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Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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IN THE FEDERAL COURT OF AUSTRALIA
SYDNEY REGISTRY

No. NSD1056/2024

Energy Resources of Australia Ltd ABN 71 008 550 865
Applicant

and

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

SEVENTH RESPONDENT'S SUBMISSIONS ON INTERLOCUTORY APPLICATION BY ZENTREE INVESTMENTS LIMITED AND PACKER & CO PTY LTD

1. By interlocutory application dated 4 October 2024, **Zentree** Investments Limited and **Packer** & Co Pty Ltd apply for leave to intervene in the proceeding pursuant to ss 236 and 237(1) of the ***Corporations Act*** *2001* (Cth), or in the alternative, r 9.12(1) of *Federal Court Rules 2011* (Cth).

2. The Seventh Respondent, Ms Margarula, submits that the application should be dismissed with costs. The focus of these submissions is on the lack of merit to the contentions Zentree and Packer seek to make against Ms Margarula (which bears upon both bases for intervention).

3. As a preliminary issue, however, s 236(1) of the *Corporations Act* is not engaged by the interlocutory application. The nature of the proposed intervention does not involve taking responsibility "for a particular step in [the] proceedings (for example, compromising or settling them)". Its effect is instead to have two sets of legal representatives advancing submissions on the Applicant's (**ERA**) behalf.

A No estoppel

4. ERA contends that cl 2 of MLN1 had the effect that the Third Respondent (**NT Minister**) was obliged to renew MLN1 for the 10 years sought by ERA. Ms Margarula argues in response, that cl 2 is invalid as a fetter on statutory discretionary powers. Zentree and Packer wish to contend that Ms Margarula is estopped from that argument.

5. No form of estoppel operates. Ms Margarula contended in 1998 proceedings that there was no power to execute MLN1 on grounds concerning the construction of the *Atomic Energy Act*

1953 (Cth) and the scope of executive power under the *Northern Territory (Self-Government) Regulations 1978* (Cth).[1] In judicial review proceedings, the relevant "claim" for the purposes of a cause of action estoppel is the ground of jurisdictional error relied on.[2] No ground was advanced or determined that cl 2 was invalid as a fetter (or otherwise addressing cl 2).

6. Likewise, as to issue estoppel, the validity of cl 2 was not a matter that a prior judgment "necessarily established as the legal foundation or justification of its conclusion".[3]

7. As to *Anshun* estoppel, whether cl 2 operated as a fetter was not an issue that it was unreasonable not to raise in the earlier proceedings.[4] The proceedings were brought more than 25 years before the expiry of MLN1. It was not then known whether ERA would apply for renewal, let alone how the NT Minister would treat cl 2 in the context of any such application. Any argument that cl 2 was an invalid fetter would have been (decades) premature. In respect of the submissions concerning the interaction of cl 2 with the *Mineral Titles Act 2010* (NT), that legislation had not yet been enacted.

8. Zentree and Packer also refer to estoppel by deed. There is no relevant clear statement of fact (or of mixed law and fact) in the LTCMA that could give rise to this species of estoppel.[5] Further, an estoppel by deed only has effect between the parties in proceedings on the deed.[6] If what is contemplated is to sue on the deed to restrain Ms Margarula from making her submissions,[7] that would be a significant expansion to the nature of the proceeding. It is also without merit; at least because cl 5.1(d) does not have application because Ms Margarula does not in this proceeding "initiate, fund or allow to be brought in [her name] any action".

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[1] *Margarula v Minister for Resources and Energy* (1998) 157 ALR 160 at 168-169 (Beaumont, Lindgren and Emmett JJ), dismissing an appeal from *Margarula v Minister for Resources and Energy* [1998] FCA 48 (Sackville J). The Northern Territory Supreme Court proceedings in *Margarula v Minister for Resource Development* (1998) 147 FLR 377 concerned environmental authorisations.

[2] ***AIO21*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 80 at [66] (Kenny, O'Callaghan and Thawley JJ).

[3] *Blair v Curran* (1939) 62 CLR 464 at 531-532 (Dixon J) (as distinct from matters that are "subsidiary or collateral"); *Tomlinson v Ramsey Food Processing* (2015) 256 CLR 507 at [22] (French CJ, Bell, Gageler and Keane JJ).

[4] *Tomlinson* (2015) 256 CLR 507 at [21] (French CJ, Bell, Gageler and Keane JJ); *Pearson v Minister for Home Affairs* (2022) 295 FCR 177 at [53]-[54]. Zentree and Packer would bear the onus of proving the factual circumstances to support the estoppel: *AIO21* (2022) 294 FCR 80 at [74].

[5] *Greer v Kettle* [1938] AC 156, 166-167 (Lord Russell of Killowen).

[6] *Ex parte Morgan* (1876) 2 Ch D 72 at 89; P Keane, *Estoppel by Conduct and Election* (3rd edn, 2023) [7-003].

[7] Affidavit of Gordon Grieve sworn 4 October 2024 (Grieve Affidavit), Exhibit GTG-1, 147.

9. The estoppel arguments would also not be available to Zentree and Packer in any intervention under r 9.12, as they were not parties to the proceedings or the LTCMA.

10. Finally, Zentree and Packer appear to misapprehend the consequence of Ms Margarula's submissions on the invalidity of cl 2. The outcome is not that "the lease should not be renewed";[8] the very point is that the relevant statutory discretions remain unfettered. Further, even if Ms Margarula's submissions on invalidity are not accepted, the injunctive relief that Zentree and Packer wish to seek[9] would not be available: that is precisely the form of relief that would cause cl 2 to operate as a fetter *in fact*, such that it would be refused.[10]

B No relief is sought by Ms Margarula

11. In relation to order 1(c) of the interlocutory application, neither Ms Margarula, nor the other respondents, seeks any relief in the proceeding. There is accordingly no occasion for any exercise of discretion to refuse relief on grounds of delay in relation to cl 2 of MLN1. It is ERA which seeks to rely on that clause to support the grounds of its application.

12. The contentions that Zentree and Packer seek to advance are not of sufficient merit to warrant a grant of leave to intervene. That is particularly so where the application has been made at a very late stage of an expedited proceeding, such that the hearing dates on 28-31 October 2024 could not be maintained. The interim stay obtained by ERA precludes the Mirarr Traditional Owners from resuming control of their land as would otherwise have occurred at the expiry of MLN1. The Court should not now permit the resolution of the proceeding to be derailed by ERA or its shareholders.

Ruth Higgins Kate Bones

Counsel for the Seventh Respondent

18 October 2024

[8] Grieve Affidavit, Exhibit GTG-1 at 146 [17]; see also at 147 [24].

[9] Grieve Affidavit, Exhibit GTG-1 at 5 [13], 128-130, 135 [6], 145 [7].

[10] See *Searle v Commonwealth of Australia* (2019) 100 NSWLR 55 at [142]-[145] (Bell P, Basten JA agreeing).