IN THE FEDERAL COURT OF AUSTRALIA
SYDNEY REGISTRY

No. NSD1056/2024

BETWEEN

Energy Resources of Australia Ltd ABN 71 008 550 865
Applicant

and

Minister for Resources and Minister for Northern Australia (Commonwealth) and others
Respondents

OUTLINE OF SUBMISSIONS OF YVONNE MARGARULA ON APPLICATION FOR JOINDER

A Introduction

1. By interlocutory application filed on 10 September 2024, Yvonne Margarula seeks to be joined to the proceeding as a respondent pursuant to r 1.32 of the ***Federal Court Rules 2011*** (Cth) on the bases that:

   (a) she ought to have been joined as a party; and/or

   (b) she is a person whose joinder as a party is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined.

2. Ms Margarula relies on her affidavit sworn on 5 September 2024 (**Margarula Affidavit**) and that of Susan O'Sullivan sworn on 10 September 2024 (**O'Sullivan Affidavit**).

B The Mirarr Traditional Owners

3. The Mirarr People are the Traditional Aboriginal Owners of the land the subject of Jabiluka Mineral Lease 1 (**MLN1**). Ms Margarula has cultural authority as a Senior Traditional Owner to speak on behalf of the Mirarr People: Margarula Affidavit, [3]-[10].

4. The Gundjeihmi Aboriginal Corporation (**GAC**)[1] is an organisation established and run by the Mirarr Traditional Owners. The title to the land the subject of MLN1 is held by the Jabiluka Aboriginal Land Trust, the Fifth Respondent, for the benefit of the Mirarr People.[2] The Northern Land Council, the Sixth Respondent, is a corporate Commonwealth entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**).

C Joinder pursuant to rule 9.05

(i) Applicable principles

5. Rule 9.05(1) of the *Federal Court Rules* relevantly provides that:

> (1) A party may apply to the Court for an order that a person be joined as a party to the proceeding if the person:
>
> (a) ought to have been joined as a party to the proceeding; or
>
> (b) is a person:
>
> (i) whose cooperation might be required to enforce a judgment; or
>
> (ii) whose joinder is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined; […]

6. Rule 9.05 is confined in its terms to an application made by an existing party to the proceeding. An order for joinder on the application of a non-party may be made in the exercise of the Court's general power under r 1.32 of the *Federal Court Rules* to "make any order that the Court considers appropriate in the interests of justice". In such an application, "the same constraints and conditions as are required by r 9.05 have been treated as generally applicable": *Karellas Investments Pty Ltd v FW Projects Pty Limited (in liq)* [2021] FCA 870 at [31] (Cheeseman J), citing *Kadam v MiiResorts Group 1 Pty Ltd* [2016] FCA 1205 at [13]-[19] (Edelman J).

7. Rule 9.05, like its equivalent in O 6 r 18 of the former rules, should be liberally construed: *Sportsbet Pty Ltd v Harness Racing Victoria (No 2)* [2010] FCA 952 at [17] (Mansfield J). It is concerned with natural justice, entitling a person whose rights may be affected by a

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[1] See O'Sullivan Affidavit, [14]. GAC is referred to throughout the Statement of Agreed Facts (**SOAF**), and various media releases and correspondence from GAC are contained in the annexures.

[2] SOAF, [7]; *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**Land Rights Act**), ss 4-5. See also O'Sullivan Affidavit at [7], addressing a portion of land depicted in the Second Schedule to MLN1, title to which is held by the Kakadu Aboriginal Land Trust.

decision to be heard before the decision is made, and ensuring that any proper contradictor can be joined, to assist the Court in discharging its statutory obligation under s 22 of the *Federal Court of Australia Act 1976* (Cth):[3] *Commonwealth Bank v Peto (No 2)* (2006) 152 FCR 362 at [33]-[34] (Rares J). As explained by Lord Diplock in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52, 55-56:[4]

> The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach […]

8. A person ought to have been joined, within the meaning of r 9.05(1)(a), if a judgment of the Court may have a direct effect on the rights and liabilities of that person: ***John Alexander's Clubs*** *Pty Ltd and Another v White City Tennis Club Ltd* (2010) 266 ALR 462 at [131] – [136] (the Court).

