

## NOTICE OF FILING

### Details of Filing

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File Title: ENERGY RESOURCES OF AUSTRALIA LTD ABN 71 008 550 865 v  
MINISTER FOR RESOURCES AND MINISTER FOR NORTHERN  
AUSTRALIA (COMMONWEALTH) &ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

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



## Affidavit

No. \_\_\_\_\_ of 20\_\_\_\_

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: 6 August 2024

I Leon Chung, Solicitor, affirm:

1. 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.
2. This affidavit is made in relation to ERA's application for interlocutory relief dated 6 August 2024. I am authorised to make this affidavit on behalf of ERA.
3. In this affidavit I depose to matters from information and belief based on instructions from David Nolan, General Counsel at ERA. I believe those matters to be true and correct. I do not intend to waive privilege and have no authority to do so.
4. Shown to me at the time of affirming this affidavit is a bundle of documents marked "**Exhibit LC-1**". Where I refer to documents in this affidavit, I refer to their page number in Exhibit LC-1.

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

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

A handwritten signature in blue ink, appearing to be 'L. Chung', with a second signature or mark to its right.

**A. MLN1**

5. On 12 August 1982, the Northern Territory Minister for Mines and Energy granted a mineral lease for the mining of uranium at Jabiluka in the Northern Territory to Pancontinental Mining Limited and Getty Oil Development Company Limited (**Pancontinental**) for a period of 42 years (**MLN1**). A copy of that agreement is at page 1 of Exhibit LC-1.
6. I am instructed by Mr David Nolan that in August 1991, ERA purchased the Jabiluka mine project, including MLN1, from Pancontinental. On 24 December 1991, the Northern Land Council (**NLC**) consented to the transfer of the Jabiluka Project to ERA. A copy of that agreement is at page 80 of Exhibit LC-1.
7. The NLC is the Land Council established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in respect of the area that includes Jabiluka and represents the interests of the Mirarr people who are the Traditional Owners of the land underlying Jabiluka.
8. MLN1 is for a term of 42 years, starting on 12 August 1982 and, having as its last day, Sunday, 11 August 2024. It is my understanding that, under section 68 of the *Mineral Titles Act 2010* (NT), provided there is an undetermined application for renewal of MLN1, the title continues in force.
9. The fee simple estate over the land on which Jabiluka is based is vested in the Jabiluka Aboriginal Land Trust, as demonstrated in the title searches commencing at page 83 of Exhibit LC-1. As shown on title search, the Commonwealth of Australia and the Northern Territory of Australia reserved the right to “any minerals existing in their natural condition, or in a deposit of waste material obtained from any underground or surface working, on or below the surface of the said land”.

**B. Agreements relating to MLN1**

10. On 21 July 1982, the Northern Land Council (**NLC**) entered into an agreement with Pancontinental for the concepts of design and operation of the Jabiluka Project pursuant to section 43 of the *Aboriginal Land Rights (NT) Act 1976* (Cth) (**Section 43 Agreement**). Certain terms of that agreement are confidential and are disclosed in my separate confidential affidavit of today's date.
11. The benefit of the Section 43 Agreement was assigned by Pancontinental to ERA along with MLN1, as confirmed by Recital B of a **Deed Poll** between the NLC and ERA dated 26 May 1998, a copy of which is at page 107 of Exhibit LC-1. That Deed Poll set out amendments to the Section 43 Agreement for the design and operation of the Jabiluka Project.



