production in response to that category has been completed. I just wanted to raise that each respondent has now indicated to the court in their submissions that they think that category 4 should now be dispensed with, in light of the other document production categories.

10 But I just wish to put on the record, from my client's perspective, that each notice to produce is still valid, is still on foot, and there has already been substantial production from both respondents. We don't understand that Kennett Js
15 consideration of the further production should hold up finishing compliance with the current notices to produce, to the extent that that hasn't been completed by the two respondents. So that's the first issue that we would be calling on today. The second matter I wish to raise is that my client has a broader concern about the manner in which production has occurred in response to all four categories of documents in the notices. And we've raised all these matters in correspondence, but just to draw out two issues. The first is the matter of privilege, which we put on the record last week,
20 that there's a number of claims for privilege legal professional privilege, we understand, in the documents, which has resulted in certain documents being withheld from production altogether or documents being redacted. We requested that those documents over which a claim of privilege is maintained are produced to the court in a sealed packet consistent with the practice note, but we called the
25 registry yesterday and understood that that has not yet occurred, so we would press for that to be done in accordance with the practice note.

The second and final issue is just that the manner in which redactions have been applied to those documents make it difficult for us to ascertain whether redactions
30 have been applied to mask legal professional privilege or on the grounds of relevance or personal information. We consent to redactions for personal information of departmental staff but not on the grounds of relevance, and that hasn't been consented to by the court, so we requested that the respondents provide us, to the extent that reductions were applied for relevance, those documents be produced to us
35 in unredacted forms, but we haven't received a response on that issue yet. So, I mean, I'm in your, Registrar's, hands, and I will, obviously, wait to hear from my friends on this point, but we thought that, potentially, one course is to – and not wishing to drag out production of the notices given; they've been on foot for quite a while now – but is, perhaps, to stand the matter over for a week so that compliance
40 could be complete in respect of category 4 and in compliance with the practice note, and, hopefully, at that stage, we will have some clarity and some certainty over the effect of Kennett Js orders on category 4 of the notice.

45 THE REGISTRAR: Okay. Understood. And before I hear from you both, Ms Ng and Ms Forbes, it is an expectation of the court in line with the practice notes that all documents are produced in response to a notice to produce, and they are to be identified as documents over which there can be general access orders made,

documents over which there may be an objection and documents over which there may be a claim for privilege. So it is possible that, in response to the notices to produce, each of the first and second respondent and then third and fourth respondent may, in effect, be producing three separate bundles of documents to be dealt with differently, as need be. Ms Ng, can I hear from you first in relation to whether or not production in response to category 4 has been completed by your clients.

MS NG: Thank you, Registrar. I hope my sound is coming through the - - -

10 THE REGISTRAR: It is.

MS NG: Thank you and thank you to my friend for raising those issues and setting them out in that sequential way. I will address them in the same order if that assists. So in relation to, I think, what's referred to as paragraph 4 of the notice to produce, for the Commonwealth respondents, our position is that the production that we indicated we would produce at the end of last week has been completed, so there was correspondence to the applicant to indicate that searches had been conducted of a number of repositories. The results of those searches have been produced. A little bit of the context here for the court, which is the category that has been addressed to the Commonwealth respondents requires searches not only of the Minister who is the respondent in the proceedings and then the Minister who made the decision but of the broader Commonwealth. That is one of the live issues that is before Kennett J at the moment, so what my clients have indicated to the applicant's solicitors last week was that we would conduct searches of the Minister's offices, the Minister's holdings and the department that advises the Minister, and the results of those searches have been produced.

THE REGISTRAR: Okay. Thank you. And Ms Forbes.

30 MS FORBES: Thank you, Registrar. My friend has advised the court that the Territory respondents have produced some documents in category 4. That is correct. We have further documents that can be produced shortly in that category. I had, as my friend has said, understood that category 4 is in issue before Kennett J, and the Territory respondents have sought to narrow category 4. We are yet to learn whether that will happen, of course. At this stage, I have instructions to provide a further bundle pursuant to category 4, but we're not yet in a position to say that we've completed category 4.

THE REGISTRAR: Thank you. Thank you, Ms Forbes. Okay. In those circumstances, I wonder if there is any utility in adjourning to a registrar next week. It may be that the parties would rather continue discussions and production, that I make an order that there be liberty to apply before a registrar, understanding that the next listing before Justice Kennett J is on 2 October, so that leaves all of September that you may require a listing, but also that you're welcome to provide consent access orders for a registrar to consider in between times, so that might keep things moving to the extent that they need to. Ms Loughland.

MS LOUGHLAND: Yes, we would be content with that, Registrar, except just to note that if there could be some sort of notation or requirement for the respondents to produce those privileged documents to the court as I referred to earlier in respect of production that has already occurred.

5

THE REGISTRAR: Yes, okay. So the notation would be along the lines of there has been communication to the applicant's lawyers that documents over which there is a potential claim for legal professional privilege exist and they are to be produced to the court?

10

MS LOUGHLAND: Yes.

THE REGISTRAR: Okay.

15 MS LOUGHLAND: And that would include documents that have been withheld from production as well as redacted.

THE REGISTRAR: Okay. And what time frame is appropriate for that production to take place? Ms Ng and Ms Forbes, do you have - - -

20

MS NG: Registrar, if I may be heard briefly on the notation itself.

THE REGISTRAR: Yes.

25 MS NG: I had intended to come back to the issue of the delivery of sealed packets to the registry. Obviously, my client's aware of the requirements of the practice note. What I would just like to note is that though it's right that the applicant had flagged the issue of legal professional privilege at last week's listing before Registrar Hammerton-Cole, it was only yesterday afternoon that we received a letter
30 articulating the particular aspects of the redactions they had concerns with. Now that's under consideration by my client. In terms of the requirements of the practice note, as I understand, the parties are encouraged to reach agreement or at least discuss with us any objections before there's – before we need to necessarily go
35 down the formal process of delivering sealed packets and lodging it at the table of rejections and the like.

So I would request that the parties be given just the opportunity to do that before we are ordered to trouble the court with that. I would note, as my friend has indicated, there has already been substantial production between the parties. All of that has
40 taken place without needing to trouble the court. And I expect that with a little bit of further time, those objections could perhaps at least be confined, if not resolved. It's simply that we haven't had the opportunity to consider the particular aspects that the applicant has identified in correspondence, as I said, late yesterday afternoon.

45 THE REGISTRAR: Yes, understood. Ms Forbes, did you want to say anything?

MS FORBES: Registrar, I'm sorry, I don't have the correspondence in front of me at the moment. The territory respondents have been requested, I think, late last week by the applicant to comply with the practice note in terms of the privilege claims and objections. I don't anticipate that we would have any objection doing so formally if
5 required, but, as my friend has said, I think the parties are close or able to resolve at least some of those issues by conferring further.

THE REGISTRAR: Thank you. All right. Ms Loughland, I do think that a week is just too soon. It goes by very quickly so I am content to either contemplate two
10 weeks from today or simply give you a liberty to apply order and you can be in touch with the registry or I can do both and make it two weeks and liberty and if two weeks is too short, then we can push it out.

MS LOUGHLAND: I think that course would be preferable. Thank you, Registrar.
15

THE REGISTRAR: Okay. So I'm going to make an order that the notices to produce be adjourned to the subpoena list on the 11th.

MS LOUGHLAND: Thank you, Registrar.
20

THE REGISTRAR: Thank you. And the notation that I will make is that the parties are presently communicating regarding the production of material over which there may be a claim for legal professional privilege with a view to resolving or confining the issues. And it's likely to be Registrar Lee that hears the matter on 11 September
25 and I will make sure that I do a handover so that she has some background to the matter. And then the orders I will make are that:

- (1) The notices to produce be adjourned to the return of subpoena lists before a registrar at 9.30 am on 11 September.
- (2) The parties have liberty to apply to re-list the matter in the return of subpoena
30 lists on two days notice.
- (3) And that the parties have leave to provide the Registry with consent orders for the consideration of a Registrar on the papers in chambers.

Thank you. If there's nothing further, you're all excused.

MS LOUGHLAND: Thank you, Registrar.
35

THE REGISTRAR: Thank you.

40 **MATTER ADJOURNED at 10.39 am UNTIL WEDNESDAY, 11 SEPTEMBER 2024**

From: [Melissa Forbes](#)
To: [Chung, Leon](#); [Loughland, Amelia](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#)
Cc: [Ng, Grace](#); [Emily Nance \(emily.nance@ags.gov.au\)](mailto:emily.nance@ags.gov.au); [Griffin, Brooke](#); [Scott, Madisen](#); [Trilby Donald](#); [Dominic Gomez](#); [Julian van Lingen](#); [Margo Hi](#); [Anna Shackell](#); [Jennifer Laurence](#)
Subject: FW: RE: TRM: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]
Date: Wednesday, 28 August 2024 1:38:17 PM
Attachments: [NSD1056-2024 Notice to Produce \(3R\) - Cat 4 \(Tranche 2\) Redacted.pdf](#)

Dear colleagues,

Please see attached a further tranche of documents in response to Category 4 of the Notice to Produce, on behalf of the Third Respondent.

As with the first tranche, the Third Respondent has redacted personal information and contact details of Commonwealth and Territory officers. We have also taken the liberty of redacting the contact details for Brad Welsh/ERA. In this tranche, those redactions are in blue. Some further redactions of irrelevant material are in green.

I hope this approach will address some of the concerns raised in the Applicant's correspondence dated 27 August 2024 regarding the approach to redactions taken to date, but I understand we may need to revisit some redactions.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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From: Melissa Forbes

Sent: Friday, 23 August 2024 9:17 AM

To: 'Loughland, Amelia' <Amelia.Loughland@hsf.com>

Cc: 'Chung, Leon' <Leon.Chung@hsf.com>; 'Scott, Nicholas' <Nicholas.Scott@hsf.com>; 'Zhu, Haiqiu' <Haiqiu.Zhu@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; 'Griffin, Brooke' <Brooke.Griffin@ags.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Emily Nance (emily.nance@ags.gov.au) <emily.nance@ags.gov.au>; 'Plitsch, Max' <Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>

Subject: TRM: RE: TRM: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]

Dear Ms Loughland,

My understanding regarding the conferral in respect of categories of documents and timeframes for production following yesterday's case management hearing differs from yours; given the Territory Respondents' proposal to dispense with production of Category 4 documents I understood that to have been included in the matters for conferral.

Nevertheless, I provide a first tranche of documents pursuant to Category 4 of the Notice to produce. At this time, the Third Respondent has taken the same approach to redaction as the Commonwealth.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Thursday, 22 August 2024 3:57 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Subject: TRM: NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors [HSF-AUS01.FID5840327]

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Dear Colleagues

Conferral

To assist with the conferral process in order 2 of Kennett J's orders, we attach a document which sets out the applicant's position and the position of the first-fourth respondents to the extent known. We otherwise confirm we are content for the parties' counsel to confer directly.

Notice to Produce

We refer to the letter from the Third and Fourth Respondents dated 20 August 2024.

As to paragraph 4 of the Notice to Produce issued to the Third Respondent on 6 August 2024 (**NTP**), we agree that those documents would ordinarily fall within the broader category of documents sought by our client by paragraph 1 of the draft orders.

However, as you know, our client has expressly sought to carve out documents responsive to paragraph 4 of the NTP from that broader category. This addresses your client's apparent concern about "simply want[ing] to avoid having to produce the same documents twice" (ts 13).

The NTP was served more than two weeks ago. We understand from your letter dated 20 August 2024 that it can be complied with by close of business tomorrow (noting that our client has not yet received any initial production in response to that category, which we understood from your letter was to occur before 9:30am yesterday). We do not understand there to be any objection to it.

In those circumstances, it remains our client's view that production in response to paragraph 4 of the NTP should occur by tomorrow, rather than being held back to respond to our client's further document requests which are currently the subject of conferral and which are not yet the subject of formal court orders.

Yours sincerely

Amelia

Amelia Loughland

Solicitor

Herbert Smith Freehills

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From: [Loughland, Amelia](#)
To: [Ng, Grace](#); [Griffin, Brooke](#); [Scott, Madisen](#); [Nance, Emily](#); [Jennifer Laurence](#); [Anna Shackell](#); [Melissa Forbes](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Trilby Donald](#); [Gomezd@nlc.org.au](#); [desley.motlop@nlc.org.au](#)
Bcc: ["{F5840327}.AUS01@mail.cloudmanage.com"](#)
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]
Date: Friday, 30 August 2024 11:48:11 AM
Attachments: [2024.08.29 Return of Subpoena Orders \(Registrar Rubinstein\).pdf](#)
[2024.08.27 Letter from HSF to First and Third Respondents.pdf](#)

Dear Colleagues

We refer to the orders of Registrar Rubinstein dated 29 August 2024, the notation to which states that:

The parties are presently in communication regarding the production of material in response to the Notices to Produce over which there may be a claim for legal professional privilege, with a view to resolving or confining the issues in dispute.

Our client's concerns about the extent and scope of the redactions applied by the respondents on the material produced to date were clearly set out in our letter of 27 August which is reattached for reference. We would be grateful for a response to that letter as soon as possible so that the issues in dispute can be resolved or confined, and look forward to receiving confirmation that documents over which a claim of privilege is maintained are produced to the Court in sealed packets consistent with the Practice Note.

If these matters are not resolved by **4 September**, our client reserves its right to approach the Court for further relief.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

T +61 2 9322 4166 M +61 459 192 861 E Amelia.Loughland@hsf.com

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Tuesday, August 27, 2024 1:21 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues

Further to the below, please see **attached** copies of the attachments referred to in our letter

dated 27 August 2024.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

T +61 2 9322 4166 M +61 459 192 861 E Amelia.Loughland@hsf.com

www.herbertsmithfreehills.com.au

From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Tuesday, August 27, 2024 1:08 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues,

Please see **attached** correspondence.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

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www.herbertsmithfreehills.com.au

From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Wednesday, August 21, 2024 2:27 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au; Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues

Please see **attached** correspondence.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

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www.herbertsmithfreehills.com.au

From: Ng, Grace <Grace.Ng@ags.gov.au>

Sent: Wednesday, August 21, 2024 9:06 AM

To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327] [AGSDMS-DMS.FID5245026]

Dear all,

Please see our letter **attached**.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

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From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Sent: Tuesday, 20 August 2024 7:13 PM

To: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327]

Dear Ms Forbes

We refer to your letter of today's date. As flagged in our letter today, our client intends to call on the Notices to Produce to the First and Third Respondent at the Return of Subpoena listed before the Registrar tomorrow morning at 9.30am.

In light of your letter we will seek confirmation from the Third Respondent at tomorrow's Return of Subpoena that production under paragraphs [1]-[3] of the Notice to Produce is complete, and seek orders that paragraph [4] be stood over to the COB 23 August 2024 on the basis that such production as is available is produced tomorrow morning and the balance by 23 August.

In response to paragraph [6] of your letter, we would be grateful if full production under paragraph [4] of the Notice to Produce is made by the morning of 23 August 2024.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

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www.herbertsmithfreehills.com.au

From: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Sent: Tuesday, August 20, 2024 4:17 PM

To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Madisen.Scott@ags.gov.au; Emily Nance <emily.nance@ags.gov.au> <emily.nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>

Subject: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce

Dear Mr Chung,

Please see attached correspondence of today's date. I would be grateful for your early attention.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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From: [Scott, Madisen](#)
To: [Scott, Nicholas](#)
Cc: [Ng, Grace](#); [Zhu, Haiqiu](#); [Chung, Leon](#); [Loughland, Amelia](#); [Melissa.Forbes@nt.gov.au](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); [Nance, Emily](#); [Griffin, Brooke](#)
Subject: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [HSF-AUS01.FID5840327] [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]
Date: Wednesday, 4 September 2024 10:33:32 PM

OFFICIAL

Dear Mr Scott

We refer to your email below.

A copy of the attachments you refer to have been uploaded to Sigbox. The link can be accessed [here](#). The password is Wednesday2024@.

We confirm as follows:

- Document 1 is a PDF bundle of the documents which were attached to Mr Latham's email. The individual documents have been converted to one PDF document so that privilege claims can be marked and contact details redacted.
- Document 2 is the PDF bundle attached to Ms Turnbull's email.

As with the Ministerial Brief produced in Category 1 and 2, Attachment I has not been produced on the basis of legal professional privilege.

All other redactions, save for the contact details on the first page of each document, have been redacted on the basis of legal professional privilege.

Regards

Madisen Scott

Senior Lawyer

Australian Government Solicitor

T 08 926 81797

madisen.scott@ags.gov.au

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From: Scott, Nicholas <Nicholas.Scott@hsf.com>
Sent: Tuesday, 27 August 2024 4:55 PM
To: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>
Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-

DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues

Further to the emails below, and the other matters raised in our letter today, we repeat our client's request for the production of communications in their entirety (including any attachments).

Kind regards

Nicholas Scott

Senior Associate

Herbert Smith Freehills

T +61 8 9211 7336 E Nicholas.Scott@hsf.com

www.herbertsmithfreehills.com

From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>

Sent: Tuesday, August 20, 2024 12:36 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Ms Ng

Our client's position is that communications should be produced in their entirety – that is, including any attachments.

We appreciate that this may result in the production of attachments separately produced elsewhere from time-to-time, but it is appropriate for our client to be able to consider that themselves. We note by way of illustrative example:

- The email from Mr Latham dated 25 July 2024 appears to attach a series of Word and PDF documents, while the "Ministerial Brief" that was originally produced was a single consolidated PDF file.
- One of the documents included in that brief (see the letter from GAC dated 9 April 2024 at pages 27 and 28 of the brief) does not appear to include the attachment to that document, while the version that was produced by the Third Respondent does include the attachment.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqui.Zhu@hsf.com
www.herbertsmithfreehills.com.au

From: Ng, Grace <Grace.Ng@ags.gov.au>

Sent: Friday, August 16, 2024 3:29 PM

To: Zhu, Haiqiu <Haiqui.Zhu@hsf.com>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [HSF-AUS01.FID5840327] [AGSDMS-DMS.FID5245026]

Dear Ms Zhu,

The attachments to both the email of Ben Latham and the email of Cassandra Turnbull correspond to the documents (being the brief to the Minister and attachments) which we produced on 13 August 2024. The exception is Attachment I, which was not produced on the basis of legal professional privilege.

Please contact me if you require further information.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

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From: Zhu, Haiqiu <Haiqui.Zhu@hsf.com>

Sent: Friday, 16 August 2024 5:10 PM

To: Ng, Grace <Grace.Ng@ags.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for

Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Ms Ng

We refer to your letter of 15 August 2024 and its enclosures.

We would be grateful if you would also produce the documents attached to the emails enclosed at pages 4 and 5 of your letter.

In our view, each of these attachments forms part of the email, and so are also responsive to paragraph 3 of our client's Notice to Produce dated 6 August 2024.

Kind regards

Haiqiu

Haiqiu Zhu

Solicitor

Herbert Smith Freehills

T +61 2 9322 4088 M +61 474 637 911 E Haiqiu.Zhu@hsf.com
www.herbertsmithfreehills.com.au

From: Ng, Grace <Grace.Ng@ags.gov.au>

Sent: Thursday, August 15, 2024 2:16 PM

To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: RE: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [SEC=OFFICIAL] [AGSDMS-DMS.FID5245026]

OFFICIAL

Dear Mr Chung,

Please see **attached** our letter of today, and enclosure.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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OFFICIAL

From: Ng, Grace

Sent: Tuesday, 13 August 2024 1:23 PM

To: 'Chung, Leon' <Leon.Chung@hsf.com>

Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>

Subject: Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) and Ors NSD1056/2024 - AGS letter (NtP) [AGSDMS-DMS.FID5245026]

Dear Mr Chung,

Please see **attached** our letter of today's date, and enclosure.

Should your client apply to the Court as foreshadowed in your email of 12.05pm today, please ensure a copy of our letter is made available to the Court.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: [Melissa Forbes](#)
To: [Chung, Leon](#)
Cc: [Loughland, Amelia](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Laird, Kayla](#); [Julian van Lingen](#); [Jennifer Laurence](#)
Subject: NSD1056/2024 - ERA v Min Resources - documents of the Third Respondent over which client legal privilege is claimed
Date: Friday, 6 September 2024 5:45:05 PM
Attachments: [Applicant's notice to produce \(3R\) - 06.08.2024.pdf](#)
[NSD1056-2024 - 3R Letter of Objection - 06.09.2024.pdf](#)
[NSD1056-2024 - 3R Objection Schedule - 06.09.2024.pdf](#)
[Order 08.08.2024.pdf](#)

Dear Mr Chung,

I refer to your letter of 21 August 2024. I advise that unredacted copies of the documents over which the Third Respondent claims client legal privilege were provided in a sealed envelope to the Darwin Registry of the Federal Court today, under cover of the attached documents.

