NOTICE OF FILING

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	24/09/2024 6:18:19 PM AEST
Date Accepted for Filing:	25/09/2024 2:04:13 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

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 59
Rule 29.02(1)

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

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

AFFIDAVIT

Affidavit of:	Madisen Anne Scott
Address:	Level 21, 2 The Esplanade, PERTH WA 6000
Occupation:	Lawyer
Date affirmed:	24 September 2024

Filed on behalf of the First Respondent and Second Respondent , Commonwealth Minister for Resources and Commonwealth of Australia
Prepared by: Madisen Scott
AGS lawyer within the meaning of s 55I of the *Judiciary Act 1903*
Address for Service:
The Australian Government Solicitor
Level 21, Exchange Tower, 2 The Esplanade, PERTH WA 6000
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Document Number	Details	Paragraph(s) of affidavit referring to annexure(s)	Page
1.	Affidavit of Madisen Anne Scott affirmed 24 September 2024		1
2.	Annexure MAS-1 being a copy of the Application for Leave to Amend the Originating Application and proposed amended application	[6]	7
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4.	Annexure MAS-3 being a copy of the transcript from 24 September 2024	[7]	29
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I, Madisen Anne Scott of Level 21, 2 The Esplanade, Perth in the State of Western Australia, Senior Lawyer, affirm:

1. I am an AGS lawyer (within the meaning of s 55I of the *Judiciary Act 1903*). I am one of the lawyers working on this matter on behalf of the First Respondent and the Second Respondent (**Commonwealth parties**).

2. I make this affidavit in support of the Commonwealth parties' application to set aside the Notices to Produce dated 16 September 2024.

3. The matters deposed to in this affidavit are true and correct to the best of my knowledge and belief, and are based on matters within my own knowledge, or information and documents provided to me by AGS' instructing officers in the Department of Industry, Science and Resources (the **Department**) and staff in the office of the First Respondent.

4. Where I rely on documents I have identified those documents in this affidavit.

5. Nothing in this affidavit is intended to waive any right of, and claim to, legal professional privilege.

Interlocutory Application of the Applicant filed 17 September 2024

6. On 17 September 2024, the Applicant filed an application for leave to amend the Originating Application (**Interlocutory Application**).

   Annexed hereto and marked **MAS-1** is a copy of the application for leave to amend, and the proposed amended application.

7. On 24 September 2024, his Honour Justice Kennett heard and determined the Interlocutory Application.

Annexed hereto and marked **MAS-2** is a copy of the orders of Kennett J dated 24 September 2024.

Annexed hereto and marked **MAS-3** is a copy of the transcript of the hearing of the Interlocutory Application.

Prior and current document production

8. Since the commencement of the proceedings, the Applicant has sought production by one or both of the Commonwealth parties of:

8.1. 4 categories of documents, pursuant to a Notice to Produce dated 6 August 2024 to the First Respondent;

8.2. 6 categories of documents, pursuant to Orders of the Court dated 9 September 2024;

8.3. 1 category of documents, pursuant to a Notice to Produced dated 16 September 2024 to the First Respondent; and

8.4. 3 categories of documents, pursuant to a Notice to Produced dated 16 September 2024 to the Second Respondent.

9. I am instructed that to produce documents under [8.1]-[8.2], the following repositories have had to be searched:

9.1. Individual email inboxes of Departmental staff members, persons in the office of the First Respondent and the First Respondent herself, from December 2022 to the present;

9.2. Contemporaneous electronic and hand-written notes of individuals who attended meetings with the applicant or in relation to Jabiluka MLN1;

9.3. dochub – the Department's primary document management system;

9.4. Parliamentary Document Management System – a system used to store, monitor and manage the flow of parliamentary and executive documents; and

9.5. Devices (e.g. mobile phones) of Departmental staff members, persons in the office of the First Respondent and the First Respondent herself, from December 2022 to the present.

10. I am instructed the searches have been conducted primarily by:

10.1. 9 employees in the Department, taking an estimated total of 80 hours of their time so far, and

10.2. 4 members of staff in the office of the First Respondent.

11. Documents are then reviewed by AGS for relevance and privilege and public interest immunity claims, and instructions are sought before they can be produced.

12. Approximately 350 pages were produced to the Applicant pursuant to the Notices referred to at [8.1].

13. I am instructed that searches for documents potentially responsive to the Orders of 9 September 2024 were completed on 19 September 2024. Partial production against some of the categories in the Orders of 9 September 2024 occurred on 23 September 2024. Approximately 1,000 documents continue to be reviewed for relevance and ascertaining privilege and public interest immunity claims.

The further notices to produce dated 16 September 2024

14. On 16 September 2024, the Solicitors for the Applicant served 2 different Notices to Produce, one on each of the Commonwealth Parties.

    Annexed hereto and marked **MAS-4** is a copy of the Notice to Produce dated 16 September 2024 directed to the First Respondent.

    Annexed hereto and marked **MAS-5** is a copy of the Notice to Produce dated 16 September 2024 directed to the Second Respondent.

15. I am instructed that to respond to those Notices, inquiries would need to be made with at least:

    15.1. The Office of the Prime Minister;

    15.2. The Department of Prime Minister and Cabinet;

    15.3. The Office of the Minister for the Environment and Water; and

    15.4. The Department of Climate Change, Energy, Environment and Water.

16. I am instructed that the following searches are anticipated to be required:

    16.1. Individual email inboxes of:

        16.1.1. Staff in each of [15.1]-[15.4];

        16.1.2. The Prime Minister;

        16.1.3. The Minister for the Environment and Water;

    16.2. Devices (e.g. mobile phones) of:

        16.2.1. Staff in each of [15.1]-[15.4];

M. A. Scarlett

Mansfield

16.2.2. The Prime Minister;

16.2.3. The Minister for the Environment and Water;

16.3. Internal document management systems of each of [15.1]-[15.4]; and

16.4. Hand-written and electronic notes.

17. Documents will need to be reviewed for relevance and privilege and immunity claims, before they are produced.

18. I am instructed it is very unlikely that the Commonwealth parties would be in a position to respond completely to the Notices to Produce served on 16 September 2024 before the close of evidence on 30 September 2024. Given the nature of the documents called for, I am instructed that production may not be able to be completed before 28 October 2024.

Affirmed by the deponent at Perth in the

State of Western Australia on

24 September 2024

.....

Before me:

Signature of witness:

.....

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the

Judiciary Act 1903 (Cth)

ANNEXURE MAS-1

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

The following 17 pages is the annexure marked MAS-1 referred to in the affidavit of Madisen Anne Scott made 24 September 2024 before me:

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the *Judiciary Act 1903* (Cth)

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged:	Interlocutory Application - Form 35 - Rule 17.01(1)(a)
Court of Filing:	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	17/09/2024 8:23:01 PM AEST
Date Accepted for Filing:	18/09/2024 10:34:33 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:	Interlocutory Hearing
Time and date for hearing:	24/09/2024, 10:15 AM
Place:	Please check Daily Court List for details

Registrar

Important Information

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The date of the filing of the document is determined pursuant to the Court's Rules.

Form 35
Rule 17.01(1)

Interlocutory application

No. 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
Respondents

To the Respondents

The Applicant applies for the interlocutory orders set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

Time and date for hearing: 10:15am, 24 September 2024

Place: Federal Court of Australia, 184 Phillip Street, Sydney

Date: 17 September 2024

Signed by an officer acting with the authority
of the District Registrar

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 Tel 02 9225 5716
Email leon.chung@hsf.com
Address for service Level 34
161 Castlereagh St
Sydney NSW 2000

[Form approved 01/08/2011]

Interlocutory orders sought

1. The Applicant has leave to file and serve an Amended Originating Application in the form annexed to the Affidavit of Leon Chung dated 17 September 2024 and marked "A".

2. Such further or other orders as the Court considers appropriate.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 17 September 2024

Signed by Leon Chung
Lawyer for the Applicant

Amended Originating application for judicial review

No. 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 Respondents

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date]
Place: [address of Court]

The Court ordered that the time for serving this application be abridged to [Registry will insert date, if applicable]

Date: ~~6 August 2024~~17 September 2024

Signed by an officer acting with the authority of the District Registrar

The Applicant applies to the Court to:

(a) review the decision of the Third Respondent dated 26 July 2024 that the Applicant's **Application** for renewal of Jabiluka Mineral Lease 1 (**Jabiluka MLN1**) be refused (**the Renewal Decision**);

(b) review the decision and/or conduct of the First Respondent and/or Second Respondent to provide advice to the Third Respondent that the Application be refused (**the Advice Decision**).

Details of claim

The Applicant is aggrieved by the decisions and/or conduct because:

1. the Applicant is the titleholder of Jabiluka MLN1;

2. the Applicant made the Application and had a right to have it lawfully determined.

Grounds of application

The Advice Decision

The Advice Decision was and is invalid or otherwise beyond power, on the grounds set out in paragraphs 1, 2, 3 and/or 3A below.

1. In making the Advice Decision, the First Respondent and/or the Second Respondent denied the Applicant procedural fairness.

   Particulars:

   (a) In deciding whether to give advice, and as to the terms of advice, for the purposes of s 187(1) of the *Mineral Titles Act 2010* (NT), the First Respondent and/or the Second Respondent was obliged to afford the Applicant procedural fairness and natural justice, including because the advice was apt to affect adversely the proprietary and financial interests of the Applicant and to destroy or impair the rights or expectations of the Applicant arising by reason of condition 2 of ~~MNL1~~ MLN1.

   (b) In making the Advice Decision, the First Respondent and/or the Second Respondent denied the Applicant procedural fairness and natural justice, because:

      (i) the First Respondent and/or the Second Respondent failed to disclose to the Applicant, and to give the Applicant an opportunity to comment on, information (including credible, relevant, adverse and significant information) received by the First Respondent and/or the Second Respondent, and/or to which the First Respondent and/or Second Respondent had regard, (including submissions and/or representations by or on behalf of:

(A) the ~~Northern Land Council~~ Sixth Respondent;

(B) the Mirarr Traditional Owners~~)~~;

(C) the Gundjeihmi Aboriginal Corporation (**GAC**);

(D) the Third Respondent;

(E) the office of the First Respondent;

(F) the Prime Minister;

(G) the Minister for the Environment and Water (**Environment Minister**);

(H) the Minister for Indigenous Australians (**Indigenous Australians Minister**);

(I) Peter Garrett;

(J) Professor Don Henry

(K) the Department of Prime Minister and Cabinet;

(L) the office of the Third Respondent;

(M) the office of the Prime Minister;

(N) the office of the Environment Minister;

(O) the office of the Minister for Indigenous Australians;

(P) Senator Malarndirri McCarthy;

(Q) the office of Senator Malarndirri McCarthy;

(R) Luke Gosling OAM MP;

(S) the office of Luke Gosling OAM MP;

(T) Senator Marion Scrymgour;

(U) the Commonwealth Department of Industry, Science and Resources (**Commonwealth Department**);

(V) the Northern Territory Department of Industry, Tourism and Trade;

(W) the Northern Territory Department of Environment Parks and Water Security;

(X) the Office of the Supervising Scientist;

(Y) Yvonne Margarula; and

(Z) unidentified members of the public;

(iA) the First Respondent and/or Second Respondent failed to give the Applicant a reasonable opportunity to be heard on the issues raised in the submissions and representations referred to in sub-paragraph (i);

(ii) the First Respondent and/or Second Respondent failed to give to the Applicant a reasonable opportunity to be heard on the procedures to be applied by the First Respondent and/or the Second Respondent in making the Advice Decision~~;~~, including because:

(A) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to when the decision would be made;

(B) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to what information would be placed before the decision-maker;

(C) the First Respondent and/or Second Respondent did not give the Applicant a reasonable opportunity to be heard as to what oral and/or written representations would be sought and/or received by the First Respondent and/or Second Respondent;

(iii) the First Respondent and/or Second Respondent failed to give the Applicant the opportunity, or a reasonable opportunity, of ascertaining the relevant or critical issues on which the decision was likely to turn, and the opportunity, or a reasonable opportunity, to make submissions and provide information on those issues, including:

(A) the desire, on the part of the Commonwealth, to extend Kakadu National Park upon the expiry of the initial term of Jabiluka MLN1;

(B) the views of the ~~Northern Land Council~~ Sixth Respondent and the Mirarr Traditional Owners;

(C) the likelihood (or otherwise) that the ~~local landowners~~ Mirarr Traditional Owners would not consent to mining during the renewal period applied for; ~~and~~

(D) the prospects of the site being developed or mined within the ten year renewal period that was sought by the Applicant~~.~~;

(E) the material received by the First Respondent and/or Second Respondent in respect of the Advice Decision; and

(F) the material placed before the First Respondent and/or Second Respondent at the time of the Advice Decision;

(iv) On 28 June 2024, there were meetings involving two representatives of the Applicant (Brad Welsh and Ken Wyatt), two or three representatives of the Commonwealth Department ~~of Industry, Science and Resources~~ (including Kym Moore and Georgia Tree) and the First Respondent and, in respect of those meetings:

(A) there was a single meeting involving the First Respondent scheduled for approximately 30 minutes, at which the First Respondent was present only for the last 10 minutes;

(B) there was a separate meeting between Brad Welsh, Ken Wyatt and Kym Moore;

(C) the First Respondent did not ask any questions or otherwise identify any issues of concern or for consideration by the Applicant, and instead said that the Applicant had "made good points";

(D) no representatives of the Commonwealth Department raised any issues of concern or for consideration by the Applicant;

(E) the First Respondent and representatives of the Commonwealth Department created the impression in the minds of the Applicant that no advice in respect of the Applicant was imminent and that, if a decision was pending, there would be consultation with the Applicant because:

(i) Kym Moore said that the Third Respondent had not referred the Application at that point;

(ii) Mr Welsh said that he did not expect the Application to be referred before the Northern Territory went into caretaker mode, and that he would come back to Canberra to meet with relevant parties, including the First Respondent, and the Commonwealth Department during September to continue the discussion;

(iii) the First Respondent and the representatives of the Commonwealth Department did not indicate that it would or might be futile to return in September because advice would, by that point, have been given;

(v) in previous discussions between Mr Welsh and representatives of the Commonwealth Department, there had been discussions about different ways of working through potential issues with the Application, including a possible

workshop; the First Respondent and/or Second Respondent otherwise failed to give the Applicant a fair and reasonable opportunity to be heard in respect of the Advice Decision;

(vi) the First Respondent and/or Second Respondent failed to give reasonable and lawful consideration to the submissions advanced by the Applicant, including the material in the Application, having regard (inter alia) to:

(A) the representations that had already been communicated to, by or on behalf of the Prime Minister, the Environment Minister and/or the Indigenous Australians Minister;

(B) the desire on the part of the First Respondent to make a decision quickly and adversely to the Applicant (inter alia) to allow the Prime Minister to make an announcement at the NSW State Labor Conference on 27 July 2024 and having regard to the timing of the NT election;

(C) the fact that the First Respondent had a copy of MS24-000911, which included (together with a volume of other documents) the Application, for not more than 79 minutes before making, and then communicating, the Advice Decision;

(D) the absence of any reasons from the First Respondent indicating that she gave reasonable or lawful consideration, or any consideration, to the Application;

(vii) the material referred to in the Affidavit of Brad Welsh affirmed 9 September 2024.

