

## 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: 17/09/2024 8:23:01 PM AEST  
Date Accepted for Filing: 18/09/2024 10:34:36 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



*Sia Lagos*

Registrar

### Important Information

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

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



## Affidavit

No. 1056 of 2024

Federal Court of Australia  
 District Registry: New South Wales  
 Division: General

### Energy Resources of Australia Ltd ABN 71 008 550 865

Applicant

**Minister for Resources and Minister for Northern Australia (Commonwealth)** and others  
 named in the Schedule

Respondents

Affidavit of: **Leon Chung**  
 Address: 161 Castlereagh Street, Sydney NSW 2000  
 Occupation: Solicitor  
 Date: 17 September 2024

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I Leon Chung, Solicitor, affirm:

- I am a partner at Herbert Smith Freehills (**HSF**), the solicitors for Energy Resources Australia Ltd (**ERA**), the Applicant in this proceeding. I have the carriage and conduct of this matter.
- I make this affidavit in support of the Applicant's interlocutory application dated 17 September 2024. I have previously made three affidavits in this proceeding.

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

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

3. Shown to me at the time of affirming this affidavit is a bundle of documents marked “**Exhibit LC-4**”. Where I refer to documents in this affidavit, I refer to their page number in Exhibit LC-4.
4. I make this affidavit in support of an application for leave to file an Amended Originating Application. A copy of the proposed Amended Originating Application is annexed and marked “A”.

**A. Notices to Produce to the First and Third Respondents**

5. On 6 August 2024, HSF served by email unsealed copies of Notices to Produce on the First Respondent and the Third Respondent (together, the **Notices to Produce**). Each of the Notices to Produce consisted of four categories of document requests. Copies of those emails and attachments are at page 1 of Exhibit LC-4.
6. On 7 August 2024, HSF served by email sealed copies of the Notices to Produce on the legal representatives for the First Respondent (the **AGS**) and the Third Respondent (the **NT Solicitor**). Copies of those emails (excluding attachments) are at page 13 of Exhibit LC-4.
7. On 8 August 2024, there were communications between the parties in respect of the scope of category 4 of the Notices to Produce. Copies of that correspondence are at page 15 of Exhibit LC-4.
8. On 8 August 2024, her Honour Justice Katzman conducted a case management hearing in respect of this proceeding. Among other things, at the hearing:

(a) Senior Counsel for the Applicant said (at T24:23-41):

*MR LANCASTER: ... The applicant has issued two notices to produce: one to the first respondent, the Commonwealth Minister, and the other to the third respondent, the decision-maker, the Northern Territory Minister. And after discussion between the parties, we have agreed to narrow one of the categories to identify an appropriate starting date range.*

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

(b) Counsel for the First Respondent said (at T27:19-36):

*MS DAVIDSON: I agree with my friend that it would be sensible for it to be listed for further directions. I would respectfully ask that that not be on 15 August and my friend, I think, is willing to accommodate that, but in respect of the notices to*

*produce, the Commonwealth's position would be whilst it's grateful for the clarification in respect of paragraph 4 of the notice issued to the first respondent, that proposed orders 5 and 6 should not be made at this point. The reason being that the Commonwealth will correspond, as I understand it, this afternoon – this was intended to happen before your honour came on the bench and hasn't quite – in respect of the time for when production is possible and what can be done.*

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

(c) Her Honour then ordered that category 4 of the Notices to Produce be amended. A copy of the Court's order is at page 18 of Exhibit LC-4. A copy of the transcript of the hearing is at page 21 of Exhibit LC-4.

9. On 9 August 2024, the following events occurred:

(a) HSF sent an email requesting production by the First Respondent and the Third Respondent under categories 1 to 3 of the Notices to Produce immediately and production under revised category 4 as soon as practicable. A copy of this email is at page 32 of Exhibit LC-4.

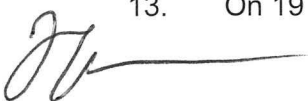
(b) The NT Solicitor replied stating that she would “*come back to you when possible.*” A copy of this email is at page 33 of Exhibit LC-4.

10. On 13 August 2024, the following events occurred:

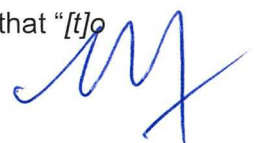
(a) HSF sent an email which repeated the request for production under categories 1 to 3 of the Notices to Produce immediately and under revised category 4 as soon as practicable. The email also requested that the First Respondent and the Third Respondent advise when production would occur. A copy of this email is at page 35 of Exhibit LC-4.