The Darwin Registry advised that the documents would be transferred to the Sydney Registry.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... 08 8935 7872

e ... melissa.forbes@nt.gov.au

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NOTICE OF FILING AND HEARING**Filing and Hearing Details**

Document Lodged: Notice to Produce - Form 61 - Rule 30.28(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 6/08/2024 9:11:55 PM AEST
Date Accepted for Filing: 7/08/2024 10:46:48 AM AEST
File Number: NSD1056/2024
File Title: ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v
MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN
AUSTRALIA (COMMONWEALTH) &ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing: Return of Subpoena
Time and date for hearing: 21/08/2024, 9:30 AM
Place: By Web Conference, Level 17, Law Courts Building 184 Phillip Street Queens
Square, Sydney



Sia Lagos

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 61
Rule 30.28(1)

Notice to produce

No. NSD 1056 of 2024

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

To the Third Respondent

Definitions

In this Notice to Produce:

- **Advice Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.
- **Document** has the meaning set out in the Dictionary to the *Evidence Act 1995 (Cth)* and includes (for the avoidance of doubt) all correspondence, memoranda, reports, notes, meeting minutes, submissions and other records (whether handwritten or electronic).
- **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Documents

The Applicant requires you to produce the following documents or things at the hearing in the proceeding at 3:00pm on 8 August 2024:

| | | |
|---|---|-----|
| Filed on behalf of (name & role of party) | The Applicant, Energy Resources of Australia ABN 71 008 550 865 | |
| Prepared by (name of person/lawyer) | Leon Chung | |
| Law firm (if applicable) | Herbert Smith Freehills | |
| Tel | 02 9225 5716 | Fax |
| Email | Leon.chung@hsf.com | |
| | Level 34 | |
| Address for service | 161 Castlereagh St | |
| (include state and postcode) | Sydney NSW 2000 | |

1. The original or one copy of all Documents evidencing or recording the Renewal Decision.
2. The original or one copy of all Documents evidencing or recording the Third Respondent's reasons for making the Renewal Decision.
3. The original or one copy of:
 - a. all Documents to which the Third Respondent had regard for the purpose of making the Renewal Decision;
 - b. all Documents evidencing or recording any information to which the Third Respondent had regard for the purpose of making the Renewal Decision; and
 - c. to the extent not otherwise covered in a and b, all Documents before the Third Respondent at the time he made the Renewal Decision.
4. The original or one copy of all Documents evidencing or recording communications between:
 - a. the First Respondent and/or the Second Respondent, on the one hand; and
 - b. the Third Respondent and/or the Fourth Respondent, on the other hand,in relation to the Advice Decision and/or the Renewal Decision.

Date: 6 August 2024



Signed by Leon Chung
Solicitor for the Applicant

Note

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

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



Department of
**THE ATTORNEY-GENERAL
AND JUSTICE**

Solicitor for the Northern Territory

Level 2 Old Admiralty Tower
68 The Esplanade, Darwin, NT,
0800

Postal address
GPO Box 1722
Darwin NT 0801
E Melissa.Forbes@nt.gov.au

T 08 8935 7872

TRM No. 20242140

6 September 2024

The Registrar
Federal Court of Australia
Level 2, Supreme Court Building
State Square
DARWIN NT 0800

By hand delivery

Copy to: leon.chung@hsf.com
Solicitor for the issuing party

Dear Registrar,

NSD1056/2024 Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia (Cth) & Ors – Third Respondent’s Letter of Objection to Production or Inspection of Documents

1. I refer to the above proceeding and the Applicant’s **Notice** to Produce to the Third Respondent, filed 7 August 2024. I act for the Third Respondent in this proceeding, the Northern Territory **Minister** for Mining, and the Fourth Respondent, the Northern Territory of Australia.
2. The Third Respondent has produced documents falling with paragraphs 1, 2, 3 and 4 of the Notice directly to the Applicant. The Third Respondent anticipates producing further documents pursuant to paragraph 4 of the Notice.
3. The Third Respondent claims client legal privilege over the whole or part of three documents, and on that basis objects to the production and inspection of unredacted copies of those documents, pursuant to section 118(c) of the *Evidence Act 1995* (Cth).
4. The Third Respondent now produces unredacted copies of those documents to the Court, and provides the following explanations for the claims of client legal privilege.

Background

5. Relevant to this proceeding:
 - (a) The Minister and the Northern Territory **Department** of Industry Tourism and Trade hold responsibilities for administering the *Mineral Titles Act 2010* (NT).
 - (b) In that capacity, the Department provided advice including legal advice and recommendations to the Minister.

- (c) Some of the legal advice conveyed to the Minister by the Department was (or was based on) legal advice obtained by the Department from independent counsel for the purpose of advising the Minister.
6. Ministerial Briefs are provided to the Minister in accordance with Departmental administrative processes necessary to maintain the functioning of the Department and the Minister's office. This includes review and comment by senior managers and executives, and handling by administrative staff within the Department and the Minister's office. The Third and Fourth Respondents do not consider that confidentiality or privilege is waived by those processes.

Document 1: Ministerial Brief re Decision on Renewal of Mineral Lease Northern 1 – Jabiluka and attachments signed by the Minister on 26 July 2024 (unnumbered)

7. Document 1 is a Brief from the Department to the Third Respondent, signed by the Third Respondent on 26 July 2024. It falls within paragraphs 1 and 2 of the Notice.
8. Document 1 was authored by Denise Turnbull (Director, Mineral Titles) and Jennifer Laurence (Director, Legal Services, Mining and Energy Division), both officers of the Department. Ms Laurence is an Australian legal practitioner who holds a current practising certificate.
9. The purpose of the document was to make a recommendation to the Minister in respect of the renewal of Mineral Lease Northern 1 – Jabiluka, pursuant to section 187 of the *Mineral Titles Act 2010* (NT).
10. Paragraph 9 of Document 1 outlines legal risks associated with the recommendation.
11. A copy of Document 1 with paragraph 9 redacted was produced to the Applicant and Respondents (other than the Third and Fourth Respondents) on 15 August 2024.
12. The Third Respondent objects to inspection of the unredacted document by the parties to the proceeding.

Document 2: Ministerial Brief 58:MIN24:1058

13. Document 2 is a Ministerial Brief provided to the Minister on 17 July 2024, and falls within paragraph 3 of the Notice.
14. Document 2 was authored by Jennifer Laurence.
15. Document 2 outlines the legal and statutory context to the matters the subject of the Brief, summarises advice received from counsel on those matters, and contains statements and recommendations regarding the legal risks, options and consequences.
16. Document 2 was withheld from production on the basis of client legal privilege. The attachments to Document 2 have been separately produced to the parties to the proceeding.

17. The Third Respondent objects to inspection of Document 2 by the parties to the proceeding.

Document 3: Ministerial Brief - 58:MIN24: 1073

18. Document 3 is a Ministerial Brief provided to the Minister on or about 23 July 2024.
19. Document 3 was authored by Denise Turnbull and Jennifer Laurence.
20. The purpose of Document 3 was to make a recommendation to the Minister in relation to seeking advice from the Commonwealth Minister for Resources, in accordance with the *Mineral Titles Act 2010* (NT).
21. A copy of Document 3 (including the attachments) was produced to the Applicant and other Respondents to the proceeding on 19 August 2024, with paragraphs 7 and 24-27 redacted, on the following bases:
- (a) Paragraph 7 contains a conclusion regarding the legal effect of a condition; and
 - (b) Paragraphs 24-27 contain statements regarding legal risks, options and consequences.
22. The Third Respondent objects to inspection of the unredacted document by the parties to the proceeding.

Objection Schedule

23. In accordance with Practice Note GPN-SUBP, the Third Respondent provides:
- (a) Unredacted copies of Documents 1, 2 and 3;
 - (b) An objection schedule; and
 - (c) A copy of the notice and orders amending the notice.
24. Please do not hesitate to contact me if you require further detail.

Yours sincerely
**SOLICITOR FOR THE
NORTHERN TERRITORY**



**Melissa Forbes
Principal Lawyer**

NSD1056/2024 – Energy Resources of Australia v Minister for Resources & Ors - Third Respondent's Objection Schedule

127

| Doc | Notice paragraph | Author | Recipient | Document details | Objection | Action |
|-----|------------------|---|--|--|---|--|
| 1. | 1&2 | Denise Turnbull & Jennifer Laurence, Department of Industry, Tourism and Trade (DITT) | Minister Monaghan, received on or about 26 July 2024 | Ministerial Brief (unnumbered) Attachments: a) Letter Minister King to Minister Monaghan dated 25 July 2024 b) Letters dated 26 July 2024 signed by Minister Monaghan, dated 26 July 2024, addressed to: i. Northern Land Council; ii. Jabiluka Aboriginal Land Trust; iii. Gundjeihmi Aboriginal Corporation iv. Energy Resources Australia | Client Legal Privilege is claimed over para [9], on the basis that it outlines legal risks associated with the recommendation in the Brief. | Redacted version produced to parties |
| 2. | 3 | Jennifer Laurence, Department of Industry, Tourism and Trade (DITT) | Minister Monaghan, received on or about 17 July 2024 | Ministerial Brief - 58:MIN24: 1058 Attachments: a) Letter Minister Monaghan to Minister King (undated) b) Email 17 July 2024 Ministerial Assistant to Minister King providing letter from Minister Monaghan | Client Legal Privilege is claimed over the whole of the Brief (excluding the attachments), on the basis that it outlines the legal and statutory context to the matters the subject of the Brief, summarises advice received from counsel on those matters, and includes recommendations regarding legal risks. | Withheld from production; attachments produced separately. |
| 3. | 3 | Denise Turnbull & Jennifer Laurence, Department of Industry, Tourism and Trade (DITT) | Minister Monaghan, received on or about 23 July 2024 | Ministerial Brief - 58:MIN24:1073 Attachments: a) Letter from Minister Monaghan to Minister King dated 23 July 2024 b) Renewal Application for MLN1 by Energy Resources Australia c) Supporting information to renewal Application for MLN1 by Energy Resources Australia dated 20 March 2024 d) Letter Northern Land Council to DITT dated 8 May 2024 e) Letter Gundjeihmi Aboriginal Corporation to Minister King and Minister Monaghan dated 9 July 2024 f) Letter Gundjeihmi Aboriginal Corporation to Chief Minister Lawler dated 9 April 2024 g) Letter Gundjeihmi Aboriginal Corporation to Chief Minister Lawler dated 14 March 2024 h) Email dated 23 July 2024 Ministerial Assistant to Minister King providing letter from Minister Monaghan i) Energy Resources Australia – Clause 8 regarding Financial Provision for Rehabilitation | Client Legal Privilege is claimed over paras: <ul style="list-style-type: none"> [7], on the basis that it contains a conclusion regarding the legal effect of a provision; and [24], [25], [26], and [27], on the basis that they contain statements regarding legal risks, options and consequences. | Redacted version produced to parties |



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1056/2024

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

Respondent

ORDER

JUDGE: JUSTICE KATZMANN

DATE OF ORDER: 08 August 2024

WHERE MADE: Sydney

**WITH THE CONSENT OF THE THIRD, FOURTH AND FIFTH RESPONDENTS,
AND IN THE ABSENCE OF OPPOSITION BY THE FIRST AND SECOND
RESPONDENTS, THE COURT ORDERS THAT:**

Interim stay

1. Upon the giving by the Applicant of the usual undertaking as to damages, until further order, the Renewal Decision, the effect of the Renewal Decision and enforcement or execution of the Renewal Decision, be stayed.

Document production

2. Paragraph 4 of the Notice to Produce issued to the First Respondent on 6 August 2024 be amended to read:

The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. *the First Respondent and/or the Second Respondent, on the one hand; and*
- b. *the Third Respondent and/or the Fourth Respondent, on the other hand,*
in relation to the Advice Decision and/or the Renewal Decision.

3. Paragraph 4 of the Notice to Produce issued to the Third Respondent on 6 August 2024 be amended to read:



The original or one copy of all Documents evidencing or recording communications occurring on or after 1 January 2024 between:

- a. the First Respondent and/or the Second Respondent, on the one hand; and*
- b. the Third Respondent and/or the Fourth Respondent, on the other hand,*
in relation to the Advice Decision and/or the Renewal Decision.

Case Management

4. The matter be listed for case management before the docket judge, or if the matter is not docketed, the duty judge, at **9:30am on Monday, 19 August 2024** or at such other time as is convenient to the docket judge or duty judge in consultation with the parties.
5. Liberty to apply on 1 day's notice.

THE COURT NOTES THAT:

1. In these orders, **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Date orders authenticated: 8 August 2024

Sia Lagos
Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Schedule**

No: NSD1056/2024

Federal Court of Australia

District Registry: New South Wales

Division: General

| | |
|-------------------|--|
| 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 |



Federal Court of Australia

District Registry: New South Wales Registry

Division: General

No: NSD1056/2024

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

ORDER

JUDGE: Justice Kennett

DATE OF ORDER: 9 September 2024

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. By 5 business days (for categories 4 and 5) and 10 business days (for categories 1, 2, 3 and 6) from the date of these orders, the First Respondent and the Second Respondent produce the documents set out in Part A of Annexure A.
2. By one week from the date of these orders, the Third Respondent and the Fourth Respondent produce the documents set out at Part B of Annexure A, unless those documents have already been produced by the First Respondent or Second Respondent.
3. Production of documents pursuant to paragraph 4 of the Notice to Produce dated 6 August 2024 issued to the First and Second Respondents and filed 7 August 2024 be dispensed with.
4. Production of documents pursuant to paragraph 4 of the Notice to Produce issued to the Third Respondent and filed 7 August 2024 be dispensed with.

Date orders authenticated: 9 September 2024

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**Schedule**

No: NSD1056/2024

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

| | |
|-------------------|--|
| 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 |



Annexure A

Definitions

In this Annexure:

- (a) **Advice Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.
- (b) **Application** means the Applicant's application for renewal of Jabiluka MLN1.
- (c) **Communication** includes oral communications and communications in writing (whether electronic or otherwise).
- (d) **Document** has the meaning set out in the Dictionary to the *Evidence Act 1995* (Cth) and includes (for the avoidance of doubt) all correspondence, memoranda, reports, notes, meeting minutes, submissions, computer and smart phone messaging communications (including WhatsApp and Signal) and other records (whether handwritten or electronic).
- (e) **Jabiluka MLN 1** means Jabiluka Mineral Lease 1.
- (f) **Renewal Decision** has the meaning set out in the Originating Application filed in this proceeding on 6 August 2024.

Part A

1. The original or one copy of all Documents evidencing or recording Communications between 1 December 2022 to 25 July 2024 to or from the First Respondent (including Communications from individuals in the office of the First Respondent to the First Respondent) and/or the Second Respondent (by the Department of Industry, Science and Resources) in relation to:
 - (a) the Application or the anticipated or potential application by the Applicant for renewal of Jabiluka MLN 1;
 - (b) the Advice Decision; and/or



- (c) the Renewal Decision.
2. The original or one copy of all Documents evidencing or recording any information received by the First Respondent between 1 December 2022 to 25 July 2024 in relation to:
- (a) the extension of the Kakadu National Park into the land covered by Jabiluka MLN 1; and
- (b) any communications from:
- (i) the Prime Minister;
- (ii) the Commonwealth Minister for the Environment and Water;
- (iii) the Hon Linda Burney MP;
- (iv) Senator the Hon Malarndirri McCarthy;
- (v) Mr Luke Gosling MP;
- (vi) Ms Marion Scrymgour MP; or
- (vii) the office of any of the above
- in respect of the Advice Decision and/or the Renewal Decision.
3. The following Documents referred to in MS24-000911 produced by the First Respondent on 13 August 2024:
- (a) MS24-000480;
- (b) MC24-003311;
- (c) records of the advice given by the Fourth Respondent referred to at page 4 [6(b)(iii)(B)] of MS24-000911;
- (d) Communications recording the consultation with the NT Department of Industry, Tourism and Trade, NLC, Gundjeihmi Aboriginal Corporation (**GAC**) and Traditional Owners referred to at page 7 [20] of MS24-000911;
- (e) MS24-000973;



- (f) MC24-001048;
 - (g) MC24-000839;
 - (h) MC24-000535;
 - (i) MB24-000473;
 - (j) MB24-000253;
 - (k) MC24-003421;
 - (l) MS24-000251;
 - (m) records of the discussions during the meeting with the Mirarr referred to at Attachment D, paragraph 33(a)(i), including any briefing to the First Respondent prior to that meeting and any debriefing Documents;
 - (n) records of the discussions during the meeting with the Applicant referred to at Attachment D, paragraph 37(a), including any briefing to the First Respondent prior to that meeting and any debriefing Documents; and
 - (o) the emails referred to at Attachment D, paragraph [51].
4. The following Documents referred to in the undated memorandum prepared by Marie Illman and Ben Latham, which was produced by the First Respondent on 15 August 2024:
- (a) Documents evidencing or recording the Communications referred to in the 5th bullet point under the heading “Adviser Comments”;
 - (b) Documents evidencing or recording the Communications referred to in the 6th bullet point under the heading “Adviser Comments”; and
 - (c) Documents evidencing or recording the Communications referred to under the heading “Communications Opportunities”.



5. The following Documents referred to in the Document titled “Decision on Renewal of Mineral Lease Norther 1 – Jabiluka”, which was produced by the Third Respondent on 15 August 2024:
 - (a) the letter from the Third Respondent to the First Respondent dated 17 July 2024, referred to at page 1 [1]; and
 - (b) the letter from the First Respondent to the Third Respondent dated 19 July 2024 referred to at page 1 [1].

6. The following Documents referred to in the Documents produced by the Third Respondent on 19 August 2024:
 - (a) the letter from Yvonne Margarula to Prime Minister Albanese in December 2022, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);
 - (b) Documents evidencing or recording any matters discussed during the meeting (or meetings) with Prime Minister Albanese and Ministers King and Plibersek on 13 February 2023, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);
 - (c) the letter from the First Respondent to GAC dated 27 March 2023, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);
 - (d) the letter from Justin O’Brien to the Hon Anthony Albanese MP dated 23 February 2023, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);



- (e) the letter from GAC to Minister Plibersek dated 23 February 2023, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);
- (f) the letter from GAC to Minister King dated 24 February 2023, referred to in the letter from Yvonne Margarula to The Hon Anthony Albanese MP dated 10 January 2024 (Attachment 4 to the letter from Yvonne Margarula to Chief Minister Eva Lawler dated 18 January 2024);
- (g) the letter from the First Respondent to GAC dated 10 May 2024, as referred to in the letter from Yvonne Margarula to the First Respondent and the Third Respondent dated 9 July 2024; and
- (h) the letter from the First Respondent to GAC dated 3 June 2024, as referred to in the letter from Yvonne Margarula to the First Respondent and the Third Respondent dated 9 July 2024.

Part B

7. To the extent not otherwise covered in paragraph 4 of the Notice to Produce dated 6 August 2024 (as amended on 8 August 2024), the original or one copy of all Documents evidencing or recording Communications to or from the Third Respondent (including Communications from individuals in the office of the Third Respondent to the Third Respondent) and/or the Fourth Respondent (by its Department of Industry, Tourism and Trade) between 1 December 2022 to 26 July 2024 in relation to:
- (a) the Application or the anticipated or potential application by the Applicant for renewal of Jabiluka MLN 1;
 - (b) the Advice Decision; and/or
 - (c) the Renewal Decision.



8. The following Documents referred to in the document titled “Decision on Renewal of Mineral Lease Norther 1 – Jabiluka”, which was produced by the Third Respondent on 15 August 2024:
- (a) the letter from the Third Respondent to the First Respondent dated 17 July 2024, referred to at page 1 [1];
 - (b) the letter from the First Respondent to the Third Respondent dated 19 July 2024 referred to at page 1 [2]; and
 - (c) 58:MIN24:1084.
9. The following Documents referred to in the Documents produced by the Third Respondent on 19 August 2024:
- (d) Documents evidencing or recording the advice from the former Minister for Mining and Industry (the Hon Nicole Manison) dated 22 December 2022, as referred to in the letter from Chief Minister Eva Lawler to Yvonne Margarula dated 20 February 2024;
 - (e) Documents evidencing or recording any consultation undertaken by the Department of Industry, Tourism and Trade with “relevant stakeholders”, as referred to in 58:MIN24:1011 at [21];
 - (f) Documents evidencing or recording any matters discussed during the meeting between (among others) the Third Respondent and representatives of GAC dated 19 April 2024; and
 - (g) Documents evidencing or recording any matters discussed during the meeting between (among others) the Third Respondent and representatives of GAC dated 8 July 2024.

From: [Scott, Madisen](#)
To: [Loughland, Amelia](#); [Melissa Forbes](#)
Cc: [Chung, Leon](#); [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Ng, Grace](#); [Nance, Emily](#); [Griffin, Brooke](#); [Julian van Lingen](#); [Jennifer Laurence](#); [Trilby Donald](#); [Dominic Gomez](#); desley.motlop@nlc.org.au; [Nitschke, Samuel](#)
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327] [AGSDMS-DMS.FID5245026]
Date: Tuesday, 10 September 2024 12:11:12 PM
Attachments: [20240828 Corr re HSF 24007108\(52439101.3\).pdf](#)

Dear Ms Loughland

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

Please find **attached** correspondence of today's date.

We note that the documents can be accessed [here](#). The password is Tuesday2024@.

Regards

Madisen Scott

Senior Lawyer

Australian Government Solicitor

T 08 926 81797

madisen.scott@ags.gov.au

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Thursday, 5 September 2024 11:43 AM

To: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; desley.motlop@nlc.org.au

Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

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Dear Colleagues

We are grateful for the email from the Third Respondent below and look forward to the further information to be provided on 6 September.

We confirm receipt of the attachments provided by the First Respondent on the evening of 4 September and would be grateful for a response in respect of the outstanding matters raised in our letters of 21 and 27 August 2024.

Yours faithfully

Amelia Loughland

Solicitor

Herbert Smith Freehills

T +61 2 9322 4166 M +61 459 192 861 E Amelia.Loughland@hsf.com

www.herbertsmithfreehills.com.au

From: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Sent: Wednesday, September 4, 2024 6:00 PM

To: Loughland, Amelia <Amelia.Loughland@hsf.com>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Emily Nance <emily.nance@ags.gov.au> <emily.nance@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Dominic Gomez <GomezD@nlc.org.au>; desley.motlop@nlc.org.au

Subject: FW: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear colleagues,

1. I refer to the above proceeding, the Applicant's Notice to produce issued to the Third Respondent (filed 7 August 2024 and amended on 8 August 2024), the Applicant's letters dated 21 and 27 August 2024 and the below email in relation to the same.
2. In relation to claims of legal professional privilege, the Third Respondent does not object to your request for those documents to be produced in unredacted form to the Court, consistent with Practice Note GPN-SUBP. In respect of documents already produced, I hope to complete that process by 6 September 2024.
3. In relation to redactions of 'identifying particulars', my client's concerns arise predominantly in the context of the establishment of the Online File. To some degree, that is also the case in respect of material redacted for relevance.
4. If our clients can agree an approach to dealing with that material and ensuring it is redacted prior to publication in the Online File, I anticipate many of my client's concerns will fall away. I will also endeavour to come back to you on this matter by 6 September 2024.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory

p ... **08 8935 7872**

e ... melissa.forbes@nt.gov.au

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>

Sent: Friday, 30 August 2024 11:18 AM

To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>

Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; GomezD@nlc.org.au; desley.motlop@nlc.org.au

Subject: TRM: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

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Dear Colleagues

We refer to the orders of Registrar Rubinstein dated 29 August 2024, the notation to which states that:

The parties are presently in communication regarding the production of material in response to the Notices to Produce over which there may be a claim for legal professional privilege, with a view to resolving or confining the issues in dispute.