12. The Section 43 Agreement provided that the NLC consented to the grant of mining interests and titles to the Joint Venturers (ie, Pancontinental) to facilitate the mining of Jabiluka (per cl 5). In exchange, the Deed Poll (and confidential terms of the Section 43 Agreement) imposed various obligations on ERA, including to:
  - a. pay the NLC to undertake 'Social Impact Monitoring' in respect of the Jabiluka mine (item 8 of the Deed Poll); and
  - b. invest in educational funding for the local Indigenous community (items 36-38 of the Deed Poll).
13. On 25 February 2005, ERA entered into an agreement with the Traditional Owners of the land underlying Jabiluka and the NLC for the "Long Term Care and Maintenance" of the Jabiluka site (**LTCMA**). A copy of the LTCMA is at page 131 of Exhibit LC-1. The agreement provides that:
  - a. under cl 4, ERA agreed to carry out rehabilitation and environmental works in relation to the Jabiluka Project. I am instructed by Mr Nolan that although no mining activities are currently being conducted by ERA at Jabiluka, ERA conducts remediation activities at the site consistent with the LTCMA, including managing vegetation and removing cement from the former mining operations;
  - b. under cl 5.1(a), the NLC and the Traditional Owners agreed that compliance by ERA with certain payment obligations in the Deed Poll and Section 43 Agreement as listed in cl 5.1(a) of the LTCMA are waived;
  - c. under cl 5.1(d), the Traditional Owners "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]"; and
  - d. under cl 6.1, the ERA agreed not to undertake any mining development or apply for any authorisation to do so without first obtaining the approval of the Traditional Owners.
14. The effect of cl 2.1 of the LTCMA is that the agreement will expire on the later of:
  - a. the end of the "care and maintenance phase". That term is defined in cl 1.1(j), as "the period starting from the commencement of this Agreement to the date on which approval has been given under clause 6 [ie, approval to mine] or the date of expiry or earlier determination of the Section 43 Agreement". The Traditional Owners have not provided their consent to mining activity under cl 6, so the care and maintenance phase will end upon the expiry of the Section 43 Agreement; or



- b. the expiry or earlier determination of the Section 43 Agreement.
15. On 23 December 2009, the Northern Territory Government entered into a **Waiver Agreement** with ERA by which it acknowledged that the Traditional Owners' consent was required under the LTCMA for any mining development, and in exchange it waived ERA from compliance with s 66(a) of the *Mining Act 1980* (NT) and the terms of MLN1 which required that ERA use the Jabiluka Project Area continuously and exclusively for the purposes for which MLN1 was granted (Recital D and cl 3.1).
16. A copy of the Waiver Agreement is at page 160 of Exhibit LC-1. That agreement expires upon the expiry of MLN1 (per clause 5.1).

### C. Refusal of application for renewal of MLN1

17. On 20 March 2024, ERA submitted an application for the renewal of MLN1 to the Northern Territory Mineral Titles Office. A copy of its covering letter and application is at page 168 of Exhibit LC-1 (**MLN1 Renewal Application**).
18. On 26 July 2024, the Northern Territory Minister for Mining and Minister for Agribusiness and Fisheries, Minister Mark Monaghan, refused ERA's application for renewal of MLN1 (**Renewal Decision**). A copy of the letter from Minister Monaghan to ERA's CEO Brad Welsh is at page 181 of Exhibit LC-1.
19. By the following correspondence, ERA has sought further information from both the Northern Territory Minister and Commonwealth Minister as to the reasons for the non-renewal decision. As at the date of this affidavit, ERA has received the letter from the Northern Territory Minister referred to subparagraph (d) below, but not the advice from the Commonwealth Minister referred to in that letter:
- a. Letter from Brad Welsh to the Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory) on 26 July 2024;
  - b. Letter from Brad Welsh to the Minister for Resources and Minister for Northern Australia (Commonwealth) on 29 July 2024;
  - c. Letter from Brad Welsh to Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory) on 1 August 2024;
  - d. Letter from the Deputy Chief Executive Officer Mining and Energy on behalf of Minister for Mining and Minister for Agribusiness and Fisheries (Northern Territory) to Brad Welsh dated 2 August 2024; and
  - e. Letter from Brad Welsh to the Minister for Resources and Minister for Northern Australia (Commonwealth) on 3 August 2024.
20. Copies of each of these letters are at pages 182 to 187 in Exhibit LC-1.