2. The Advice Decision was unreasonable.

Particulars

(a) In deciding whether to give advice, and as to the terms of advice, for the purposes of s 187(1) of the *Mineral Titles Act 2010* (NT), the First Respondent and/or the Second Respondent was obliged to act in a manner which was legally reasonable and having regard to all considerations which the law required, and was obliged otherwise to act for authorised purposes;

(b) in making the Advice Decision, the First Respondent and/or the Second Respondent:

(i) engaged in the conduct alleged in particular (b) in Ground 1;

(ii) failed to have regard to, or give the weight lawfully required to (inter alia):

(A) the Applicant's interest in Jabiluka MLN1;

(B) condition 2 of Jabiluka MLN1;

(C) the potential for Jabiluka MLN1 to be renewed beyond the 10 years referred to in condition 2 of Jabiluka MLN1;

(D) the adverse economic consequences (including for shareholders of the Applicant) of advice that the Application be refused;

(E) section 35(4) of the *Atomic Energy Act 1953* (Cth), including the consideration that the title and property of the Commonwealth in any uranium in the area of Jabiluka MLN1 was subject to the rights of the Applicant in Jabiluka MLN1;

(F) the obligations of the Applicant under condition 3 and Schedule 3 of Jabiluka MLN1 (including the Applicant's rehabilitation obligations);

(G) clauses 2.1 and 5.1(d) of the Long Term Care and Maintenance Agreement with the Applicant dated 25 February 2005 (**LTCMA**) and the provisions made in those clauses;

(H) in the event that Jabiluka MLN1 was not renewed, the potential for a future government to grant a new mining lease over the area of Jabiluka MLN1;

(I) further to sub-paragraph (H), in the event that a future government were to grant a new mining lease over the Area, the potential for any future titleholder not to be the subject of a contractual or other obligation to the effect set out in clause 5.1(d) of the LTCMA;

(J) the process for proclaiming land into Kakadu National Park as set out under s 344 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);

(K) the fact that a proclamation to include land into Kakadu National Park under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) can be reversed by further proclamation;

(L) section 68 of the *Mineral Titles Act 2010* (NT);

(M) section 203 of the *Mineral Titles Act 2010* (NT);

(N) the national interest in preserving Commonwealth control over "prescribed substances" within the meaning of the *Atomic Energy Act 1953* (Cth);

(iii) had regard to and gave excessive and impermissible weight to (inter alia):

(A) the desire to extend the Kakadu National Park upon the expiry of the initial term of Jabiluka MLN1;

(B) the views of the ~~Northern Land Council~~ Sixth Respondent and the Mirarr ~~people~~ Traditional Owners (including because of the obligations under cl 5.1(d) of the ~~Long Term Care and Maintenance Agreement with ERA (LTCMA) dated 25 February 2025~~ LTCMA)~~.~~;

(C) the desire to make a decision, adverse to the Applicant, to allow the Prime Minister to deliver a speech to the NSW State Labor Party conference making announcements about mining in Jabiluka and the Kakadu National Park;

~~(iv) failed to have regard to (or gave inadequate weight to) the fact, of which they were aware, that the Mirarr people were obliged, by cl 5.1(d) of the LTCMA to acknowledge that "ERA holds and is entitled to continue to hold MLN1 and that they will not initiate, fund or allow to be brought in their names any action which seeks the result that MLN1 is forfeited, cancelled or otherwise prejudicially affected, otherwise than for breach by ERA of [the LTCMA]";~~

(iv) acted with regard to and for the purpose of extending the Kakadu National Park into the land covered by Jabiluka MLN1;

Particulars

The Hon Madeleine King MP, "Work Begins to Add Jabiluka Site to Kakadu National Park" (27 July 2024).

Anthony Albanese, Speech, New South Wales State Labor Conference (27 July 2024).

Further particulars will be provided after compulsory production.

(v) did not act for the purposes of the *Atomic Energy Act 1953* ~~(NT)~~(Cth), including the interest in preserving Commonwealth control over "prescribed substances" in the national interest~~.~~;

(vi) failed to proceed on the basis of correct legal principles, correctly applied, including by proceeding on the basis that:

(A) non-renewal of Jabiluka MLN1 would ensure Jabiluka was protected from mining forever;

(B) non-renewal of Jabiluka MLN1 had the effect that the area the subject of Jabiluka MLN1 was allowed to be added to Kakadu National Park;

(C) her advice was binding on, and must be adhered to, by the Third Respondent and/or Fourth Respondent;

(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.

3. The Advice Decision was a purported exercise of executive power of the Commonwealth that was not authorised by, or was inconsistent with, statute.

Particulars

(a) The executive power vested in the First Respondent and/or Second Respondent to give "advice" was, at all times, subject to statutory control;

(b) On the proper construction of the *Atomic Energy Act 1953* (Cth), including s 35(4) of that Act, the power or capacity of the First Respondent and/or Second Respondent to give "advice" in respect of a "prescribed substance" was subject to rights granted by the Northern Territory in respect of uranium, including Jabiluka MLN1, such that it was (and is) not open to the First Respondent and/or Second Respondent to give "advice" to the effect that such a right should be extinguished, defeated or impaired;

(c) At all material times, under Jabiluka MLN1, by reason of condition 2 of that lease, the Applicant had a right to a renewal of Jabiluka MLN1;

(d) Further, at all material times, under the *Mineral Titles Act 2010* (NT) and Jabiluka MLN1, the Applicant had a right to a consideration of an application for renewal of Jabiluka MLN1 on the merits;

(e) The effect of the Advice Decision was to extinguish, defeat or impair those rights, and/or to acquire the property of the Applicant recognised in s 35(4) without statutory authority, and the Advice Decision was therefore in breach of the condition alleged in paragraph (b).

3A. The Advice Decision was unlawful because the First Respondent and/or Second Respondent failed to proceed on the basis of correct legal principles, correctly applied.

Particulars

(a) Paragraph 2(b)(vi) is repeated.

(b) Paragraphs 6(a)–(f) below are repeated.

4. In all the circumstances, by reason of the Advice Decision being invalid or otherwise beyond power as set out above, the "advice" provided to the Third Respondent was not "advice" within the meaning of section 187(1) of the *Mineral Titles Act 2010* (NT).

The Renewal Decision

The Renewal Decision was and is invalid or otherwise beyond power, on the grounds set out in paragraphs 5, 6 and/or ~~6~~ 7 below.

5. The Third Respondent erred in law and made a jurisdictional error in considering that s 187 of the *Mineral Titles Act 2010* (NT) conferred the power or the duty to make the Renewal Decision.

Particulars

(a) It was a condition of validity of the Renewal Decision that:

(i) the Third Respondent proceed in accordance with correct legal principles correctly applied;

(ii) the Third Respondent treat the exercise of the power to renew as a discretionary power, to be exercised in accordance with the circumstances of the case pursuant to ss 43 and 70 of the *Mineral Titles Act 2010* (NT), subject to any valid operation of any duty imposed by s 187(1) of the *Mineral Titles Act 2010* (NT);

(b) in making the Renewal Decision, the Third Respondent:

(i) proceeded on the basis that the Advice Decision was valid;

(ii) proceeded on the basis that there was, before him, "advice of the Commonwealth Minister" for the purposes of section 187(1) of the *Mineral Titles Act 2010* (NT)

(iii) proceeded on the basis that he was subject to a duty to act in accordance with, and to give effect, to that advice;

(iv) failed to exercise a discretion, by reference to all the circumstances of the case, and instead treated the exercise of the power as foreclosed by the purported "advice" from the Second Respondent;

(c) the Advice Decision was invalid, and the "advice" given by the First Respondent was not "advice of the Commonwealth Minister" within the meaning of section 187(1) of the *Mineral Titles Act 2010* (NT);

(d) further or in the alternative to (c) above, s 187(1) of the *Mineral Titles Act 2010* (NT) purported to impose a statutory limitation on the power to renew that was inconsistent with the obligation to renew in condition 2 of Jabiluka MLN1, with the consequence that condition 2 prevailed and s 187(1) did not operate in the circumstances;

(e) the Third Respondent therefore:

(i) failed to proceed in accordance with correct legal principles correctly applied;

(ii) failed to treat the exercise of the power to renew as a discretionary power, to be exercised in accordance with the circumstances of the case, subject to any valid operation of any duty imposed by s 187(1) of the *Mineral Titles Act 2010* (NT);

(iii) committed jurisdictional error in making the Renewal Decision.

6. The Third Respondent asked the wrong question, and/or failed to take account of a relevant consideration, and/or failed to act in accordance with correct legal principles correctly applied and/or otherwise acted unlawfully, by failing to consider and determine the ~~renewal application~~ Application by reference to and application of condition 2 of Jabiluka MLN1.

Particulars

(a) Jabiluka MLN1 was a "corresponding mineral title" within the meaning of the *Mineral Titles Act 2010* (NT);

(b) under s 203(1) of the *Mineral Titles Act 2010* (NT), if a condition of a corresponding mineral title is inconsistent with a provision of the Act, the condition of the corresponding mineral title prevails to the extent of the inconsistency;

(c) it was a condition of Jabiluka MLN1 that, provided the Applicant has complied with the *Mining Act 1980* (NT) (or, alternatively, the *Mining Act 1980* (NT) and any successor statutes, including the *Mineral Titles Act 2010* (NT)) and the conditions to which Jabiluka MLN1 is subject, the Third Respondent must renew the lease for a period not exceeding ten years (condition 2);

(d) at all material times, the Applicant had, as a matter of substance, complied with the *Mining Act 1980* (NT), the *Mineral Titles Act 2010* (NT) and the conditions of Jabiluka MLN1, such that the entitlement given by condition 2 was enlivened;

(e) the entitlement given by condition 2 of Jabiluka MLN1 included an entitlement to a renewal of Jabiluka MLN1 for such lease term, not exceeding 10 years, as was applied for by the Applicant;

(f) the Third Respondent was obliged to give effect to that entitlement, that being an obligation which prevailed over any obligation otherwise arising to give effect to advice of the First Respondent and/or Second Respondent;

(g) the Third Respondent unlawfully failed to give effect to that entitlement, and instead purported to treat the advice of the First Respondent and/or Second Respondent as binding and determinative of the Application.

7. In making the Renewal Decision, the Third Respondent denied the Applicant procedural fairness.

Particulars:

(a) In deciding under s 43(2) of the *Mineral Titles Act 2010* (NT) (or otherwise) whether to renew a mineral title, the Third Respondent was obliged to afford the Applicant procedural fairness and natural justice, including because any decision in respect of renewal was apt to affect adversely the proprietary and financial interests of the Applicant and to destroy or impair the rights or expectations of the Applicant arising by reason of condition 2 of MLN1.

(b) The decision-making process put in train and acted on by the Third Respondent in respect of the renewal involved the seeking, preparation, communication and receipt of advice from the First Respondent and/or Second Respondent.

(c) The First Respondent and/or Second Respondent departed from the requirements of procedural fairness and natural justice, for the reasons set out in Ground 1.

(d) At all material times, including after the Advice Decision and before the Renewal Decision, the First Respondent and/or Second Respondent did not remedy these departures by the First Respondent and/or Second Respondent, and those departures infected the fairness of the Renewal Decision.

Orders sought

1. An order setting aside the Renewal Decision.
2. Further, or alternatively, an order declaring that the Renewal Decision is invalid and of no legal effect.
3. An order declaring that the Advice Decision was beyond power and is invalid and of no legal effect.
4. Further or in the alternative, an injunction restraining the First Respondent and/or the Second Respondent from giving advice to the Third Respondent and/or the Fourth Respondent, for the purposes of section 187(1) of the *Mineral Titles Act 2010* (NT), unless and until natural justice has been afforded to the Applicant.
5. An order declaring that Jabiluka MLN1 continues in force.
6. Costs.

7. Interest on costs.

8. Such further or other order as the Court considers appropriate.

Applicant's address

The Applicant's address for service is:

Place: Level 34, 161 Castlereagh St, Sydney NSW 2000

Email: leon.chung@hsf.com

The Applicant's address is:

Level 8, TIO Building
24 Mitchell St,
Darwin City NT 0800.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: ~~6 August 2024~~17 September 2024

Signed by Leon Chung
Lawyer for the Applicant

Schedule

No. of 20

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
Seventh Respondent:	Yvonne Margarula

ANNEXURE MAS-2

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

The following 3 pages is the annexure marked MAS-2 referred to in the affidavit of Madisen Anne Scott made 24 September 2024 before me:

.....Mwoollett.....

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the *Judiciary Act 1903* (Cth)

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: 24 September 2024

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. Leave be granted to the applicant to file an amended originating application incorporating the amendments shown in the draft at Annexure A to the affidavit of Leon Chung affirmed 17 September 2024, save for:
    a. the additions proposed to particular (b)(i) of ground 1;
    b. the addition of paragraphs (E) and (F) to particular (b)(iii) of ground 1;
    c. paragraphs (A) and (B) of proposed particular (b)(vi) of ground 1;
    d. proposed particular (b)(vii) of ground 1;
    e. proposed paragraph (C) of particular (b)(iii) of ground 2.
2. The interlocutory application filed 17 September 2024 otherwise be dismissed.
3. The applicant pay the costs of the fifth and sixth respondents of the interlocutory application filed 17 September 2024.
4. The parties otherwise bear their own costs.

THE COURT NOTES THAT:

5. The applicant does not press:
    a. The word "including" in particular (b)(i) of ground 1;
    b. The world "including" in particular (b)(iii) of ground 1;
    c. The words "inter alia" in particular (b)(vi) of ground 1;
    d. The word "including" in particular (b)(vi) of ground 2.

Date orders authenticated: 24 September 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
Seventh Respondent	YVONNE MARGARULA

ANNEXURE MAS-3

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

The following 46 pages is the annexure marked MAS-3 referred to in the affidavit of Madisen Anne Scott made 24 September 2024 before me:

.....Mwoollett.....

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the *Judiciary Act 1903* (Cth)

VIQ SOLUTIONS

T: 1800 287 274
E: clientservices@viqsolutions.com
W: www.viqsolutions.com.au

Ordered by: Fatemeh Hashemi
For: Australian Government Solicitor (NSW)
Email: fatemeh.hashemi@ags.gov.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1962100

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

KENNETT J

No. NSD 1056 of 2024

ENERGY RESOURCES OF AUSTRALIA LTD
and
MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH) and OTHERS

SYDNEY

10.17 AM, TUESDAY, 24 SEPTEMBER 2024

MR R. LANCASTER SC appears with MR D. HUME for the applicant
MR P.M. KNOWLES SC appears MS DAVIDSON for the first and second respondents
MR L. SPARGO-PEATTIE appears for the third and fourth respondents
MR S. GLACKEN KC appears for the fifth and sixth respondents
MS K. BONES appears for the seventh respondents

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

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

HIS HONOUR: Thank you, Mr Lancaster.

MR P.M. KNOWLES SC: Court pleases, I appear with my learned friend Ms DAVIDSON for the first and second respondents.

HIS HONOUR: Yes. Thanks, Mr Knowles.

MR L. SPARGO-PEATTIE: If it pleases the court, my name is Spargo-Peattie. I appear for the third and fourth respondents.

HIS HONOUR: Yes, Mr Spargo-Peattie.

MR S. GLACKEN KC: If your Honour pleases, I appear with Mr SOLOMON RIDGE for the NLC parties, the fifth and sixth respondents.

HIS HONOUR: Yes. Thank you, Mr Glacken.

MS K. BONES: May it please the court, Bones, I appear for the seventh respondent.

HIS HONOUR: Yes. Thank you, Ms Bones.

MR LANCASTER: Your Honour, the applicant moves on the interlocutory application to amend its originating application. The interlocutory application was filed on 17 September. In support of the application, the applicant reads the affidavit of Leon Chung of 17 September 2024.

HIS HONOUR: Yes.

MR LANCASTER: And I tender exhibit LC4, exhibited to that affidavit.

HIS HONOUR: That being the proposed amended application?

MR LANCASTER: So the proposed amended application is an annexure to the affidavit.

HIS HONOUR: I see. So exhibit - - -

MR LANCASTER: There's a separate exhibit, called LC4.

HIS HONOUR: I see. Just let me make sure I have that.

MR LANCASTER: There will be only limited recourse to that. I hope, your Honour, perhaps we could proceed on the basis that when I come to it, I can hand up a copy to your Honour.

HIS HONOUR: Yes. All right. Yes.