Our client's concerns about the extent and scope of the redactions applied by the respondents on the material produced to date were clearly set out in our letter of 27 August which is reattached for reference. We would be grateful for a response to that letter as soon as possible so that the issues in dispute can be resolved or confined, and look forward to receiving confirmation that documents over which a claim of privilege is maintained are produced to the Court in sealed packets consistent with the Practice Note.

If these matters are not resolved by **4 September**, our client reserves its right to approach the Court for further relief.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

T +61 2 9322 4166 M +61 459 192 861 E Amelia.Loughland@hsf.com

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>
Sent: Tuesday, August 27, 2024 1:21 PM
To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues

Further to the below, please see **attached** copies of the attachments referred to in our letter dated 27 August 2024.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>
Sent: Tuesday, August 27, 2024 1:08 PM
To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Melissa Forbes <Melissa.Forbes@nt.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues,

Please see **attached** correspondence.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

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From: Loughland, Amelia <Amelia.Loughland@hsf.com>
Sent: Wednesday, August 21, 2024 2:27 PM
To: Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au; Melissa Forbes <Melissa.Forbes@nt.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [AGSDMS-DMS.FID5245026] [HSF-AUS01.FID5840327]

Dear Colleagues

Please see **attached** correspondence.

Yours sincerely

Amelia Loughland

Solicitor

Herbert Smith Freehills

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From: Ng, Grace <Grace.Ng@ags.gov.au>
Sent: Wednesday, August 21, 2024 9:06 AM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Melissa Forbes <Melissa.Forbes@nt.gov.au>
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327] [AGSDMS-DMS.FID5245026]

Dear all,

Please see our letter **attached**.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

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From: Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>
Sent: Tuesday, 20 August 2024 7:13 PM
To: Melissa Forbes <Melissa.Forbes@nt.gov.au>
Cc: Chung, Leon <Leon.Chung@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Loughland, Amelia <Amelia.Loughland@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Plitsch, Max <Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna Shackell <Anna.Shackell@nt.gov.au>; Trilby Donald <DonalT@nlc.org.au>; Gomezd@nlc.org.au; desley.motlop@nlc.org.au
Subject: RE: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce [HSF-AUS01.FID5840327]

Dear Ms Forbes

We refer to your letter of today's date. As flagged in our letter today, our client intends to call on the Notices to Produce to the First and Third Respondent at the Return of Subpoena listed before the Registrar tomorrow morning at 9.30am.

In light of your letter we will seek confirmation from the Third Respondent at tomorrow's Return of Subpoena that production under paragraphs [1]-[3] of the Notice to Produce is complete, and seek orders that paragraph [4] be stood over to the COB 23 August 2024 on the basis that such production as is available is produced tomorrow morning and the balance by 23 August.

In response to paragraph [6] of your letter, we would be grateful if full production under paragraph [4] of the Notice to Produce is made by the morning of 23 August 2024.

Kind regards
Haiqiu

Haiqiu Zhu
Solicitor
Herbert Smith Freehills

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www.herbertsmithfreehills.com.au

From: Melissa Forbes <Melissa.Forbes@nt.gov.au>
Sent: Tuesday, August 20, 2024 4:17 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Loughland, Amelia <Amelia.Loughland@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Scott, Nicholas <Nicholas.Scott@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Madisen.Scott@ags.gov.au; Emily Nance

(emily.nance@ags.gov.au) <emily.nance@ags.gov.au>; Plitsch, Max
<Maximilian.Plitsch@ags.gov.au>; Jennifer Laurence <Jennifer.Laurence@nt.gov.au>; Anna
Shackell <Anna.Shackell@nt.gov.au>
Subject: NSD1065/2024 - ERA v Min Resources & Ors - notice to produce

Dear Mr Chung,

Please see attached correspondence of today's date. I would be grateful for your early attention.

Regards,

Melissa Forbes

Principal Lawyer | Litigation Division | Solicitor for the Northern Territory
p ... 08 8935 7872
e ... melissa.forbes@nt.gov.au

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Your ref.82783241 Our ref. 24007108

10 September 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

Australian Government Solicitor

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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors - NSD1056/2024

1. We refer to your letter dated 27 August 2024.

Approach to Redactions

2. We confirm that redactions have been made to documents falling within Categories 1, 2 and 3 on the basis of:
 - 2.1. Your confirmation by email on 13 August 2024 that the applicant consents, and is content, for the names of departmental officers not responsible for advising the First Respondent, and the telephone numbers and email addresses of departmental staff, to be redacted; and
 - 2.2. Legal professional privilege.
3. The documents produced under Category 4 have had redactions applied on the basis of the matters at [2] above, and to information which our client considers to be irrelevant to the decisions under review. In relation to the matter you have raised in your letter:
 - 3.1. ATTACHMENT A – The redacted material relates to information shared regarding the negotiation to settle the rehabilitation authority for the Ranger Uranium Mine and the consequences if an agreement cannot be reached. Given the negotiations are ongoing, disclosure of this information was not considered relevant.
 - 3.2. ATTACHMENT B – The redacted information concerns projects and issues unrelated to the Jabiluka renewal application, advice and decision. Most of the redacted information relates to the Ranger Uranium Mine. The paragraphs under the Jabiluka subheading which are redacted concern the Jabiluka Mine Closure Plan and the authorisation issued by the Northern Territory government.

- 3.3. ATTACHMENT C – Redactions have been applied on the basis of legal professional privilege.
- 3.4. ATTACHMENT D – Redactions have been applied on the basis of legal professional privilege.
- 3.5. ATTACHMENT E – Redactions have been applied on the basis of relevance. The redacted portions relate to a separate issue which the relevant Ministers were also conferring upon at the relevant times.
4. For the avoidance of any doubt, we confirm that the exchange of information between the Commonwealth parties and Northern Territory parties does not waive any claim of legal professional privilege. The exchange of information occurred on the basis of and understanding between the parties that such disclosure would attract common interest privilege.
5. For convenience, we attach a colour-coded redacted version of the category 4 documents. In this regard:
 - 5.1. redactions marked in blue are redactions on the basis of relevance;
 - 5.2. redactions marked in green are redactions on the basis of legal professional privilege (including common interest privilege);
 - 5.3. redactions in purple are claims on the basis of a combination of legal professional privilege and relevance; and
 - 5.4. redactions in black are to the names and identifying particulars.
6. We acknowledge your client’s position on relevance, as stated in the final paragraph of Part 1 of your letter. However, where the information in the documents does not concern or relate to the matters the subject of these proceedings, and involve inter-departmental, intra-departmental or third-party discussion in relation to ongoing matters, our client does not agree, subject to what is stated at [7] below, to producing the documents in unredacted form.
7. Our client will consider the release of the documents in unredacted form, save for claims of legal professional privilege, to the applicant’s solicitors and counsel subject to receiving a signed confidentiality undertaking that the documents will not be disclosed further without written authorisation. If the applicant agrees to this proposal, we will prepare the relevant undertakings and provide them to you. We note that a similar approach has recently been taken in another matter where HSF is instructed, being NSD777/2024.
8. In the event that the applicant does not agree to the proposal above at [7], we note r 30.28(2) of the *Federal Court Rules 2011* (Cth) is available to your client.

Identifying Particulars

9. We note that your email of 13 August 2024 states:

[5], the applicant is content for the names to be redacted at this time but reserves its rights to press for disclosure of the names in due course, if relevant to the proceedings

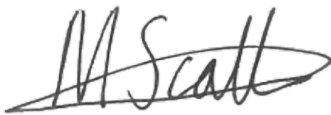
[7], the applicant consents to the redaction of telephone numbers and email addresses of departmental staff.

10. Redactions have been made to the produced documents consistent with what was consented to in that email. Nevertheless, we provide in Attachment A the information you have requested.

Privilege

11. Once the applicant has had the opportunity to consider the material identifying the basis of our client's redactions, as noted at [5] above, the parties can reconvene to discuss the matters you raise in this part of your letter.

Yours sincerely



Madisen Scott
Senior Lawyer
T 08 926 81797
Madisen.Scott@ags.gov.au

cc. Melissa Forbes
Dominic Gomez

Attachment A

| Document | Position of redacted individual |
|---|---|
| Part 4.1 | |
| Page 21 – email from DISR to NTG | Acting Manager of Remediation and Policy Section, DISR |
| Page 22 – email from DISR to NTG | Acting Manager of Remediation and Policy Section, DISR |
| Page 23-24 – internal email within DISR | <p><u>Sender</u> - Assistant Manager of Remediation and Policy Section, DISR</p> <p><u>Receivers</u></p> <p>Acting Manager of Remediation and Policy Section, DISR</p> <p>Senior Policy Officer of Remediation and Policy Section, DISR</p> <p>Policy Officer of Remediation and Policy Section, DISR</p> |
| Page 25 - email from DISR to NTG | Acting Manager of Remediation and Policy Section, DISR |
| Page 28 – Internal Email from Minister’s Office | <p><u>Sender</u> – Adviser</p> <p><u>Receiver</u> - Executive Assistant</p> |
| Page 34 - email from DISR to NTG | Acting Manager of Remediation and Policy Section, DISR |
| Page 39 - email from NTG to DISR | Assistant Manager of Remediation and Policy Section, DISR |
| Page 49 – emails between DISR and email from NT to DISR | <p>4:17PM</p> <p><u>Sender</u> - Assistant Manager of Remediation and Policy Section, DISR</p> <p><u>Receiver</u> - Senior Policy Officer of Remediation and Policy Section, DISR</p> <p>3:58PM</p> <p><u>Sender</u> - Acting Manager of Remediation and Policy Section, DISR</p> |

| | |
|--|--|
| | <p><u>Receiver</u> - Assistant Manager of Remediation and Policy Section, DISR</p> <p>3:45PM</p> <p>Acting Manager of Remediation and Policy Section, DISR</p> |
| Part 4.2 | |
| Page 1-3 – email between Minister Monaghan’s Office and Minister King’s Office | Senior Adviser |
| Page 4 – Meeting note | <p>Assistant Manager of Remediation and Policy Section, DISR</p> <p>Acting Manager of Remediation and Policy Section, DISR</p> <p>Senior Policy Officer of Remediation and Policy Section, DISR</p> <p>Policy Officer of Remediation and Policy Section, DISR</p> <p>Director, OSS</p> |
| Page 7-9 - email from DISR to NTG | <p>Assistant Manager of Remediation and Policy Section, DISR</p> <p>Senior Policy Officer of Remediation and Policy Section, DISR</p> |
| Page 10 – Calendar Entry | Mobile telephone of Minister Monaghan and alternative contact |
| Page 11 - email from DISR to NTG | <p>Assistant Manager of Remediation and Policy Section, DISR</p> <p>Senior Policy Officer of Remediation and Policy Section, DISR</p> |
| Page 14 - email from DISR to NTG | <p>Assistant Manager of Remediation and Policy Section, DISR</p> <p>Acting Manager of Remediation and Policy Section, DISR</p> <p>Senior Policy Officer of Remediation and Policy Section, DISR</p> |
| Pages 17-18 – File Notes | Assistant Manager of Remediation and Policy Section, DISR |

| | |
|--|---|
| Page 19 - email from DISR to NTG | These redactions have been incorrectly applied, the individual receiving the email is Peter Chesworth, Head of Division, DISR |
| Pages 21-23 – File Notes | Assistant Manager of Remediation and Policy Section, DISR |
| Pages 24-25 – Internal DISR email | Assistant Manager of Remediation and Policy Section, DISR Acting Manager of Remediation and Policy Section, DISR |
| Pages 26-27 - email from DISR to NTG | Assistant Manager of Remediation and Policy Section, DISR Acting Manager of Remediation and Policy Section, DISR |
| Page 28 – Text Messages to Minister Monaghan’s Adviser | ‘Gabby’ – Minister’s Adviser |
| Page 29 – Text messages | Minister King and Minister Monaghan |
| Pages 30-31 | These redactions have been incorrectly applied, the individual is Ben Latham, Parliamentary Adviser |
| Page 32 - Text messages | Minister King and Minister Monaghan |
| Pages 33-35 – Text Messages | Ben Latham, Parliamentary Adviser and NT Adviser |
| Page 36-37 – Text Messages | Kym Moore |
| Pages 38-44 - Text Messages | Kym Moore |

From: [Melissa Forbes](#)
To: [Chung, Leon](#)
Cc: [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Laird, Kayla](#); [Ng, Grace](#); [Griffin, Brooke](#); [Scott, Madisen](#); [Emily Nance \(emily.nance@ags.gov.au\)](#); [Julian van Lingen](#)
Subject: NSD 1056/2024 ERA v Min Resources - Notices to produce
Date: Tuesday, 10 September 2024 12:49:19 PM
Attachments: [20240909 - NSD1056_2024 - Orders of Kennett J.pdf](#)
[Order \(Registrar\) - 28.08.2024.pdf](#)

Dear Mr Chung,

I refer to orders 4 of the orders made by Justice Kennett yesterday and order 2 of Registrar Rubenstein's orders made 28 August 2024 (both attached).

I enquire whether your client would consent to an order vacating order 1 of the orders made on 28 August 2024, listing the Notice to produce issued to the Third Respondent in the Return of Subpoena list tomorrow at 9:30am AEST.

Regards,

Melissa Forbes

Principal Lawyer
Litigation Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice
Northern Territory Government

Level 2, 68 The Esplanade Darwin
GPO Box 1722, Darwin, NT 0801

p ... **08 8935 7872**

f ... **08 89357857**

e ... melissa.forbes@nt.gov.au

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From: [Ng, Grace](#)
To: [Melissa Forbes](#); [Chung, Leon](#)
Cc: [Scott, Nicholas](#); [Zhu, Haiqiu](#); [Laird, Kayla](#); [Griffin, Brooke](#); [Scott, Madisen](#); [Nance, Emily](#); [Julian van Lingen](#)
Subject: RE: NSD 1056/2024 ERA v Min Resources - Notices to produce [AGSDMS-DMS.FID5245026]
Date: Tuesday, 10 September 2024 3:46:27 PM

Dear Mr Chung,

We refer to the email below and Ms Loughland's email of 30 August 2024 at 11.18am.

The Commonwealth respondents are prepared to provide to the court documents produced pursuant to the Notice to Produce, in a form in which material subject to a LPP claim is unredacted. I expect to be able to do so this week.

In light of this, paragraph 3 of Justice Kennett's orders yesterday, and our letter of today (email 11.03am), can you please advise what orders (if any) the applicant is seeking tomorrow or whether the listing may be vacated by consent.

Regards

Grace Ng

Senior Executive Lawyer
Australian Government Solicitor
T 02 9581 7320 M 0417 991 508
grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: Melissa Forbes <Melissa.Forbes@nt.gov.au>
Sent: Tuesday, 10 September 2024 12:49 PM
To: Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>
Subject: NSD 1056/2024 ERA v Min Resources - Notices to produce

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Dear Mr Chung,

I refer to orders 4 of the orders made by Justice Kennett yesterday and order 2 of Registrar Rubenstein's orders made 28 August 2024 (both attached).

I enquire whether your client would consent to an order vacating order 1 of the orders made on 28 August 2024, listing the Notice to produce issued to the Third Respondent in the Return of

Subpoena list tomorrow at 9:30am AEST.

Regards,

Melissa Forbes

Principal Lawyer
Litigation Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice
Northern Territory Government

Level 2, 68 The Esplanade Darwin
GPO Box 1722, Darwin, NT 0801

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From: [Scott, Nicholas](#)
To: [Ng, Grace](#); [Melissa Forbes](#); [Chung, Leon](#)
Cc: [Zhu, Haiqiu](#); [Laird, Kayla](#); [Griffin, Brooke](#); [Scott, Madisen](#); [Nance, Emily](#); [Julian van Lingen](#)
Subject: RE: NSD 1056/2024 ERA v Min Resources - Notices to produce [AGSDMS-DMS.FID5245026]
Date: Tuesday, 10 September 2024 7:33:55 PM

Dear Colleagues

While we understand that the First and Third Respondents do not propose to produce further documents in response to categories 1 to 3, as set out in previous correspondence our client has some remaining issues about the manner in which production has occurred.

We note that the Third Respondent had sought to address some of those issues by:

- confirming that unredacted copies of the documents over which it claims legal professional privilege have now been produced to the Court (and providing an objection schedule identifying those documents); and
- colour coding the redactions in one of its production tranches (but not the earlier tranches), in an attempt to identify the basis on which redactions were made.

We had understood from Ms Forbes' email dated 4 September 2024 that the Third Respondent was endeavouring to respond to our client's remaining issues by 6 September 2024, though we have yet to receive that response.

We are conscious that the AGS has sent a letter earlier today, which is also directed at the issues raised in our letter. Our client intends to respond the matters raised in that letter separately.

In those circumstances, we do consider there to be utility in retaining tomorrow's listing (assuming it goes ahead given the apparent issues around its listing), and so do not consider that it should be vacated. Our client proposes to put the current position on the record and then seek liberty to apply in the event the remaining issues cannot be resolved.

Kind regards

Nicholas Scott
Senior Associate
Herbert Smith Freehills
T +61 8 9211 7336 E Nicholas.Scott@hsf.com
www.herbertsmithfreehills.com

From: Ng, Grace <Grace.Ng@ags.gov.au>
Sent: Tuesday, September 10, 2024 1:46 PM
To: Melissa Forbes <Melissa.Forbes@nt.gov.au>; Chung, Leon <Leon.Chung@hsf.com>
Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>
Subject: RE: NSD 1056/2024 ERA v Min Resources - Notices to produce [AGSDMS-DMS.FID5245026]

Dear Mr Chung,

We refer to the email below and Ms Loughland's email of 30 August 2024 at 11.18am.

The Commonwealth respondents are prepared to provide to the court documents produced pursuant to the Notice to Produce, in a form in which material subject to a LPP claim is unredacted. I expect to be able to do so this week.

In light of this, paragraph 3 of Justice Kennett's orders yesterday, and our letter of today (email 11.03am), can you please advise what orders (if any) the applicant is seeking tomorrow or whether the listing may be vacated by consent.

Regards

Grace Ng

Senior Executive Lawyer

Australian Government Solicitor

T 02 9581 7320 M 0417 991 508

grace.ng@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

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From: Melissa Forbes <Melissa.Forbes@nt.gov.au>

Sent: Tuesday, 10 September 2024 12:49 PM

To: Chung, Leon <Leon.Chung@hsf.com>

Cc: Scott, Nicholas <Nicholas.Scott@hsf.com>; Zhu, Haiqiu <Haiqiu.Zhu@hsf.com>; Laird, Kayla <Kayla.Laird@hsf.com>; Ng, Grace <Grace.Ng@ags.gov.au>; Griffin, Brooke <Brooke.Griffin@ags.gov.au>; Scott, Madisen <Madisen.Scott@ags.gov.au>; Nance, Emily <Emily.Nance@ags.gov.au>; Julian van Lingen <Julian.VanLingen@nt.gov.au>

Subject: NSD 1056/2024 ERA v Min Resources - Notices to produce

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Dear Mr Chung,

I refer to orders 4 of the orders made by Justice Kennett yesterday and order 2 of Registrar Rubenstein's orders made 28 August 2024 (both attached).

I enquire whether your client would consent to an order vacating order 1 of the orders made on 28 August 2024, listing the Notice to produce issued to the Third Respondent in the Return of Subpoena list tomorrow at 9:30am AEST.

Regards,

Melissa Forbes

Principal Lawyer
Litigation Division
Solicitor for the Northern Territory
Department of the Attorney-General and Justice
Northern Territory Government

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Our ref. 24007108

12 September 2024

The Registrar
Federal Court of Australia
Level 17
Law Courts Building
Queens Square
SYDNEY NSW 2000

Australian Government Solicitor
Level 10, 60 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By hand

cc (without enclosures): Leon.Chung@hsf.com; Nicholas.Scott@hsf.com;
Haiqiu.Zhu@hsf.com

Dear Registrar

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors NSD1056/2024 – Notice to Produce (Objection letter)

1. We refer to:
 - 1.1. the **Notice** to Produce filed by the applicant on 6 August 2024
 - 1.2. the orders of Justice Katzmann of 8 August 2024 varying the Notice, and
 - 1.3. orders of Justice Kennett of 9 September 2024, dispensing compliance with paragraph 4 of the Notice.
2. Documents responsive to the Notice, as amended, have been produced directly to the applicant. Redactions were applied to that production in respect of material over which legal professional privilege (**LPP**) is claimed, irrelevant material and some personal details.
3. **Enclosed** with this letter is a sealed envelope marked “Envelope A – Privileged Documents”, containing copies of the documents referred to at [2]. In each document the LPP redactions have remained marked but have not been applied.
4. The sealed envelope has been produced in compliance with the Court’s Practice Note *Subpoenas and Notices to Produce Practice Note* (GPN-SUBP). The first and second respondents object to the inspection of the documents within the sealed envelope by any person, other than a Judge or a Registrar of the Federal Court of Australia as required by the Court.
5. In the event the objection is upheld, we will seek return of the sealed envelope and the unredacted copies of the documents within it.

6. The first and second respondents claim LPP over the redacted material as they form part of a communication made for the dominant purpose of the first and / or second respondents being provided with legal advice. The nature and grounds of the first and / or second respondents' claim in respect of each document (or part thereof) are set out in the **enclosed** Objection Schedule.