9. It is the effect of the orders sought in the proceeding upon the applicant third party that must be determined: ***News Limited*** *and Others v Australian Rugby Football League Limited and Others* (1996) 64 FCR 410 at 525 (the Court). "The test involves matters of degree, and ultimately judgment, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party applicant which might be directly affected": *News Limited* at 525.

10. Where the orders sought concern a proprietary interest in land, "all persons who have or claim an interest in the subject matter are necessary parties. This is because an order in favour of the claimant will, to a corresponding extent, be detrimental to all others who have or claim an interest": *News Limited* at 524–525, quoted with approval in *John Alexander's Clubs* at [132].

11. Further, where declaratory relief is sought, "[i]t is well established that a declaration generally should not be made unless all persons interested in the declaration are made

[3] Being an obligation, amongst other things, to grant remedies so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.

[4] Referred to with approval in *News Limited and Others v Australian Rugby Football League Limited and Others* (1996) 64 FCR 410 at 524-525 (the Court) and *Victoria v Sutton* (1998) 195 CLR 291 at [77] (McHugh J).

parties to the application": *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* (2015) 329 ALR 1 at [942]–[944] (Edelman J).

12. In relation to r 9.05(1)(b)(ii), the phrase "each issue in dispute in the proceeding (like its predecessor referring to "all matters in dispute in the proceeding") is not limited to matters arising on the existing pleadings, and "may also include those disputed issues of fact which are subjacent to the pleadings": *Qantas Airways Ltd v AF Little Pty Ltd* [1981] 2 NSWLR 34 at 38; *John Holland Pty Ltd v Comcare* (2009) 260 ALR 103 at [23] (the Court).

(ii) Rights and liabilities directly affected – r 9.05(1)(a)

13. MLN1 was granted for a term of 42 years ending on 11 August 2024. On 26 July 2024, the Third Respondent (**Territory Minister**) refused ERA's application for renewal of MLN1 (the **Renewal Decision**), in accordance with advice given by the First Respondent (**Commonwealth Minister**) on 25 July 2024 (the **Advice Decision**).

14. By the Originating Application filed on 6 August 2024, the applicant (**ERA**) challenges the validity of the Advice Decision and the Renewal Decision. The relief sought by ERA includes, *inter alia*:

    (a) an order setting aside the Renewal Decision, or alternatively an order declaring the Renewal Decision is invalid and of no legal effect; and

    (b) an order declaring that MLN1 continues in force.

15. The rights and/or liabilities of Ms Margarula and the Traditional Owners would be directly affected by the orders sought by ERA, for the following reasons.

16. *First,* an order declaring that MLN1 continues in force has a direct detrimental effect on the rights of the Traditional Owners in respect of the Jabiluka Project land. That effect is as follows:

    (a) Within the meaning of s 3 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (***Land Rights Act***), the Mirarr People:

        (a) have common spiritual affiliations to the sites on the land, being affiliations that place the Mirarr under a primary spiritual responsibility for those sites and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.

(b) Under s 40 of the ***Mineral Titles Act*** *2010* (NT), ERA has a right to occupy the title area specified in MLN1.

(c) ERA is the holder of a "mining interest" as defined in s 3 of the *Land Rights Act*. Under s 70(2) of the *Land Rights Act*, as the holder of an interest in Aboriginal land (defined in s 66 to including a mining interest), ERA is "entitled to enter and remain on the land for any purpose that is necessary for the use or enjoyment of that estate or interest by the owner of the estate or interest".

(d) Under s 71(1) of the *Land Rights Act*, the Mirrar People are "entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land". Those rights are subject to s 71(2), which provides that s 71(1) "does not authorize an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals".

(e) Under the Section 43 Agreement,[5] the Traditional Owners are prevented from entering designated parts of the Jabiluka Project land without approval (cll 17.3, 17.7).