MR LANCASTER: Thank you. That's the evidence on the application for the applicant.

HIS HONOUR: Yes. Thank you.

MR KNOWLES: Your Honour, I seek to read on the application the affidavit of my instructing solicitor, Madisen, M-a-d-i-s-e-n, Anne with an E, Scott with a double T. And that is an affidavit affirmed on 23 September 2024.

HIS HONOUR: Yes.

MR LANCASTER: There are some objections to that, your Honour.

HIS HONOUR: Yes. All right. Maybe we should deal with those.

MR LANCASTER: It was served just after 5.30 last night. I didn't have the opportunity to give notice to my friend or to your Honour of the objections, but I hope they're able to be dealt with readily.

HIS HONOUR: Yes?

MR LANCASTER: Yes. So the objections are to paragraphs 6, 16 to 17, and 18 to 22. The objection to paragraph 6 is a limited one. In the form in which it is in, it gives the impression that the only materials before the first respondent were those in the ministerial brief. We know, I think, that not to be correct. It's conclusory in form, so it's objectionable on that basis, but if my learned friend is prepared to read that on the basis that that ministerial brief was before the first respondent, I can agree that your Honour would read it in that way. It's just the purported exclusiveness of the way it's currently expressed.

HIS HONOUR: Yes. Do you want to say anything about that, Mr Knowles?

MR KNOWLES: Your Honour, I don't necessarily agree with my friend that it's obviously incorrect, unless he is referring to what is referred to in his submissions as the "yellow submission," but I'm happy to read it in the limited way that he seeks to confine it.

HIS HONOUR: Yes.

MR KNOWLES: That this was before the Minister at the time of making the decision. That's not in dispute. Whether there was anything else in addition can be a matter, if at all, for the final hearing.

MR LANCASTER: That's precisely the point, your Honour. Yes.

HIS HONOUR: Yes.

MR LANCASTER: A more substantial objection to 16 and 17. In my submission, your Honour would read these paragraphs as submissions. There are matters that I would wish to investigate in cross-examination if they're not read as submissions. I don't say they would ..... by any stretch, but your Honour will see that the gist of 16 and 17 is a very generally expressed assertion that the Commonwealth's response to two of the proposed grounds would require certain steps and would put the timetable at risk.

If my friend wishes to advance a submission from the Commonwealth on that basis, that's one thing, but the generality in which it's expressed means it cannot or should not stand as evidence of those propositions. For example, in respect of 17, there's no identification of the witnesses or witness who might be involved. I might say that the two grounds referred to in paragraph 16, your Honour, can look at the proposed amendments.

They both go to the Minister's consideration, the Minister's state of mind, and how it is that there could be thought to be affidavit evidence from someone other than the Minister about these things is difficult to fathom, and as presently advised – I think this is common ground – there's been a refusal to provide a statement of reasons for the decision from the Commonwealth, and we're not aware of any intention to call the Commonwealth Minister to give evidence.

So in those circumstances, we're at a loss as to what the evidence in paragraph 17 could refer to. So that responds to the substance of what's said there, but as I indicated, it's one thing for that to be advanced as a submission, it's another thing for it to be put in an affidavit.

HIS HONOUR: Mr Knowles.

MR KNOWLES: The Court please. Your Honour, we do make a submission, which I will come to in course, that my client is prejudiced by the opening up of new factual disputes or areas of contention within a compressed timetable for an expedited hearing. I do press this as evidence of that prejudice and evidence of the steps that will need to be taken to address some limited grounds advanced in the proposed amended application.

The starting point would be that my friend, if he wished to cross-examine on an interlocutory application, particularly cross-examining an instructing solicitor, would need leave. To the extent it's said that that evidence lacks specificity, well, that's a

matter that could entirely be considered in the questions of weight, but in my submission, it doesn't lack specificity.

For example, it is said that paragraph 16 and 17 do not identify the witnesses involved. That's the very point. In order to determine who, for instance, prepared the speech at paragraph – referred to in paragraph 16.1 of the affidavit, investigations would have to be made to determine who the relevant individual was and then determine the matters in paragraph 16.2 and 16.3.

So I don't accept that the affidavit is somehow – or those paragraphs of the affidavit are somehow defective because they lack specificity. To the extent my friend made a submission about the position of the Minister and evidence that may or may not be given to the Minister, my client completed the service of evidence on the existing issues in the application this morning. There can be no inference drawn that because we didn't call the Minister in relation to the existing issues in the application, further inquiries wouldn't be made on relation to new issues which are sought to be introduced by the amended application, and to the extent my friend sought to make something of the refusal by my client to provide a statement of reasons, that has nothing to do whether or not evidence would be called from any particular person.

It just reflects the state of the authorities that an ex post facto statement of reasons is inadmissible, except perhaps to the extent it would constitute an admission. So, with respect, there's not much forensic benefit for my client issuing a statement of reasons that can only be used against it. The Court pleases.

HIS HONOUR: I'm not sure how much – I mean, what do I get from these paragraphs - - -

MR KNOWLES: I will come to it, your Honour.

HIS HONOUR: - - - that couldn't be pointed out as a matter of obvious inference from circumstances.

MR KNOWLES: In part, yes, including the circumstances of the nature of the persons from whom instructions would need to be sought. It is obvious, but when I come to the last - - -

HIS HONOUR: Except for the last sentence, which just relays an instruction.

MR KNOWLES: Yes.

HIS HONOUR: I don't know how whether – I don't know where that takes me either.

MR KNOWLES: Is your Honour referring to the last sentence of paragraph - - -

HIS HONOUR: 17.

MR KNOWLES: - - - 17? Yes. That is an instruction. The point that will be made ultimately in my submission is that on the compressed expedited timetable, we're not in a position to meet the factual matters raised by a small number of the new allegations, and it puts in jeopardy the existing timetable, including the hearing date. That's where it ultimately leads.

I accept that the evidence is only one matter that your Honour would consider in relation to that inference is also available, and many of these matters probably could be made by submission, but I don't want to leave my friend in the position of being able to say, well, there's no evidence to support the submission being made that, for instance, it would take time not available in the current timetable to meet these new factual questions.

HIS HONOUR: Yes, all right.

MR KNOWLES: I suspect that will also be the submissions I will make in relation to paragraphs 18 to 21, but I haven't heard my friend's objection to that.

HIS HONOUR: Are you replying on 16 and 17?

MR LANCASTER: In my submission, your Honour would reject paragraph 16 and 17, particularly having regard to those grounds that I mentioned. If your Honour has had the opportunity to cross-reference, ground 1B(vi) is a failure by the Commonwealth Minister and the Commonwealth to give consideration to submissions advanced by the applicant having regard to subparagraphs (a) to (d).

So that is very much in the nature of the applicant adding a particular to the ground of denial of procedural fairness by reference to the inferences and facts that will be available at the hearing as to what was involved in the decision-making process.

It falls, paragraph (vi), in my submission, falls squarely within what you read in our written submissions is that many of these amendments are in the nature of elucidating what submissions will be made at final hearing on existing grounds, and in that respect, we thought we were assisting the process of the respondents' consideration of the case by providing further particulars, but in relation to (vi), it's clearly tied to the Commonwealth Minister's position and state of mind, and that will be a matter of inference in the absence of any evidence from her and the absence of a statement of reasons, which is why I mentioned that, and then to look at paragraph 2(iii)(C), that, likewise, is a further particular of what we will invite your Honour to consider, is an inferred desire to make the decision within a time frame and of a nature to allow the Prime Minister to make a speech about Jabiluka not going ahead, which the materials will support.

So again, query how either of those two particulars could, as asserted in 16 and 17, require the preparation of affidavit evidence that might prejudice the hearing. In any event, the objection is that it's not sufficiently particularised to allow your Honour to

place any weight on it, and the materials before the court at the final hearing will determine whether or not the relevant inferences can be breached.

HIS HONOUR: Yes. All right. Well, I will allow 16 and 17, but I don't regard that as foreclosing submissions to the effect that they're not right.

MR LANCASTER: Thank you, your Honour. Which I think I've made and probably won't repeat.

HIS HONOUR: Yes.

MR LANCASTER: In relation to 18 to 22, there is no application to set aside these notices to produce. They are directed to, again, the role of the Minister in respect of two very limited categories of conduct. I don't know if your Honour has had the opportunity to look at the notices to produce. One is about a joint press release that was issued, and one is about the prime ministerial speech about Jabiluka Mine extension. Can I go briefly to show your Honour the notices? So the first one, which the deponent annexes as MAS3, starts at page 99 of the bundle. It's got print page 99, I assume that's the same on the PDF.

HIS HONOUR: It's never the same.

MR LANCASTER: The notice itself, the paragraph of it, single paragraph of it is on page 101, 102 of the print copy. Does your Honour have that?

HIS HONOUR: I have that.

MR LANCASTER: So that identifies – we have a joint media release. This calls for draft versions of it, the dates of the drafts, comments on proposed amendments and communications to and from the first respondent in respect of it. So a very limited category. As I said, there's no current application to set aside.

So the first basis for the objection is materiality, but if the point of it is to support the general contention in paragraph 22 of difficulty of responding in time, again, cannot, in the form in which it's presented, rise above a recording of an instruction without any explanation of how those estimates are arrived at and what searches would require to be undertaken and who would need to be contacted and so on.

The second notice to produce, which the deponent annexes is MAS4, is a relevant paragraph. There are three relevant paragraphs, pages 106 to 107 of the bundle, and this is directed to obtaining a copy of the final version of the speech that's been referred to. It occurred at – we know from reports that it occurred at a labour annual conference on 27 July.

We don't have the full text of it, so we're calling for that. Paragraph 1, and paragraphs 2 and 3, seeking to obtain draft versions of the speech communications relevant to it. So again, very, very limited and specific, and we would have thought

that even if the searches in paragraphs 19 and 20 of this affidavit are required to be undertaken, it's searching for very specific things.

So in other words, the objection is paragraph 22 on instructions should not be accepted as a matter of evidence, because it is incapable of supporting the instructions that were given and the submission that's made in paragraph 22.

HIS HONOUR: These notices to produce are directed to the Commonwealth, are they?

MR LANCASTER: They are. The first one is to the Minister, that's on page 101, and the second one is directed to the Commonwealth, that's page 106.

HIS HONOUR: Yes. Yes, Mr Knowles?

MR KNOWLES: Your Honour, once again, my friend's objection and the submissions on it drift into arguments about what weight could be put on it, and your Honour can hear that argument in the course of the motion, in my submission. There's nothing objectionable in terms to Ms Scott's evidence. Contrary to what my friend said, paragraphs 19 and 20 do identify the type of enquiries that would need to be made, and there's quite an important contradiction in what my friend said in the objection to the earlier paragraphs and the content of the notice to produce.

In respect of the earlier paragraphs, he made the submission that the scope of factual dispute is not significantly wider because the questions now raised by the amendments really just go to the Minister's state of mind when making the decision and her intentions, and yet that argument is contradicted by the form of the notices to produce themselves, which in particular the second one addressed to the Commonwealth will require searches beyond the Minister do go to the underlying issues surrounding the speech delivered by the Prime Minister and, to the extent my friend said that the statements in the affidavit concerning the amount of time required to make those searches is not sufficiently explained, or the instructions about the time required is not sufficiently explained by the affidavit itself.

In my submission, first, the inference would be available even without the affidavit, given the breadth of the matter sought in the notices to produce but, in any event, that can be a matter for submission and weight. It doesn't require the cross-examination of the deponent, and it certainly doesn't require the court refusing to or rejecting the evidence on the threshold question of admissibility.

HIS HONOUR: What's the relevance, if there's no application to set aside these notices to produce?

MR KNOWLES: Not yet, and they were served on the 16th. They're currently under consideration but, in some ways, it's a bit cheeky of my friend to say there's no application to set them aside. The notices to produce seek documents that can only be relevant if these amendments are allowed. So, to some extent, they've

jumped the gun by serving the notice to produce but if the notice – but if the amendments are allowed, and assuming the notices to produce are not set aside, then we are making an argument about "This is how much time will be required to respond to them," and the relevance of that is that the amount of time to taken to respond to the notices to produce, assuming they are not set aside, goes to the question of whether leave should be granted to open up these new factual inquiries.

HIS HONOUR: Yes.

MR KNOWLES: Court please.

HIS HONOUR: Yes.

MR LANCASTER: Just two brief submissions in reply, your Honour. One is that it's not right that the notices to produce are only supported by the proposed amendments. We have in paragraph 3 – I'm sorry, paragraph 2(b)(4) made an allegation about the Minister acting with regard and for the purpose of extending Kakadu and so on, and the notice to produce calls for material relevant to that contention. The second point in reply is, your Honour, to the extent the notices to produce go outside merely communications of the first respondent, we would be entitled – and, in my submission are entitled – to documents from which a submission can be made of an inference of the Minister's state of mind having regard to other material, in the absence of a statement of reasons and in the absence of evidence from the Minister.

So the objection to the breadth, even though there is no current application to set aside, is not a good one, in my submission because that is the way an applicant is entitled to seek to prove its case by inference from surrounding documentary material in the absence of the decision-maker going into evidence him or herself.

HIS HONOUR: Yes. Well, I think the only relevance for today's purposes is that solicitors for the Commonwealth parties are already busy, among other things, responding to notices to produce. Because at least one of those notices is directed to the Commonwealth as a polity and relates to a speech by the Prime Minister, it doesn't seem far-fetched that there would be a large number of searches that would need to be made. That's as far as I think it goes. I will allow those paragraphs and submissions can be made on weight.

MR LANCASTER: May it please the Court. Your Honour, could I then address the proposed amended - - -

HIS HONOUR: Now, is there evidence from other respondents before we move on? Or at least, Mr Knowles, does that complete your evidence?

MR KNOWLES: That's all of my evidence. Yes.

HIS HONOUR: Yes. Thank you. Do the territory respondents have any affidavits to rely on?

MR SPARGO-PEATTIE: No, your Honour, and we don't oppose leave being granted to amend the originating application in order to include new paragraphs concerning our decision, the renewal decision. We've indicated that to our learned friends, and they've put that in writing. So we don't seek to be hurt on the application today unless we can be of assistance.

HIS HONOUR: Yes. All right. Thank you. Mr Glacken, is there any evidence from your clients?

MR GLACKEN: No, we don't seek to tender any evidence, your Honour, but we may refer to what's been tendered by others.

HIS HONOUR: Yes, thank you. Yes, Ms Bones.

MS BONES: There's no evidence from the seventh respondent consistently with the position that was indicated at the joined hearing last Monday. The seventh respondent consents to a grant of leave, so we don't seek to be heard on the application unless it arises, including us to .....

HIS HONOUR: Yes. All right. Thank you. Yes, Ms Lancaster.

MR LANCASTER: Thank you, your Honour. Your Honour, I would propose, subject to your Honour directing me otherwise, that it may be the most efficient way if I address or apply a submission to the Commonwealth's NLCs written submissions rather than start from the position of my written submissions-in-chief, if your Honour pleases, assuming your Honour has had the opportunity to review the submissions.

HIS HONOUR: Yes, I think that should be okay. I did read your submissions, but I didn't have time to go to documents that were being referred to. So if there's anything that you clearly want to take me to and show me, then I think now would be the time to do it.

MR LANCASTER: I will do that, your Honour. So if I could work one by one through the proposed amendments, perhaps, and then make submissions about my friend's submissions in response on the way through. So I won't address the tidying up amendments, if I can put it that way. No party objects to those. In relation to proposed amendments to ground 1, in particular B, the Commonwealth has objected to the inclusion in the pleading of – or in the originating application of the word "including" and "inter alia," and I don't press those words in the pleading. So this actually existed before the amendment, but for the purpose of today, that that might be read as being or simply deleted.