Yours sincerely

Grace Ng
Senior Executive Lawyer
T 02 9581 7320
grace.ng@ags.gov.au

OBJECTIONS SCHEDULE

| NO. | DOCUMENT DESCRIPTION | DATE | CLAIM |
|------------|---|-------------------------------|--------------|
| 1 | Brief to Minister for Resources – Jabiluka mineral lease renewal application – advice to the Northern Territory Minister for Mining | 25 July 2024 | LPP (Part) |
| 2 | Attachment D to Brief – Context and key considerations | 25 July 2024 | LPP (Part) |
| 3 | Attachment H to Brief – Legal considerations | 25 July 2024 | LPP (Part) |
| 4 | Attachment G to Brief – AGS Legal advice | 23 July 2024 | LPP (Full) |
| 5 | Adviser note | 24 July 2024 | LPP (Part) |
| 6 | Email to Kym Moore and others | 12 April 2024, 1.30pm | LPP (Part) |
| 7 | RITC Minutes | 1 May 2024 | LPP (Part) |
| 8 | Email from Kym Moore to Denise Turnbull and another | 20 June 2024, 3.31pm | LPP (Part) |
| 9 | Draft RITC Minutes | 27 June 2024 | LPP (Part) |
| 10 | Email to Denise Turnbull, Simone Symonds and another | 3 June 2024, 12.26pm | LPP (Part) |
| 11 | 4 June 2024 – call to Denise at DITT | 4 June 2024 | LPP (Part) |
| 12 | 20 June 2024 – call to Denise | 20 June 2024 | LPP (Part) |
| 13 | Draft placemat (attachment to email from Kym Moore to Shaun Drabsch, Anne Tan and others) | Email of 12 July 2024, 6.52pm | LPP (Full) |
| 14 | 15 July 2024 – call to Jennifer Laurence | 25 July 2024 | LPP (Part) |
| 15 | 16 July 2024 – call to Jennifer Laurence | 15 July 2024 | LPP (Part) |
| 16 | Email (Jabiluka letters) | 16 July 2024, 11.44am | LPP (Part) |
| 17 | Email from Denise Turnbull to Jennifer Laurence and another | 16 July 2024, 3.04pm | LPP (Part) |
| 18 | Text message | 1 July 2024, 6.07pm | LPP (Part) |



Madisen Scott
Senior Lawyer
Level 21, Exchange Tower
2 The Esplanade
Perth WA 6000
By email: Madisen.Scott@ags.gov.au

12 September 2024
Matter 82783241
By Email

Copy to:
Melissa Forbes
Director, Legal Services
Department of Industry, Tourism and Trade
5th Floor, Centrepoint Building, 48-50 Smith
Street
Darwin NT 0801
By email: Melissa.Forbes@nt.gov.au

Dominic Gomez
Principal Legal Officer
Northern Land Council
45 Mitchell Street
Darwin NT 0801
By email: GomezD@nlc.org.au
Copy to: donalt@nlc.org.au

Dear Colleagues

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

We refer to:

- the notices to produce served on the First and Third Respondents on 6 August 2024 (as amended by her Honour Justice Katzmann on 8 August and his Honour Justice Kennett on 9 September 2024) (together, the **Notices to Produce**);
- the documents produced to date by the First and Third Respondents pursuant to the Notices to Produce; and
- the parties' correspondence concerning the Notices to Produce, in particular our letter dated 27 August 2024 and the letter from the AGS dated 10 September 2024.

1 Common Interest Privilege

Based on your letter of 10 September 2024, we understand the position of the First Respondent (and, we apprehend, the Second Respondent) to be that the exchange of information between the Commonwealth parties and the Northern Territory parties “does not waive any claim of legal professional privilege” as the “exchange of information occurred on the basis of and understanding between the parties that such disclosure would attract common interest privilege”.

Doc 2060713715



As you will appreciate, “common interest privilege” is not a discrete category of privilege. Rather, it is instead a recognition of particular circumstances in which there will not be a loss of legal professional privilege despite disclosure to a third party; for example, under s 122 of the *Evidence Act 1995* (Cth).

So that our client can properly consider your client’s claims for legal professional privilege in respect of communications between the Commonwealth and the Northern Territory, our client requests that the First Respondent (and, if relevant, the Second Respondent) identify with precision:

- the basis upon which legal professional privilege is asserted in respect of the each of the documents produced to date; and
- the “common interest” which is said to:
 - have the effect that disclosure of the substance of legal advice as between the Commonwealth and the Northern Territory did not result in the loss of privilege; or
 - otherwise underpin the asserted “common interest privilege”.

For completeness, we note that there are inconsistencies between the approach taken by the First Respondent and the Third Respondent to the redaction of documents to reflect this apparent common interest. See, for example, the email sent to Denise Turnbull on 3 June 2024.

2 Redactions for relevance

We also understand from your letter dated 27 August 2024 that the First Respondent (and, we apprehend, the Second Respondent) maintains that it is entitled, when producing documents in response to a notice to produce, to redact unilaterally documents based on its own assessment of relevance.

It suffices to say that our client does not agree.

However, in the interests of avoiding protracted dispute about this matter, our client is prepared to consider providing a confidentiality undertaking as proposed by paragraph [7] of your letter. We would be grateful if you would prepare the relevant undertakings and provide them to our client as a matter of priority.

For the avoidance of doubt, we note that even if our client is prepared to provide an undertaking, this does not amount to an acceptance that the relevant portions of the documents are, in fact, irrelevant and that our client reserves the right to require unconditional production of unredacted documents.

3 Next steps

The First and Second Respondents are due to commence the production of further documents by Monday, 16 September 2024. In those circumstances, our client is keen to resolve these issues as soon as possible, to avoid those same issues impacting the further production of documents in these proceedings.



We therefore request your responses to the matters raised above, as well as the proposed undertakings, as soon as possible, and in any event by no later than **1pm on 13 September 2024**.

Yours sincerely

Leon Chung
Partner
Herbert Smith Freehills

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

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Department of
**THE ATTORNEY-GENERAL
AND JUSTICE**

Solicitor for the Northern Territory

Level 2 Old Admiralty Tower
68 The Esplanade, Darwin, NT,
0800

Postal address
GPO Box 1722
Darwin NT 0801
E julian.vanlingen@nt.gov.au

T 08 8935 7870

TRM No. 20242140

17 September 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

By email: leon.chung@hsf.com

Dear Mr Chung

NSD1056/2024 – Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors – Documents to be produced pursuant to orders made 9 September 2024

1. I refer to the **Orders** made on 9 September 2024, and our letter to you dated 16 September 2024.

Paragraph 7 of Annexure A to the Orders

2. Documents produced by the Third Respondent and the Fourth Respondent (**Territory Parties**) falling within the description in paragraph 7 of Annexure A to the Orders can be accessed at the link below which will expire on 17 October 2024.
[https://ftp-agd.nt.gov.au/main.html?download&weblink=f011d3950ee4f6699f912ce051befb67&realfilename=Production\\$20Paragraph\\$207\\$20of\\$20Annexure\\$20A.zip](https://ftp-agd.nt.gov.au/main.html?download&weblink=f011d3950ee4f6699f912ce051befb67&realfilename=Production$20Paragraph$207$20of$20Annexure$20A.zip)
3. At this stage we do not anticipate any further production within this paragraph.
4. For the time being, the Territory Parties have adopted the same approach to redactions as the First Respondent and the Second Respondent outlined at [5] of the letter from Ms Scott of AGS, dated 10 September 2024. That is, redactions in:
 - a) Blue are on the basis of relevance;
 - b) Green are on the basis of client legal privilege;
 - c) Purple are on the basis of a combination of client legal privilege and relevance; and
 - d) Black are of names, and identifying particulars.

Client legal privilege

5. For the avoidance of doubt, the Territory Parties also confirm their position that certain communications between the Territory and the Commonwealth were exchanged on the basis of common interest, and client legal privilege is not waived.

Undertaking regarding redactions for reasons other than client legal privilege

6. We will write to you separately in relation to an undertaking, with a view to reaching agreement in relation to past and future redactions.

Yours sincerely

**SOLICITOR FOR THE
NORTHERN TERRITORY**

A handwritten signature in black ink, appearing to read 'Julian van Lingen', written over the printed name below.

**Julian van Lingen
Senior Lawyer**



Your ref.82783241 Our ref. 24007108

17 September 2024

Leon Chung
Herbert Smith Freehills
Level 34
161 Castlereagh Street
SYDNEY NSW 2000

Australian Government Solicitor
Level 21, Exchange Tower
2 The Esplanade Perth WA 6000
GPO Box U1994 Perth WA 6845
T 08 9268 1199
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

By email: leon.chung@hsf.com

Dear Mr Chung

Energy Resources of Australia Ltd v Minister for Resources and Minister for Northern Australia & Ors - NSD1056/2024

1. We refer to your letter dated 12 September 2024.

Confidentiality Undertaking

2. Please find **attached** a proposed Confidentiality Undertaking.
3. We would be happy to discuss the terms of the Confidentiality Undertaking, and confirm that, upon receipt of the signed documents, disclosure will occur promptly.

3 June 2024 email

4. The email from Denise Turnbull dated 3 June 2024, produced by our client on 23 August 2024, contained a redaction applied in error. You will note that the colour-coded production exchanged on 11 September 2024 did not mark this information as privileged.
5. You refer to the 3 June 2024 email as an 'example'. If there are other instances, we welcome you to identify these.

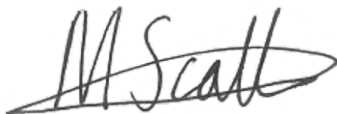
Common Interest Privilege

6. It is unclear to us what clarification or information is being sought in the following part of your letter:

the basis upon which legal professional privilege is asserted in respect of the each of the documents produced to date
7. If you seek further precision, we confirm that the privilege is claimed on the basis of advice privilege.
8. In relation to the clarification you seek regarding the 'common interest':
 - 8.1. the information exchanged related to legal advice that the respective governments had obtained on particular issues;

- 8.2. the valid and lawful exercise of executive power by the Northern Territory pursuant to the intention of the 2000 Agreement, and in accordance with s 187 of the *Mineral Titles Act 1987* is, and was at the time of the exchange of information which was otherwise the subject of legal professional privilege, a common interest between the First and Second Respondents and the Third and Fourth Respondents. This is particularly so when the Northern Territory Minister must act in accordance with the advice of the Commonwealth Minister; and
- 8.3. the exchange of the privileged information was related to, and for the purpose of, providing consistency as to the means by which a lawful exercise of executive power by the Northern Territory could occur in circumstances where both the Northern Territory and the Commonwealth had a role to play in the exercise of that power.
9. We note that the Supreme Court of Western Australia has recognised a ‘common interest’ where parties were concerned with the lawful exercise of power, and the ‘proper construction’ of legislation: *Crawford v Quail* [2021] WASC 290 at [60].
10. Further to this, our client also relies on the disclosure of any information the subject of legal professional privilege to the Third and/or Fourth Respondents as having occurred on a strictly confidential basis for the purpose of the lawful exercise of executive power. In this context, any disclosure to the Third and/or Fourth Respondents was a limited waiver of privilege, and not a general waiver.

Yours sincerely



Madisen Scott
Senior Lawyer
T 08 926 81797
Madisen.Scott@ags.gov.au

cc. Melissa Forbes
Dominic Gomez
Anna Falzon



Madeleine King MP ✓



27 Jul 2024 · 🌐

I have formally advised the Northern Territory Government that the Jabiluka Mineral Lease should not be renewed, allowing the site to be added to Kakadu National Park.

It has been the wish of the Mirrar people to have their land returned to them for decades.

This decision will ensure Jabiluka is protected forever.



NOTICE OF FILING**Details of Filing**

Document Lodged: Statement of Agreed Facts
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 4/09/2024 5:27:51 PM AEST
Date Accepted for Filing: 4/09/2024 5:27:58 PM AEST
File Number: NSD1056/2024
File Title: ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v
MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN
AUSTRALIA (COMMONWEALTH) &ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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.



STATEMENT OF AGREED FACTS

No. NSD 1056 of 2024

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

A. Introduction

1. This Statement of Agreed Facts will be used as evidence in the proceeding in accordance with s 191 of the *Evidence Act 1995* (Cth), each fact being an “agreed fact” within the meaning of s 191(1) of that Act. Agreement to these facts is for the purpose of this proceeding only, and does not convey agreement as to the relevance of any of those facts to the issues in this proceeding or a concession that the facts agreed are able to be verified independently. Where documents are annexed to the statement of agreed facts, the parties agree that the annexures are true copies of the documents described, but do not necessarily agree that facts asserted in those documents are true.
2. This document is divided into the following sections (noting that headings in this document do not constitute agreed facts):
 - a) **Section B** details the relevant agreements to these proceedings;
 - b) **Section C** outlines the interactions between the Applicant and stakeholders in relation to its application for the renewal of Jabiluka MLN1;
 - c) **Section D** outlines the Advice and Renewal Decisions;
 - d) **Section E** details materials that were received by the relevant decision-makers prior to the Advice and Renewal Decisions;

| | | |
|--------------------|---|-----|
| Filed on behalf of | Energy Resources of Australia Ltd ABN 71 008 550 865, Applicant | |
| Prepared by | Leon Chung | |
| Law firm | Herbert Smith Freehills | |
| Tel | 02 9225 5716 | Fax |
| Email | leon.chung@hsf.com | |

| | |
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| | Level 34 |
| Address for service | 161 Castlereagh St |
| (include state and postcode) | Sydney NSW 2000 |

- e) **Section F** outlines material that was disclosed to the Applicant;
 - f) **Section G** details the contemporaneous communications with and subsequent to the Renewal Decision;
 - g) **Section H** details public statements made by the parties with respect to Jabiluka MLN1.
3. Subject to the requirements of s 191(2) of the *Evidence Act 1995* (Cth), the parties agree that the mere reference to an event or occurrence in this document does not preclude any party adducing further or other evidence in addition to, or expansion upon, the agreed facts herein.
 4. The parties agree that not every fact in this document is relevant to, or within the knowledge of, each respondent to the proceedings. To the extent a fact in this document is not relevant to and/or is beyond the knowledge of a particular respondent, it is “agreed” by that respondent for the purposes of these proceedings only in the sense that the respondent does not and will not dispute it in the proceedings (consistently with the terms of s 191(1) of the *Evidence Act 1995* (Cth)).
 5. Where in this document it is admitted that an action was not taken, that admission does not constitute a concession by any party that there was a duty or obligation to perform that action. Where applicable and unless the context otherwise indicates, capitalised terms used in this document which are not otherwise defined have the meaning set out in the Applicant’s Originating Application dated 6 August 2024.

B. Jabiluka MLN1 and related documents

6. The area of land known as the Pancontinental Project Area or Jabiluka Project Area (the **Jabiluka Project land**) is Aboriginal land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
7. The Fifth Respondent, the Jabiluka Aboriginal Land Trust, is a Land Trust established under the Land Rights Act that holds title to the Jabiluka Project land in accordance with that Act.
8. The Sixth Respondent, the Northern Land Council, is a Land Council established under the *Land Rights Act* for the area of the northern half of the Northern Territory that includes the Jabiluka Project land.
9. On about 21 July 1982, an agreement was made between the Sixth Respondent, Pancontinental Mining Limited and Getty Oil Development Company Limited (together, **Pancontinental**) in respect of the Jabiluka Project in accordance with former section 43 of the *Land Rights Act* (**Section 43 Agreement**).

10. On about 12 August 1982, the Fourth Respondent, the Northern Territory of Australia, granted to Pancontinental a mineral lease pursuant to the *Mining Act 1980* (NT) in respect of the Jabiluka Project land for the term of 42 years for the purpose of mining uranium ore, expiring on 11 August 2024, being Mineral Lease No. ML N1 (**Jabiluka MLN1**). A copy of MLN1 is Annexure A to this Statement of Agreed Facts.
11. On about 6 August 1991, the Applicant, Energy Resources of Australia Ltd, purchased the Jabiluka Project, including Jabiluka MLN1, from Pancontinental.
12. On about 21 August 1991, Pancontinental assigned all of their right, title and interest under the Section 43 Agreement to the Applicant, except for Pancontinental's rights as operator of the Jabiluka Project. On the same date, the Applicant made a deed poll in favour of the Sixth Respondent undertaking to assume and comply with all of the obligations of Pancontinental under the Section 43 Agreement.
13. On about 24 December 1991, the Applicant and the Sixth Respondent entered into an agreement by which the Sixth Respondent consented to the assignment to the Applicant of the rights of the operator of the Jabiluka Project. A copy of that agreement is Annexure B to this Statement of Agreed Facts.
14. On about 26 May 1998, the Applicant executed a **Deed Poll** in favour of the Sixth Respondent in relation to the Jabiluka Project. A copy of the Deed Poll is Annexure C to this Statement of Agreed Facts.
15. On about 17 November 2000, the Second Respondent, the Commonwealth of Australia, and the Fourth Respondent entered into an Agreement titled "Agreement between the Commonwealth of Australia and the Northern Territory of Australia in relation to Principles to be applied in the Regulation of Uranium Mining in the Northern Territory of Australia" (**Intergovernmental Agreement**). A copy of the Intergovernmental Agreement is Annexure D.
16. On about 25 February 2005, the Applicant, Traditional Aboriginal Owners of the Jabiluka Project land, and the Sixth Respondent, made an agreement titled "Jabiluka Long Term Care and Maintenance Agreement" (**LTCMA**). A copy of the LTCMA is Annexure E to this Statement of Agreed Facts.
17. On about 23 December 2009, the Fourth Respondent and the Applicant made an agreement pursuant to s 172 of the *Mining Act 1980* (NT) referred to herein as the **Waiver Agreement**. A copy of the Waiver Agreement is Annexure F to this Statement of Agreed Facts.
18. On 15 February 2024, the First Respondent sent a letter to the Third Respondent. The letter (which is dated 14 February 2024) is Annexure G to this Statement of Agreed Facts.

19. On 8 March 2024, the Third Respondent sent a letter in response to the First Respondent. The 8 March 2024 letter is Annexure H to this Statement of Agreed Facts
20. On 5 June 2024, the Fourth Respondent published the *General Reservation of Land on Cessation of Title (RL 33778)* in the Government Gazette. The 5 June 2024 Gazettal is Annexure I to this Statement of Agreed Facts.
21. On 17 July 2024, the Third Respondent sent a letter to the First Respondent. The 17 July 2024 letter is Annexure J to this Statement of Agreed Facts.
22. On 19 July 2024, the First Respondent sent a letter to the Third Respondent. The 19 July 2024 letter is Annexure K to this Statement of Agreed Facts.

C. Interactions between the Applicant and various stakeholders in relation to the Application prior to the Advice and Renewal Decisions

23. On 13 March 2023, Anne Tan (Deputy Chief Executive Officer Mining and Energy, Department of Industry, Tourism and Trade of the Fourth Respondent) sent an email to Mr Brad Welsh, Chief Executive Officer of the Applicant. The 13 March 2023 email is Annexure L to this Statement of Agreed Facts.
24. On 10 November 2023, the Australian Financial Review published an interview with the Applicant's Chief Executive Officer Brad Welsh. A copy of the article is Annexure M to this Statement of Agreed Facts.
25. Between 6 February and 8 February 2024, representatives of the Applicant, including Mr Welsh, met with various officers of the Second Respondent in Canberra in respect of the renewal of Jabiluka MLN1. Those officers included:
 - a) Georgia Tree, Senior Adviser to the First Respondent;
 - b) Dave McElrea, Deputy Chief of Staff to the Minister for the Environment and Water; and
 - c) Kym Moore, Angela Kraatz, Erin Cockram and Peter Chesworth from the Commonwealth Department of Industry, Science and Resources.
26. On 20 March 2024, the Applicant submitted the Application to the Northern Territory Mineral Titles Office seeking renewal of Jabiluka MLN1 for a further term of 10 years.
27. On 3 April 2024 at 9.58am, Ms Moore returned a missed call from Mr Welsh received on 2 April 2024.
28. On 10 May 2024, Mr Welsh received a letter from the First Respondent. The 10 May 2024 letter is Annexure N to this Statement of Agreed Facts.

29. On 26 June 2024, representatives of the Applicant, including Mr Welsh, met with the First Respondent, Ms Moore, Ms Tree and Cecilia Tran (adviser of the First Respondent) in Canberra to discuss the Application.

D. The Advice Decision and the Renewal Decision

The Advice Decision

30. On or about 19 July 2024, the Northern Territory Department of Industry, Tourism and Trade provided a brief of materials to the Third Respondent regarding the Application (**NT Minister's Brief**). The NT Minister's Brief is Annexure O to this Statement of Agreed Facts.
31. On 23 July 2024, the Third Respondent sent a letter to the First Respondent. The 23 July 2024 letter is Annexure P to this Statement of Agreed Facts.
32. Between about 4:21pm and 5:03pm on 25 July 2024, the First Respondent received a ministerial brief from the Department of Industry, Science and Resources titled "Jabiluka Mineral Lease Renewal Application – Advice to the Northern Territory Minister for Mining" (MS24-000911) (**Commonwealth Ministerial Brief**). The Commonwealth Ministerial Brief is Annexure P1 to this Statement of Agreed Facts.
33. At or around this time, the First Respondent also received an advice dated 24 July 2024 from Marie Illman (Deputy Chief of Staff to the First Respondent) and Ben Latham (Parliamentary Advisor to the First Respondent). The 24 July 2024 document is Annexure Q to this Statement of Agreed Facts.
34. On or about 25 July 2024, the First Respondent made the Advice Decision. The First Respondent sent a letter to the Third Respondent. The 25 July 2024 letter is Annexure R to this Statement of Agreed Facts.

The Renewal Decision

35. On or about 26 July 2024, the Third Respondent received a recommendation from the Northern Territory Department of Industry, Tourism and Trade titled "Decision on Renewal of Mineral Lease Northern 1 – Jabiluka". The recommendation is Annexure S to this Statement of Agreed Facts.
36. On or around 26 July 2024, the Third Respondent made the Renewal Decision referred to in 35 above.