(b) The NT Solicitor replied stating that the Third and Fourth Respondents were “*in the process of compiling documents*” and were “*not in a position to produce documents, nor advise when production will occur, other than to say that it will be as soon as possible*”. A copy of this email is at page 37 of Exhibit LC-4.

- (c) HSF sent a further email requesting production by the First and Third Respondents immediately and, in any event, by no later than 4pm on 13 August 2024. A copy of this email is at page 40 of Exhibit LC-4.
- (d) The NT Solicitor sent a letter stating that the Third and Fourth Respondents were not yet in a position to produce documents in response to the Notice to Produce and were “*working to compile the documents referred to in the notice and will produce them as soon as possible*”. A copy of this letter is at page 43 of Exhibit LC-4.
- (e) The First Respondent produced a copy of the “Ministerial Decision Brief” dated 25 July 2024, which the AGS said “*respond[s] to paragraphs 1 and 2 of the Notice*”. A copy of the covering letter (excluding its attachment) is at page 44 of Exhibit LC-4.
11. On 15 August 2024, the following events occurred:
- (a) The First Respondent produced:
- i. a document titled “In Confidence – Internal MO Use Only”;
  - ii. an email from Ben Latham (Parliamentary Adviser to the First Respondent) which was dated 25 July 2024 and which referred to various attachments (which were not produced with the email); and
  - iii. an email from Cassandra Turnbull (Department Liaison Officer) which was dated 25 July 2024 and which referred to various attachments (which were not produced with the email).
- A copy of that letter and its attachments is at page 46 of Exhibit LC-4.
- (b) The Third Respondent produced a “Ministerial Brief” dated 26 July 2024. The covering letter noted that the Third Respondent did not “*anticipate producing further documents in respect of Categories 1 and 2*”. A copy of that letter (excluding its attachments) is at page 51 of Exhibit LC-4.
12. On 16 August 2024, the following events occurred:
- (a) HSF sent an email to the AGS, seeking production of the documents that were attached to the emails referred to in paragraph 11(a) above. A copy of this email is at page 52 of Exhibit LC-4.
- (b) The AGS replied, stating that “*attachments to both the email of Ben Latham and the email of Cassandra Turnbull correspond to the documents (being the brief to the Minister and attachments) which we produced on 13 August 2024*” (with the exception of one attachment, Attachment I, which was the subject to a claim of legal professional privilege). A copy of this email is at page 54 of Exhibit LC-4.
13. On 19 August 2024, the following events occurred:




- (a) The AGS sent a letter seeking agreement to narrow the scope of category 4 of the Notice to Produce to the First Respondent. A copy of this letter is at page 58 of Exhibit LC-4.
- (b) The Third Respondent produced a bundle of 12 documents which were described in the covering letter as being *“in response to paragraph 3 of the Notice”*. The letter also foreshadowed that the Third Respondent would *“write separately regarding paragraph 4 of the Notice”*. A copy of this letter (excluding its attachments) is at page 60 of Exhibit LC-4.
14. On 20 August 2024, the following events occurred:
- (a) HSF sent a letter to the First and Third Respondents in relation to the matters that had been raised by the First Respondent about the scope of category 4 and the timing of production in response to the Notices to Produce. A copy of this letter is at page 62 of Exhibit LC-4.
- (b) HSF sent an email to the First Respondent, repeating the Applicant’s request that communications be produced in their entirety, including any attachments. A copy of this email is at page 66 of Exhibit LC-4.
- (c) The NT Solicitor sent a letter stating that *“the Third Respondent has now produced to the Applicant the documents in paragraphs [1]-[3] of the Notice to Produce”* and sought the Applicant’s consent to *“vary the date for compliance in the Notice to Produce – in relation to paragraph [4] only – to close of business on 23 August 2024”*. A copy of this letter is at page 70 of Exhibit LC-4.
- (d) HSF sent an email to the Third Respondent, stating that the Applicant intended to call on the Notices to Produce at the Return of Subpoena listed on 21 August 2024 and indicating that the Applicant would seek confirmation from the Third Respondent that production under categories 1 to 3 of the Notice to Produce is complete. A copy of this email is at page 72 of Exhibit LC-4.
- (e) The NT Solicitor sent a further letter, which stated the Third Respondent’s *“preference that production under Category 4 is dispensed with”* given the Applicant’s further document requests (which were the subject of proposed orders at a case management hearing due to occur on 22 August 2024). A copy of this letter is at page 74 of Exhibit LC-4.
15. On 21 August 2024, the following events occurred:
- (a) The AGS sent a letter stating that the documents produced by the First Respondent to date *“represent the entirety of the material which was before the Minister at the time of making the decision”*. The letter also referred to category 4, noting that “[t]o