Then In relation to the more substantial amendments to the – that is, the addition of subparagraphs (C) through to (Z). These are supported because the material now

available to the – I should say, and go back a step. Mr Chung's affidavit, I don't know if your Honour has had a chance to read it, but it does indicate that the original version of the originating application was prepared in circumstances of some urgency. There has been material production of documents explained in the affidavit in August and, as your Honour heard, continuing into September, and evidence has started to be served yesterday and this morning, and we anticipate later today from the respondents.

So the originating application was prepared in circumstances where we did not have the decision brief, among other very material things which have since emerged, and the process of amending the originating application has been designed to provide a fair basis for response by the respondents to the claim by indicating the submissions that we will be making by way of particulars of existing grounds. And these additions to the particulars of the existing ground of denial of procedural fairness by the Commonwealth Minister reflect that the material available to the applicant since the commencement of the proceedings has shown that representations were made to the Commonwealth from those sources.

We will submit at the final hearing, we either know or can infer that it was adverse representations to the extension application. We have sought documents as to what information was contained in these documents and in respect of some of the categories, it's not necessary to go through them specifically. In respect of some of the categories we may, depending on final production from the Commonwealth, know the substance of the representation that was made, but in respect of many of them, we simply don't know what was said. We know that there was a source of inferentially-adverse representations made, and we're identifying that we will rely on that at the hearing because there was not an opportunity given to the applicant to know or understand what the representation said and to comment on them.

So a very large part of the Commonwealth and the Northern Land Council's objections to these amendments is along the lines of, "You need to particularise what the allegedly-credible adverse allegations in these submissions were for there to be a ground of judicial review available in respect of it," and that is, in one sense, relying on the Commonwealth's own what we suggest is administrative law wrong in not providing the representations adverse to the applicant to it before the decision was made for an opportunity to comment, and we're simply not in a position to further particularise what many of these particular sources of information actually contain, because that was the whole point of our ground. We didn't know.

We still don't know, in respect of most of them, what was said. And so that will go in to our denial of procedural fairness allegation as set out in (i)(A), because there was a failure to give notice of inferentially-adverse information, credible and inferentially taken into account. And so, these are simply particulars of the existing ground of procedural fairness, and it does not sit appropriately – in our respectful submission – in the mouth of the Commonwealth to say "You can't rely on this assertion without telling us the specifics of the representations that were made,"

when there hasn't been any production of the documents to allow us to know, or any other revelation to allow us to know.

HIS HONOUR: That might be a question of the sequence in which things should be done and everybody's working to a compressed timetable, but if there's an allegation that there were submissions or representations to the Minister by the minister's office, which is capital E or some other person, Commonwealth departments know that I'd infer that those were necessarily adverse, but you ultimately need to prove adverse representations.

MR LANCASTER: Yes. And that will depend on the evidence that is before your Honour at the final hearing, and inferences available properly from it.

HIS HONOUR: At the moment, so far as the respondents are concerned, they need to guess what it is that, for example, Professor Henry or the Prime Minister or any of these people said to the Minister that might have been adverse to your client?

MR LANCASTER: Well, they don't need to guess, because this is their client who received the representation.

HIS HONOUR: They don't know what you say is the adverse material. Those will tell me you don't know either, and that's part of why we're here.

MR LANCASTER: Yes. Yes. So on one way that we put the denial of procedural fairness ground, it is material, that is, there is a significance to the inference that it is adverse, but there is not a significance as to its precise – the precise content of the representation, because it demonstrates the receipt of information or representations from a large variety of sources that, according to Mr Welsh's affidavit for the applicant, was simply not canvassed with him.

So in that sense, these particulars are relevant to the procedural fairness, whatever they said, because they speak of a procedure, whereby there are numerous other sources of information provided to the Minister, taken into account, but never revealed. So that's one aspect of the procedural fairness. The other aspect of it is, to the extent that there is a basis for inference as to the content and adversity of these particular sources of information, that that will be a matter for inference and submission from the material of the hearing. So we do put it on those two bases. In relation to the next - - -

HIS HONOUR: Just one fairly basic thing for my benefit before we go on. The advice decision that's one of the decisions under review. Is that a decision made in a formal sense by the Commonwealth Minister?

MR LANCASTER: Yes.

HIS HONOUR: So she's the repository of the relevant power. I think it's the Minister's - - -

MR LANCASTER: Yes.

HIS HONOUR: - - - mind that we need to understand.

MR LANCASTER: Yes. So it's the – we've put it in submissions to the Court that is most likely part of the executive power of the Commonwealth. It's a power that is also referred to in the Northern Territory provision that says you must comply with the direction from the Commonwealth Minister, and it is her decision that we plead as the advice decision.

HIS HONOUR: At some stage I need to understand what the Commonwealth is doing here. Maybe I will just leave that thought with you.

MR LANCASTER: Yes. Thank you, your Honour. All right. I might move on to 1B(i)(A), and I've addressed your Honour on – just pardon me a moment. Before I get to there, there is an objection by the Commonwealth to the particular at Z in B(i), which identifies unidentified members of the public. If this creates a difficulty, it's not the applicant's creation of the difficulty. Can I go – because it uses the description in the decision brief. The convenient location for this is in the Scott affidavit, in the attachment to it. So annexure MAS1 is the decision brief, and if your Honour goes to affidavit page 72 in the print version.

HIS HONOUR: Yes.

MR LANCASTER: Paragraph 51, does your Honour have that?

HIS HONOUR: Page 70?

MR LANCASTER: Page 72.

HIS HONOUR: I have page 72.

MR LANCASTER: Yes. That's paragraph 51 of the decision brief. Is there – it's the second paragraph under the heading, "Other interested parties," who – this is in a section called stakeholder views, paragraph 71, and it refers to three emails from members of the public. And so that particular is directed only to that part of the decision room, and then while you're on that page, your Honour, can I just make a submission about paragraphs 49 and 50?

HIS HONOUR: Yes.

MR LANCASTER: Because these are a couple of the parties identified in our proposed additional list of particulars of sources of representations made to the Minister. So this is part of the material that we've been provided since the originating application was filed that indicate the representations were made and

received by the Minister, but not revealing all of the content, or at least in respect of some of the submitters, there's a summary.

But in respect of others, for example, paragraph 50, there's nothing beyond advocating the refusal. Just as a matter of preparation of the amendments, that's the kind of material that we've seen since the case started that support the making of the amendments. So then going back to the proposed amendments, paragraph – and we're still in the grounds of the particulars supporting ground 1, denial of procedural fairness, paragraph B(i)(A). I've addressed that, your Honour. The relevant part of the list of representors in the earlier particular has that two-fold role in the applicant's case that I've just explained. Then can I move to the proposed amendments to (1)(b)(ii), I accept that the word "including" can be deleted in (1)(b)(ii) in the chapeau, or in the first part of that paragraph. And the contention is, or as your Honour reads it, part of the denial of procedural fairness is this particular of failure to give a reasonable opportunity to be heard on the procedures applied.

My learned friend for the Commonwealth say that, in paragraph 6 to 9 of their submissions, that this allegation is doomed to fail for the reasons that are set out in paragraphs 7, 8 and 9, including that procedural fairness didn't extend to notifying this applicant of what the procedure would be or any changes to the procedure, what they would be. If I've encapsulated that the wrong way, your Honour can read 7, 8 and 9 of my friend's submissions. The difficulty with that submission is that this allegation already exists in (ii); in other words, we've already provided a particular of the denial of procedural fairness in that form. All we're doing by the amendment is further particularising the basis upon which that reasonable opportunity to be heard as to procedures will be relied on at the hearing.

This doesn't advance any new case, doesn't advance any wider case. The case is there in the un-amended version of the pleading. Our friends might say, "Well, it's doomed to fail for various reasons," and that will be an issue for the final hearing, but it's not a basis for rejecting the amendment as a matter of pleading it, because it's simply further particularising something that's already there. And Mr Welsh, representative of ERA, who has put on affidavit evidence which is included in Mr Chung's affidavit for the purpose of today and I might – can I hand your Honour a copy of that exhibit that I referred to.

HIS HONOUR: Yes.

MR LANCASTER: LC4. As I said, Mr Chung annexed Mr Welsh's affidavit. The affidavit starts at page 199 of the bundle.

HIS HONOUR: Yes. And on page 207 to 208, he addresses the question of timing of the decision. So paragraph 35, at about point 8 on page 207, he gives evidence about an understanding of when the renewal decision would be made, the basis for that understanding, and then paragraph 36, what he would have done and what he would have expected if he had been told that it was going to be determined before September 2024. And so, in terms of this contention about notice to be heard on the

procedures, that will be, in broad terms, the scope of the issue; that, as I submitted, it's an existing pleading. We're merely adding further particulars and there's no basis for rejecting it as a matter of pleading, because we will be advancing the contention in any event, by reference to Mr Walsh's evidence.

HIS HONOUR: Yes.

MR LANCASTER: While you're in Mr Welsh's affidavit, if I can put it that way, would your Honour go to page 220 of the bundle?

HIS HONOUR: Yes.

MR LANCASTER: What the deponent does in paragraph 60 and following is to address material that have, since the commencement of the proceedings, become available and known to the applicant, and it goes through, among other things, what Mr Welsh, who was the principal officer involved for ERA, what he understood the issues were and how he addressed them at the time and what issues he was not at the time – was made aware of, and so that forms the basis for this denial of procedural fairness argument by reference to, among other things, those various sources of representations that I referred to, because it – as the applicant proposes to run its case, Mr Welsh's evidence will be relied on in that respect. So just giving your Honour some of the context in which those amendments are made. Then could I move them to the amendments to the particular in 1B(iii)?

HIS HONOUR: Yes.

MR LANCASTER: Our learned friends for the Commonwealth say these particulars don't identify any arguable ground of review, and they've got the same deficiency as early particulars, which don't identify the specific representations that were made. So our response is, firstly, that this doesn't plead the ground, of course. It doesn't intend to plead a ground.

It adds to particulars of the denial of procedural fairness by reference in capital E and capital F of the particulars, to the material that was actually received and that was actually taken into account, and so to the extent that our final submission about any of these sources of information can be specific, they will be.

If they're not, then we will either need to rely on inferences or our friends are at liberty to make the contention that there's no disclosed making good of the procedural fairness ground. As a matter of pleading, it's entirely consistent with the existing cases pleaded by indicating that there was not an opportunity or a sufficient reasonable opportunity to address these submissions and to provide contentions in response. So with my earlier submissions and those brief submissions, I hope that addresses 1B(iii).

HIS HONOUR: Three becomes rather broad, doesn't it, if this also uses the word "including?"

MR LANCASTER: Yes, I am also content to remove that from the pleading and the final form of the document will – can remove that.

HIS HONOUR: Right. I think that's useful. Even so, the complaint is, as I read it, failure to bring to your clients attention the critical issues. A to D seem to identify what might be regarded as issues, but then E and F are just general references to the material for the decision-makers. So that material would have to be gone through to see what issues were lurking in there. That submission, presumably, is your client wasn't .....

MR LANCASTER: Yes, but I certainly take your Honour's point about that, but the difficulty with the current stage of the proceedings though is that, as I understand it, the Commonwealth has not said to us they've completed all production or all of their materials haven't all come forward and so, as I understand it – and I would stand to be corrected – but, in most circumstances we sought to plead ENF to be in a position at the hearing to be able to rely on either direct evidence or such inferences as we can identify from the material that is in evidence of the critical issues in which it's turned, and it's true because, we didn't know many of the representations were made let alone their content.

We are not presently in a position to particularise those issues, but that's not a difficulty of the applicant's making, in my submission, and we should have the opportunity at the final hearing to advance the contention to the extent at the final hearing we're able to invite your Honour to infer what those issues were in addition to (A) to (D). Then, if I can move on, your Honour, to (1)(b)(vi) which is a new particular, again a new particular of the denial of procedural fairness by reason of failure to give lawful consideration to the applicants submissions, you can see in the expression of (vi) that. Now I don't press "(inter alia)," that can be deleted. Then - - -

HIS HONOUR: When you say "having" – well, when the draft says, "having regard to," I'm just not sure I understand the force of that.

MR LANCASTER: It is giving advance notice of the basis of the inference that's asserted in the first three lines of the ground. So it is, in the category that I mentioned earlier, intended to give advance notice to the respondent of what the proposition the applicant relies on at the hearing will be, which is that, in light of what we endeavour to prove as the facts in (A) through to (D), then the inference should be drawn, or the conclusion should be made of failure to give lawful consideration to the submissions advanced by the applicant, remembering that this is a procedural fairness ground.

HIS HONOUR: Yes.

MR LANCASTER: So again, in my submission, this is not objectionable as a matter of pleading, because it simply does provide further particulars of a case that

will be advanced on procedural fairness. Now, one of the propositions that our friends from the Commonwealth advanced is that paragraphs (A) and (B), dealing with them together, does not identify any error or category of error. Now, as I hope I've just explained to you, that's not the basis on which they are put forward. They are put forward to provide the evidentiary framework within which to make a submission about failure of lawful consideration of the applicant's submissions, having regard to the context in which the decision was made; that is, with the Prime Minister communicating to the Environment Minister about the banner, and what the material we propose to rely on at the hearing will show about the urgency of the need for a decision to be made having regard to the Prime Minister's keynote speech to the Labour conference on 27 July, and those two matters will support the inference that we propose.

Now, paragraph 13 of my learned friend's written submissions is the part of their submissions that is endeavoured to be supported by the affidavit that your Honour saw – has seen this morning. That is that there is said to be obvious prejudice and that provides a potential for delay. Now, I took your Honour to the notices to produce, in my submission they – even if a number of different mailboxes and so on need to be searched, they are searches for very specific events and very specific items, and, your Honour, it could not be thought that there is such a dramatic potential for delay.

If the Commonwealth parties have not sought to set those documents aside, those notices to produce aside, if there is production according to them, then we can proceed without any procedural delay, and if an issue comes up or some application is made, that will need to be determined or considered in the context in which it is raised in the future, but is not presently raised.

And we make that submission in response to what the Commonwealth says in paragraph 13 and 18. So your Honour would not accept there is an obvious prejudice, and while there may be a potential for delay, there is always a potential for delay in the preparation of a trial, but at the moment it does not seem to have crystallised to anything that would put the existing hearing dates at risk. Can I then address the contention in paragraph 14 of the Commonwealth submissions, and this goes to the particular in (vi)(C) in the amendment.

HIS HONOUR: Yes.

MR LANCASTER: So the decision brief, the materials show, in our submission, the decision brief was provided to the Minister, and the Minister had a maximum duration for consideration of the brief of 79 minutes. Now, the question for the amendment is whether there's an arguable basis for the amendment, because the objection from the Commonwealth is put in terms of – look, this particular is doomed to fail, so your Honour shouldn't allow the amendment to be made.

The threshold is arguability, and we do say there is an arguable, at least, legal contention that a consideration of a briefing note of this nature, which it seems that

there is no dispute that it is the fact that it was considered for not more than 79 minutes, it's put on the basis, but I don't hold my friend to any concession about that, but the objection in paragraph 14 is put on the basis that a proposition that consideration of not more than 79 minutes is doomed to fail, and we say, well, it does not fall beneath the relevant threshold of arguability for a pleading, and the amendment should be allowed on that basis.

Your Honour will be in a better position at the hearing to determine whether or not, in the context of the whole of the decision-making procedure, that maximum duration of available consideration of the briefing note was lawfully adequate or not, and that's all the amendment.

HIS HONOUR: There are time stamps on documents .....

MR LANCASTER: There are emails which show provision of the brief, yes. But so as a matter of pleading, we say it ought go to final hearing. In relation to paragraph 15 of my learned friend - - -

HIS HONOUR: So this is still a procedural fairness point?

