

## 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

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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No. NSD 1056 of 2024

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

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

Applicant

**Minister for Resources and Minister for Northern Australia (Commonwealth)  
and Others**

Respondents

**SUBMISSIONS OF THE THIRD AND FOURTH RESPONDENTS  
ON THE APPLICATION FOR LEAVE TO INTERVENE BY  
ZENTREE INVESTMENTS LTD AND PACKER & CO PTY LTD**

**Filed Pursuant to Order 2 of the Orders of Justice Kennett dated 9 October 2024**

## Introduction and summary

1. The Third and Fourth Respondents oppose the application (**Application**) by **Zentree** Investments Ltd and **Packer** & Co Pty Ltd for leave to intervene under ss 236 and 237(1) of the *Corporations Act 2001* (Cth) or r 9.12(1) of the *Federal Court Rules 2011* (Cth) (**FCR**).

## Application under the Federal Court Rules

2. As to r 9.12, the Court has a broad discretion whether to grant leave and the principles are well understood.<sup>1</sup> Leave should be refused for five reasons.

3. The first is that Zentree and Packer have an insufficient interest to warrant intervention and, particularly, nothing independent of the Applicant's interest (which is already represented).<sup>2</sup> The subject matter of the proceeding is the validity of certain decisions affecting the ongoing existence of MLN1. MLN1 is held by the Applicant and it is only the Applicant's interests which are directly affected by the relief sought. Zentree and Packer's interests are, at most, indirectly affected as shareholders, and only in the derivative sense that the fortunes of the Applicant may financially affect Zentree and Packer as shareholders. Such an indirect and contingent affectation of legal interests does not justify leave to intervene.<sup>3</sup>

4. The second reason is that Zentree's and Packer's contribution would not be "useful and different" for the purposes of r 9.12(2)(a). Zentree and Packer seek leave to pursue three arguments.<sup>4</sup>

- a) A "cause of action" that the First and Third Respondents permitted or engaged in conduct that wrongfully derogated from the grant of interests conferred by MLN1. That appears to turn on whether Covenant 2 of MLN1 conferred an absolute right of renewal upon the Applicant. The Applicant is pursuing the issue of a right of renewal as a result of Covenant 2: AS [72], [82]-[85].<sup>5</sup> Further, it appears that Zentree and Packer wish to pursue that cause of action to obtain a

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<sup>1</sup> See *Lendlease Building Contractors Pty Ltd v ABCC* [2020] FCA 240, [11] (Snaden J); *Roadshow Films Pty Ltd v IINet Ltd* (2011) 248 CLR 37, [2]-[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Levy v Victoria* (1997) 189 CLR 579, 600-604 (Brennan CJ).

<sup>2</sup> *Lendlease Building Contractors Pty Ltd v ABCC* [2020] FCA 240, [11(1)] (Snaden J).

<sup>3</sup> *Levy v Victoria* (1997) 189 CLR 579, 602 (Brennan CJ).

<sup>4</sup> Interlocutory Application dated 4 October 2024, Order 1(a)-(c).

<sup>5</sup> Amended Originating Application dated 25 September 2024 (**AOA**), Ground 5, Particulars (d)-(e) and Ground 6. The issue raised under Ground 2, Particulars (b)(ii)(B), (E) and (M) and Ground 3, Particulars (b)-(c)

mandatory injunction to compel the renewal of MLN1, but such relief cannot be granted against the Third and Fourth Respondents.<sup>6</sup>

- b) A submission that Ms Margarula ought to be estopped from arguing that Covenant 2 is invalid. That would not be useful in two senses. First, that submission would not assist the Court to avoid error;<sup>7</sup> it would merely prevent Ms Margarula, in particular, from making a submission contrary to the Applicant's interests (which may or may not be accepted). Secondly, even if Ms Margarula were to be estopped, it would not prevent any other party (for example, the Fifth and Sixth Respondents) from making precisely the same submission.
- c) A submission that, to the extent that any Respondent seeks relief to the effect that Covenant 2 of MLN1 is invalid, the Court should in the exercise of its discretion, refuse that relief on the ground of delay. No Respondent has indicated it intends to seek such relief. The Respondents' arguments respond to the relief claimed *by the Applicant*.