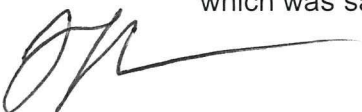


*be clear, the Commonwealth respondents have not refused to produce documents responsive to paragraph 4 of the Notice” and reaffirming that “the Commonwealth respondents are working to produce, documents in response to paragraph 4 before the case management hearing on 22 August 2024”.* A copy of this letter is at page 77 of Exhibit LC-4.

- (b) The Notices to Produce were the subject of an appearance in the return of subpoena list before Registrar Hammerton-Cole. Among other things, the solicitor for the First Respondent stated that *“as far as the Commonwealth respondents are concerned, we consider that production against paragraphs 1, 2 and 3 to be complete”* (T3:26-27). A copy of the transcript is at page 79 of Exhibit LC-4; and
- (c) HSF sent a letter to the First and Third Respondents about the production of documents in response to category 4 and the approach to the production of privileged material and compliance with GPN-SUBP. A copy of this letter is at page 85 of Exhibit LC-4.
16. On 22 August 2024, the following events occurred:
- (a) The matter came before his Honour Justice Kennett for a case management hearing. His Honour made Orders seeking the parties confer in relation to the document production categories. A copy of these Orders is at page 87 of Exhibit LC-4.
- (b) The First Respondent produced a bundle of 76 pages, which was said in the covering email to be *“a production under paragraph 4 of the Notice to Produce dated 7 August 2024 as amended by the orders of Katzmann J of 8 August 2024”*. A copy of that email (excluding its attachments) is at page 90 of LC-4.
- (c) HSF sent an email to the First and Third Respondents, in which it stated that *“production in response to paragraph 4 of the NTP should occur by tomorrow, rather than being held back to respond to our client’s further document requests which are currently the subject of conferral and which are not yet the subject of formal court orders”*. A copy of that email (excluding its attachments) is at page 91 of LC-4.
17. On 23 August 2024, the following events occurred:
- (a) The First Respondent produced a further bundle of 44 pages, which was said in the covering email to be *“the remainder of the documents to be produced under paragraph 4 of the Notice to Produce dated 7 August 2024 as amended by the orders of Katzmann J of 8 August 2024”*. A copy of that email (excluding its attachments) is at page 92 of LC-4.



- (b) The Third Respondent produced a further tranche of 8 documents, which was said in the covering email to be made "*pursuant to Category 4 of the Notice to produce*". A copy of that email (excluding its attachments) is at page 94 of LC-4.
18. On 27 August 2024, the following events occurred:
- (a) HSF sent a letter to the First to Fourth Respondents, which raised various concerns about the manner in which production had occurred to date. A copy of that letter is at page 96 of LC-4. Among other things, those concerns related to the nature and extent of redactions that had been applied to produced documents and compliance with GPN-SUBP.
- (b) The Applicant and the First to Fourth Respondents provided written submissions about further document production in the proceeding. In each case, the First to Fourth Respondents sought an order dispensing with category 4 of the Notices to Produce.
19. On 28 August 2024, the following events occurred:
- (a) The Notices to Produce were the subject of a further appearance in the return of subpoena list before Registrar Rubinstein. Among other things, in relation to category 4, counsel for the First Respondent stated that "*what my clients have indicated to the applicant's solicitors last week was that we would conduct searches of the Minister's offices, the Minister's holdings and the department that advises the Minister, and the results of those searches have been produced*" (T4:23-26). Counsel for the Third Respondent stated: "*I have instructions to provide a further bundle pursuant to category 4, but we're not yet in a position to say that we've completed category 4*" (T4:35-37). A copy of the transcript of the hearing is at page 99 of Exhibit LC-4.
- (b) The Third Respondent produced a second tranche of documents in response to category 4 of the Notice to Produce. A copy of this email (excluding its attachments) is at page 105 of Exhibit LC-4. Unlike the other documents which had been produced by the Third Respondent, the covering email stated that the NT Solicitor had made colour-coded redactions including "*[s]ome further redactions of irrelevant material ... in green*".
20. On 30 August 2024, HSF sent an email to the solicitors of the First to Fourth Respondents, seeking a response to the matters raised in HSF's letter dated 27 August 2024. A copy of that email (excluding attachments) is at page 108 of Exhibit LC-4.
21. On 4 September 2024, the First Respondent produced a further tranche of documents, which was said in the cover email to contain a "*PDF bundle of the documents which*