MR LANCASTER: It is still a procedural fairness point, yes, and so it's one of the sub-particulars of the procedural fairness ground, and of course, the legal adequacy or inadequacy of the actual time spent with the briefing note, of course, needs to be considered by what your Honour eventually finds about the whole of the process in the way that we've pleaded it. And that's what we would have thought an orthodox approach under ..... and all the cases that have applied it. The other particular, particular D, is objected to in paragraph 15 of the Commonwealth submissions, also on the basis that it's untenable. In other words, as we read it, liable to be struck out, but D is unobjectionable as a matter of pleading, in my submission.

It merely identifies a contention that will be made by the applicant that raises no disputed facts. There are no reasons for decision given. So as a matter of fact, the pleadings reference to the absence of any reasons is common ground, and this paragraph D merely gives notice of one of the sub-particulars of the contention we make as to denial of procedural fairness as to reliance, and, your Honour - - -
HIS HONOUR: This is part of the factual matrix from which you would infer the minister didn't properly consider your clients - - -

MR LANCASTER: Exactly. And - - -

HIS HONOUR: - - - submissions?

MR LANCASTER: - - - in my submission we'd be entitled to make that submission. We'd need to make that submission whether or not it's in the pleading, but it's entirely unobjectionable to be in the originating application to give notice of that contention. It's absolutely orthodox proposition that we could not be prevented

from advancing a trial with or without this amendment, but we've put it in to make our case clearer.

Then the next particular is (vii). It's – there's a missing word "of" at the start of that particular. So I don't know if that's right. So the intention is that this is part of – as your Honour has expressed it – part of a factual matrix that the applicant relies on to determine the procedural fairness claim. We will, of course, be referring to the material in Mr Welsh's affidavit as to the process adopted and his understanding of the relevant issues.

So again, it's as a matter of what's in the application for judicial review. It's simply drawing attention to reliance on that fact of the final hearing as one of the many facts that will be relevant for your Honour to consider.

HIS HONOUR: I'm just not sure how it fits the matter of syntax into. So it's part of particular 1B, is it?

MR LANCASTER: That's right. The flow is denial of procedural fairness because of the material we referred to in Mr Welsh's affidavit, and then, your Honour, under the next ground of review, which is an unreasonableness ground, there are a lesser number of objections from the Commonwealth.

In respect of the amendments in paragraph 2B(ii), the Commonwealth doesn't object to G to N, but does object to subparagraph (n), and that's at paragraph 17 of the Commonwealth submissions. Paragraph N is a contention as to a failure to address that topic as a particular of legal unreasonableness. That a contention of that character is pleaded elsewhere already. In 2(b)(v), there is a contention supporting the allegation of legal unreasonableness that the Commonwealth Minister did not act for the purposes of the Atomic Energy Act. And so there is no new issue raised by the particular in (n). The Commonwealth's objection in their paragraph 17 is, in my respectful submission, misdirected when it says it introduces a new factual question, which could be the subject of evidence. From the applicant's perspective, this is, as a particular of unreasonableness, a failure to address this topic of the national interest under the Atomic Energy Act.

That's based on the applicant not seeing any indication of the consideration of that topic in any of the materials. It's then a matter for the respondent as to what, if any, evidence it might wish to provide on that topic, but there's no indication of how it could be the subject of evidence in the context of the claim that's put forward, but that comes to be a matter for the respondent as to how it replies to the claim rather than a difficulty with the pleading of the claim, and that pleading is supported, as I've said, because there's an existing contention in a different ground on that topic, and - - -

HIS HONOUR: But where's the other contention in the same topic?

MR LANCASTER: 2(b)(v), just over the page, on page 21 of the - - -

HIS HONOUR: Yes.

MR LANCASTER: Does your Honour have (v)?

HIS HONOUR: Yes.

MR LANCASTER: Yes. So in my submission, the Commonwealth's proposition is not a basis to reject sub-paragraph (n). In relation to the Commonwealth's submission in paragraph 18, I've made submissions responding to their paragraph 13, and I think this issue stands or falls with that topic.

HIS HONOUR: It relates to (b)(3).

MR LANCASTER: Yes. It's 2(b)(3) subparagraph (C) is the limited scope of that. Then, finally, I think the Commonwealth objects to – or second from final, the Commonwealth objects to the amendment to paragraph (2)(b)(vi), to the extent that objection is to the word "including," I accept that can be deleted or read as "being." Then 2(b)(vi) is another instance of – in the applicant's submission, another instance of merely identifying what, in final submissions, will be the basis for coming to a view on the part of your Honour that there was a legal unreasonableness in the decision. And the materials, we say, will show that the Minister did proceed on the basis of subparagraphs (A) to (D), so that is the factual basis for the decision being made, and the amendment is simply to allow that to be considered in the context of the legal unreasonableness argument.

And as we've addressed paragraph 6 in our written submissions, in paragraph 15 of our written submissions, and we've put to your Honour that the factual merit of this contention will rise and fall based on the Commonwealth Minister's actual reasoning process, which has always been in issue, and whether beliefs the Commonwealth Minister actually formed were erroneous in law, which is a legal issue. And so it's, of course, up to the Commonwealth if and to what extent it responds. It's hard to see how, given no reasons for decision were provided, but this is merely, again, advanced notice of the contentions we make in support of the ground, and are not objectionable as a matter of pleading. Then, ground 3A - - -

HIS HONOUR: So these are propositions again, I think, about what was happening in the Minister's mind.

MR LANCASTER: Yes.

HIS HONOUR: Which the Minister presumably knows and might give evidence about or not.

MR LANCASTER: Precisely. And if not, then we will need to make submissions based on inference from existing documents, in that case.

HIS HONOUR: Yes. So you would say, I suppose, there's no particular inquiries.

MR LANCASTER: No.

HIS HONOUR: Searches that need to be made.

MR LANCASTER: No. With very many of these categories of amendments, it's in precisely that category, namely, ultimately the question of lawfulness or validity of the decision will turn on what the Minister thought and did. And it's - - -

HIS HONOUR: It might be inferred from something that she wrote down or a document that was - - -

MR LANCASTER: Yes.

HIS HONOUR: - - - a piece of advice that was given to her, but - - -

MR LANCASTER: Yes. Precisely.

HIS HONOUR: But the inquiries wouldn't go much .....

MR LANCASTER: Yes. And of course, that's – I accept I don't have specific evidence of this on the application, but there has been a process of provision of notice to admit to the respondents, and that has resulted in, not an admission relevant to this point specifically that I wish to address your Honour on now, but part of the evidence before your Honour, we propose, is – by way of tender bundle or just separate documentary tender, is responses to the notice to admit, which we say goes to some of these questions of fact.

But as your Honour observed, it's – the Commonwealth is then in a position to decide to advance evidence on this topic or not, and then we have to work with what we have at the hearing. New ground 3A is addressed in our written submissions at paragraph 15 as well. This is a different way of expressing the legal error by reference to a phrase that your Honour, with respect, will recognise from some of the authorities, that is, failing to proceed on the basis of correct legal principles correctly applied.

To the extent there's a difference from the unreasonableness ground in that regard, this new ground 3A is meant to address that specific expression of legal error, of jurisdictional error, but it's by way of reference to existing paragraphs of the pleading, and so is simply a new expression of a legal argument based on the existing material that will be before the court and not objectionable as a matter of pleading, in our submission.

HIS HONOUR: We're not under the ADJR Act here, are we?

MR LANCASTER: No, we're not. And in one sense it's yet to be seen precisely how the Commonwealth puts the legal constraints on the decision-maker in the context of this advice decision. There are denials and some admissions in – I will withdraw that. There are – well, I will leave it at that general proposition. It's yet to been precisely how the Commonwealth puts the extent of its obligations. Then paragraphs 6 and 7, the proposed amendments to paragraph 6 is, as we've said in our written submission supporting that amendment, simply identifying a new expression of the jurisdictional error and not objectionable as a matter of pleading. In respect of the new ground in paragraph 7, this is also a ground that does not extend or vary the factual basis for determination of the case.

It is simply to put the applicant in a position to say that one reason for considering separately that the Northern Territory Minister denied the applicant procedural fairness were the unrepaired denials of procedural fairness by the Commonwealth process that was undertaken, and as your Honour has heard, the Northern Territory doesn't oppose the amendments, including the insertion of paragraph 7. Your Honour - - -

HIS HONOUR: So the essential failure was the territories process didn't cure the Commonwealth's failures to give you procedural fairness.

MR LANCASTER: Yes. Your Honour, I've mentioned the NLCs objections along the way in a couple of respects, but your Honour will have seen the substance of the objections in my learned friend, Mr Glacken's written submissions at paragraph 6 through to 9, and I have endeavoured to respond to the Commonwealth's objections on those subparagraphs in a way that also incorporates what I wish to say about Mr Glacken's objections. So those are my submissions-in-chief.

HIS HONOUR: Yes. All right. Yes. Thank you. Yes, Mr Knowles.

MR KNOWLES: While I'm on my feet, and before I forget it because I don't have a note, my friend, in the last part of his submissions, referred to the amendments to paragraph 6 and 7. If it wasn't clear from our written documents, we don't object to the amendments to paragraph 6 and 7. I will deal with the other proposed amendments which are objected to in numerical order.

Can I start with particular paragraph 1B(i). My friends acknowledged the difficulty with the non-exhaustive language and has cured that particular problem, but other difficulties remain, and we say they are significant. First, as your Honour observed, although what's termed in the originating application, the advice decision, or generically, the advice, was given by the Minister. The particulars here are framed in terms of things done and representations received by the Minister and the Commonwealth.

It's difficult to see what the receipt by the Commonwealth as opposed to the decision-maker of a representation could – or what significance that could have. But

perhaps our more significant problem with the amendment is the one identified by Mr Lancaster in that both subparagraph (i) and (i)(A) deal with fairly familiar aspects of procedural fairness, that is a failure to allow reasonable opportunity to comment on information that was adverse, credible, relevant and significant in relation to Roman (I) and a reasonable opportunity to be heard on the issues, that is Roman (iA). The difficulty with both of the particularisations of those grounds is that the grounds don't identify what the relevant information or what the relevant issues were. Rather, they identify simply the source of representations said by inference to be adverse, credible, relevant, and significant. And they identify unstated issues said to be raised in those representations.

And my friend's response to that, orally and in writing, but in writing it's probably best encapsulated by my friend's written submissions at paragraph 3, where, at the bottom of the first page, it's suggested that it would be perverse if not Kafkaesque for the Commonwealth to be able to both on one hand rely on ex parte representations, and on the other hand seek to resist a procedural fairness complaint on the basis that it's necessary for his client to identify the information and the issues contained in the relevant representations.

Now, I don't need to resort to literary allusions to tell your Honour why that position is wrong. The applicant chose to commence this case, did so at short notice and it did so presumably with a reasonable basis to contend that it had been denied procedural fairness. As is typical, including in judicial review cases, in the course of the document production process, further information has come to light, and one would expect further particularisation, if not amendments, be made to what the arguments are going to be. But ultimately, it is the applicant's case to run and prove. And they elected to commence at short notice. They elected not to seek, for example, preliminary discovery to determine whether they in fact had a case.

And Mr Lancaster says, "Well, we can't be expected to know that, and it can all be left to final submissions and inference at trial". Now, I will come back to why it can't all be left to final submissions and inference at trial. But before I do, can I just continue, or have your Honour continue in paragraph 3 of my friend's written submissions. Because after accusing the Commonwealth of placing his client in a Kafkaesque nightmare, it's then said what ERA has done is to have Mr Welsh work through the materials placed before the Commonwealth Minister, identify issues raised and the adverse representations put to the Minister, and address ERAs position.

And indeed, Mr Lancaster took your Honour to some of Mr Welsh's evidence. Now, to the extent they can do it, and to the extent Mr Welsh has purportedly identified what the information in the representations were, or what the issues were, they should be pleaded. It shouldn't be left to some catch-all allegation in – which I will come to, but it is really in Roman (vi) of paragraph 1(b) to rely generally on the material referred to in the affidavit of Mr Welsh without specification. To the extent the applicants now know with the benefit of the document production that has been done to date what the information was that is said to be adverse and what the issues

that it is said that they didn't have a reasonable opportunity to make submissions on, then that should be identified in the proper way, not by simply referring to the sources of representations.

And one only needs to look through the range of sources to realise why this is going to be a problem if left to final submissions and inference. Unlike many judicial review cases, this will be a case where there will be cross-examination, in particular, cross-examination of Mr Welsh, as to the extent that he was, and by implication, the applicant was, aware that a particular issue was in dispute or aware of the position taken by some other stakeholder or likely to be taken by some other stakeholder.

So we will be making submissions in trial, based on the cross-examination and based on the documentation available, that certain issues or certain information was in fact known to ERA and that they had a reasonable opportunity to make submissions on that issue. But what we can't do at trial, because we won't necessarily have addressed the matter in cross-examination, and we won't necessarily have produced evidence in relation to the issue, is to meet inferences that we don't know what the inferences sought to be drawn are, and we don't know yet what the information said to be credible, relevant and significant is. And in our submission, having elected not to seek preliminary discovery, having sought quite wide notices to produce in the nature of discovery, there comes a time, if not now, at some point in time before the hearing, where we need to know precisely what it is that is the applicant's case as to why procedural fairness was not afforded because I will need to cross-examine Mr Welsh as to whether he was aware of those issues.

And my friends say, "Well, to some extent, the document production on the part of the Commonwealth is incomplete". That's correct, but Mr Welsh, on their own submissions, is already in a position to have gone through the material and identified issues, and to that extent, they can be articulated, and to the extent something else arises from further document production, if and when we get to that question, it can be the subject of some further application to amend or particularise the denial of procedural fairness. But what we can't, with respect, consent to is for the applicants to ask the court to accept that there was a denial of procedural fairness on account of a failure to put the applicant on notice of the relevant issues or a failure to allow the applicant to comment on credible, relevant and significant adverse information when neither those issues nor that information are identified.

And we submit that that pleading is bad in form, but more importantly, it's bad in substance because it gives rise to a real risk that the hearing of this matter will, in effect, go off because the cross-examination of Mr Welsh will proceed at a time when we won't necessarily know what it is that the applicants say the issues are or the information that he didn't have a chance to address is. Now, that's not a circular point, or it's not the Commonwealth, as my friend has it, trying to take advantage of its own asserted wrongdoing. It's just the ordinary consequence - - -

HIS HONOUR: Well, it's an artefact of the compressed time that there has been for document production.

MR KNOWLES: It's an artefact of the compressed time. It's an artefact of that the applicants sought both commenced proceedings, at a time when they did, and sought an early final hearing, and we're trying to accommodate that, but we're unwilling to accommodate an early final hearing that incorporates ambush. And if the applicants want to go away and try again, based on what Mr Welsh has already done, and reserve, open to them, the right to bring some further application after further document production, then that's one thing, but that's not what they have done in this application or at least in paragraphs 1 and paragraphs 1(A). And we just say that, finally, just to add to what - - -

HIS HONOUR: So 1A - - -

MR KNOWLES: Yes.

HIS HONOUR: - - - is really a necessary step, isn't it, having said what they say in 1?

MR KNOWLES: Yes.

HIS HONOUR: To make out a procedural fairness argument, they need to say what's in 1(A).

MR KNOWLES: Yes. Well, I understand it – I think the answer to your Honours question is yes, but I understand (i) to be addressing an argument of the type considered in V-EA-L. That is, there was credible relevant significant and adverse information which was not disclosed.

HIS HONOUR: Yes.

MR KNOWLES: And(i)(A) addresses a different, but related argument of the type acknowledged in SZBEL, that procedural fairness requires not just disclosure of the adverse information but an opportunity to ascertain the relevant issues, but they're very closely related because in (i), the information is said to be the information contained in these submissions made by various people. In (i)(A), the issues are the issues raised in those same submissions and representations.

So the problem is the same for both. We accept that whether couched in terms of VEAL or SZBEL style arguments, they are orthodox procedural fairness arguments, which we will have to meet at trial.