5. The third reason is that, for the purposes of r 9.12(2)(b), Zentree's and Packer's intervention would unreasonably interfere with the conduct of the proceeding and almost certainly lead to the forthcoming trial dates being vacated. The matter is due to be heard in just over a week's time. Contrary to Zentree's and Packer's assertions, its new arguments would raise new factual issues and require the marshalling of further evidence.<sup>8</sup> For example, the new (and as yet unparticularised) "cause of action" for derogation from grant would (at least to the extent the "cause of action" differs from the Applicant's current argument) involve some question of loss; the submission concerning estoppel would involve evidence as to the reasonableness of Ms Margarula's conduct in earlier proceedings<sup>9</sup>, and the submission concerning discretion would require evidence about any delay and the explanation for it. Even putting that aside, there would be insufficient time to exchange written submissions about those new issues, and dedicating resources to them would create a real risk that the parties would not have adequate preparation time to proceed with a hearing on 28 October 2024.<sup>10</sup>

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<sup>6</sup> *Crown Proceedings Act 1993* (NT), s 8(2). As to the relief proposed, see affidavit of Gordon Grieve dated 4 October 2024 (**Grieve Affidavit**), GTG-1, pg 128-130, 136, 145.

<sup>7</sup> *Levy v Victoria* (1997) 189 CLR 579, 603 (Brennan CJ).

<sup>8</sup> Cf **Grieve Affidavit**, [31]-[32].

<sup>9</sup> *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602 (Gibbs CJ, Mason and Aickin JJ).

<sup>10</sup> *CFMEU v Duluxgroup (Australia) Pty Ltd* [2022] FCA 357, [51] (Collier J).

6. The fourth reason is that it is not in the interests of justice for leave to be granted.<sup>11</sup> Zentree and Packer have brought this circumstance upon themselves because they delayed seeking leave to intervene until three weeks before the hearing. They have been aware of the litigation since at least the date it commenced, on 6 August 2024,<sup>12</sup> and potentially aware of the Applicant’s intention to bring the proceedings since before that date (evidence of which has not been disclosed). There has been no adequate explanation as to why they have only sought to intervene over two months later and three weeks before the matter is to proceed to trial. The capacity of the Fifth to Seventh Respondents to seek to be joined in a timely way demonstrates that Zentree and Packer have not acted diligently.

7. Finally, Zentree and Packer have not done what they needed to do in order to obtain leave and, in particular, minimise the unreasonable interference with the conduct of the proceeding. For example, Zentree and Packer foreshadow a new “cause of action”, but they have not provided any pleaded or otherwise proper formulation of that claim. The Court is therefore not in a position to make an informed finding that it is in the interests of justice for leave to be granted.<sup>13</sup>

### **Application under the Corporations Act**

8. Many of those matters also inform the satisfaction of the criteria in s 237(2) of the *Corporations Act*. Zentree and Packer must satisfy the Court of all five of those matters if leave is to be granted.<sup>14</sup> In the circumstances outlined, Zentree and Packer have not established that there is a serious question to be tried.

**S Lloyd SC**  
Counsel for the Third and Fourth Respondent  
18 October 2024

**E Jones**

**L Spargo-Peattie**

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<sup>11</sup> FCR, r 9.12(2)(c).

<sup>12</sup> Grieve Affidavit, [11].

<sup>13</sup> *CFMEU v Duluxgroup (Australia) Pty Ltd* [2022] FCA 357, [54] (Collier J).

<sup>14</sup> *MG Corrosion Consultants Pty Ltd v Gilmour* [2012] FCA 461, [30]-[32] (Barker J).