were attached to Mr Latham's email" and "PDF bundle attached to Ms Turnbull's email" (see paragraph 11(a) above). A copy of that email (excluding attachments) is at page 113 of Exhibit LC-4.

22. On 6 September 2024, the Third Respondent sent an email stating that unredacted copies of the documents over which the Third Respondent claims client legal privilege had been provided in a sealed envelope to the Darwin Registry of the Federal Court. A copy of this email and attachments are at page 119 of Exhibit LC-4.
23. On 9 September 2024, His Honour Justice Kennett made Orders dispensing with production under category 4 of the Notices to Produce and further orders in respect of categories of document production. A copy of these orders is at page 131 of Exhibit LC-4.
24. On 10 September 2024, the following events occurred:
- (a) The First Respondent re-produced to the Applicant documents in response to category 4 with colour coded redactions. A copy of this email providing a download link, and its attachment is at page 139 of Exhibit LC-4.
- (b) The AGS also sent a letter in relation to the First Respondent's approach to redactions on documents produced in response to the Notice to Produce. A copy of this letter is at page 146 of Exhibit LC-4. Among other things, the letter stated that:
- i. *"[T]he exchange of information between the Commonwealth parties and Northern Territory parties does not waive any claim of legal professional privilege. The exchange of information occurred on the basis of and understanding between the parties that such disclosure would attract common interest privilege";* and
  - ii. *"We acknowledge your client's position on relevance, as stated in the final paragraph of Part 1 of your letter. However, where the information in the documents does not concern or relate to the matters the subject of these proceedings, and involve inter-departmental, intra-departmental or third-party discussion in relation to ongoing matters, our client does not agree, subject to what is stated at [7] below, to producing the documents in unredacted form.*  
  
*"Our client will consider the release of the documents in unredacted form, save for claims of legal professional privilege, to the applicant's solicitors and counsel subject to receiving a signed confidentiality undertaking that the documents will not be disclosed further without written authorisation. If the applicant agrees to this proposal, we will prepare the relevant undertakings*




*and provide them to you. We note that a similar approach has recently been taken in another matter where HSF is instructed, being NSD777/2024.”*

- (c) The NT Solicitor sent an email asking “*whether [the Applicant] would consent to an order vacating order 1 of the orders made of 28 August 2024.*” A copy of this email (excluding attachments) is at page 152 of Exhibit LC-4.
- (d) In response to HSF’s email on 30 August 2024, the AGS sent an email to the effect that the First Respondent was prepared to produce to the court, in unredacted form, documents over which legal professional privilege was claimed. A copy of this email is at page 153 of Exhibit LC-4.
- (e) HSF sent a further email to the AGS in relation to the Applicant’s concerns regarding the manner in which production had occurred. A copy of this email is at page 155 of Exhibit LC-4.
25. On 11 September 2024, the Notices to Produce were the subject of a further appearance in the return of subpoena list before Registrar Lee.
26. On 12 September 2024, the following events occurred:
- (a) The First Respondents sent a letter to the Federal Court Registry enclosing a sealed envelope containing documents the subject of a claim for legal profession privilege. A copy of this letter (excluding attachments) is at page 158 of Exhibit LC-4.
- (b) In a letter dated 12 September 2024, the Applicant:
- i. requested that the First Respondent identify, in respect of communications between the Commonwealth and the Northern Territory, “*the basis upon which legal professional privilege is asserted in respect of the each of the documents produced to date*”;
  - ii. requested that the First Respondent identify “*the ‘common interest’ which is said to: have the effect that disclosure of the substance of legal advice as between the Commonwealth and the Northern Territory did not result in the loss of privilege; or otherwise underpin the asserted “common interest privilege”*”; and
  - iii. notwithstanding its position that the First Respondent is not entitled to redact documents for relevance, requested that the First Respondent provide a confidentiality undertaking for the Applicant’s consideration.