HIS HONOUR: Yes. So one - - -

MR KNOWLES: But what's not orthodox is to be not told what the issues are and not told what the information was.

HIS HONOUR: Well, (i) currently has, in the current application, has some content that you haven't taken issue with.

MR KNOWLES: (i) has some – well, that's true, but in a sense, this application was filed without our consent or permission. We would have had to bring it – an unusual step would be to bring an application for summary dismissal.

HIS HONOUR: Yes. Yes, I follow that. At any rate, (i)(A) seems to me – to the extent that (i)(A) has advice that comes from the breadth or lack of particularity in (i).

MR KNOWLES: Yes, I think that's right. They're very closely related.

HIS HONOUR: It doesn't have a separate – there isn't a separate problem about (i)(A).

MR KNOWLES: Well, except just the extent that the issues are not identified as opposed to the information, but I agree, your Honour. The problem comes from the fact that it has got the problem in (i).

HIS HONOUR: Yes.

MR KNOWLES: Now, in respect of (ii), again, the issue of non-exhaustive language has been remedied. There's probably a need to identify or distinguish between (B) and (C) – that is (ii)(B) and (C) on the one hand and (A). (A) goes to the timing issue and (B) and (C) are somewhat different, and I will come back to those. On the timing issue, we say that sub-particular (A), that the first or second respondents did not give the applicant a reasonable opportunity to be heard as to when the decision would be made.

We say that, as framed, is unarguable, and in saying that, we don't deny that where there has been some representation on the part of a decision-maker or where there has been some change in an established and known procedure that there could be a requirement of procedural fairness to put an applicant or a person affected on notice of that change if there's going to be a departure from a representation or a change from an ordinary established position, but that's not, with respect, what this ground alleges, because there is no relevant change or alteration or representation made as to a procedure that would be followed.

All that's said is that we did not give a reasonable opportunity to be heard on the decision and when it would be made in subparagraph (a). In circumstances where it's not suggested that there's any statutory restriction on the timing of the decision and there's no suggestion that my client made any representation as to when the decision would be made, we say that's unarguable, and to the extent Mr Welsh deals with his understanding of the timeframe, which your Honour was taken to by Mr Lancaster, none of that derived from any representation made by the Commonwealth.

It was his own position, derived from, amongst other things, some discussions he had had with the Northern Territory.

But ultimately, I accept one aspect of Mr Lancaster's submission, which is that the threshold here is one of arguability, and that's a fairly low threshold, and if your Honour was persuaded that this is something less than hopeless, then it is a matter that we can go forward with and, if my friend wishes to advance something that's slightly less than hopeless, I would encourage him to do so in some ways, but I won't – I withdraw that. Can I make a slightly different position in respect of particular B and C. This is somewhat different, because it goes beyond merely being unarguably hopeless. We think it is apt for confusion, or at least I am confused by it, because as it reads, what it seems to suggest is that procedural fairness required the applicant to be given a reasonable opportunity to be heard as to what information will be placed before a decision maker and what representations will be sought or received by the decision maker.

Now, we can readily accept that procedural fairness might require a decision maker in particular circumstances to disclose and give a person an opportunity to comment on information that is received, but in the absence of any identified statutory procedure or restriction, we simply don't understand how it could be said that the applicant – as a matter of procedural fairness – was entitled to make submissions on what information could be put before the decision maker and what information could be received by the decision maker. To use the language of a teenager that's very "meta," because it is not an argument about having an opportunity to comment on actual information.

it's at a higher level of generality having an opportunity to comment on what information can even be considered, and we say that is both confusing and unarguable, and to the extent my friend says, "Well, it's really just further particularisation of the existing ground, because we don't know the exact universe of information considered," that's no answer, because that's not what particulars B and C contend. In fact, they contend for some right of procedural fairness to be heard at the preliminary stage of "What can I even consider?" And that is both confusing and, in my submission, unarguable in the absence of any identified statutory requirement that that occur.

Can I move to – I should say, just before I leave that point, a further reason why (B) and (C) are unarguable is that, on the evidence of the applicant – that is Mr Welsh's own evidence, and we footnote this in paragraph 10 at footnote 10 of our written submissions – the applicant had a meeting with the minister – a short meeting – but they had a meeting with the minister before the application – or the advice was given. The applicant had numerous meetings with the minister's office and the department. The applicant also made – or had written correspondence with the department and the minister's office – and it was the applicant who ultimately made the application for renewal to the Northern Territory Government. So in those circumstances, we don't see how it could even be contended – assuming this meta right to be heard on what the minister can even consider exists – we don't see how it

can be said that the applicant, who, in effect, controlled the timing of the process by determining when to make an application for renewal, or, at least, could influence the timing of that process, couldn't have had a reasonable opportunity to make submissions to the minister to tell her what she could and couldn't consider, or what representations she should or should not seek or receive. But we accept that sub-paragraph – or sub-particular (A) – the issue of the timing – is a slightly different one. That's not confusing. We say it's hopeless, but that, we accept, is a relatively low threshold.

Can I then move to (iii), that is paragraph 1(B)(iii).

HIS HONOUR: Yes.

MR KNOWLES: This also raises somewhat similar issues. We object to both paragraphs (E) and (F), but, again, when read with the chapeau to 3, it seems what an aspect of the denial of procedural fairness being contended for, was that:

> *the applicant was not given a reasonable opportunity to make submissions and provide information on –*

And it's difficult, with respect, to read (E) and (F) as flowing from the chapeau, but on those issues:

> *the material received by the first respondent and the second respondent, in respect of the advice decision, and the material placed before the first respondent or the second respondent at the time of the advice decision.*

Now, either this has the same confusion or what I've called the meta problem of the previous ground, that there just cannot be an obligation to – at a preliminary stage – invite someone to comment on what materials will be taken into account for the purposes of making some later decision. If that were the case, there would be multiple rounds of procedural fairness, where the whole minute brief going up to the minister would have to be disclosed to say, "Well," or perhaps, even at an earlier stage, that would have to be disclosure of, "Does any party object to material being sought or received or being placed before the minister from X, Y and Z?" So we say if it's that meta argument, that must fail.

But if it's an argument that Mr Lancaster sought to make in oral argument that it's really leaving open an inference, depending upon what, at trial, is finally determined to be the material received, or the material placed before the first respondent, then we say that suffers from the difficulty of the first particular, is that the time has really come, with respect, for the applicant to identify what are the issues and information that it says led to the denial of procedural fairness. And to the extent they can't or to the extent that there is information that's still the subject of documentary requests, then, as I said, that can be an application, if we get to it, to be determined on its merits at a later time, a further application for an amendment. Then can I come to paragraph 1, Roman (v). Sorry, yes. It's 1 Roman (vi). And our complaints in

respect to this paragraph are slightly different. And it's different between the various sub-paragraphs of Roman VI.

Can I deal with first, because it's more straightforward, sub-particulars capital C and capital D. Sub-particular capital C, as we understand it, is – leads to – and I accept Mr Lancaster's submission that these particulars can't be read in isolation from the wider arguments being advanced. But it seems to us that sub-particular C introduces an argument along the lines considered by the Full Court in Carrascalao,, that there just wasn't enough time to allow – taken by the minister to allow proper, genuine and realistic consideration, or lawful consideration of the submissions that were – or the briefing note that was put to the Minister.

HIS HONOUR: Well, this is a particular procedural fairness ground.

MR KNOWLES: Yes.

HIS HONOUR: I don't think Carrascalao was in that line of country.

MR KNOWLES: Well, e except that I think that it's – the procedural fairness waters – and I don't hold my friends to any idea that the categories of judicial review are fixed or immutable. But the concept of procedural fairness is widened somewhat by the chapeau, because it's alleged that denial of procedural fairness arose because of the failure to give reasonable and lawful consideration to the submissions advanced by the applicant. Now, that can be characterised as a denial of procedural fairness. But part of the argument they wish to run is that a period of not more than 79 minutes wasn't sufficient for the Minister to, in effect - - -

HIS HONOUR: Well - - -

MR KNOWLES: - - - do justice to their arguments.

HIS HONOUR: Yes. Well, I take this as an allegation that the applicant wasn't given a proper hearing. If they want to say that that's an aspect of legal unreasonableness, then I think they need to articulate that separately.

MR KNOWLES: Yes.

HIS HONOUR: As part of an allegation that the applicant wasn't given a proper hearing, it seems to me to work in just a factual way.

MR KNOWLES: Yes.

HIS HONOUR: Essentially "The Minister didn't read our material properly, and we seek to infer that from the short time that she had with it".

MR KNOWLES: If that's the argument, then our objections to it are narrow. We can meet the factual question of how long the Minister had in time for the hearing.

We would say that given the briefing note is six pages long plus annexures, not more than 79 minutes and giving the Minister the credit of an assumption of ordinary literacy ability, that's more than enough time to consider the briefing note. We say that's a hopeless argument that shouldn't go forward. But we accept that that's a low threshold. We can meet it at the trial. And in some – to some respects, the argument in subparagraph (d) is the same. We say there was no obligation to give reasons, the failure to give reasons doesn't allow for any inference that things weren't properly considered.

But it's essentially a legal argument, and we can meet it. We say it's doomed to fail, but we don't put our objection on any other basis than that. But subparagraphs (A) and (B) are different. First, because reading the paragraph in the way your Honour did as properly limited to procedural fairness, it follows that – there's no obligation – sorry, no prohibition on the Minister considering the matters in (A) and (B) even assuming that they will be factually made out, but there's no – it's not suggested they are prohibited or relevant considerations.

We just don't see how it's tenable to say that because those matters were taken into account, assuming those matters were taken into account, that that could give rise to a denial of procedural fairness, but perhaps on the procedural – I understand that the difficulty with some of the arguments I raise in respect of this particular is that it's asking your Honour to essentially reach a final conclusion on the arguability of these grounds at a preliminary stage, but what doesn't involve that is the next argument that I raise, which is - - -

HIS HONOUR: Is (B) – sorry to keep throwing thought bubbles around, but – I don't know whether you throw bubbles, but anyway – is (B) really a bias argument?

MR KNOWLES: Not as articulated, your Honour, although I understand that - - -

HIS HONOUR: Or enacting under dictation argument or - - -

MR KNOWLES: Yes, or a fettering of discretion argument. Perhaps there are - - -

HIS HONOUR: Perhaps I shouldn't give people ideas, but anyway.

MR KNOWLES: Well, even accepting that bias comes within the general rubric of procedural fairness, if there's going to be a bias argument raised - - -

HIS HONOUR: You would want it to be stated directly.

MR KNOWLES: Very clearly.

HIS HONOUR: Yes.

MR KNOWLES: And so we just don't understand how those arguments really hang together, because the possibility of taking those two matters into account, which are

not prohibited relevant considerations, just doesn't bear upon whether lawful consideration was given to the applicant submission, but perhaps more relevantly for today's purposes, or equally as relevant perhaps, is it's not open, with respect, for my friends to say, well, this doesn't really broaden the factual – the landscape of the factual dispute, because it's really focused upon the second respondent's subjective understanding or state of mind at the time of making the decision.

Now, it is true that some of those particulars are framed in terms of what the first respondent had regard to, but one can see from the ..... the language the first respondent and/or the second respondent is still used. So the inquiries do necessarily have to go on the argument raised beyond the Minister's state of mind, and subparagraphs (A) and (B) have with them factual matters that underpin what is said to have been the considerations.

So what were the representations communicated by or on behalf of the Prime Minister, the Environmental Minister and the Indigenous Australians Minister to either the first or the second respondent. Although it said that there's a desire on the part of the first respondents to make a decision quickly and not adversely to the applicant, it's then suggested that that was to allow the Prime Minister to make an announcement at a New South Wales State labour conference meeting and having regard to the timing of the Northern Territory election, but I might take your Honour to why this does significantly increase the scope of factual disputes, because your Honour's been taken in the affidavit of Ms Scott, to the notices to produce. Can I ask your Honour to turn back to that, and, in particular, at page 101 of the bundle – 102 of the PDF – is the notice to produce issued to the Commonwealth. I'm sorry, the relevant page is 106 and 107, which is 107 and 108.

HIS HONOUR: Yes.

MR KNOWLES: What is sought, apparently in aid of both this ground and also B(vi), is copies of the speech, in paragraph (i), given by the Prime Minister, and then originals, in paragraph (ii), of various draft versions of the speech, as well as comments and amendments to the speech, and the communications to or from the first respondent about the speech. And then, in (iii), which moves on from the Prime Minister's speech to the issue of a joint press release between the first respondent and the Minister for the Environment, again documentation not just about the press release itself but the drafts, the comments and communications. Ms Scott's evidence – and you've already, really, heard the arguments about weight that should be given to this, but Ms Scott makes the reasonable point, in my submission, at paragraph 19 and 20, that this notice to produce, which is opened up by this amendment and the amendment to (vi), will require instructions of the offices of not only the first respondent but the Prime Minister, the Department of the Prime Minister and Cabinet, the office of the Minister for the Environment and the Department of Climate Change, Energy, Environment and Water and, by reference to the nature of the searches that would have to be conducted, including searches of very senior members of the Government, there would have to be review of that documentation, including for immunity claims. And Ms Scott gives instruction gives evidence based

on instructions, but in my submission instructions for which there's a reasonable inference given paragraphs 19 and 20, that that production may not be completed before 28 October, when this matter is listed for trial. So, we say there is real prejudice by opening up the factual matters which are advanced in (vi), A and B, and then again in point 2(vi), which deal with both the Prime Minister's speech and any interaction between the Minister, who is the first respondent, and the Minister for the Environment. Consistent with the ordinary?--- - - -

HIS HONOUR: This is 2(vi)?

MR KNOWLES: 2(vi), yes, is the same – the same point. I'm sorry. Yes, it is 2(vi), which failed to proceed on the basis of correct legal principles properly applied. And that seems to be – I'm sorry. No, that's not – it's not – I shouldn't have said 2(vi). I should have said (iii)(c), which is the desire to make a decision adverse to the applicant to allow the Prime Minister to deliver a speech about mining in Jabaluka. That's the further reference. I withdraw the reference to 2(vi). And we do say that, consistently with the principles in Aon, your Honour wouldn't grant an amendment that opens up new areas of factual dispute which will cause prejudice to my client by having to conduct searches which may not be completed right up until the trial itself, may not even be considered by the trial, and your Honour is being put in the invidious position by the applicants of seeking leave to amend in circumstances where that puts the current timetable and the current hearing dates at risk.

I suppose the response to that could be that it would always be open for the hearing date to be moved, but we don't understand that to be the applicant's position, because they are the ones who sought urgent interlocutory relief, and they are the ones who sought, albeit with our consent, an expedited final hearing, but our position really is that if these matters are to go forward, they have to go forward in an orderly way. If we are still investigating and producing documents or adducing further evidence beyond the current timetable to address these new factual issues, then it may simply be that the trial can't go ahead. Now, we say there's an easy answer to that: don't allow the amendments.

But we accept that there's an alternative procedural approach, but it's really in my friend's hands to accept, I suppose, that if it is the case that your Honour accepts Ms Scott's evidence, they really have a choice to make. Are they pushing these grounds of amendment when they can't be accommodated within the existing timetable? Or are they accepting that the existing timetable including the hearing date may have to change? Well, can I just make two further references. I've already dealt with paragraph 1(b)(vii), which really just refers to the material referred to in the affidavit of Mr Welsh. Now, we appreciate this isn't a case done on the pleadings, but if it were, you don't plead a case by simply saying, "Here's the evidence."

What is it about the material referred to in the affidavit of Mr Welsh which is said to give rise to the denial of procedural fairness? It's there, the affidavit is there, and it should be within the control of the applicants to particularise that. In relation to

paragraph 2, as Mr Lancaster said, our objections to the unreasonableness grounds are much more limited. Subparagraph (b)(ii), we have no objection to new particulars G to M. We do raise an issue about Roman N – sorry not Roman N – N, the national interest in preserving the Commonwealth control over prescribed substances. We said in writing that that introduces a new factual issue as to how that national interest might be determined. Mr Lancaster's response is that that issue is already raised in (v) of the same ground.