E. Materials relating to renewal of Jabiluka MLN1Material received by the First and/or Second Respondents before the Advice Decision

37. In the period from December 2022 to July 2024, the First Respondent received information and material including through the following means:
- a) A meeting between the Gundjeihmi Aboriginal Corporation (**GAC**), the First Respondent, the Prime Minister, the Minister for the Environment and Water of Australia (**Minister Plibersek**) and the Hon Peter Garrett AM on 13 February 2023.
 - b) A letter from the GAC to the First Respondent which was sent on 24 February 2023. At no time prior to either the Advice Decision or the Renewal Decision was a copy of this letter provided to the Applicant by the First Respondent or the Second Respondent's Department of Industry, Science and Resources.
 - c) A letter from Ms Thalia van den Boogaard (CEO of the GAC) which was sent on behalf of Ms Margarula to the Hon Eva Lawler, Chief Minister of the Northern Territory (**NT Chief Minister**) on 14 March 2024 and copied to the First Respondent, the Third Respondent and Matthew Ryan (Chairperson of the Sixth Respondent). At no time prior to either the Advice Decision or the Renewal Decision was a copy of this letter provided to the Applicant by the First Respondent or the Second Respondent's Department of Industry, Science and Resources.
 - d) A meeting between the First Respondent and Mirarr Traditional Owners on 20 March 2024.
 - e) A letter from Ms van den Boogaard on behalf of the GAC, which was sent to the NT Chief Minister on 9 April 2024 and copied to the Prime Minister, the First Respondent, the Third Respondent and Minister Plibersek. At no time prior to either the Advice Decision or the Renewal Decision was a copy of this letter provided to the Applicant by the First Respondent or the Second Respondent's Department of Industry, Science and Resources.
 - f) A letter from Ms Margarula on behalf of the GAC which was sent to the First Respondent and the Third Respondent on 9 July 2024. At no time prior to either the Advice Decision or the Renewal Decision was a copy of this letter provided to the Applicant by the First Respondent or the Second Respondent's Department of Industry, Science and Resources.
 - g) A letter from the Hon Peter Garrett AM and Professor Don Henry AM which was sent to the First Respondent and Third Respondent on 17 July 2024 and copied to the Prime Minister and the Hon Linda Burney, the then Minister for Indigenous

Australians. At no time prior to either the Renewal Decision or the Advice Decision was a copy of this letter provided to the Applicant by the First Respondent or the Second Respondent's Department of Industry, Science and Resources.

38. The First Respondent did not receive:
- a) A letter from Yvonne Margarula which was sent to the Hon Anthony Albanese, Prime Minister of Australia (**Prime Minister**) in December 2022.
 - b) A letter from Justin O'Brien (then CEO of the GAC) which was sent to the Prime Minister on 23 February 2023.
 - c) A letter from the GAC to Minister Plibersek which was sent on 23 February 2023.
 - d) A letter from Ms Yvonne Margarula on behalf of the GAC which was sent to the Prime Minister and copied to Joe Martin-Jard, then-CEO of the Sixth Respondent on 10 January 2024.
39. The documents before the First Respondent at the time she made the Advice Decision comprised:
- a) the advice from Ms Illman and Mr Latham to the First Respondent dated 24 July 2024, referred to at paragraph 33 above;
 - b) the Commonwealth Ministerial Brief, which included the following attachments:
 - (i) the Application and supporting letter from the Applicant (attached to the letter from the Third Respondent referred to in paragraph 31 above);
 - (ii) a letter from the Sixth Respondent described in paragraph 40.j) (attached to the letter from the Third Respondent referred to in paragraph 31 above), which was described in the Commonwealth Ministerial Brief as the "Northern Land Council submissions";
 - (iii) the letters from the GAC described in paragraphs 40.g), 40.i) and 40.l) below;
 - (iv) a document described as "Context and key policy considerations";
 - (v) a series of three draft letters on the First Respondent's letterhead, each of which reflected a different "option" in response to the Third Respondent's request;
 - (vi) a document described as "Legal considerations"; and
 - (vii) an advice from the Australian Government Solicitor dated 23 July 2024.

Material received by the Third and/or Fourth Respondents before the Renewal Decision

40. The following information and material, which are Annexure T to this Statement of Agreed Facts (as a bundle), was available to the Third Respondent and/or his Department:
- a) A letter from Ms Margarula on behalf of the GAC which was sent to Minister Manison and copied to Samuel Bush-Blanasi (then Chairperson of the Sixth Respondent) on 22 December 2022.
 - b) A letter from Mr O'Brien on behalf of the GAC which was sent to Minister Manison on 8 March 2023.
 - c) A letter from Minister Manison to Ms Margarula dated 28 March 2023.
 - d) A letter from Ms Margarula on behalf of the GAC which was sent to the Hon Chanston Paech MLA (then Northern Territory Minister for Arts, Culture and Heritage) (**Minister Paech**) on 24 October 2023 and was copied to Minister Manison and Mr Martin-Jard.
 - e) A letter from Ms Yvonne Margarula on behalf of the GAC which was sent to the NT Chief Minister and was copied to the Third Respondent and Mr Martin-Jard on 18 January 2024, and which attached the letters referred to at 40(a), (b) and (d) above.
 - f) A letter from the GAC which was sent to Denise Turnbull, Director Mineral Titles in the Northern Territory Department of Industry Tourism and Trade on 1 March 2024.
 - g) A letter from Ms van den Boogaard which was sent on behalf of Ms Margarula to the NT Chief Minister on 14 March 2024 and copied to the First Respondent, the Third Respondent and Mr Ryan.
 - h) Email from the Northern Territory Department of Industry, Tourism and Trade regarding the process for renewing Jabiluka MLN1 which was sent by email to the Third Respondent's office on 27 March 2024.
 - i) A letter from Ms van den Boogaard on behalf of the GAC, which was sent to the NT Chief Minister on 9 April 2024 and copied to the Prime Minister, the First Respondent, the Third Respondent and Minister Plibersek.
 - j) A letter from Ms Jessie Schaecken (interim CEO of the Sixth Respondent), which was sent to Ms Turnbull on 8 May 2024.
 - k) Email from the Northern Territory Department of Industry, Tourism and Trade sent by email to the Third Respondent's office on 10 May 2024.

- l) A letter from Ms Margarula on behalf of the GAC which was sent to the First Respondent and the Third Respondent on 9 July 2024.
 - m) A letter from the Hon Peter Garrett AM and Professor Don Henry AM which was sent to the First Respondent and Third Respondent on 17 July 2024 and copied to the Prime Minister and the Hon Linda Burney, the then Minister for Indigenous Australians.
41. The brief to the Third Respondent at the time he made the Renewal Decision included:
- a) the recommendation from the Northern Territory Department of Industry, Tourism and Trade to the Third Respondent on or about 26 July 2024 to refuse to renew Jabiluka MLN1, referred to at 35 above;
 - b) the letter from the First Respondent to the Third Respondent dated 25 July 2024, referred to at 34 above; and
 - c) draft letters advising each of the Fifth and Sixth Respondents, Applicant and Ms Margarula of the Renewal Decision.

F. Disclosure to the Applicant

The Advice Decision

42. At all times prior to the making of the Advice Decision, the First Respondent and the Second Respondent (by its Department of Industry, Science and Resources) did not provide to the Applicant the following documents:
- a) the letter from the GAC to the First Respondent dated 24 February 2023 referred to at 37.b) above;
 - b) the letter from the GAC which was copied to the First Respondent dated 14 March 2024, referred to at 37.c) above;
 - c) the letter from the GAC which was copied to the First Respondent dated 9 April 2024, referred to at 37.e) above;
 - d) the letter from the GAC which was copied to the First Respondent dated 9 July 2024, referred to at 37.f) above; and
 - e) the letter from the Hon Peter Garrett AM and Professor Don Henry AM which was copied to the First Respondent dated 17 July 2024, referred to at 37.g) above.

The Renewal Decision

43. Prior to the making of the Renewal Decision, the Third Respondent did not provide the following documents to the Applicant:

- a) the advice from Minister Manison dated 22 December 2022 referred to at 40.a) above;
- b) the letter from the GAC to Minister Manison dated 22 December 2022 referred to at 40.a) above;
- c) the letter from the GAC to Minister Manison dated 8 March 2023 referred to at 40.b) above;
- d) the letter from the GAC to Minister Paech dated 24 October 2023 referred to at 40.d) above;
- e) the letter from the GAC to the NT Chief Minister dated 18 January 2024 referred to at 40.e) above;
- f) the letter from the GAC to the Director Mineral Titles in the Northern Territory Department of Industry Tourism and Trade dated 1 March 2024 referred to at 40.f) above;
- g) the letter from the GAC to the NT Chief Minister dated 14 March 2024 referred to at 40.g) above;
- h) the email from the Department of Industry, Tourism and Trade on 27 March referred to at 40.h) above;
- i) the letter from the GAC to the NT Chief Minister dated 9 April 2024 referred to at 40.i) above;
- j) the letter from the Sixth Respondent to the Director Mineral Titles in the Northern Territory Department of Industry Tourism and Trade dated 8 May 2024 referred to at 40.j) above;
- k) the email from the Northern Territory Department of Industry, Tourism and Trade regarding the Application dated 10 May 2024 referred to at 40.k) above;
- l) the letter from the GAC to the First Respondent dated 9 July 2024 referred to at 40.l) above; and
- m) the letter from the Hon Peter Garrett AM and Professor Don Henry AM to the First and Third Respondents dated 17 July 2024 referred to at 40.m) above.

G. Interactions between the Applicant, the First Respondent and the Third Respondent subsequent to the Renewal Decision

44. At about 11.54 am on 26 July 2024, Mr Welsh received a phone call from the Third Respondent advising that he was going to refuse the Application.

45. The Third Respondent sent a letter to Mr Welsh dated 26 July 2024 advising that he had made the Renewal Decision and that the Application had been refused. The 26 July 2024 letter is Annexure U to this Statement of Agreed Facts.
46. The Third Respondent sent letters dated 26 July 2024 to the Sixth Respondent, the Fifth Respondent and the GAC, notifying each of them of the Renewal Decision. Those letters are Annexure V to this Statement of Agreed Facts.
47. Also on 26 July 2024, Mr Welsh sent a letter on behalf of the Applicant to the Third Respondent. The 26 July 2024 letter is Annexure W to this Statement of Agreed Facts.
48. On 1 August 2024, Mr Welsh sent a letter on behalf of the Applicant to the Third Respondent. The 1 August 2024 letter is Annexure X to this Statement of Agreed Facts.
49. On 2 August 2024, Ms Tan sent a letter to the Applicant on behalf of the Third Respondent. The 2 August 2024 letter is Annexure Y to this Statement of Agreed Facts.
50. On 3 August 2024, Mr Welsh sent a letter on behalf of the Applicant to the First Respondent. The letter is Annexure Z to this Statement of Agreed Facts.

H. Public statements in respect of Jabiluka MLN1

51. On 9 April 2022, GAC issued a media release titled “Mirarr welcome Ranger clean up commitment from Rio Tinto”. The media release is Annexure AA to this Statement of Agreed Facts.
52. On 28 July 2022, GAC issued a media release titled “Jabiluka deposit will never be mined”. The media release is Annexure BB to this Statement of Agreed Facts.
53. On 26 September 2022, the Applicant issued an announcement to the ASX titled “Independent Expert’s Report Received”. The announcement is Annexure CC to this Statement of Agreed Facts
54. On 28 September 2022, GAC issued a media release titled “Mining report flags sacred site destruction”. The media release is Annexure DD to this Statement of Agreed Facts.
55. On 10 October 2022, GAC issued a media release titled “ERA minorities completely wrong on Jabiluka”. The media release is Annexure EE to this Statement of Agreed Facts.
56. On 26 February 2023, GAC issued a media release titled “Rio downgrades Jabiluka, why won’t ERA?”. The media release is Annexure FF to this Statement of Agreed Facts.
57. On 1 September 2023, GAC issued a media release titled “Jabiluka’s permanent protection a key test of Australia’s heritage laws”. The media release is Annexure GG to this Statement of Agreed Facts.

58. On 19 March 2024, GAC issued a media release titled “GAC corrects recent reporting by Energy Resources of Australia Ltd”. The media release is Annexure HH to this Statement of Agreed Facts.
59. On 20 March 2024, the Applicant issued an announcement to the ASX titled “ERA lodges application for renewal of Jabiluka Lease”. The announcement is Annexure II to this Statement of Agreed Facts.
60. On 21 March 2024, GAC issued a media release titled “Empty words with a \$2 billion dollar price tag from Kakadu uranium miner”. The media release is Annexure JJ to this Statement of Agreed Facts.
61. On 3 April 2024, GAC issued a media release titled “Traditional Owners welcome ERA’s back-flip on Ranger rehabilitation”. The media release is Annexure KK to this Statement of Agreed Facts.
62. On 19 April 2024, GAC issued a media release titled “Traditional Owners welcome NT Government support at Jabiluka”. The media release is Annexure LL to this Statement of Agreed Facts.
63. On 24 April 2024, GAC issued a media release titled “ERA plans put Jabiluka in jeopardy and Kakadu at risk”. The media release is Annexure MM to this Statement of Agreed Facts.
64. On 5 June 2024, GAC issued a media release titled “NT Government stands up for Kakadu National Park”. The media release is Annexure NN to this Statement of Agreed Facts.
65. On 19 July 2024, GAC issued a media release titled “Claims about mining Jabiluka are bogus”. The media release is Annexure OO to this Statement of Agreed Facts.
66. On 26 July 2024, GAC issued a media release titled “Jabiluka’s priceless heritage permanently protected”. The media release is Annexure PP to this Statement of Agreed Facts.
67. On 26 July 2024, the Sixth Respondent issued a media release titled “Historic decision secures permanent protection for Jabiluka”. The media release is Annexure QQ to this Statement of Agreed Facts.
68. On 27 July 2024, the Prime Minister gave a speech to the NSW Labor Conference in Sydney.
69. On 27 July 2024 the First Respondent and Minister Plibersek issued a joint media release titled “Work begins to add Jabiluka site to Kakadu National Park”. The joint media release is Annexure RR to this Statement of Agreed Facts.

Date: 4 September 2024



Leon Chung
Herbert Smith Freehills
Solicitor for the Applicant

Date: 4 September 2024



Grace Ng
AGS lawyer
for and on behalf of the Australian
Government Solicitor
Solicitor for the First and Second Respondents



Melissa Forbes
Solicitor for the Northern Territory
Solicitor for the Third and Fourth
Respondents



Principal Legal Officer, Northern Land
Council
Solicitor for the Fifth and Sixth Respondents

Schedule

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

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NOTICE OF FILING**Details of Filing**

Document Lodged: Notice to Admit - Form 41 - Rule 22.01
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 5/09/2024 4:09:11 PM AEST
Date Accepted for Filing: 5/09/2024 4:09:19 PM AEST
File Number: NSD1056/2024
File Title: ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v
MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN
AUSTRALIA (COMMONWEALTH) &ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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.

Notice to admit



No. NSD 1056 of 2024

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

To the First Respondent

The Applicant requires you to admit, for the purpose of the proceeding only, the truth of the following facts:

Procedure in respect of the Advice Decision

1. Prior to making the Advice Decision, the First Respondent received at least the following documents in respect of the possible renewal of Jabiluka MLN1:
 - (a) A letter from the GAC to the First Respondent dated 24 February 2023.
 - (b) A letter from Ms Thalia van den Boogaard (CEO of the GAC) on behalf of Ms Margarula to the Hon Eva Lawler, Chief Minister of the Northern Territory (**NT Chief Minister**) dated 14 March 2024 which was copied to the First Respondent, the Third Respondent and Matthew Ryan (Chairperson of the Sixth Respondent) and was included in the Departmental Brief as 'Attachment C'.
 - (c) A letter from Ms van den Boogaard on behalf of the GAC to the NT Chief Minister dated 9 April 2024 which was copied to the Prime Minister, Anthony Albanese MP (**Prime Minister**) the First Respondent, the Third Respondent and the Commonwealth Minister for the Environment and Water, the Hon Tanya Plibersek

| | | | |
|------------------------------|---|-----|--------------|
| Filed on behalf of | Energy Resources of Australia Ltd ABN 71 008 550 865, Applicant | | |
| Prepared by | Leon Chung | | |
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Filed on behalf of

Energy Resources of Australia Ltd ABN
 71 008 550 865, Applicant

MP (**Minister Plibersek**) and was included in the Departmental Brief as 'Attachment C'.

- (d) A letter from the Sixth Respondent to the Director Mineral Titles of the Northern Territory Department of Industry Tourism and Trade dated 8 May 2024 which was included in the Departmental Brief as 'Attachment C'.
- (e) A letter from Ms Margarula on behalf of the GAC to the First Respondent and the Third Respondent dated 9 July 2024 which was included in the Departmental Brief as 'Attachment C'.
- (f) A letter from the Hon Peter Garrett AM and Professor Don Henry AM to the First Respondent and Third Respondent dated 17 July 2024 which was copied to the Prime Minister and the Hon Linda Burney, the then Minister for Indigenous Australians (**Minister Burney**).
- (g) An advice from Marie Illman (Deputy Chief of Staff to the First Respondent) and Ben Latham (Parliamentary Advisor to the First Respondent) dated 24 July 2024.
- (h) Three emails from "members of the public".
- (i) The Departmental Brief which included the following attachments.
 - (i) A letter from the Third Respondent to the First Respondent dated 23 July 2024 requesting the First Respondent's advice;
 - (ii) the Application;
 - (iii) the letter from the Sixth Respondent dated 8 May 2024 referred to at (d) above;
 - (iv) the letters from the GAC dated 14 March, 9 April and 9 July 2024 referred to at (b), (c) and (e) above;
 - (v) a document entitled 'Attachment D' described as "Context and key policy considerations";
 - (vi) a series of three draft letters on the First Respondent's letterhead, each of which reflected a different "option" in response to the Third Respondent's request for advice;
 - (vii) a document entitled 'Attachment H' described as "Legal considerations"; and
 - (viii) an advice from the Australian Government Solicitor dated 23 July 2024.

2. Prior to making the Advice Decision, the First Respondent received at least the following information or representations in respect of the possible renewal of Jabiluka MLN1:

- (a) A representation from the Sixth Respondent that ERA did not have the financial capacity to mine in the Area;
- (b) A representation from the GAC that ERA did not have the financial capacity to mine in the Area;
- (c) A representation from the Sixth Respondent that ERA was not a “fit and proper person” to hold a mineral lease;
- (d) A representation from the Sixth Respondent that ERA had not complied with the terms of Jabiluka MLN1 and other related legislation and mining authorisations;
- (e) A representation from the GAC that ERA had not complied with the terms of Jabiluka MLN1 and its related mining authorisation;
- (f) A representation from the Sixth Respondent that the Area was demonstrably unsuitable for mining due to its proximity to Kakadu National Park;
- (g) A representation from the Commonwealth Department of Industry, Science and Resources that renewal of Jabiluka MLN1 would impact on the regulatory framework and future rehabilitation of the Ranger site;
- (h) A representation from the Commonwealth Department of Industry, Science and Resources that ERA’s prospects of mining Jabiluka were “limited”;
- (i) A representation from the Commonwealth Department of Industry, Science and Resources that mining in the Area could be expected to have environmental impacts;
- (j) A representation from the Commonwealth Department of Industry, Science and Resources that renewal of Jabiluka MLN1 may negatively impact on ERA’s ability to raise capital to continue the rehabilitation of the Ranger site;
- (k) A representation from the Commonwealth Department of Industry, Science and Resources that refusal to renew Jabiluka MLN1 may impact upon ERA’s ability to rehabilitate the Area;
- (l) A representation from the Mirarr Traditional Owners that Jabiluka should be incorporated into Kakadu National Park;
- (m) A representation from Minister Plibersek that Jabiluka MLN1 should not be renewed in order to allow the Area to be incorporated into Kakadu National Park; and
- (n) A representation from Minister Burney that Jabiluka MLN1 should not be renewed in order to allow the Area to be incorporated into Kakadu National Park; and

- (o) A representation from Senator Malarndirri McCarthy (**Senator McCarthy**) that Jabiluka MLN1 should not be renewed in order to allow the Area to be incorporated into Kakadu National Park;
 - (p) A representation from Luke Gosling MP that Jabiluka MLN1 should not be renewed in order to allow the Area to be incorporated into Kakadu National Park; and
 - (q) A representation from Marie Illman and/or Ben Latham to the First Respondent that it was doubtful that Rio Tinto would fund ERA's challenge to an adverse decision.
3. Prior to making the Advice Decision, the First Respondent spoke orally about the possible renewal of Jabiluka MLN1 with at least:
- (a) Ms Margarula, from at least December 2022;
 - (b) The Prime Minister on at least 13 February 2023;
 - (c) Minister Plibersek on at least 13 February 2023;
 - (d) the Hon Peter Garrett AM on at least 13 February 2023;
 - (e) the GAC on at least 13 February 2023;
 - (f) a representative or representatives of her office in respect of "communications opportunities";
 - (g) the Mirarr Traditional Owners on at least 20 March 2024; and
 - (h) the Third Respondent on at least 18 April 2024, 11 June 2024, 25 July 2024 and 26 July 2024.
4. Prior to making the Advice Decision, a member of staff or other representative of the First Respondent spoke orally about the possible renewal of Jabiluka MLN1 with at least:
- (a) a member of staff or other representative of the Prime Minister;
 - (b) a member of staff or other representative of Minister Plibersek;
 - (c) a member of staff or other representative of Minister Burney;
 - (d) a member of staff or other representative of Senator McCarthy;
 - (e) a member of staff or other representative of Luke Gosling MP;
 - (f) a member of staff or other representative of the Third Respondent;
 - (g) the Commonwealth Office of the Supervising Scientist, the NT Department of Industry, Tourism and Trade and the Northern Territory Department of Environment, Parks and Water Security through the meetings of the "Ranger Intergovernmental Taskforce on Closure" from February 2024 onwards;