17. The result is that, as explained in the Margarula Affidavit, at [4]-[20], the Traditional Owners are restricted in accessing and looking after their land, and so in discharging their cultural responsibilities. The effect on the Traditional Owner's rights of an order declaring that MLN1 continues in force, regardless of the length of time that MLN1 continues, is accordingly of deep significance. That is particularly so given the cultural significance of the land, and the widely recognised history of this matter spanning over the last 42 years.[6] Ms Margarula is in poor health and fears she may not live to see the land restored to the Traditional Owners, or to see her generation pass cultural knowledge to the younger Mirarr generation.

[5] SOAF, [9]; O'Sullivan Affidavit, Exhibit SO-1, p 203.

[6] See the press releases issued by the GAC at Annexures AA, DD, EE, FF, GG, HH, JJ, KK, LL, MM, NN, OO and PP to the SOAF; the summary contained at Annexure P to the SOAF, pp 229-241; and O'Sullivan Affidavit, [16], [27].

18. On the other hand, if MLN1 does not continue in effect, the Traditional Owners will resume their control over and enjoyment of the Jabiluka Project land. Further, a general reservation of the Jabiluka Project land made by the Third Respondent on 5 June 2024, following requests by the Traditional Owners,[7] comes into effect and prevents any application for the grant of any mineral title in relation to the land.

19. *Second,* the Traditional Owners are parties to the Long Term Care and Maintenance Agreement (**LTCMA**) entered with ERA on 25 February 2005. The LTCMA remains in force until MLN1 ceases to be in effect.[8] Indeed, the impact of the expiry of MLN1 on the LTCMA was a matter relied upon in ERA's application for a stay of the Renewal Decision. If the order sought by ERA is made, declaring that MLN1 continues in effect, that determines that the LTCMA remains in effect and the Traditional Owners' liabilities under that agreement continue. That includes the Traditional Owners' agreement that ERA may have access to the Jabiluka Project Area for the purpose of carrying out exploration activities (cl 8); and the acknowledgement given by the Traditional Owners in cl 5.1(d) (which ERA relies upon in the grounds of the Originating Application, addressed further below).

20. The present case is one, concerning an interest in land, in which an order in favour of the Applicant will, or is likely to, have a corresponding detrimental effect on the Traditional Owners: *News Limited* at 525. It is necessary to prevent injustice being done that the Traditional Owners have an opportunity to be heard before a declaration is made that affects their use of their traditional lands.

(iii) Necessary to ensure each issue in dispute in the proceeding is able to be heard and finally determined – r 9.05(2)(b)(i)

21. In the alternative, pursuant to r 9.05(2)(b)(ii), the joinder of Ms Margarula is necessary to ensure that each issue in dispute in the proceeding is able to be heard and finally determined. This is established by the issues and outcomes described at paragraphs [14] to [20] above. It is also established by the following three issues arising from the Originating Application and the material filed in the proceedings to date.

[7] SOAF, Annexure I pp 128-129; O'Sullivan Affidavit, [20]-[21].
[8] O'Sullivan Affidavit, [19].

22. *First*, the grounds of the Originating Application put in issue the obligations of Ms Margarula and the Traditional Owners under cl 5.1(d) of the LTCMA. Ground 2 contends that the Advice Decision was unreasonable for reasons including that the First Respondent and/or the Second Respondent:

(a) "had regard to and gave excessive and impermissible weight to […] the views of the Northern Land Council and the Mirarr people (including because of the obligations under cl 5.1(d) of the [LTCMA])" (particular (b)(iii)(b)); and

(b) "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 MLN 1 is forfeited, cancelled or otherwise prejudicially affected, otherwise than for breach by ERA of [the LTCMA]'" (particular (b)(iv)).

23. Ms Margarula and the Gundjeihmi Aboriginal Corporation made various submissions in the decision-making processes impugned by the Applicant. These feature prominently in the SOAF by the parties.[9] The apparent implication of the Applicant's grounds set out at paragraph [22] above is that Ms Margarula and the Mirarr Traditional Owners, in expressing their views that the lease should not be renewed, failed to acknowledge or act in accordance with aspects of their obligations under the LTCMA.