Well, we say that it's done slightly differently there, that it said that we did not act for the purposes of the Atomic Energy Act rather than in terms of what weight was given to the national interest, but can I also say that, if that ground is to be permitted, there really needs to be some articulation as to how not renewing the lease somehow affects Commonwealth control. The implicit argument in subparagraph 2(N) is that the Commonwealth ceases to preserve control over the prescribed substances if it does not renew the lease. It's not articulated in the application how that is the case legally, nor – and this is much an argument along the same lines – in (vi)(D) the point is made that the effect of the advice decision was that the third respondent was enabled to decline to extend Jabiluka when it would not otherwise have been enabled to do so.

We understand that these are really just identification of legal arguments and submissions that might be put, but there is a difficulty in that particular expression of the argument because it assumes that the Minister was acting on an incorrect basis by proceeding with a view that it was the advice decision that would enable the application to be declined when it would not otherwise have been able to be declined.

We think that sits somewhat uncomfortably with the particulars to paragraph 6, which seemed to suggest that there was an entitlement to renewal in any event. But I accept that that argument doesn't raise any factual confusion. I raise it now, really, to say that these legal arguments really have to be identified with some precision and in a way that they're not currently identified. But we can probably go forward and address that matter, those legal arguments at trial.

They're not matters that I would need to cross-examine Mr Welsh, for example, on and in – because of that, they sit somewhat in distinction to our complaints about procedural fairness, which really do go to the heart of some factual disputes that will be in issue, and we say it's incumbent on the applicants to identify what their case is in terms of what information needed to be disclosed to them and what issues they didn't have a reasonable opportunity to make submissions upon. If your Honour gives me one moment. They're the submissions for the first and second respondent.

HIS HONOUR: What's the factual inquiry that could be opened up by (ii)(V) – (ii)(N)?

MR KNOWLES: (ii)(B)?

HIS HONOUR: The national interest point.

MR KNOWLES: (ii)(N)?

HIS HONOUR: Yes.

MR KNOWLES: It's only this, your Honour, is that if it's said that it's unreasonable not to have regard to or not to give due weight to the national interest in preserving Commonwealth control over prescribed substances, that necessarily asks, well, what other countervailing factors was the Minister entitled to consider on a determination of the national interest on an issue with as many competing policy arguments as uranium mining in the middle of a large national park, could potentially raise factual issues that to say that - - -

HIS HONOUR: Well, it doesn't say the national interest simpliciter.

MR KNOWLES: No, it doesn't, but - - -

HIS HONOUR: You might infer, in the absence of something to the contrary that, a conception of the national interest in coming to the decision she came to, this involves an assertion that there is a national interest in preserving Commonwealth control over prescribed substances.

MR KNOWLES: Yes. As I said - - -

HIS HONOUR: Drawing on the Atomic Energy Act.

MR KNOWLES: As I said, we don't necessarily understand the legal hinge upon which that operates, that why control is ceded by not renewing the lease, but your Honour's question to me was prior to that, was what's the factual issue raised. It really is only – it's limited in this sense, that the national interest in preserving the Commonwealth control can be understood.

That wouldn't be something we would necessarily lead evidence on once we understand the legal hinge upon which it operates. But it's in the context of an unreasonableness argument that insufficient attention was given to that issue. If it's going to be put forward that it's an outcomes focused unreasonableness argument, that is it was simply unreasonable to come to this decision, then there might be other considerations of the national interest that would be called upon to be considered, not necessarily considerations that the court would be well suited to resolve, but evidence could be led of other competing interests. That's the only point raised by subparagraph (n).

HIS HONOUR: Yes.

MR KNOWLES: And I think in writing we have made a submission about Romans (vi) of paragraph 2(b). I just wanted to clarify that position before I leave, your Honour. Yes. We say in paragraph 19 that there may be a new factual issue by

focusing upon the first respondent's state of mind. But I think I should, having heard Mr Lancaster explain what is meant by proceeding on the basis of the correct legal principles correctly applied, I think I can accept that to the extent that there is some factual question as to the basis upon which the first respondent proceeded to give that decision, they're matters which will likely be dealt with in the ordinary way in considering the lawfulness of the decision.

So I don't put that paragraph as opening up some new factual issue that can't be met at the hearing, unlike the issues relating to the involvement of the Prime Minister in the decision, or the correspondence with the Minister for the Environment. If the court please.

HIS HONOUR: Yes. Yes, Mr Glacken.

MR GLACKEN: Your Honour, we've identified four groups of amendments that we say should be refused. We say they should be refused for two connected reasons. First, they did not simply disclose a cause of action. And secondly, they expressed in terms to give rise to prejudice and unfairness. I will be relatively brief, given that the Commonwealth has covered some of this ground, your Honour. But the four groups of amendments are 1B Roman numerals (I) at pages 2 to 3, secondly 1B Roman numerals (i)A at page 3.

HIS HONOUR: Yes.

MR GLACKEN: Thirdly, 1B Roman numerals (iii)E and F. And F on pages 4 and 5.

HIS HONOUR: Yes.

MR GLACKEN: And then fourthly, 1B Roman numeral (vii) at page 6.

HIS HONOUR: Yes.

MR GLACKEN: As to the first submission that no reasonable cause of action is displayed by these proposed amendments, If we take each of those four groups briefly, the first one at 1B, Roman numerals (I) does not specify the information that was relevant, significant, or adverse. Your Honour will appreciate that a person whose interests are affected does not have to be given an opportunity to comment on every piece of information, only the information that is relevant, significant, and adverse. So on the face of this pleading, it simply doesn't disclose a cause of action. As to the unfairness, I will come to that in a moment.

Again, the next group, 1(b)(i)(A), it does not specify the issues on which ERA was not allegedly given opportunity to be heard. And again, your Honour will appreciate, going back to, say, Alpha 1, endorsed by the High Court, that procedural fairness requires an opportunity to be heard on the relevant issues, that is, the issues relevant to a decision. And again, if we take the third group of amendments, 1(b)(iii)(E) and

(F), we start, in the substance of (iii), with a pleading that there was a failure to give ERA an opportunity of ascertaining the relevant or critical issues.

Could I just point out to your Honour, and I will come to this later, but (iii), and then (A), (B), (C) and (D), was the case pleaded at the outset, and the case to which the parties have marshalled their evidence and negotiated an agreed statement of facts, but what's being introduced at (E) and (F) is to say, to read it literally:

> *ERA was not given an opportunity to make submissions and provide information on the material in (E) and the material in (F).*

That expression simply does not identify an issue to disclose a cause of action. Now, for unfairness, I will come to that in a moment. The fourth and final one, if your Honour goes to page 6, (vi), the material referred to in the affidavit of Mr Welsh. Now, unfortunately, your Honour has to actually go back to page 2 and go to 1(b), where the chapeau says:

> *In making the advice decision, the Commonwealth Minister and the Commonwealth denied ERA procedural fairness and natural justice, because of* –

and then we get to page 6, the material referred to in Mr Welsh's affidavit. Now, that doesn't disclose any cause of action on its face. As to the second submission of unfairness, and bearing in mind that characterisation of how things are being put, is that the amendments simply are unfair and do not serve the function of an originating application to define the issues and state the factual and legal case that's going to be advanced at trial. Your Honour heard references to submissions by ERA that it would be a matter of inference, but, as the Commonwealth has pointed out, there is no pleading of an inference at the moment.

So if we take each of those four categories, your Honour. In the first category, 1(b)(i), if we don't know what the information is that is relevant, significant, and adverse, then we don't know what case to meet. Likewise, 1(b)(i)(A), if there's no identification of the relevant issues on which ERA was not heard, then we don't know what is the case on procedural unfairness. Then, likewise, for the third and fourth categories, simply referring to material.

Now, two consequences follow, your Honour. The first is that we are unable to search, gather, and adduce evidence to assess if ERA was given the opportunity of assessing what were the relevant issues and given an opportunity to be heard on the relevant issues. And the second consequence is that we're unable to assess if information or material was relevant and significant to the decision to be made. Now, as a matter of the way – and perhaps I will just go back to what I said earlier – the agreed facts, at paragraphs 51 to 65, assemble various public statements by my clients and other people on what were the four issues identified in (iii) of the originating application, and the evidence that's being put on overnight does the same thing.

Now, in terms of form, your Honour's bubbles really indicate the vagueness of these various amendments and the difficulty of second-guessing what sort of case is being met, and of course, we don't know – that is, the NLC parties. We don't know what the Commonwealth might know, so we shouldn't be lumped with that sort of submission made by ERA, which, in any event, should just be rejected given the functions and requirements of an originating application, but, your Honour, in terms of the guesswork, can we just give two examples to illustrate the problem without – and examples can be multiplied, but, your Honour heard from ERA that 1(b)(i) and the listing of persons in (a) to (z) is based on what's revealed by the ministerial brief. If your Honour looks at that long list, you will see, in (x), "the office of the supervising scientist". And if your Honour turns up the ministerial brief, which is annexure MAS1 - - -

HIS HONOUR: I did have that in front of me earlier.

MR GLACKEN: This is the affidavit by Ms Scott.

HIS HONOUR: Yes. I have the affidavit.

MR GLACKEN: If your Honour goes to PDF page 61.

HIS HONOUR: Yes.

MR GLACKEN: This is attachment D to the ministerial brief. This is the only reference that we can find to the supervising scientist in our guesswork – at the bottom of the page, at paragraph 6.

HIS HONOUR: Yes.

MR GLACKEN: And then it refers to monitoring by the supervising scientist; and then over the page, about groundwater contamination risks; and then the footnote invites comments on ERAs mine closure plan. Now, are we to guess that there was an issue in play in making a decision about groundwater monitoring? If we're not to make that guess, what is the issue, in terms of the pleading that the supervising scientists made a representation which is said to be causative of procedural unfairness to ERA? If I can take one other example. Your Honour will bear in mind that the amendments at 1(b)(vi) allege causative procedural unfairness because of "the material" in Mr Welsh's affidavit. That's in annexure LC4 to Mr Chung's affidavit.

HIS HONOUR: Yes.

MR GLACKEN: Your Honour went to it earlier.

HIS HONOUR: Yes.

MR GLACKEN: It commences at page 198 of the exhibit, I should say.

HIS HONOUR: Yes.

MR GLACKEN: I want to take your Honours to two parts, but contextually it consists of 83 paragraphs. It's accompanied by an exhibit of 94 pages. It talks about basically everything Mr Welsh knows of, in relation to the renewal application, but in terms of the confusion and guesswork, if your Honour goes to paragraph 37 - - -

HIS HONOUR: 37?

MR GLACKEN: Paragraph 37 of his affidavit.

HIS HONOUR: Yes.

MR GLACKEN: Now, Mr Welsh then – he identifies seven issues that he was aware of that certain matters had been raised with the Commonwealth Minister or the Territory Minister and then goes on to deal with his views on those seven issues up until paragraph 72, but then if we go to paragraph 75, Mr Welsh then opines about 11 further submissions or issues. Now, this is all a bit of a riddle. What is it in his affidavit that was causative of procedural unfairness, and how does this sit with a case that started with four issues identified in (iii) of the pleading, to which we've marshalled our evidence and responded. Now, as I said, examples can be multiplied, your Honour, but the point we wish to make is probably best drawn from ..... of Perram J the decision that we sent to your Honour's chambers this morning.

HIS HONOUR: Yes.

MR GLACKEN: I hope your Honour has it, it's - - -

HIS HONOUR: Yes.

MR GLACKEN: - - - Stuart v Deputy Commissioner of Taxation [2011] 267 ALR 637. Your Honour might recall this concerns Ms Hogan and Cornell and others, and what occurred is that there was a strikeout application, and then the usual response to try and salvage the case by way of an amended pleading, and I should say, before I go to the ..... your Honour, is that there's no question today that an originating application is required to state the material facts necessary to give the respondents fair notice of the case to be made at trial.

If it is in contention, we will reject any such contrary contention. We mentioned our written submissions at rule 805, paragraphs 3 and 4, plainly contemplate that originating application should serve that function. The other contextual point I'd like to make is that ERA made a number of submissions about – if I can put it this way, to be crude – defects in existing pleading, and what was being done was just repeating another defect or something like that.

Can we say that on an amendment application, the Court should read the old bits and the new bits together, just to put that in context, and you should read the new bits and the old bits together to try and divine what case is being put. Now, Perram J put things in very succinct ways. The statement of principles at paragraph 35 that I will come to in a moment, but the context which we say echoes here commences at paragraph 33 where his Honour is dealing with the attempt to re-plead the case, and notes that they are well below the ..... line of competence which this court is entitled to expect of parties with representation.

The pleading in particular is filled with irrelevancies and allegations which reveal the absence either of comprehension or application or both. Then, referring to the task of pleadings in the very last slide, his Honour says anyone who seeks to wrestle with the mysteries of the proposed further amended statement of claim will see that it's more akin to a Chinese puzzle box than a succinct statement of the applicant's case.

That, we say, is the vice in the amendments being put forward today by the two small examples that I've given, illustrated, I should say, by those examples, and illustrated by your Honour's bubbles. But the point of principle, or statement of principle of paragraph 35, is this. Pleas in judicial review proceedings are not to be drawn by the ritual incantation of words such as unlawful and procedural fairness without a concomitant grappling with the doctrines upon which such allegations rest.

Pleadings are succinct statements of a case designed to inform the Court and foe alike of what is said and how it will be put. Properly done, they promote the identification of issues in dispute and, by doing so, their prompt and efficient resolution, and in the last four lines:

> *It follows that a pleading which departs from its principal purpose of affording procedural fairness to the opposing party is a pleading which confounds the ends of justice. It engenders expense, delay and the wastage of public resources. It is not to be countenanced.*

Now, your Honour, the Commonwealth's written submission sets out in more detail the points that I made about the doctrinal basis of grounds of review. That, we say, is the vice with these amendments. There is no attempt to grapple with the doctrines upon which judicial review grounds rest. Your honour, that's all I wanted to say orally.

HIS HONOUR: Yes. Mr Lancaster, I notice the time. Do you have much to say in reply?

MR LANCASTER: I expect I could deal with it in 10 to 15 minutes, your Honour, but - - -

HIS HONOUR: Yes. All right. I think we might resume. Yes, I think we might come back at 2.15.

MR LANCASTER: Yes, your Honour.

HIS HONOUR: Court will adjourn.

ADJOURNED **[12.52 pm]**

RESUMED **[2.15 pm]**

HIS HONOUR: Yes, Mr Lancaster.

MR LANCASTER: Thank you, your Honour. Your Honour, in response to the submissions of the Commonwealth and of the NLC, can I make these brief reply submissions. I won't repeat anything I said in chief. The first category for reply is in the proposed amendments in 1(b)(i), subparagraphs C through to Z, an objection is taken by both the Commonwealth and the NLC that there needs to be an identification with particularity of the issues that are raised by those representations. Further to what I've put in chief, can I take you on a back to Mr Welsh's affidavit just to identify what will be in the applicants evidence or what we propose to read. So in Mr Chung's affidavit in exhibit LC4, from page 209 of that bundle, paragraph 37 and following, I think I took your Honour to paragraph 37 but - - -

HIS HONOUR: Yes.

MR LANCASTER: The deponent identifies in A to G the issues effectively that he now understands were on the table at the relevant time, and the extent to which he was aware of each of those issues, and that's then dealt with under subheadings that run through up to and including paragraph 53. And then, he refers to the brief, and that included certain correspondences listed in paragraph 54. And then in respect of the correspondence that's listed, Mr Welsh in paragraph 56 and following adopts a procedure where he refers to the relevant correspondence NLC letter above paragraph 56, the first GAC letter above paragraph 60, the second and third GRC letters, the third of which is dealt with in paragraph 67.