- (h) a member or members of the Mirarr Traditional Owners; and
 - (i) the GAC.
5. Prior to making the Advice Decision, the First Respondent received representations, adverse to the interests of the Applicant, in respect of the possible renewal of Jabiluka MLN1 from or on behalf of:
- (a) the Prime Minister;
 - (b) Minister Plibersek;
 - (c) Minister Burney;
 - (d) Senator McCarthy;
 - (e) Luke Gosling MP;
 - (f) Ms Margarula and other members of the Mirarr Traditional Owners;
 - (g) the Hon Peter Garrett AM;
 - (h) the GAC;
 - (i) the Sixth Respondent;
 - (j) the Commonwealth Department of Industry, Science and Resources; and
 - (k) unknown members of the public who sent emails to the Office of the First Respondent.
6. Prior to making the Advice Decision, the First Respondent did not disclose to the Applicant the following documents:
- (a) the letter from the GAC to the First Respondent dated 24 February 2023, referred to at 1(a) above;
 - (b) the letter from the GAC to the First Respondent dated 14 March 2024, referred to at 1(b) above;
 - (c) the letter from the GAC to the First Respondent dated 9 April 2024, referred to at 1(c) above;
 - (d) the letter from the Sixth Respondent dated 8 May 2024, referred to at 1(d) above;
 - (e) the letter from the GAC to the First Respondent dated 9 July 2024, referred to at 1(e) above;
 - (f) the letter from Hon Peter Garrett AM and Professor Don Henry AM to the First Respondent and Third Respondent dated 17 July 2024, referred to at 1(f) above;
 - (g) the advice to the First Respondent dated 24 July 2024, referred to at 1(g) above,

- (h) the covering note to the Departmental Brief;
 - (i) Attachment D to the Departmental Brief referred to at 1(i)(v) above;
 - (j) Attachment H to the Departmental Brief referred to at 1(i)(vii) above;
 - (k) the advice from the Australian Government Solicitor dated 23 July 2024 referred to at 1(i)(viii) above;
 - (l) the emails from unknown “members of the public” of unknown date referred to at 1(h) above.
7. Prior to making the Advice Decision, the First Respondent did not disclose to the Applicant the following information:
- (a) the representations made by Ms Margarula in December 2022 in respect of the renewal of Jabiluka MLN1;
 - (b) the representations made by Ms Margarula and/or the GAC at the meeting with the First Respondent, the Prime Minister, the Hon Peter Garrett AM and Minister Plibersek on 13 February 2023 in respect of the renewal of Jabiluka MLN1;
 - (c) the representations made by the Prime Minister at the meeting on 13 February 2023 in respect of the renewal of Jabiluka MLN1;
 - (d) the representations made by the Hon Peter Garrett AM at the meeting on 13 February 2023 in respect of the renewal of Jabiluka MLN1;
 - (e) the representations made by Minister Plibersek at the meeting on 13 February 2023 in respect of the renewal of Jabiluka MLN1;
 - (f) the representations made by the Mirarr Traditional Owners to the First Respondent on 20 March 2024 in respect of the renewal of Jabiluka MLN1;
 - (g) the representations made by the Third Respondent to the First Respondent on 18 April 2024 in respect of the renewal of Jabiluka MLN1;
 - (h) the representations made by the Third Respondent to the First Respondent on 11 June 2024 in respect of the renewal of Jabiluka MLN1;
 - (i) the representations made by the Third Respondent to the First Respondent on 25 July 2024 in respect of the renewal of Jabiluka MLN1;
 - (j) the representations made by the Third Respondent to the First Respondent on 26 July 2024 in respect of the renewal of Jabiluka MLN1;
 - (k) the representations made by Minister King’s Office or Department in respect of the renewal of Jabiluka MLN1 prior to the Advice Decision; and

- (l) the representations made by the Commonwealth Office of the Supervising Scientist, the NT Department of Industry, Tourism and Trade and the Northern Territory Department of Environment, Parks and Water Security to the First Respondent's Commonwealth Department of Industry, Science and Resources Department at the meetings of the "Ranger Intergovernmental Taskforce on Closure".
8. Prior to making the Advice Decision, the First Respondent did not disclose to the Applicant that the following were issues that had arisen in the course of considering what (if any) advice to give in respect of the possible renewal of Jabiluka MLN1:
- (a) that ERA did not have the financial capacity to mine in the Area;
 - (b) that ERA was not a "fit and proper person" to hold a mineral lease;
 - (c) that ERA had not complied with the terms of Jabiluka MLN1 and other related legislation and mining authorisations;
 - (d) that the Area was demonstrably unsuitable for mining due to its proximity to Kakadu National Park;
 - (e) that renewal of Jabiluka MLN1 would impact on the regulatory framework and future rehabilitation of the Ranger site;
 - (f) that ERA's prospects of mining Jabiluka were "limited";
 - (g) that mining in the Area could be expected to have environmental impacts;
 - (h) that renewal of Jabiluka MLN1 may negatively impact on ERA's ability to raise capital to continue the rehabilitation of the Ranger site;
 - (i) that refusal to renew Jabiluka MLN1 may impact upon ERA's ability to rehabilitate the Area;
 - (j) that the Area should be incorporated into Kakadu National Park;
 - (k) that Jabiluka MLN1 should not be renewed in order to allow the Area to be incorporated into Kakadu National Park; and
 - (l) that it was doubtful that Rio Tinto would fund ERA's challenge to an adverse decision.
9. On or around 28 June 2024, the First Respondent represented to the Applicant that no decision would be made on the Application prior to September 2024.
10. The representation referred to in paragraph 9 was not corrected at any time between 28 June 2024 and the time of the making of the Advice Decision.
11. On or around 28 June 2024, the First Respondent represented to the Applicant that the Applicant would be afforded an opportunity to make submissions to the First Respondent

in respect of the possible renewal of Jabiluka MLN1, further to those made orally on 7 February and 28 June 2024 and those made in writing on 20 March 2024.

12. The representation referred to in paragraph 11 was not corrected at any time between 28 June 2024 and the date of the Advice Decision.
13. When making the Advice Decision, the First Respondent had regard to at least the following matters:
 - (a) the submissions of the Sixth Respondent, marked as both 'Attachment B' and 'Attachment C' of the Departmental Brief;
 - (b) the submissions of Ms Margarula and the GAC representing the Mirarr Traditional Owners, in letters marked as 'Attachment C' of the Departmental Brief;
 - (c) the desire to include the Area in Kakadu National Park;
 - (d) the desire to ensure the Renewal Decision was made prior to the Northern Territory election;
 - (e) the desire to allow the Prime Minister to deliver a speech to the NSW State Labor Conference on 27 July 2024, announcing that there would never be mining at Jabiluka;
 - (f) the views of the Prime Minister in respect of the Advice Decision;
 - (g) the views of Minister Plibersek in respect of the Advice Decision;
 - (h) the views of Minister Burney in respect of the Advice Decision;
 - (i) the views of Senator McCarthy in respect of the Advice Decision;
 - (j) the views of Luke Gosling MP in respect of the Advice Decision;
 - (k) the views of the Hon Peter Garrett AM and Professor Don Henry AM in respect of the Advice Decision; and
 - (l) the submissions of the Commonwealth Department of Industry, Science and Resources in respect of the Advice Decision.
14. When making the Advice Decision, the First Respondent held the following views:
 - (a) the effect of the Advice Decision was that there would never be mining in the Area;
 - (b) the effect of the Advice Decision was that the Area would be protected from mining forever;
 - (c) the effect of the Advice Decision was that the Area was allowed to be added to Kakadu National Park; and

(d) the effect of the Advice Decision was that the Third Respondent was enabled to decline to extend Jabiluka MLN1, when it would not otherwise have been enabled to do so.

15. On 27 July 2024, during the NSW State Labor Conference, the Prime Minister gave a speech which included the following words:

“Over the past 18 months, Linda, Tanya Plibersek and myself have met with leaders and representatives of the Mirarr people, the traditional owners of the Jabiluka site in Kakadu. Madeleine King, our Resources Minister, has joined us.

They were seeking a guarantee that there would never be uranium mining on their land.

....

Today, I am proud to announce that our Government will be working with the traditional owners to make Jabiluka part of Kakadu National Park, once and for all.

This means there will never be mining at Jabiluka.

The Mirarr people have loved and cared for their land for more than 60,000 years.

Our Government will work with them to keep it safe for all time.”

Renewal Decision

16. In making the Renewal Decision, the Third Respondent proceeded on the basis that the Advice Decision was valid.
17. In making the Renewal Decision, the Third Respondent proceeded on the basis that the advice given by the First Respondent on 25 July 2024 was “advice” within the meaning of section 187(1) of the *Mineral Titles Act 2010* (NT).
18. In making the Renewal Decision, the Third Respondent proceeded on the basis that he was obliged to exercise powers in accordance with, and give effect to, the advice given by the First Respondent on 25 July 2024.

Compliance

19. At the time of the Advice Decision, the Applicant had complied with the *Mining Act 1980* (NT), the *Mineral Titles Act 2010* (NT) and the conditions of Jabiluka MLN1 at all times during the life of Jabiluka MLN1.
20. At the time of the Renewal Decision, the Applicant had complied with the *Mining Act 1980* (NT), the *Mineral Titles Act 2010* (NT) and the conditions of Jabiluka MLN1 at all times during the life of Jabiluka MLN1.

21. At the time of the Advice Decision, the First Respondent was satisfied that the Applicant had, at all times during the life of Jabiluka MLN1, complied with the *Mineral Titles Act 2010* (NT) and the terms of Jabiluka MLN1.
22. At the time of the Renewal Decision, the Third Respondent was satisfied that the Applicant had, at all times during the life of Jabiluka MLN1, complied with the *Mining Act 1980* (NT), the *Mineral Titles Act 2010* (NT) and the terms of Jabiluka MLN1.

Definitions

Advice Decision means the decision and/or conduct of the First Respondent and/or Second Respondent to provide advice on 25 July 2024 to the Third Respondent that the Application be refused.

Application means the Applicant's application for renewal of Jabiluka Mineral Lease 1 dated 20 March 2024 including the supporting letter from the Applicant.

Area means the Jabiluka Mine Area in respect of which Jabiluka MLN1 is granted.

Departmental Brief means the brief of materials provided to the First Respondent by the Commonwealth Department of Industry, Science and Resources in respect of the Advice Decision on 25 July 2024.

GAC means the Gundjeihmi Aboriginal Corporation.

Jabiluka MLN1 means Jabiluka Mineral Lease 1 granted on 12 August 1982.

LTCMA means the Jabiluka Long Term Care and Maintenance Agreement dated 25 February 2005 between the Applicant, the Sixth Respondent and the Mirarr Traditional Aboriginal Owners.

Renewal Decision means the decision of the Third Respondent dated 26 July 2024 that the Application be refused.

If you do not serve a notice of dispute on the Applicant within 14 days, you will be taken to have admitted the truth of each fact or the authenticity of each document specified.

Date: 5 September 2024



Signed by Leon Chung
Lawyer for the Applicant

Schedule

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

NOTICE OF FILING**Details of Filing**

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
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Date of Lodgment: 9/09/2024 3:38:57 PM AEST
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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
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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.



Affidavit

No. NSD 1056 of 2024

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

Affidavit of: **Brad Welsh**
 Address: 8/24 Mitchell St, Darwin City NT 0800
 Occupation: Chief Executive Officer
 Date: 9 September 2024

I, Brad Welsh, affirm:

1. I am the Chief Executive Officer of Energy Resources of Australia Ltd (**ERA**). I am authorised to make this affidavit on ERA's behalf.
2. Except where otherwise stated, I make this affidavit based on my knowledge of the facts, circumstances and business processes that have existed during the time I have been employed by ERA.
3. Nothing contained in this affidavit is intended to waive any privilege that is attached to the work performed by ERA's legal advisers, and I am not authorised by ERA to waive any such privilege.
4. I have previously affirmed one affidavit in this proceeding on 7 August 2024 (**First Affidavit**).
5. Shown to me at the time of affirming this affidavit is a bundle of documents marked "**Exhibit BW-2**". Where I refer to documents in this affidavit, I primarily refer to their page

| | | |
|--------------------|---|-----|
| Filed on behalf of | Energy Resources of Australia Ltd ABN 71 008 550 865, Applicant | |
| Prepared by | Leon Chung | |
| Law firm | Herbert Smith Freehills | |
| Tel | 02 9225 5716 | Fax |
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 Sydney NSW 2000

number in Exhibit BW-2. However, if a document was exhibited to my First Affidavit, I refer to the page number in Exhibit BW-1 and confirm I had access to that document for the purposes of affirming this affidavit.

A. Background and role with ERA

6. I hold the degrees of Bachelor of Welfare (Aboriginal Community Studies), Bachelor of Laws and Master of Mining Engineering (Mine Management).
7. I have spent more than thirteen years working in the resources industry, including about ten years living in remote and rural communities.
8. Before working at ERA, my professional experience included the following:
 - (a) From November 2000 to February 2008, I worked in the New South Wales Department of Community Services, where I held various senior positions.
 - (b) From February 2008 to November 2008, I was a media assistant in the Office of the Prime Minister of Australia.
 - (c) From November 2008 to December 2009, I was a policy adviser in the Office of the New South Wales Minister for Planning.
 - (d) From December 2009 to January 2011, I was a policy adviser in the Office of the New South Wales Premier.
 - (e) From January 2011 to October 2021, I held various roles within the Rio Tinto Group. These included:
 - (i) Manager Community and External Affairs for Rio Tinto's Northparkes mines;
 - (ii) Manager Operations for Rio Tinto's Weipa bauxite operations;
 - (iii) Acting General Manager Operations for Rio Tinto's Weipa bauxite operations; and
 - (iv) Chief Advisor to the CEO – Indigenous Affairs at Rio Tinto.
9. In about October 2021, I was appointed the Acting Chief Executive Officer of ERA. In February 2022, I was formally appointed as Chief Executive Officer and Managing Director of ERA. I have continued to perform this role since then.
10. As Chief Executive Officer and Managing Director of ERA, I am responsible for various matters, including:
 - (a) working closely with the Chair and Board of ERA to set organisational governance and strategic direction;



- (b) ensuring our organisation responds appropriately to shareholder interests; and
 - (c) liaising with a broad cross-section of stakeholders, including governments, Traditional Owners and other interested groups.
11. In relation to ERA's application to renew its title to Jabiluka MLN1 (**MLN1 Renewal Application**), I was responsible for:
- (a) engaging with representatives of the Commonwealth and Northern Territory Governments to discuss the Application;
 - (b) consulting with groups such as the Northern Land Council (**NLC**) and the Gundjeihmi Aboriginal Corporation (**GAC**) in relation to the Application;
 - (c) communicating with employees and community members in relation to the basis for the Application; and
 - (d) overseeing a small team within ERA who were involved in working on the Application.
12. It was part of my job at ERA to have a general sense of what people were saying about ERA in public. In this role, information from the GAC, the NLC and the Mirarr Traditional Owners generally came to my attention in three main ways.
- (a) First, the GAC or the NLC would often issue press releases. ERA was not given prior notice of these press releases, or an opportunity to comment on them. I generally became aware of press releases because they would be placed on a LinkedIn page of a person of whom I am a LinkedIn connection. Where press releases were not picked up in the mainstream media, they would not show up in daily press clippings.
 - (b) Secondly, sometimes comments made by the GAC, the NLC or Mirarr Traditional Owners would be picked up in the mainstream media. Where that occurred, ERA would often be given advance notice, by the journalists calling ERA to provide media comment. Also, once published, this material generally found its way into daily press clippings, which were sent to me and which I generally reviewed.
 - (c) Thirdly, the GAC and the NLC were represented on forums of which ERA was also a member. Examples are the Mine Technical Committee and the Alligator Rivers Region Advisory Committee. Comments made at these forums were sometimes drawn to my attention, and I was able to review the minutes.
13. In respect of each of these three ways of information coming to my attention, I reviewed this information to get a general sense of what was being said about ERA in public. I would have reviewed this information whether or not ERA was applying for renewal. I

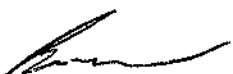


did not review this information with a specific eye to guessing what information was being placed before Minister King or Minister Monaghan in the context of ERA's renewal application. As I explain further below, it was my general expectation that ERA would be given an opportunity to see adverse material being put to the Ministers and an opportunity to comment on it.

14. While I did regularly engage with the Commonwealth Department of Industry, Science and Resources, I was not typically involved in the day-to-day engagement between ERA and representatives from the Northern Territory Department of Industry, Tourism and Trade. However, I instructed those responsible for engaging with the Northern Territory Department to bring any material issues, concerns or information arising from those engagements to my attention. I also received regular updates about the engagements which occurred in my role as Chief Executive Officer and Managing Director.

B. ERA's engagement with the Mirarr before decision to reject the MLN1 Renewal Application

15. During my time at ERA, I have believed it to be important that ERA has the opportunity to speak directly with the Traditional Owners of the land the subject of Jabiluka MLN1, being the **Mirarr Traditional Owners**.
16. The Mirarr Traditional Owners are a small group of about 18 people. I understand that Yvonne Margarula, Nida Mangarrbar and Corben Mudjandi typically speak on behalf of the Mirarr Traditional Owners with respect to matters that affect the interests of that group. While the GAC is established by the Mirarr Traditional Owners, and its Board comprises Mirarr Traditional Owners, my understanding based on my interactions with the GAC is that it is run on a day-to-day basis by various advisers who are not themselves Mirarr Traditional Owners.
17. In my view, direct dialogue with the Mirarr Traditional Owners themselves was and remains an important part of ensuring that the Mirarr Traditional Owners are fully informed about all relevant matters when it comes to making decisions about the cultural use of the area underlying Jabiluka MLN1.
18. In paragraph [31(f)] of my First Affidavit, I referred to a discussion with Kym Moore (Acting General Manager Mining, Department of Industry, Science and Resources) and Georgia Tree (Policy Adviser to the Minister for Resources, the Honourable Madeleine King (**Madeleine King**)) on 28 June 2024, where I stated that ERA had been unable to meet directly with the Mirarr Traditional Owners. This continued to be my experience until the MLN1 Renewal Application was rejected.
19. I note that, before the ML1 Renewal Application was lodged, I had a short telephone call on 8 February 2024 with Ms Margarula, Ms Mangarrbar, Mr Mudjandi and another Mirarr



Traditional Owner, Ruth, who I understood to have been accompanied by Susan O'Sullivan (legal adviser at the GAC) and Murray Garde (who translated). The call lasted around ten minutes and did not involve any substantive discussion about the renewal of Jabiluka MLN1.

C. Interactions with Minister Monaghan and NT Government about the MLN1 Renewal Application

20. On 19 April 2024, the GAC issued a media release entitled "Traditional Owners welcome NT Government support at Jabiluka" which I read at or around the time it was published. A copy of the media release is at page 1 of BW-2.
21. Based on that release, I was concerned that the MLN1 Renewal Application may not be the subject of a fair process. I was therefore concerned to confirm that the Northern Territory Minister for Mining, the Honourable Mark Monaghan (**Minister Monaghan**), would approach the MLN1 Renewal Application with an open mind, and that he had not already determined to make a decision adverse to ERA.
22. On the evening of 19 April 2024, I met with Minister Monaghan during a rugby league game in Darwin. We arranged to meet during the half time break and had an informal discussion. A copy of the text messages setting up that discussion is at page 2 of Exhibit BW-2. Although I do not recall the exact words that were used, our conversation included the following:
 - (a) I told Minister Monaghan that I had seen the GAC's media release and was concerned that the MLN1 Renewal Application would not be a fair process and would not be conducted at arm's length. In response, Minister Monaghan assured me that it would be an arm's length process. He also told me that he was disappointed with the GAC's announcement, as it did not reflect what he and the NT Government had committed to do.
 - (b) I told Minister Monaghan that I understood the process to be that he would refer the MLN1 Renewal Application to Minister King for advice, and that the advice would then inform his decision. Minister Monaghan said that my understanding was wrong. He said that the NT Department of Industry, Tourism and Trade would first review the MLN1 Renewal Application, and once those checks were complete he would refer the Application to the Commonwealth so they could make their "decision".
 - (c) I suggested a meeting between ERA, the Chief Minister, the Honourable Eva Lawler (**Chief Minister Lawler**), and Minister Monaghan so that ERA could have further comfort that the decision-making process would be fair.



23. By 22 April 2024, I understood that a media outlet in the Northern Territory intended to run a story to the effect that the NT Government had promised the Mirarr Traditional Owners that it would not renew Jabiluka MLN1. This was contrary to my understanding of the conversation with Minister Monaghan on 19 April 2024. I therefore engaged in the following text exchange with Minister Monaghan:

ME: *Hi Minister. The NT news has contacted us to say that they are planning to run a story that the NT Gov promised Yvonne not to renew the lease. We haven't commented but thought I would let you know so that your media people might make contact and correct the journalist in terms of due process etc?*

+61 447 384 105 Zizi Averill is the reporter from NT news

MONAGHAN: *Thanks Brad I'll pass onto my comms team*

Just got this back :

We are all over it, query came to the Chiefs office it has been handled

ME: *Ok thank you*

24. On 23 April 2024, I exchanged further text messages with Minister Monaghan about my request for a meeting with him and Chief Minister Lawler. A copy of those text messages is at page 3 of Exhibit BW-2.
25. On 24 April 2024, I attended a meeting with Chief Minister Lawler and Minister Monaghan at the Chief Minister's Office at Parliament House in Darwin. The meeting was also attended by Ken Wyatt from ERA. There were also a number of other individuals who I understood to be associated with Chief Minister Lawler, but I do not remember how many there were or what their names were.
26. Although I do not recall the exact words that were used, the meeting included the following exchanges:
- (a) I explained ERA's views that the existing arrangements in relation to Jabiluka were the best set of arrangements for all parties including for the Mirarr Traditional Owners, whose right of veto over mining at Jabiluka better protected their interests than any other alternative. Chief Minister Lawler said that we needed to speak directly with the Mirarr Traditional Owners. In response, I said that we had been trying to speak directly with them but had not been able to do so.
- (b) I said that we had seen the media reports and were concerned that the decision-making process in respect of ERA's application to renew Jabiluka MLN1 would



not be a fair process. Minister Monaghan said that he and Chief Minister Lawler had met with Ms Margarula and Mr Mudjandi and that Minister Monaghan had advised them that:

- (i) he had not received from his Department either ERA's application to renew Jabiluka MLN1 or any application for the special reservation of Jabiluka so that it could be incorporated into Kakadu National Park;
 - (ii) the determination of both applications would be subject to proper processes; and
 - (iii) accordingly, he could not make any commitments about the outcome of either application.
- (c) Minister Monaghan did not refer to any views that had been expressed, or any submissions that had been made, by Ms Margarula or Mr Mudjandi on behalf of the Mirarr Traditional Owners during the meeting.
- (d) Minister Monaghan repeated the assurance he had given me on 19 April 2024 that the process for determining the MLN1 Renewal Application would be fair and conducted at arm's length.