24. The hearing and determination of that issue requires that Ms Margarula have the opportunity to be heard on the proper construction and application of cl 5.1(d) of the LTCMA. In *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* [2011] FCA 1206, Kenny J found that the basis for joinder under r 9.05(1)(b)(ii) was met where the grounds of the application "appear[ed] to call into question the conduct of the NLC": at [14]-[15]. Here, the conduct of Ms Margarula is called into question, as a matter affecting the decisions that took into account her views on behalf of the Mirarr People.

[9] SOAF, [37], [40] and corresponding annexures.

25. If joined to the proceedings, Ms Margarula would contend that cl 5.1(d) did not apply to prevent the Traditional Owners from seeking that MLN1 should not be renewed, including because:

(a) The renewal of a mineral lease amounts to the grant of a fresh lease: *Commonwealth of Australia v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167 at 183 (Black CJ and Foster J); *Mineral Titles Act,* ss 43, 85(4). A refusal of the Applicant's application for renewal would accordingly not involve a result that "MLN 1 is forfeited, cancelled or otherwise prejudicially affected" within the meaning of cl 5.1(d) of the LTCMA.

(b) Clause 2 of MLN1 is invalid for the reason that it purports to fetter the future exercise of a statutory power (addressed further at paragraphs [27]-[28] below).

26. *Second,* there are apparent disputed issues of fact concerning the extent to which the Applicant was aware of the views and submissions of the Traditional Owners opposing the renewal of MLN1. The Applicant appears to rely on evidence on that issue as relevant to Ground 1 of the Originating Application.[10] The SOAF annexes media releases issued by GAC concerning the Mirarr's opposition to renewal of MLN1.[11] As set out in the O'Sullivan Affidavit at [47]-[51], Ms Margarula and the Traditional Owners were also involved in discussions and correspondence directly with ERA, and would seek to address those factual matters.

27. *Finally*, if joined to the proceeding, Ms Margarula would further contend that cl 2 of MLN1 purports to fetter the exercise of statutory powers, in connection with both the *Mining Act 1980* (NT) and the *Mineral Titles Act,* with the consequence is that cl 2 is invalid.[12] Clause 2 provides that "[t]he Territory covenants with the lessees that, provided the lessees have complied with the Mining Act and the conditions to which this lease is subject, the Minister at the expiration of this lease and in accordance with that Act will renew this lease for a further term not exceeding ten (10) years". In the Originating Application, the Applicant relies on cl 2 of MLN1 within ground 2 (particular (b)(ii)), ground 3 (particular (c)), ground 5 (particular (d)) and ground 6.

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[10] See particulars (b)(i) and (b)(iii)(B)-(D) of ground 1; Affidavit of Brad Welsh affirmed 9 September 2024, [15]-[19], [28]-[31], [38]-[40]; Affidavit of Brad Welsh affirmed 6 August 2024, [21(g)], [31], [33].

[11] SOAF, [51]-[52], [54]-[58], [60]-[66] and corresponding annexures.

[12] *Ansett v Commonwealth* (1977) 139 CLR 54 at 74-75 (Mason J); *Searle v Commonwealth of Australia* (2019) 100 NSWLR 55 at [132]-[135] (Bell P, Bathurst CJ and Basten JA agreeing).

28. The consequence of this argument would be that the Northern Territory acted beyond power and is not bound by a provision of the contract it entered. The terms of MLN1 were entered on the Commonwealth's advice.[13] The construction and consequences of a contractual provision that appears to fetter the exercise of a statutory power is one that is an issue of some nuance and complexity, as discussed by Bell P in *Searle v Commonwealth of Australia* (2019) 100 NSWLR 55 at [114]-[146]. The argument that cl 2 operates as a fetter, and that this sounds in invalidity, is an aspect of the matter warranting treatment.

Dated: 10 September 2024

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[13] See the letters from the Commonwealth Minister for Trade and Resources wrote to the Territory Minister for Mines and Energy dated 25 June 1982 and 23 July 1982, set out in *Margarula v Minister for Resources and Energy* [1998] FCA 48 (Sackville J).