But the reason I take your Honour back to that is the materials to which – the materials that have been produced, we sought to deal with by the deponent addressing it in terms and, in the course of that, identifying, for example, by reference to period 67, what the deponent now understands the issues to have been that were raised with the decision maker, and he goes in sequence through those issues identifying what, if anything, he knew about that issue being on the table and what he would have said in respect of it. But there are two things that flow from that, for my reply submissions. The first is that there is very clear specification of a detailed list of issues in Mr Welsh's affidavit of identification of issues from representations of which we did become aware that we've dealt with in the evidence, and so to the extent that the objection in - - -

HIS HONOUR: But there are some categories, aren't there, where you know that representations were received from somebody, but you don't know the detail - - -

MR LANCASTER: Exactly.

HIS HONOUR: - - - even now, the detail of what they were.

MR LANCASTER: Yes, that's right. So the reason for going back to it is to then go back to the amended pleading. So at, category C, obviously, in respect of GAC in category capital C, in the pleading. The affidavit performs the function of a very clear particularisation of the issues, and that has been done in respect of the correspondence that we have that we know the content of. So, that's the first point for reply. These are not all in the same category because, in respect of some of them, we've given very clear particularisation of what those issues are in the affidavit, and we didn't consider it appropriate to put all that detail in the originating application.

And in respect of the others, I made submissions in chief about the impossibility of that specification because we simply don't know the content of the representation. And your Honour will recall my other submission in chief about the duel function of these particulars, namely the fact of the representation from what was then an unknown source to the Minister in multiple different instances, is itself a factor to be taken into account in assessing the procedural fairness or otherwise of the decision-making process. So in my submission, those aspects of it support as a matter of pleading all of those subparagraphs.

It's of course common ground that the Commonwealth production of documents is not yet complete. A halfway house your Honour might adopt as a solution is to allow the amendments and to direct the applicant after the finalisation – after we are told by the Commonwealth that everything has been produced – withdraw that – everything that will be produced has been produced. We can provide further particulars of those subparagraphs in A to Z, having been informed of that. But in my submission, there is presently a proper basis for pleading A to Z as I've explained, but your Honour might wish to adopt that further solution for further particulars after production is complete. I don't know how many more documents are coming. We haven't been told that. I think we have been told is one category where 1000 are being reviewed, but we don't know how many of that we will get.

Now, the next point for reply is in respect of the proposed amendment, to add (iA). My learned friend for the Commonwealth accepted the principle that departure from a presented timeline for decision-making may form an arguable denial of procedural fairness as a matter of principle. And that is indeed the principle upon which we rely, and I took your Honour to the Welsh affidavit on timing as to his understanding and expectation – sorry, I will finish that sentence – his understanding of an expectation of timing, having regard to what was said to him by the Commonwealth offices. I think I said this was (iA), it's not. This is a reply to submissions made about ii.

HIS HONOUR: Yes.

MR LANCASTER: So I apologise for that confusion. So in my submission, there is a proper basis for A in ii, because it relies on the accepted principle my learned friend referred to. And then it just becomes a matter for whether or not the evidence makes that ..... be at the final hearing. But I've taken your Honour to sufficient evidence to indicate there's an arguable proposition there. My learned friend, Mr Knowles', objection to B and C – whether or not B and C – what is put to your Honour, essentially, is that it's inarguable that there is – that the content of procedural fairness in this particular case extended to those matters, and so your Honour shouldn't allow the identification of those is the basis for the unfairness. But - - -

HIS HONOUR: Well, I think, as you say, the additions to two are really narrowing - - -

MR LANCASTER: Yes.

HIS HONOUR: - - - something that's already there.

MR LANCASTER: Yes. Narrowing what is already there, and - - -

HIS HONOUR: And if it's flimsy, then I think that's a submission that can be made at the final hearing.

MR LANCASTER: Thank you, your Honour. Then, in reply on 1Biii, E and F, all I would add – I support the amendment ..... what I said in chief, but I would add to that the further alternative that I suggested a moment ago. One other option for your honour is to allow the amendments then, after we're told production is complete, to direct us to provide further particulars of ENF identifying more specifically what's being referred to, but we do defend it in the form it is presently in as an arguable pleading. Then, can I address 1(b)(vi). I won't say anything more about C and D, but my learned friend addressed A and B to say that it does materially increase the – my word – materially increase the range of the factual dispute in the case.

Now, one of the difficulties remains that the objection that pressed is really an objection to the two notices to produce, not directly to the pleading. So the proposed amendment to the pleading is resisted on the ground that that pleading appears to the respondent to support the notice to produce, which is said to be unduly demanding. That proposition falls down when there's no separate challenge to the notice to produce, put part of the production under the notice to produce is, as your Honour saw, the Prime Minister's speech itself, as in the full final form of the speech. That itself would provide a basis for making a submission about an inference in respect of A and B and, in that respect, there will be material that will allow the applicant to make a submission to the effect of A and B already.

So the question then is a separate question – not before your Honour today, in my submission – that if there turns out to be a real oppression or prejudice or delay occasioned by responding to the notices to produce that have been served, then that can be dealt with in the ordinary way, but it's not a reason for striking out the proposed pleading which, in any event, will be able – in my submission, will be able to be advanced and accommodated by reference to material that will undoubtedly be before the court, including at the very least the final version of the Prime Minister's speech, and perhaps information about when that final version was prepared. None of that involves any extensive investigation of facts and, to the extent there is an oppression style of objection raised, in the future the notice to produce, that can be dealt with in that context, but in my submission, it's not a reason for rejecting the pleading.

In relation to (vii), the reference to Brad Welsh's affidavit, it is no difficulty if the applicant is directed to – if your Honour allows that amendment, but we're directed to identify the specific paragraphs in Mr Welsh's affidavit to which we refer. That can readily be done. My learned friend frankly pressed some objections to ground 2 without any disrespect to him for the Commonwealth. The legal hinge that is involved in the particular in ground 2(b)(6) is section 387 of the EPBC Act, which says that there should be no mining in Kakadu, and my learned friend expressly said he doesn't press the contention there's any new factual inquiry in that respect, but just inquired as it were as to the legal hinge for paragraph N. This is going on. I might have misstated the particular again. (ii), subparagraph (n), this is the national interest - - -

HIS HONOUR: Yes.

MR LANCASTER: - - - point. So that provision of the EPBC Act saying essentially, in substance, "No mining in Kakadu," is the source of the Commonwealth control that's referred to in the pleading. In other words, the statute takes away any such control by its existing terms. Your Honour, my learned friend for the NLC referred to the case of Stewart, Perram Js decision. One of the purposes of my friend going to that seems to have been to invite your Honour to accept a slur against the pleaders of the present amendments, but your Honour would not adopt that. This is the courage that comes from the AVL connection I think, but your Honour would not accept it. The principles aren't in any doubt. And the - - -

HIS HONOUR: Yes. The pleading, so far as I recall it, in Stewart was a different kettle of fish to the - - -

MR LANCASTER: Totally different kettle fo fish. The problem there was lack of particularisation. He and Mr Glacken's seeking to strike out our further particulars that we're offering. So that's a big difference to begin with. Finally, your Honour asked during the course of argument – well, perhaps didn't ask, but raised why the Commonwealth is also a party. One answer is that, as we see it, this was an exercise by the first respondent Minister of executive power of the Commonwealth, but in circumstances where it has not been said to us by the Commonwealth that the

Minister was the single relevant decision maker, and because we don't know that position, the only solution as a matter of naming of parties was to join the Commonwealth as well. May it please the court.

HIS HONOUR: So the operative or the renewal decision is made by the Territory Minister under a Northern Territory enactment?

MR LANCASTER: Yes, under the Mineral Titles Act.

HIS HONOUR: Which envisages advice, does it, from the Commonwealth?

MR LANCASTER: Yes. I don't know if your Honour has section 187 of the Mineral Titles Act in the materials. One of the issues in the case is the applicability of this provision, but perhaps can I just read your Honour - - -

HIS HONOUR: Yes.

- - - subsection 1. It says,

> *In relation to a prescribed substance* –

which includes uranium –

> *the Minister* –

that is, the Territory Minister –

> (a) must exercise the Minister's powers in accordance with, and give effect to, the advice of the Commonwealth Minister; and
>
> (b) must not exercise the Minister's powers otherwise than in accordance with the advice of the Commonwealth Minister.

So the Northern Territory Minister received the Commonwealth's advice, "Do not renew," and said, "I've received this advice; accordingly, I do not renew." Now, there are a number of issues connected with whether or not section 187 applied in the circumstances in the sense that there's a separate provision of the mineral title – section 203 – that says a condition of a mineral title that's inconsistent with the Act prevails over the Act. So one of our contentions is we have a condition with a right to renew, and that prevails over this advice provision. So that's how that fits together. Sorry, and section 187, subsection (3) of the Mineral Titles Act 2010 of the Territory says Commonwealth Minister means the Minister for the Commonwealth administering the Atomic Energy Act.

HIS HONOUR: Yes.

MR LANCASTER: Those are my reply submissions, your Honour.

HIS HONOUR: Yes. All right. I will make some orders in a moment. Won't give reasons unless anybody asks for them, but can I just observe that to the extent that factual questions are opened up concerning the tendency of the Prime Minister's speech, certainly while the Commonwealth is a party that is, to me, to open up large yet unexplored factual provinces which are not likely to be practicable for a hearing to occur so soon.

My other observation is that insofar as particulars or proposed particulars refer to a lack of procedural fairness in relation to the contents of representations or things of that sort. I wouldn't rule out those matters being revisited with better particularity after document production is complete. In the light of those things, the orders I will make are as follows.

Leave is granted to the applicant to file an amended originating application incorporating the amendments shown in the draft at annexure A to the affidavit of Leon Chung affirmed 17 September 2024, save for, first, the additions proposed to particular B1 of ground 1, secondly, the addition of paragraphs E and F to particular B3 of ground 1. Thirdly, paragraphs A and B of proposed particular B6 of ground 1. Fourthly, proposed particular B7 of ground 1. Fifthly, proposed paragraph C of particular B3 of ground 2.

The Court notes that the applicant does not press the word "including" in particular B1 of ground 1, the word "including" in particular B3 of ground 1, the words "inter alia" in particular B6 of ground 1, the word "including" in particular B6 of ground 2. I hope I've got all those right, but hopefully somebody will point it out to me if I've not got those references right. That I make is – the interlocutory application filed on 17 September is otherwise dismissed, and should I make any order as to costs?

MR GLACKEN: Your Honour, can I first raise something before we address cost?

HIS HONOUR: Yes.

MR GLACKEN: I'm not sure whether it's my hearing or note-taking, but your Honour's recitation of things disallowed was 1B(i). I don't know whether your Honour referred to 1B(i)(A) on the top of page 4, which is bound up with the one that your Honour's disallowed.

HIS HONOUR: Yes. No. I've – I have let that go in essentially on the basis that it takes its content from what precedes it. What precedes it is it takes most of its content from what precedes it, which I've substantially disallowed. Yes. So should I make any order as to cost or reserve or costs in the cause?

MR LANCASTER: Your Honour, I don't have instructions, but I would seek costs. We've been substantially successful, and the applicant also made concessions today about the form without even any submissions being made in terms of the non-exhaustive language so, on the whole, we've won more than they have, and on that basis, I would seek costs.

HIS HONOUR: The sides of the bar table always have different views on that.

MR LANCASTER: Yes. I'm not sure I would accept that, but your Honour has seen the mark-up and your Honour sees the result, and there are substantial amendments that have been permitted that were contested. So - - -

HIS HONOUR: Yes. Do you have anything to say on costs, Mr Glacken?

MR GLACKEN: We do. I thought I had been successful four out of four, but at least three out of four, if not in substance four out of four. They were the four points we invited the applicant to replead in the correspondence annexed to our submission. The invitation was rejected. We've been here today to argue those points and we've been, I think, wholly successful on them and costs of an occasion by the amendments should be paid. Well, cost of the application, I should say, more accurately.

HIS HONOUR: Yes. Yes. Yes. Costs are always rough and ready, but I will order that the applicant pay the costs of the fifth and sixth respondents – costs of the application of the fifth and sixth respondents and otherwise the parties bear their own costs.

MR LANCASTER: Please the court.

HIS HONOUR: Court will adjourn.

MATTER ADJOURNED at 2.42 pm INDEFINITELY

ANNEXURE MAS-4

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

The following 4 pages is the annexure marked MAS-4 referred to in the affidavit of Madisen Anne Scott made 24 September 2024 before me:

.....Mwoollett.....

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the *Judiciary Act 1903* (Cth)

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:	16/09/2024 10:28:10 AM AEST
Date Accepted for Filing:	16/09/2024 12:29:10 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
Reason for Listing:	Return of Subpoena
Time and date for hearing:	25/09/2024, 9:30 AM
Place:	By Web Conference, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney

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 First Respondent

Definitions

In this Notice to Produce:

- **Communication** includes oral communications and communications in writing (whether electronic or otherwise).
- **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).

The Applicant requires you to produce the following documents or things before a Registrar of the Court by 9:30am on 25 September 2024:

1. The original or one copy of all Documents evidencing or recording:

   (a) draft versions of the Joint Media Release by the Hon Madeleine King MP and the Hon Tanya Plibersek MP titled "Work begins to add Jabiluka site to Kakadu National Park" dated 27 July 2024 (**Joint Media Release**);

   (b) the date on which draft versions of the Joint Media Release were prepared;

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

(c) comments on and proposed amendments to the Joint Media Release; and

(d) Communications to or from the First Respondent, on or before 25 July 2024, in respect of the Joint Media Release.

Date: 16 September 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
Sixth Respondent:	Northern Land Council

ANNEXURE MAS-5

ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865
Applicant

MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN AUSTRALIA (COMMONWEALTH)
First Respondent

COMMONWEALTH OF AUSTRALIA
Second Respondent

MINISTER FOR MINING AND MINISTER FOR AGRIBUSINESS AND FISHERIES (NORTHERN TERRITORY)
Third Respondent

NORTHERN TERRITORY
Fourth Respondent

JABILUKA ABORIGINAL LAND TRUST
Fifth Respondent

NORTHERN LAND COUNCIL
Sixth Respondent

YVONNE MARGARULA
Seventh Respondent

The following 4 pages is the annexure marked MAS-5 referred to in the affidavit of Madisen Anne Scott made 24 September 2024 before me:

Margarita Woollett

An AGS Lawyer pursuant to s 55I of the *Judiciary Act 1903* (Cth)

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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 Second Respondent

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The Applicant requires you to produce the following documents or things before a Registrar of the Court by 9:30am on 25 September 2024:

1. The original or one copy of all Documents evidencing or recording the final version of the text of the speech given by the Hon Anthony Albanese MP at the New South Wales Labor Annual Conference on 27 July 2024 (**Speech**), at which Mr Albanese addressed Jabiluka.

2. The original or one copy of all Documents evidencing or recording:

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

(a) draft versions of the Speech, but excluding draft versions which do not refer to Jabiluka;

(b) the date on which draft versions of the Speech were prepared;

(c) comments or proposed amendments to the Speech relating to Jabiluka; and

(d) Communications to or from the First Respondent, on or before 25 July 2024, in respect of the Speech.

3. The original or one copy of all Documents evidencing or recording:

(a) draft versions of the Joint Media Release by the Hon Madeleine King MP and the Hon Tanya Plibersek MP titled "Work begins to add Jabiluka site to Kakadu National Park" dated 27 July 2024 (**Joint Media Release**);

(b) the date on which draft versions of the Joint Media Release were prepared;

(c) comments on and proposed amendments to the Joint Media Release; and

(d) Communications to or from the First Respondent, on or before 25 July 2024, in respect of the Joint Media Release.

Date: 16 September 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
Sixth Respondent:	Northern Land Council