21. I understand from this correspondence that the basis of the Renewal Decision was “advice” provided by the First Respondent (or Second Respondent) to the Third Respondent, to the effect that the MLN1 Renewal Application should be refused (**the Advice Decision**).

**D. ERA’s challenge to the Renewal Decision and the Advice Decision**

22. In these proceedings, ERA proposes to challenge each of the Renewal Decision and the Advice Decision. The basis of ERA’s complaint is set out in the Originating Application.

**E. Consequences of expiry of MLN1**

23. In the event that the Renewal Decision is valid, then MLN1 will cease to have effect this coming Monday, 12 August 2024. I anticipate that steps will be taken in reliance on the validity of the Renewal Decision and in reliance on the view that, come 12 August 2024, MLN1 will have ceased.
24. A copy of the Northern Territory Register of Titles showing ERA’s title in MLN1 is at page 188 of Exhibit LC-1. I am instructed by Mr Nolan that, after the expiry of MLN1, the Register will be updated to reflect the fact that MLN1 would be a ‘historical’ mineral title.
25. I am instructed by Mr Nolan that the expiry of MLN1 may have (inter alia) the following consequences:
- a. As set out at paragraphs 14-16 above, other agreements will expire along with MLN1. The Section 43 Agreement facilitated the grant of mining rights in relation to Jabiluka in accordance with the requirements of the *Aboriginal Land Rights Act 1976* (NT) and the Waiver Agreement facilitates ERA’s compliance with s 66(a) of the *Mining Act 1980* (NT) and the terms of MLN1. If these agreements expire, I am instructed by Mr Nolan that it may be challenging, costly and time consuming for ERA to seek to negotiate new agreements to replace these agreements, if such agreements can be negotiated at all.
  - b. Within three months of the expiry of MLN1, ERA will be obliged to remove from the title area all plant, machinery and other equipment placed there by ERA. I refer to section 99(1) of the *Mineral Titles Act 2010* (NT).
  - c. After the expiry of MLN1, the LTCMA will also expire. ERA will no longer have the right to occupy the Jabiluka area to continue the rehabilitation activities currently being undertaken. That work is being completed by ERA employees and contractors who will need to leave the site, unless an arrangement can be reached with the Owners.



- d. ERA will not practically be able to sell its interest in Jabiluka to third parties. On 29 July 2024, ERA issued a media release to the ASX (a copy of which is at page 191 of Exhibit LC-1) confirming that:

*it received a non-binding indicative offer from Boss Energy Limited to buy MLN-1 for \$550 million, subject to conditions including ... relevant regulatory and third party approvals. The proposal involved a number of features, including a 10% free carried interest (post recovery of capital) in favour a Northern Territory focussed indigenous foundation to support indigenous communities.*

...

*ERA received notice yesterday evening that the proposal has been withdrawn given the announcement released by the NT government on 26 July 2024, advising that the Jabiluka Mineral Lease will not be renewed.*

- e. By media release dated 27 July 2024, the Minister for Resources and Minister for Northern Australia, The Hon Madeleine King, MP announced that “*The Albanese Labor Government has advised the Northern Territory Government that the Jabiluka Mineral Lease should not be renewed, allowing the site to be added to Kakadu National Park...The Albanese Government will now begin the process of incorporating the site to the Kakadu National Park, in line with the wishes of the Mirarr Traditional Owners*”. The media release also quoted Minister for the Environment and Water, Tanya Plibersek as stating “*That’s why today I’m pleased to begin work to incorporate the Jabiluka site into Kakadu National Park*”. A copy of that media release is at page 193 of Exhibit LC-1.

The process to incorporate Jabiluka into Kakadu National Park is set out in Part 15, Division 4 (Commonwealth Reserves) of *the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)*.