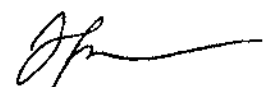

27. After the meeting on 24 April 2024, I exchanged further text messages with Minister Monaghan. A copy of those text messages is at page 4 of Exhibit BW-2.

D. Matters raised with ERA about the MLN1 Renewal Application

28. Prior to the MLN1 Renewal Application and until it was rejected, I was aware that the GAC and the NLC had made statements to the effect that the Mirarr Traditional Owners were opposed to the renewal of Jabiluka MLN1. This included both public statements and statements made in correspondence sent to ERA. I was also aware that the GAC and the NLC had advanced multiple arguments as to why, in their view, Jabiluka MLN1 should not be renewed.

29. The precise arguments that were raised varied over time and were not typically expressed in a consistent or clear way or supported by the same reasons or even any reasons at all. It was challenging to work out what their main arguments against renewal were and the precise reasons that were advanced in support.

30. From around February 2024, I also became aware that representatives from the GAC and the NLC had met with Minister King, Minister Monaghan and other representatives of the Commonwealth and the NT Governments, such as the Prime Minister and Chief Minister Lawler, and that at least the NT Department of Industry, Tourism and Trade had sought submissions from the GAC and the NLC about the MLN1 Renewal Application.



I was also aware that there had been meetings between representatives of the Commonwealth and NT Governments and the Mirarr Traditional Owners themselves.

31. I generally understood the GAC and the NLC were opposed to the renewal of Jabiluka MLN1. I also anticipated that the GAC and the NLC were communicating their opposition to Minister King, Minister Monaghan and others within the Commonwealth and NT Governments. However, I did not know precisely what the GAC and the NLC were saying because:
- (a) I was not informed of what had been said during those meetings, or the content of written material provided by or on behalf of those groups to the Commonwealth or the Northern Territory;
 - (b) I was not informed about what was said during the meetings with the Mirarr Traditional Owners themselves; and
 - (c) as noted above, the GAC and the NLC had previously advanced multiple arguments as to why Jabiluka MLN1 should not be renewed, but I did not know which of those arguments had been communicated to the Commonwealth or the Northern Territory, how those arguments had been raised, what reasons had been advanced in support and which of those arguments had been put before either Minister King or Minister Monaghan or were otherwise being genuinely entertained.
32. As set out in paragraph [41(a)] of my First Affidavit, I expected that ERA would be informed once the MLN1 Renewal Application had been referred to Minister King for her advice and given a further opportunity to address Minister King and/or her Department in relation to the Application. I expected this would occur once Minister King and her Department had had the opportunity to digest the material which had been received from ERA, Minister Monaghan and any other stakeholders. I also expected that ERA would be informed of, and be given the opportunity to respond to, those matters which:
- (a) had been raised in the meetings with and written material received from the GAC, the NLC and the Mirarr Traditional Owners; and
 - (b) were proposed to be put before Minister Monaghan or Minister King when they came to make their decisions, or which were otherwise being considered in the context of the MLN1 Renewal Application.
33. Therefore, while I expected that the GAC and the NLC were raising points against the renewal of Jabiluka MLN1 with Minister King, Minister Monaghan and others, I did not anticipate that those matters would be put before either of the Ministers at the time they



made their respective decisions without ERA being given an opportunity to comment first.

34. I held the expectations I have described in paragraphs 32 and 33 above because:

- (a) Jabiluka MLN1 was a significant asset to ERA and, to my understanding, ERA had a right of renewal for a further term in accordance with condition 2. I expected that this would be understood by the Ministers and their respective offices and Departments. I also expected that, because of this, if adverse representations were going to be placed before the Ministers, then ERA would be given those representations, and given an opportunity to comment on them;
- (b) I was conscious that the NLC and the Mirarr Traditional Owners were the subject of obligations under the LTCMA to acknowledge ERA's entitlement to hold Jabiluka MLN1 and not to take certain types of actions which seek the result that Jabiluka MLN1 is forfeited, cancelled or otherwise prejudicially affected. I expected that the Ministers, and their respective offices and Departments, would understand this too, and that any submissions that were being made contrary to that obligation (as I understood it) would be brought to ERA's attention so that ERA would have an opportunity to respond;
- (c) ERA had prepared its MLN1 Renewal Application without being informed of what was being said against it privately. I expected that the Ministers, and their respective offices and Departments, would understand that there was an obvious information asymmetry between what ERA had been told and what the Ministers and their Departments and offices had been told. I expected that the Ministers and their offices and Departments would seek to address this asymmetry before making a decision; and
- (d) as set out in paragraph 35 below, I was not told by Minister King or members of her staff that my planned return to Canberra to discuss the MLN1 Renewal Application further was too late or that my expectation was wrong.

35. Further, from around April 2024, I also understood that a decision on the MLN1 Renewal Application would not be made before at least September 2024. I formed that view for the following reasons:

- (a) As noted in paragraph 22(b) above, I understood from my discussion with Minister Monaghan on 19 April 2024 that the NT Department of Industry, Tourism and Trade would first review the MLN1 Renewal Application before the Application was referred to the Commonwealth;



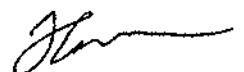
- (b) Based on my review of the minutes of a meeting of the Alligator Rivers Region Advisory Committee on 19 April 2024, I understood that the NT Department of Industry, Tourism and Trade would take about six months to assess the MLN1 Renewal Application. Therefore, having regard to the matters I had discussed with Minister Monaghan on 19 April 2024 (see paragraph 35(a) above), I did not expect that the MLN1 Renewal Application would even be referred to Minister King until at least September 2024 given the MLN1 Renewal Application had been submitted in late March 2024;
 - (c) As set out at paragraph [32(a)] of my First Affidavit, on 28 June 2024 I was advised by Ms Moore that Minister Monaghan had not referred the MLN1 Renewal Application to Minister King yet;
 - (d) As set out in paragraph [34] of my First Affidavit, on 28 June 2024 I told Minister King that we did not expect anything to happen before the NT Government went into caretaker mode, and that I expected to return to Canberra for meetings in around September 2024 to discuss the MLN1 Renewal Application further. At no point then or afterwards did Minister King or her staff tell me that my expectation was wrong, or that coming back in September to discuss the MLN1 Renewal Application would be too late; and
 - (e) As set out in paragraphs [37] to [38] of my First Affidavit, following my meeting with Minister King on 28 June 2024, I separately told Ms Moore that I did not expect any decision until after August 2024 when the NT Government went into caretaker mode, and I expected representatives from ERA would return to Canberra in around September 2024 to continue this discussion. At no point then or afterwards did Ms Moore tell me that my expectation was wrong, or that coming back in September to discuss the MLN1 Renewal Application would be too late.
36. Had I been told that ERA would not be informed when the MLN1 Renewal Application had been referred to Minister King, or that the MLN1 Renewal Application was going to be determined before September 2024, I expect I would have:
- (a) asked to be given advance notice about when the MLN1 Renewal Application would be referred to Minister King;
 - (b) asked for a copy of the information that was being provided to Minister King; and
 - (c) caused ERA to make further and more fulsome oral and written submissions to Minister King and her Department, including with the benefit of the information being put before Minister King.



37. Against that background, I have commented below on the extent to which I was aware that certain matters had been raised with Minister King or Minister Monaghan, or were being genuinely entertained in the context of the MLN1 Renewal Application, before that Application was rejected. Those matters are:
- (a) whether ERA was a fit and proper person to hold Jabiluka MLN1;
 - (b) whether ERA had complied with the terms of Jabiluka MLN1 and the *Mining Management Act 2001* (NT) (**MMA**);
 - (c) the implications of the renewal of Jabiluka MLN1 for the potential incorporation of Jabiluka into Kakadu National Park;
 - (d) ERA's ability to fund rehabilitation activities at the Ranger mine;
 - (e) ERA's capacity to fund rehabilitation activities at Jabiluka;
 - (f) ERA's financial capacity to fund mining activity at Jabiluka; and
 - (g) various matters raised in documents which I now understand were before Minister King at the time she made the decision in issue in this proceeding.

Fit and proper person and related submissions (paragraph 37(a))

38. In my interactions with the GAC, I recall one instance where the topic of whether ERA was a fit and proper person came up. Although I do not recall her exact words, I remember Ms O'Sullivan saying after a meeting of the ERA/Mirarr Relationship Committee on 19 September 2023 that she did not consider ERA to be a fit and proper person to hold Jabiluka MLN1. I do not recall her providing any reasons in support of her view.
39. Before the MLN1 Renewal Application was rejected, I believed that it was possible that the GAC had made a generalised complaint to Minister Monaghan and Minister King to the effect that ERA was not a fit and proper person to hold a mining title. I did not anticipate that a document containing such a complaint would be placed before the Ministers at the time of their decisions. I also did not anticipate that, if the GAC did make such a complaint, it would advance any particular allegations in support of it. This is for the following reasons:
- (a) I considered ERA to be a fit and proper person, and I was not aware of any material that caused me to doubt that view.
 - (b) In my role, I had previously had a number of dealings with Ms O'Sullivan. Based on those dealings, and consistent with paragraph 28 above, I formed the view that Ms O'Sullivan had a tendency to advocate for a position by raising as many arguments as possible, regardless of their individual merit. As noted above, I do



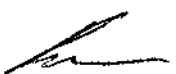
not recall Ms O'Sullivan having provided any particular reasons in support of, or related to, a broader argument that ERA was not a fit and proper person.

I expected that Ms O'Sullivan would likely adopt the approach of raising many arguments before the Commonwealth and NT Governments, and that it was possible that those arguments would correspond with what the GAC had said publicly or to me directly. However, I certainly did not know with any certainty what arguments she would make or what reasons if any she would provide in support of those arguments.

- (c) I also did not consider that complaints that ERA was not a fit and proper person would be placed in a document before Minister King or Minister Monaghan when they came to make their decisions. This would be a serious complaint, and I anticipated that a complaint of that level of seriousness would be drawn to my attention by the Ministers or their Departments if it had been raised and was going to be placed before the Minister.
- (d) I do not recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments raising the issue of whether ERA was not a fit and proper person to hold Jabiluka MLN1 with me. Nor do I recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments informing me that an issue had been raised or a submission had been made concerning ERA's fitness or propriety, and I am not aware of such an issue or submission being raised with any other representative from ERA either. If such an issue had been raised with someone else from ERA, I believe I would have been aware of that because of my role as Chief Executive Officer and Managing Director and given my oversight of the small team from ERA that was involved in the MLN1 Renewal Application.
40. Further, as noted in paragraph 38 above, although Ms O'Sullivan had raised the issue previously, I did not know what her reasons were (if any) for saying ERA was not a fit and proper person to hold Jabiluka MLN1.
41. Had I been informed that a submission that ERA was not a fit and proper person was going to be placed before the Ministers, I would have sought a copy of the submission (or submissions), reviewed it carefully and then sought to make a further submission addressing in greater detail and with greater specificity the question of whether ERA was a fit and proper person and any reasons that had been advanced as to why we were not.

Compliance with the terms of Jabiluka MLN1 (paragraph 37(b))

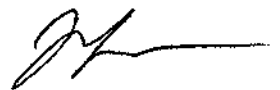
42. Prior to making the MLN1 Renewal Application, I was aware that an issue that would arise in the Northern Territory's consideration of ERA's application for renewal was



- whether ERA had complied with its obligations under the *Mineral Titles Act 2010* (NT) (MTA). I anticipated that Minister Monaghan would likely form a view as to ERA's compliance with those obligations in the course of deciding whether to grant the renewal.
43. Also, ERA attended Mine Technical Committees. During those meetings, questions were raised as to whether ERA had lodged mine closure plans in accordance with the MMA. I anticipated from this that an issue which might be raised in respect of the renewal of Jabiluka MLN1 was ERA's compliance in respect of mine closure plans. I also therefore anticipated that an issue that might arise before Minister Monaghan was ERA's compliance with its obligations in respect of mine closure plans.
44. I did not know what, if anything, the NLC, the GAC or others were saying privately to either Minister Monaghan or Minister King in respect of ERA's compliance with Jabiluka MLN1 or in respect of mine closure plans. I anticipated that they were probably saying something like the issue that had been raised in the Mine Technical Committee meetings, namely that ERA had failed to lodge reports containing mine closure plans. I also anticipated it was possible that they were making a generalised complaint about ERA's compliance with the MTA, but I did not know this with any certainty and I did not know the specifics of any complaint.
45. I do not recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments raising with me any concerns about ERA's compliance with the terms of Jabiluka MLN1 or its obligations under the MMA or any other applicable statute such as the MTA. Nor do I recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments informing me that any issue had been raised or any submission had been made to the effect that ERA had failed to comply with any of those requirements. I am not aware of such an issue or submission being raised with any other representative from ERA either.
46. In respect of this issue, I refer to what I have said in paragraphs 32, 33 and 36 above.
- Incorporation into Kakadu National Park (paragraph 37(c))
47. Before the MLN1 Renewal Application was rejected, I believed that the Mirarr Traditional Owners, as well as the GAC and the NLC, had been arguing for the Federal Australian Labor Party to "complete" Kakadu National Park by incorporating the area underlying Jabiluka MLN1. For example:
- (a) on 20 March 2024, Mr Mudjandi was quoted in a GAC announcement (which I read at or around this time) as saying: "ERA says it wants to protect our cultural heritage at Jabiluka, the best way of doing that is to include it in the World Heritage listed Kakadu National Park where it belongs". A copy of that announcement is at page 5 of Exhibit BW-2; and



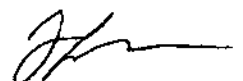
- (b) on 6 June 2024, Thalia van den Boogaard (CEO of the GAC) was interviewed as part of the ABC's "NT Country Hour" about the decision by the NT Government to declare special reserve status over the Jabiluka area, which I listened to at or around this time. During that interview, Ms van den Boogaard said: "[The Mirarr Traditional Owners] want to see Jabiluka permanently protected. So they want to see it incorporated in the Kakadu National Park where it is safe from mining. For that to happen, the Commonwealth needs to give advice to the Northern Territory Government who should then not approve the lease extension application".
48. I was generally aware of public statements to that effect. I also anticipated that it was possible that statements to this effect had been communicated privately to Minister Monaghan or Minister King. However, I did not anticipate or expect that submissions or material to this effect would be placed before either Minister at the time they made their decisions, or indeed that any final decision would be made in respect of the MLN1 Renewal Application, without ERA first being given notice of such a submission and an opportunity to address it. This was for the following reasons:
- (a) As noted in paragraph [19] of my First Affidavit, in February 2024 I met with Dave McElrea and Charlee-Sue Frail from the office of the Minister for the Environment and Water, the Honourable Tania Plibersek (**Minister Plibersek**). During that meeting, Mr McElrea said words to the effect that, even if the current lease was to become a national park, it may still be mined in the future if considered to be in the national interest and it did not impact on matters of national environmental significance. I understood this to be consistent with my view that the incorporation of Jabiluka into Kakadu National Park would not afford the same level of protection against future mining as the existing arrangements, and therefore that the prospect of extending Kakadu had not been advanced (at least by Minister Plibersek and her office) as a consideration in favour of refusing to renew Jabiluka MLN1. As set out in paragraph [24] of my First Affidavit, a copy of Megan Highfold's summary of that meeting (which I agree is an accurate summary) is at page 138 of Exhibit BW-1.
- (b) In late June 2024, I met with Mr McElrea and Deborah Katona (a policy advisor to Minister Plibersek). During that meeting, Mr McElrea said that if the Government did not renew the lease, then his Minister would be supportive of the incorporation of the area into the Kakadu National Park. While I understood this to be a change from the position that had been communicated to me by Mr McElrea in February 2024, Mr McElrea also said that the cost and process for incorporating Jabiluka into the Kakadu National Park was not known and that Minister Plibersek could not influence the decision on renewal itself. Based on



that conversation, I did not understand the Commonwealth to have given any significant thought about the merits of incorporating Jabiluka into Kakadu National Park. Given that I understood it to be a separate issue, I did not understand the question of extending Kakadu National Park to have been advanced (at least by Minister Plibersek and her office) as a consideration in favour of refusing to renew Jabiluka MLN1 either. A copy of my file note of that conversation is at page 7 of Exhibit BW-2. I have reviewed that summary and agree that it is an accurate summary of the meeting, except that the reference to the "Minister for environment" in the fifth line of the bullet summarising this meeting should be a reference to Minister King.

- (c) In paragraph [36(c)] of my First Affidavit, I noted that Minister King did not advise me, during our meeting on 28 June 2024, that the Commonwealth Government was considering extending Kakadu National Park to incorporate the land underlying Jabiluka MLN1. To elaborate:
- (i) although I outlined some of the limitations of a national park lease with Ms Moore and Ms Tree at our meeting on 28 June 2024, as set out in paragraph [32] of my First Affidavit neither Ms Moore nor Ms Tree provided any substantive response to my statement;
 - (ii) although I also outlined those same limitations to Minister King when she arrived at our meeting on 28 June 2024, as set out in paragraph [35] of my First Affidavit, the Minister replied only with words to the effect of "you've made good points" and did not make any other substantive comments;
 - (iii) I do not recall this matter being raised with me by Minister King on any other occasion, or by Minister Monaghan or any other representative of the Commonwealth or NT Governments, other than as set out above;
 - (iv) I do not recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments informing me, at any time, that any submission had been made to the effect that the MLN1 Renewal Application should be rejected so that the land underlying Jabiluka MLN1 could be incorporated into Kakadu National Park; and
 - (v) I am not aware of this issue or such a submission being raised with any other representative from ERA either.

49. Had I been informed that the incorporation of Jabiluka into Kakadu National Park had been or would be put before either Minister at the time they made their decisions, and that ERA would not be informed of this or given an opportunity to respond, I would have



again sought a copy of the submission (or submissions) in respect of incorporation of Jabiluka into Kakadu National Park, reviewed it carefully and taken steps to place responsive material before the Ministers. I expect:

- (a) I would have caused ERA to explain more forcefully and in additional detail the greater level of protection that the existing veto right provided to the Mirarr Traditional Owners, as compared with the level of protection that would be afforded by the cancellation of Jabiluka MLN1 and the extension of Kakadu National Park;
- (b) consistent with paragraph 34(b) above, I would have further explained that ERA considered it had performed its side of the agreement under the LTCMA, and that it expected the NLC and the Mirarr Traditional Owners would likewise comply with their obligations under the LTCMA to acknowledge ERA's entitlement to hold Jabiluka MLN1 and not to take certain types of actions which seek the result that Jabiluka MLN1 is forfeited, cancelled or otherwise prejudicially affected;
- (c) relatedly, caused ERA to explain in greater detail how ERA's inability to get direct dialogue with the Mirarr Traditional Owners impacted upon the extent to which they were fully informed about the relative advantages and disadvantages of renewing Jabiluka MLN1 and of cancelling it and incorporating the land into an extended Kakadu National Park; and
- (d) caused ERA to submit that the process of considering whether to extend Kakadu was and should be legally and practically separate from the process of giving advice about and making a decision on the renewal of Jabiluka MLN1.

ERA's financial capacity (paragraphs 37(d) to 37(f))

50. Before the MLN1 Renewal Application was rejected, I was aware that the GAC had made statements about ERA's financial circumstances. For example:

- (a) on or around 19 March 2024, I read a public statement from the GAC which indicated that the "Mirarr could not see any basis on which ERA could be granted an extension of the Jabiluka mineral lease" and referred to "the publicly reported dire financial circumstances of ERA and the prohibitive costs of rehabilitation demonstrated at the adjacent Ranger site are all factors that stand in the way of an extension application". A copy of that announcement is at page 11 of BW-2; and
- (b) on or around 21 March 2024, I read an article titled "ERA applies to extend lease on Jabiluka uranium mine against traditional owners' wishes" which I understand



was published around 21 March 2024. In that article, Mr Mudjandi was quoted as saying: "What guarantee is there that this company will be operating in 12 months' time?" and that applying to extend Jabiluka MLN1 was "big talk from a company that is \$2 billion short of rehabilitation at Ranger". A copy of that article is at page 13 of Exhibit BW-2.