A copy of this letter is at page 161 of Exhibit LC-4.

27. On 17 September 2024, the following events occurred:

(a) the NT Solicitor sent a letter to HSF. Among other things, the letter stated:




- i. "[T]he Territory Parties also confirm their position that certain communications between the Territory and the Commonwealth were exchanged on the basis of common interest, and client legal privilege is not waived"; and
- ii. "We will write to you separately in relation to an undertaking, with a view to reaching agreement in relation to past and future redactions".

A copy of that letter is at page 164 of Exhibit LC-4.

(b) The AGS sent a letter to HSF. Among other things, the letter enclosed a proposed confidentiality undertaking and addressed the First Respondent's position on common interest privilege. A copy of that letter is at page 166 of Exhibit LC-4.

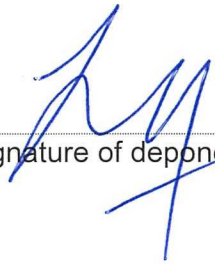
28. The First and Third Respondents have indicated that production under categories 1 to 3 is complete (see above at, 11(b), 14(c) and 15(b)). However, as identified above, the parties continue to confer in relation to the redactions and claims for legal professional privilege made by the First and Third Respondents in respect of the documents produced to date.

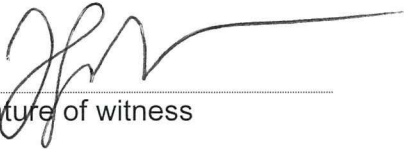
#### **Proposed amended originating application**

29. As set out above, the First and Third Respondents have to date produced a number of documents in response to the Notices to Produce.
30. On 23 August 2024, a solicitor in my team caused to be downloaded an excerpt from the First Respondent's Facebook page. A copy of that excerpt is at page 168 of Exhibit LC-4.
31. On 4 September 2024, the Applicant filed a Statement of Agreed Facts, which had been agreed between the Applicant and the First to Sixth Respondents. A copy of that Statement is at page 169 of Exhibit LC-4.
32. On 5 September 2024, the Applicant sent each of the First to Sixth Respondents a Notice to Admit. The admissions sought by each Respondent are identical. A copy of the Notice to Admit issued to the First Respondent is at page 186 of Exhibit LC-4.
33. On 9 September 2024, the Applicant filed and served an Affidavit of Brad Welsh. A copy of the body of that affidavit (excluding exhibits) is at page 198 of Exhibit LC-4.
34. On 13 September 2024, the Applicant provided to the other parties to the proceeding a proposed amended originating application. That document was in the same form as is annexed and marked "LC-A".




Affirmed by the deponent )  
at Sydney )  
in New South Wales )  
on 17 September 2024 )  
Before me: )

  
\_\_\_\_\_  
Signature of deponent

  
\_\_\_\_\_  
Signature of witness

Haiqiu Zhu, an Australian Legal Practitioner within the meaning of the *Legal Profession Uniform Law* (NSW) who has in force a current practising certificate

**Schedule**

No. 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
- Seventh Respondent:** Yvonne Margarula



## Certificate identifying annexure

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Energy Resources of Australia Ltd ABN 71 008 550 865**

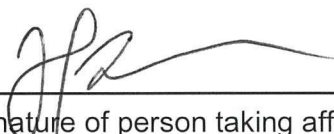
Applicant

**Minister for Resources and Minister for Northern Australia (Commonwealth)** and others  
named in the Schedule

Respondents

This is the annexure marked "**LC-A**" now produced and shown to Leon Chung at the time of affirming his affidavit on 17 September 2024.

Before me: Haiqiu Zhu

  
\_\_\_\_\_  
Signature of person taking affidavit

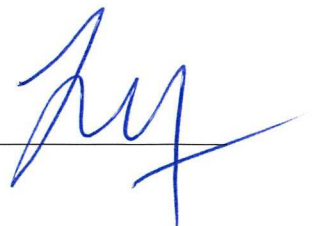
Solicitor

161 Castlereagh Street, Sydney NSW 2000

An Australian Legal Practitioner within the meaning of the *Legal Profession Uniform Law* (NSW)

Date: 17 September 2024

Annexure LC-A



**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

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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

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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