

NOTICE OF FILING

Details of Filing

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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.



**Notice of a Constitutional matter
under section 78B of the Judiciary Act 1903**

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
named in the Schedule

Respondents

The First and Second Respondents give notice that the proceeding involves a matter arising under the Constitution or involving its interpretation within the meaning of section 78B of the *Judiciary Act 1903*.

Nature of Constitutional matter

The present case involves questions about whether the Legislative Assembly of the Northern Territory could, by s 187 of the *Mineral Titles Act 2010* (NT), confer upon the Commonwealth Minister the power to give advice within the meaning of that section, or otherwise regulate the exercise by the Commonwealth Minister of a non-statutory, non-prerogative executive capacity, consistently with constitutional principles.

The arguments of the applicant give rise to three constitutional questions:

1. If (as the First and Second Respondents contend) the Commonwealth Minister in making the “Advice Decision” exercised a non-statutory, non-prerogative executive capacity, is the legislative power of the Northern Territory to regulate the exercise of that capacity limited by reference to the constitutionally implied immunity of the Commonwealth recognised in *Commonwealth v Cigamatic Pty Ltd (in liq)*¹ and *Re*

¹ (1962) 108 CLR 372.

Filed on behalf of the First and Second Respondent
Minister for Resources and Minister for Northern Australia
Commonwealth of Australia

Prepared by: Grace Ng
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Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority?² This is ultimately a question of construction of the *Northern Territory (Self-Government) Act 1978* (Cth), but informed by the application of constitutional principles, as it would not readily be assumed that the Commonwealth Parliament intended to give the Legislative Assembly more power than would be possessed by a State Parliament in this respect.

2. Could the Legislative Assembly of the Northern Territory unilaterally and without the consent of the Commonwealth vest in the Commonwealth Minister a power, impliedly derived from s 187 of the *Mineral Titles Act 2010* (NT), to make the Advice Decision? Again, this is ultimately a question of construction of the *Northern Territory (Self-Government) Act 1978* (Cth), but may depend upon the application of constitutional principles.³
3. Assuming that the answer to Q1 is 'no' but the answer to Q2 is 'yes', and if the Legislative Assembly has purported to confer by s 187 of the *Mineral Titles Act 2010* (NT) a power on the Commonwealth Minister to give advice, and to subject the exercise of that power to limits, does that infringe the constitutionally implied immunity of the Commonwealth recognised in *Commonwealth v Cigamatic Pty Ltd (in liq)*⁴ and *Re Residential Tenancies Tribunal (NSW) and Henderson; Ex parte Defence Housing Authority*, in circumstances where the Commonwealth Minister could have given the same advice in the exercise of a non-statutory, non-prerogative capacity?⁵

Facts showing that section 78B Judiciary Act 1903 applies

1. The Statement of Agreed Facts filed in the proceedings on 4 September 2024 and annexed to this notice includes further details of relevant factual matters. The facts noted below are by way of summary.
2. On 20 March 2024, the Applicant applied to renew Mineral Lease No. MLN1, being the mineral lease granted to Pancontinental Mining Limited and Getty Oil Development Company Limited pursuant to the *Mining Act 1980* (NT) in respect of the Jabiluka Project land for the term of 42 years for the purpose of mining uranium ore, expiring on 11 August 2024 (Jabiluka MLN1).
3. On or around 25 July 2024, the First Respondent advised the Third Respondent to refuse the Applicant's application to renew Jabiluka MLN1.

² (1997) 190 CLR 410.

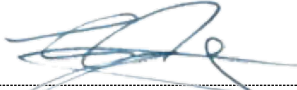
³ See *Bond v The Queen* (2000) 201 CLR 213; *R v Hughes* (2000) 202 CLR 535.

⁴ (1962) 108 CLR 372.

⁵ (1997) 190 CLR 410.

4. On or around 26 July 2024, the Third Respondent refused the Applicant's application to renew Jabiluka MLN1.

Date: 25 October 2024



Signed by Grace Ng
Lawyer for the First and Second
Respondents