51. I considered that it was possible that the GAC had said something to Minister Monaghan or Minister King to the effect that ERA's finances were poor. I did not know with any certainty that this kind of thing had been said or how strongly it might be advanced. I also did not anticipate or expect that submissions or material to this effect would be placed before either Minister at the time they made their decisions, without ERA first being shown the submissions or their substance and given an opportunity to respond. I held these expectations for the following reasons:

- (a) The public statements from the GAC about ERA's financial circumstances were typically factually wrong. For example, in relation to the remediation work at Ranger, ERA had been funding remediation at Ranger over many years, including with the support of Rio Tinto, and had successfully managed to raise capital on multiple occasions in the past. Further, ERA had plans to engage in further capital raisings, and I had been involved in multiple discussions with the Commonwealth Department of Industry, Science and Resources in which I had advised the Department of these plans.
- (b) Before the MLN1 Renewal Application was rejected, I was involved in numerous discussions with representatives of the Commonwealth and NT Governments about ERA's capacity to fund rehabilitation at the Ranger mine. At times, those discussions also touched on other topics including Jabiluka. However, I did not understand from those discussions that the issue of ERA's financial capacity to fund rehabilitation at Ranger was being conflated with ERA's capacity to fund either the rehabilitation of Jabiluka in the short-term or any mining development in the event consent from the Mirarr Traditional Owners was to be obtained at some point in the future. In particular, it was my view that:
 - (i) Ranger and Jabiluka are separate mines with very different contexts;
 - (ii) the cost of rehabilitating Jabiluka in its present state is significantly less than the cost of rehabilitating Ranger;
 - (iii) Jabiluka is a "Tier 1" resource containing a large quantity of high grade uranium, which is open at depth and larger than the Ranger mine. It was (and remains) my view that, if consent was obtained from the Mirarr Traditional Owners to mine Jabiluka, there would be no real difficulty in



obtaining funding to do so given the potentially extensive economic returns involved; and

- (iv) in any case, ERA had been funding remediation at Ranger over many years, including with the support of Rio Tinto, and as noted above had successfully managed to raise capital on multiple occasions in the past.
- (c) Although I do not recall when it occurred and cannot remember the exact words that were used, I have a vague recollection of Ms Moore raising ERA's financial capacity to mine Jabiluka during one of our conversations. In response, and consistent with my view above, I said that ERA would not have any problems raising capital to fund the development of Jabiluka in the event the consent of the Mirarr Traditional Owners was obtained. In my role, I regularly spoke with Ms Moore about the funding of rehabilitation at Ranger, but I do not ever recall her saying anything that caused me to consider that this issue was connected with ERA's capacity to fund activities at Jabiluka or the MLN1 Renewal Application. This conversation was no exception.
- (d) Although I again do not recall when it occurred, I also recall a discussion with Ms Moore about the \$1 million security held by the NT Government to complete rehabilitation of Jabiluka. During that discussion, Ms Moore said words to the effect that \$1 million might be enough for ERA to complete rehabilitation, but it might not be enough for the Government to do so. I said something to the effect that I understood that logic given ERA already has a presence in the area at Ranger, but I also said that I cannot see why ERA would commit to further works (including rehabilitation) on something that is not an asset.
- (e) Otherwise, I do not recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments raising with me any concerns in relation to ERA's financial capacity in the context of discussions about Jabiluka MLN1 or the MLN1 Renewal Application. Nor do I recall Minister King, Minister Monaghan or any other representative of the Commonwealth or NT Governments informing me that any concerns had been raised or a submission had been made about ERA's financial capacity in the context of the MLN1 Renewal Application. I am not aware of any of those concerns or any such submission being raised with any other representative from ERA either.
- (f) An allegation to the effect that ERA was in dire financial circumstances is to my mind a serious allegation to make. I did not anticipate that a document containing an allegation of that level of seriousness would be placed before one of the




Ministers in the context of the MLN1 Renewal Application without ERA first being given notice of the allegation and an opportunity to respond to it.

52. Had I been informed that written submissions were being placed before either Minister to the effect that ERA was in a dire financial position, I would have again sought a copy of the submission (or submissions), reviewed it carefully and then sought to make a further submission addressing the question of ERA's financial position and any reasons advanced as to why ERA's financial position was "dire". For example, I would have caused ERA to provide responsive submissions addressing in detail the matters set out in paragraphs 51(b)(i) to 51(b)(iv) above.

Matters referred to in the Ministerial Brief and other documents (paragraph 37(g))

53. In the course of preparing this affidavit, I have reviewed the document titled "Jabiluka Mineral Lease Renewal Application – Advice to the Northern Territory Minister for Mining" (MS24-000911), which I understand is a brief of materials that was provided to Minister King by her Department on or around 25 July 2024 (**Ministerial Brief**). A copy of that document is at page 18 of Exhibit BW-2.
54. I saw the Ministerial Brief for the first time on around 13 August 2024, which is when I understand it was produced by Minister King in this proceeding. It consists of a series of documents. Of those, the following documents were not provided to ERA prior to the decisions in issue in this proceeding:
- (a) A partially redacted seven-page recommendation from Minister King's Department to Minister King (**Recommendation**).
 - (b) A letter from Minister Monaghan to Minister King dated 23 July 2024.
 - (c) A letter from the NLC to Denise Turnbull (Director Mineral Titles, NT Department of Industry, Tourism and Trade) dated 8 May 2024 (**NLC Letter**).
 - (d) A letter from the GAC to Chief Minister Lawler (copied to Minister Monaghan, Minister King and Matthew Ryan) dated 14 March 2024 (**First GAC Letter**).
 - (e) A letter from the GAC to Chief Minister Lawler (copied to the Prime Minister, Minister King, Minister Plibersek and Minister Monaghan) dated 9 April 2024 (**Second GAC Letter**).
 - (f) A letter from the GAC to Minister King and Minister Monaghan dated 9 July 2024 (**Third GAC Letter**).
 - (g) A partially redacted document titled "Attachment D – Context and key considerations" (**Key Considerations Attachment**).
 - (h) Three draft letters labelled as "Annexure E", "Annexure F" and "Annexure G".




- (i) A partially redacted document titled "Attachment H – Legal considerations".
55. I address some of these documents below. Having now received and reviewed those documents, I see that they contain a large number of allegations against ERA which I was not aware had been communicated to the Ministers or were before them at the time of their decisions. Had I been aware that allegations of this kind were being made against ERA and were being communicated to the Minister, I would have taken the following steps:
- (a) I would have asked for copies of the representations, so that I could understand what was being said.
- (b) I would have then caused ERA to prepare material responsive to the representations. By way of example, in respect of the allegation (addressed below) that ERA was nearing insolvency, I would have caused material to be prepared showing that ERA was not insolvent or close to insolvent.
- (c) Finally, I would have taken all the steps I could to bring this responsive material to the attention of the Ministers. The renewal of Jabiluka MLN1 was of great importance to ERA. I have no reason to doubt that I would have taken all the steps I could to ensure that information, which I believed to be wrong or incomplete, was corrected.

The NLC Letter:

56. Based on my review of the NLC Letter, I now understand that the following submissions were before Minister King at the time she made her decision:
- (a) ERA had failed to comply, or there were concerns about ERA's non-compliance, with the terms of the agreement entered into under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), being the agreement referred to at paragraph [9] of my First Affidavit (**Section 43 Agreement**).
- (b) There was a material or real risk that ERA would go into receivership or some form of external administration either prior to or during the period of any extended mineral lease term.
- (c) It was likely or highly likely that ERA would be wound up.
- (d) ERA had no capacity to maintain Jabiluka MLN1 for the period sought by the MLN1 Renewal Application.
- (e) It was likely or highly likely that Jabiluka MLN1 would become an asset for disposal in a winding up of the company.



57. In respect of the proposition in paragraph 56(a) above (about ERA's compliance with the Section 43 Agreement), I did not anticipate or expect that a submission to this effect had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that a submission to this effect would be placed before Minister King or Minister Monaghan at the time they made their decisions. This was because:

- (a) I do not recall this point being made by the GAC, the NLC or others, whether publicly or to ERA, and I do not recall being informed that this point had been communicated to the Ministers or either of them;
- (b) no one informed me (or ERA) that a submission to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;
- (c) it is an allegation which I believe to be false, and had it been drawn to my attention at the time I expect I would have had the same view; and
- (d) it was a serious allegation against ERA (and its directors and management), which I did not think would be kept secret if it had been communicated to the Ministers.

58. In respect of the propositions in paragraphs 56(b) to 56(e) above, as set out in paragraph 50 above, I was aware that the GAC had made statements about ERA's financial circumstances. I considered it was possible that the GAC had made a submission to Minister Monaghan or Minister King about ERA's financial circumstances, potentially in strong terms. However, I did not know with any certainty what specific terms might be used. I certainly did not anticipate that allegations to the effect that:

- (a) there was a material risk that ERA would go into some form of external administration;
- (b) ERA did not have the financial capacity to continue operating as a going concern and to maintain Jabiluka MLN1 during the period of renewal that had been applied for; or
- (c) ERA was likely to be wound up with Jabiluka MLN1 becoming an asset for disposal,

would be placed in documents before Minister King or Minister Monaghan at the time they made their decisions.

59. This was because:

- (a) no one informed me (or ERA) that submissions to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;



- (b) these are allegations which I believe to be false, and had they been drawn to my attention at the time I expect I would have had the same view; and
- (c) these were serious allegations against ERA, which I did not think would be kept secret if they had been communicated to the Ministers.

The First GAC Letter:

60. Based on my review of the First GAC Letter, I also now understand that the following submissions were before Minister King at the time she made her decision:

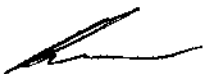
- (a) There had been previous non-compliance with the Section 43 Agreement.
- (b) There was a demonstrated lack of financial capacity.
- (c) It could not be assumed that ERA will continue to operate past September 2024 or until August 2024.
- (d) ERA's financial difficulties were posing a threat at Ranger to the surrounding Kakadu National Park.

61. In respect of the proposition in paragraph 60(a) above (about ERA's compliance with the Section 43 Agreement), I refer to what I have said in paragraph 57 above.

62. In respect of the proposition in paragraph 60(b) (about ERA's apparent financial capacity), I refer to what I have said in paragraphs 58 and 59 above.

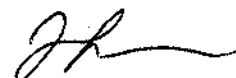
63. In respect of the proposition in paragraph 60(d) (about the apparent impact of ERA's financial position on Ranger and Kakadu National Park), I did not anticipate or expect that submissions to this effect had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that submissions to this effect would be placed before Minister King or Minister Monaghan at the time they made their decisions. This was because:

- (a) I do not recall these points being made by the GAC, the NLC or others, whether publicly or to ERA, and I do not recall being informed that these points had been communicated to the Ministers or either of them;
- (b) no one informed me (or ERA) that submissions to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;
- (c) these are allegations which I believe to be false, and had they been drawn to my attention at the time I expect I would have had the same view; and
- (d) these were serious allegations against ERA, which I did not think would be kept secret if they had been communicated to the Ministers.



The Second GAC Letter:

64. Based on my review of the Second GAC Letter, I also now understand that the following submissions were before Minister King at the time she made her decision:
- (a) ERA's application was disingenuous.
 - (b) ERA had made it clear that it had no plans to mine at Jabiluka.
 - (c) ERA knew that Jabiluka would never be mined.
 - (d) ERA's application was an attempt to manipulate speculation over uranium.
 - (e) Rio Tinto supported the inclusion of Jabiluka in Kakadu National Park.
65. I did not anticipate or expect that submissions to this effect had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that submissions to this effect would be placed before Minister King or Minister Monaghan at the time they made their decisions. This was because:
- (a) I do not recall these points being made by the GAC, the NLC or others, whether publicly or to ERA, and I do not recall being informed that these points had been communicated to the Ministers or either of them;
 - (b) no one informed me (or ERA) that submissions to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;
 - (c) these are allegations which I believe to be incomplete or false, and had they been drawn to my attention at the time I expect I would have had the same view; and
 - (d) these were serious allegations against ERA, which I did not think would be kept secret if they had been communicated to the Ministers.
66. Specifically:
- (a) In respect of the proposition in paragraph 64(b), this is an incomplete statement of ERA's position. ERA's position has been, and remains, that it does not propose to conduct mining at Jabiluka without the consent of the Mirarr Traditional Owners. It was, and remains, ERA's view that the current arrangements were and are the best arrangements for the reasons set out in paragraph 83(d) below.
 - (b) In respect of the proposition in paragraph 64(e), this did not reflect my understanding of Rio Tinto's position. I understood that while Rio Tinto supported the Mirarr Traditional Owners, it had not taken a specific view on the extension of Kakadu National Park. Had this issue been raised with me, I would have sought



first to clarify Rio Tinto's position, encouraged Rio Tinto to communicate its position to the Ministers, and advised both the Commonwealth and the NT Governments to seek confirmation directly from Rio Tinto. I would also have conveyed that, although Rio Tinto is ERA's majority shareholder, ERA's views are independent of Rio Tinto's views.

The Third GAC Letter:

67. Based on my review of the Third GAC Letter, I also now understand that the following submissions were before Minister King at the time she made her decision:
- (a) There was an emerging related crisis at Ranger.
 - (b) ERA's minority shareholder was conducting a public campaign for mining at Jabiluka without any financial, technical or environmental proposition to justify its demands.
 - (c) ERA's minority shareholder appeared to have a strategy of maximising a premium for its shareholding.
 - (d) There was an increasing risk of potential insolvency.
 - (e) The renewal of Jabiluka was derailing ERA's approach at Ranger.
 - (f) ERA management's position was that it wanted to retain Jabiluka MLN1 for it not to be mined.
 - (g) Rio Tinto supported inclusion of Jabiluka in Kakadu National Park.
 - (h) There was dysfunction within ERA.
 - (i) ERA was unable to raise further funding for rehabilitation works while the dysfunction continued.
 - (j) ERA is heading towards insolvency.
 - (k) A decision on the renewal would allow a realistic valuation to be agreed between all the shareholders which would guide the capital raising for rehabilitation works at Ranger.
 - (l) ERA's application was disingenuous.
 - (m) ERA knew that Jabiluka would never be mined.
 - (n) ERA's application was an attempt to manipulate speculation over uranium.
68. In respect of the propositions set out in paragraphs 67(d), 67(i) and 67(j) above (about ERA's apparent financial capacity), I refer to what I have said in paragraphs 58 and 59 above.



69. In respect of the propositions set out in paragraphs 67(f) and 67(m) above (about ERA's apparent lack of intention to conduct mining operations at Jabiluka) I refer to what I have said in paragraphs 65 and 66(a) above.
70. In respect of the proposition in paragraph 67(g) above (about Rio Tinto apparently supporting inclusion of Jabiluka into Kakadu National Park), I repeat what I have said in paragraph 66(b) above.
71. In respect of the proposition in paragraph 67(l) above (about ERA's application apparently being disingenuous), I repeat what I have said in paragraph 65 above.
72. Otherwise, I did not anticipate or expect that submissions to the effect set out in the remaining sub-paragraphs in paragraph 67 above had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that submissions to this effect would be placed before Minister King or Minister Monaghan at the time they made their decisions. This was because:
- (a) I do not recall these points being made by the GAC, the NLC or others, whether publicly or to ERA, and I do not recall being informed that these points had been communicated to the Ministers or either of them;
 - (b) no one informed me (or ERA) that submissions to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;
 - (c) these are allegations which I believe to be incomplete or false, and had they been drawn to my attention at the time I expect I would have had the same view; and
 - (d) these were serious allegations against ERA, which I did not think would be kept secret if they had been communicated to the Ministers.

Further propositions:

73. In the course of preparing this affidavit, I have also reviewed a memorandum addressed to Minister King with a "Yellow Date" of 25 July 2024. A copy of that document is at page 93 of Exhibit BW-2. I saw this document for the first time some time after 15 August 2024, which is when I understand it was produced by Minister King in this proceeding. It was not provided to ERA prior to the decision in this proceeding. Based on my review of that document, I now understand that a submission concerning the source of funding for any possible challenge by ERA was before Minister King at the time she made her decision.
74. I did not anticipate or expect that a submission to this effect had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that submissions to this effect would be placed before Minister King or Minister Monaghan at the time they



made their decisions. To the best of my knowledge, it was not a point that the GAC or the NLC or others had made publicly (or to ERA), and at no point did I understand ERA's ability to fund a legal challenge was relevant in any way to the question of whether the MLN1 Renewal Application should be granted or rejected.

75. For the purposes of this affidavit, I have been asked to assume that the following further submissions were made by or on behalf of the GAC to representatives of the Commonwealth and NT Governments:

- (a) The only supporter of uranium mining in Kakadu National Park is a vocal minority shareholder.
- (b) Rio Tinto would fully support a measure that prevents the resource being developed by others while the question of permanent protection is resolved.
- (c) ERA is not a suitable entity to hold a mineral lease due to its lack of financial capacity.
- (d) ERA has no intention to mine the resource.
- (e) There is no reasonable prospect that development would be commercially feasible as the known costs of rehabilitation in this location are prohibitive.
- (f) ERA's application is disingenuous.
- (g) ERA has made clear it has no plans to mine at Jabiluka. Consequently, there is no economic benefit or prospects of increased employment on offer.
- (h) Had the Commonwealth commenced preparations for the inevitable expiry of Jabiluka MLN1 and inclusion in Kakadu National Park, the sole focus of ERA and its major shareholder would be on funding rehabilitation at Ranger rather than on this attempt to manipulate speculation over uranium in the full knowledge that the deposit will never be mined.
- (i) The major shareholder of ERA supports the wishes of the Mirarr for inclusion of Jabiluka in Kakadu National Park.
- (j) The recent announcement by the company that its major shareholder, Rio Tinto, will take over management of the Ranger Rehabilitation Project reflects the seriousness of the situation. While this announcement responds to the crisis at Ranger, it does not address the vulnerability of the Jabiluka site to a further term of mineral lease in the hands of a moribund company.
- (k) Announcements to the ASX by ERA indicate that ERA may be insolvent by September 2024. There is no reliable source of further funding for ERA as it does not trade; the company is dependent on a potentially discretionary decision by



shareholders for all future funding. Therefore, there is a high risk that an extended mineral lease will be in the hands of a liquidator during the period of the extension.

76. Although I thought it was possible that the GAC might make any of these submissions, I thought it was unlikely that they would make the submissions set out in paragraphs 75(b), 75(h) and 75(k) above. In all cases, if any of the submissions set out in paragraph 75 above were to be put before either or both Ministers, I expect that these submissions would be put to ERA who would be given an opportunity to respond.
77. In respect of the propositions set out in paragraph 75(b) and 75(i) above (about the apparent position of ERA's majority shareholder), I refer to what I have said in paragraph 66(b) above.
78. In respect of the propositions set out in paragraphs 75(d) and 75(g) above (about ERA's apparent lack of intention to conduct mining operations at Jabiluka), I refer to what I said in paragraphs 65 and 66(a) above above.
79. In respect of the position set out in paragraph 75(f) above (about ERA's application apparently being disingenuous), I refer to what I have said in paragraph 65 above.
80. In respect of the propositions set out in paragraphs 75(c), 75(j) and 75(k) above (about ERA's apparent financial capacity), I refer to what I have said in paragraphs 58 and 59 above.
81. Otherwise, I did not anticipate or expect that submissions to the effect set out in the remaining sub-paragraphs in paragraph 75 above had been communicated to Minister King or Minister Monaghan. I also did not anticipate or expect that submissions to this effect would be placed before Minister King or Minister Monaghan at the time they made their decisions. This was because:
- (a) I do not recall these points being made by the GAC, the NLC or others, whether publicly or to ERA, and I do not recall being informed that these points had been communicated to the Ministers or either of them;
 - (b) no one informed me (or ERA) that submissions to that effect had been made to Minister King, Minister Monaghan or the Commonwealth or NT Governments;
 - (c) these are allegations which I believe to be incomplete or false, and had they been drawn to my attention at the time I expect I would have had the same view; and
 - (d) these were serious allegations, which I did not think would be kept secret if they had been communicated to the Ministers.



Recommendation and Key Considerations Attachment:

82. It is apparent to me that the substance of various of the submissions set out in paragraphs 56, 60, 64, 67, 73 and 75 above were also repeated or otherwise referred to in the Recommendation and the Key Considerations Attachment. It does not appear to me that there were any further submissions referred to in those documents which I did not anticipate or expect would be placed before Minister King and Minister Monaghan at the time they made their decisions.


ERA's response had it been informed of these matters


83. Had I been informed that any of the matters set out in paragraphs 56, 60, 64, 67, 73 and 75 above had been raised with either Minister Monaghan or Minister King, or were before them when they came to make their decisions, then I would have taken the steps set out in paragraph 55 above. For example, and depending on the precise matter raised:
- (a) in relation to the contention that there had been previous non-compliance with the terms of the lease, I would have gathered further evidence of ERA's historical compliance with its obligations under Jabiluka MLN1 and sought to place that evidence before Minister King and/or Minister Monaghan (as applicable);
 - (b) in relation to the contention that there had been previous non-compliance with the Section 43 Agreement, I would have gathered evidence that ERA had in fact materially and substantially complied with the Section 43 Agreement and sought to place that evidence before Minister King and/or Minister Monaghan (as applicable);
 - (c) in relation to the various contentions about ERA's financial situation, I would have gathered evidence that ERA was of financial substance and was not likely to be wound up and sought to place that evidence before Minister King and/or Minister Monaghan (as applicable); and
 - (d) in relation to the contention that ERA management did not want Jabiluka to be mined, I would have sought to address the issue by making clear it was factually incorrect. In particular, I would have caused ERA to make clear to Minister King, Minister Monaghan and the Commonwealth and NT Governments that it was not, and is not, the case that ERA wished to retain Jabiluka MLN1 so that it could not be mined. Rather, it has consistently been ERA's position that the current set of arrangements were the best set of arrangements. By this I mean that, in ERA's view, the current set of arrangements:

- (i) best protected the interests of the Mirarr Traditional Owners by preserving their right to veto any mining activity, which as explained in my First Affidavit and above afforded a greater degree of protection than the extension of Kakadu National Park to incorporate Jabiluka;
- (ii) took proper account of ERA's interests, as the long-term holder of a valuable asset (being Jabiluka MLN1) which carried with it a right of renewal for a further term in accordance with condition 2 and in respect of which (as set out in paragraph [65(e)] of my First Affidavit) was the subject of a non-binding indicative offer at around the time of the decision was made to refuse the MLN1 Renewal Application;
- (iii) took proper account of ERA's prior efforts to comply with its obligations under the LTCMA;
- (iv) took proper account of ERA's compliance with Jabiluka MLN1 as well as its compliance with rehabilitation activities at the Ranger mine;
- (v) best protected the position of ERA's shareholders;
- (vi) involved ERA continuing to undertake rehabilitation activities at Jabiluka; and
- (vii) preserved the possibility of future mining at Jabiluka in the event Free, Prior and Informed Consent was obtained from the Mirarr Traditional Owners.

Affirmed by the deponent
at Sydney
in New South Wales
on 9 September 2024
Before me:

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)
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Signature of deponent


Signature of witness

Haiqiu Zhu, an Australian Legal Practitioner within the meaning of the *Legal Profession Uniform Law (NSW)* who has in force a current practising certificate.

Schedule

Federal Court of Australia

District Registry: New South Wales

Division: Administrative and Constitutional Law

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