The process requires that the Governor-General make a proclamation, in accordance with s 344 of the EPBC Act, to declare land as a Commonwealth reserve. In accordance with s 344(1)(a) of the EPBC Act, the declaration can only be made if, relevantly, the land is owned by the Commonwealth in a Territory or is held under lease by the Commonwealth or the Director of National Parks in a Territory. The incorporation of Jabiluka into Kakadu National Park therefore requires that the landowners, the Jabiluka Aboriginal Land Trust, grant ownership or a lease of Jabiluka to the Commonwealth or the Director of National Parks.

I note that MLN1, as currently in effect, grants to ERA:

- i. A right to occupy the title area specified in the mining lease, in accordance with s 40 of the *Mineral Titles Act 2010* (NT);
- ii. An obligation to permit and protect completely the exercise of free ingress, egress and regress at all times by persons who reside in the Jabiluka Project Area...except those areas which, because mining, treatment or transport operations are being specifically conducted on them and the presence of those persons on them will cause safety hazards to personnel, operations of equipment, are designated by the lessees as restricted areas, in accordance with condition 1(f) of MLN1.

If MLN1 is allowed to expire, there is no impediment to the Commonwealth or the Director of National Parks being granted tenure to Jabiluka, to allow the process for declaration of the land as a Commonwealth reserve. The consequences of such a grant and subsequent declaration are that:

- i. there is the potential for the creation of tenure that is inconsistent with the continuation of MLN1;
- ii. once the land is included in Kakadu National Park, the EPBC Act states that "A person must not carry out mining operations in Kakadu National Park".

26. ERA wishes to move the Court promptly to obtain relief to preserve the status quo pending determination of a challenge to the validity of the Renewal Decision and Advice Decision.

**F. Addresses for substituted service**

27. I am instructed by Mr Nolan that:
  - a. in respect of the First Respondent, ERA has been communicating with Minister King at [minister.king@industry.gov.au](mailto:minister.king@industry.gov.au), her Chief of Staff Laurence Coleman at [laurence.coleman@industry.gov.au](mailto:laurence.coleman@industry.gov.au) and Ms Kym Moore at [Kym.Moore@industry.gov.au](mailto:Kym.Moore@industry.gov.au) with regards to the MLN1 Renewal Application and Advice Decision.
  - b. in respect of the Third Respondent, ERA has been communicating with Minister Monaghan at Minister Monaghan at [minister.monaghan@nt.gov.au](mailto:minister.monaghan@nt.gov.au), his Deputy Chief Executive Officer Mining and Energy, Anne Tan at [Anne.Tan@nt.gov.au](mailto:Anne.Tan@nt.gov.au) and Executive Officer Kylie Nelson at [kylie.nelson@nt.gov.au](mailto:kylie.nelson@nt.gov.au) with regards to the MLN1 Renewal Application and Renewal Decision.

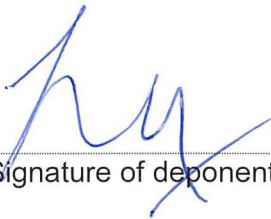


28. I have also caused inquiries to be made to confirm that service of court documents can be effected on the First and Fourth Respondents by the following email addresses, consistent with the requirements of s 63 of the *Judiciary Act 1903* (Cth) and s 13 *Crown Proceedings Act 1993* (NT) on:


- a. The Commonwealth of Australia (First Respondent) at [processservice@ags.gov.au](mailto:processservice@ags.gov.au); and
- b. The Northern Territory (Fourth Respondent) at [LegalServices.SFNT@nt.gov.au](mailto:LegalServices.SFNT@nt.gov.au).

29. In respect of the fifth Respondent, I have caused inquiries to be made to confirm that Mr Domenic Gomez of the NLC can accept service of court documents on behalf of the Jabiluka Aboriginal Land Trust by email at [Gomezd@nlc.org.au](mailto:Gomezd@nlc.org.au).

Affirmed by the deponent )  
 at Sydney )  
 in New South Wales )  
 on 6 August 2024 )  
 Before me: )



Signature of deponent

Before me:  
  
 Signature of witness

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

**Schedule**

No.

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

